Passage of the

Tribunals (Scotland) Bill
2013

SPPB 201
Passage of the

Tribunals (Scotland) Bill 2013

SP Bill 30 (Session 4), subsequently 2014 asp 10

SPPB 201

EDINBURGH: APS GROUP SCOTLAND
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The annexes to the Justice Committee’s Stage 1 Report are reproduced in full in this volume after the Stage 1 Report. These annexes include the written evidence received by the Finance Committee in response to its questionnaire and the Delegated Powers and Law Reform Committee report on the delegated powers contained in the Bill As Introduced. They also include all the oral evidence taken, and written submissions received, by the Justice Committee.

There was further correspondence between the Scottish Government and the Delegated Powers and Law Reform Committee prior to Stage 2 and this correspondence is also included in this volume.

The Delegated Powers and Law Reform Committee report on the delegated powers provisions in the Bill As Amended at Stage 2 is included in the volume After Stage 2.
Tribunals (Scotland) Bill
[AS INTRODUCED]

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PART 1
THE SCOTTISH TRIBUNALS

CHAPTER 1
ESTABLISHMENT AND LEADERSHIP

Establishment and headship etc.

1 Establishment of the Tribunals
(1) There are established two tribunals to be known as—
   (a) the First-tier Tribunal for Scotland,
   (b) the Upper Tribunal for Scotland.

(2) The Tribunals mentioned in subsection (1) are referred to in this Act—
   (a) respectively as—
       (i) the First-tier Tribunal,
       (ii) the Upper Tribunal,
   (b) collectively as the Scottish Tribunals.

(3) The constitution, operation and administration of the Scottish Tribunals are as provided for by or under this Act.

(4) The jurisdiction, powers and other functions of the Scottish Tribunals are as conferred by or under this Act.

2 Head of the Tribunals
(1) The Lord President is the Head of the Scottish Tribunals.
(2) In that capacity, the Lord President has the functions exercisable by him or her by virtue of this Act.

3 Upholding independence

(1) The following persons must uphold the independence of the members of the Scottish Tribunals—
   (a) the First Minister,
   (b) the Lord Advocate,
   (c) the Scottish Ministers,
   (d) members of the Scottish Parliament,
   (e) all other persons with responsibility for matters relating to—
      (i) the members of the Scottish Tribunals, or
      (ii) the administration of justice,
      where that responsibility is to be discharged only in or as regards Scotland.

(2) In particular, the First Minister, the Lord Advocate and the Scottish Ministers—
   (a) must not seek to influence particular decisions of the members of the Scottish Tribunals through any special access to the members, and
   (b) must have regard to the need for the members to have the support necessary to enable them to carry out their functions.

President of the Tribunals

4 Assignment to office

(1) There is established the office to be known as that of President of the Scottish Tribunals.

(2) It is for the Lord President to assign a person to that office.

(3) An assignment of a person to that office continues for as long as the Lord President considers appropriate.

(4) The Lord President may nominate a Vice-President of the Upper Tribunal to act temporarily in that office—
   (a) if a person assigned to that office is for the time being unable to act in it, or
   (b) pending an assignment of a person to that office.

(5) A person assigned to that office under subsection (2) or nominated to act in it under subsection (4) must be a judge of the Court of Session (but may not be a temporary judge).

5 Functions of office

(1) Under the headship of the Lord President, the President of Tribunals is the senior member of the Scottish Tribunals.

(2) The President of Tribunals has the functions exercisable by him or her by virtue of this Act.
(3) In this Act, a reference to the President of Tribunals is to the President of the Scottish Tribunals (and a reference to the office of President of Tribunals is to be read accordingly).

CHAPTER 2
OVERARCHING RESPONSIBILITIES

Head of the Tribunals

6 Representation of interests
The Lord President is responsible for—
(a) representing the views of the membership of the Scottish Tribunals to—
   (i) the Scottish Ministers, and
   (ii) the Scottish Parliament,
(b) laying before the Scottish Parliament written representations on matters that appear to the Lord President to be of importance in relation to the Scottish Tribunals (including as to the administration of justice).

7 Business arrangements
(1) The Lord President is responsible for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals.
(2) The Lord President is responsible for ensuring that appropriate arrangements are made and maintained as to the welfare of the members of the Scottish Tribunals.

8 Delegation of functions
(1) The Lord President may delegate to the President of Tribunals the exercise of any of the functions mentioned in subsection (2).
(2) That is, the functions exercisable by the Lord President by virtue of—
   (a) section 7(1) or (2),
   (b) section 30(1) or (2), or
   (c) section 31(1) or (2).

9 Directions on functions
(1) The Lord President may give directions to the President of Tribunals as to the exercise of the functions exercisable by the President of Tribunals by virtue of this Act.
(2) Directions under subsection (1) may—
   (a) vary or revoke earlier such directions,
   (b) relate to particular functions or functions generally.
Regulations by Ministers

10 Authority under regulations

(1) Regulations under section 19(2) or 22(2) may—

(a) delegate to the Lord President authority to make arrangements of the kind to which that section relates,

(b) include provision relying on the effect of Tribunal Rules.

(2) Regulations under section 35(1) or 37(1) may—

(a) delegate to the President of Tribunals authority to determine the things to which that section relates,

(b) include provision relying on the effect of Tribunal Rules.

(3) Delegation of authority under subsection (1) or (2) is subject to such provision about the exercise or sub-delegation of the authority as may be made in the regulations referred to in that subsection.

11 Consultation on regulations

(1) Before making regulations under section 19(2) or 22(2), the Scottish Ministers must—

(a) obtain the Lord President’s approval,

(b) consult such other persons as they consider appropriate.

(2) Before making regulations under section 35(1) or 37(1), the Scottish Ministers must consult the President of Tribunals.

PART 2
ORGANISATIONAL ARRANGEMENTS

CHAPTER 1
MEMBERSHIP TYPES

Overview and main types

12 Overview of membership

(1) Each of the First-tier Tribunal and the Upper Tribunal is to consist of its ordinary, legal and judicial members.

(2) Any type of member of the First-tier Tribunal or the Upper Tribunal is not, merely by reason of having that type of membership of the Tribunal, precluded from having any type of membership of the other Tribunal.

(3) In this Act, the references to the members of the Scottish Tribunals are to—

(a) the ordinary and legal members of either or both of the Tribunals by virtue of sections 14 and 15, and

(b) the judicial members of either or both of the Tribunals by virtue of section 16 (as read with section 18).
13 **Capacity of members**

(1) Membership of the Scottish Tribunals as an ordinary or legal member of the Tribunals has the effect of granting such a member judicial status and capacity for the purpose mentioned in subsection (3).

(2) For avoidance of doubt—

(a) a judicial member of the Scottish Tribunals has judicial status and capacity for the purpose mentioned in subsection (3) by reason of holding judicial office,

(b) an extra judge derives judicial status and capacity in relation to the Upper Tribunal for the purpose mentioned in subsection (3) from authorisation to act as mentioned in section 17(5).

(3) Subsections (1) and (2) refer to the purpose of exercising the decision-making function of the First-tier Tribunal or (as the case may be) the Upper Tribunal in any matter in a case before the Tribunal.

14 **First-tier members**

(1) A person is an ordinary member of the First-tier Tribunal if the person is that type of member of the First-tier Tribunal through—

(a) transfer-in as such by virtue of section 28(b), or

(b) appointment as such by virtue of section 29(1).

(2) A person is a legal member of the First-tier Tribunal if the person is—

(a) that type of member of the First-tier Tribunal through—

(i) transfer-in as such by virtue of section 28(b), or

(ii) appointment as such by virtue of section 29(1), or

(b) however holding the position, a Chamber President or Deputy Chamber President in the First-tier Tribunal.

(3) Despite subsection (2)(b), a person assigned as a Temporary Chamber President in the First-tier Tribunal, if a judicial member of the Tribunal, remains such a member of the Tribunal.

15 **Upper members**

(1) A person is an ordinary member of the Upper Tribunal if the person is that type of member of the Upper Tribunal through—

(a) transfer-in as such by virtue of section 28(b), or

(b) appointment as such by virtue of section 29(3).

(2) A person is a legal member of the Upper Tribunal if the person is—

(a) that type of member of the Upper Tribunal through—

(i) transfer-in as such by virtue of section 28(b), or

(ii) appointment as such by virtue of section 29(3),

(b) however holding the position, a Chamber President in the First-tier Tribunal except a Temporary Chamber President, or
(c) however holding the position, a Vice-President of the Upper Tribunal.

(3) Despite subsection (2)(c)—

(a) a person assigned as a Vice-President of the Upper Tribunal under section 24(1) or (2) remains a judicial member of the Tribunal,

(b) a person assigned as a Temporary Vice-President of the Upper Tribunal, if a judicial member of the Tribunal, remains such a member of the Tribunal.

Judiciary eligible to sit

16 Sheriffs and judges

(1) By reason of holding judicial office, a person is eligible to act as a member of the First-tier Tribunal if the person is a sheriff (including a part-time sheriff).

(2) By reason of holding judicial office, a person is eligible to act as a member of the Upper Tribunal if the person is—

(a) apart from the Lord President and the President of Tribunals, a judge of the Court of Session (including a temporary judge),

(b) the Chairman of the Scottish Land Court, or

(c) a sheriff (except a part-time sheriff).

(3) A sheriff may act as a member of—

(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

only if authorised to do so by the President of Tribunals.

(4) Apart from the Lord President and the President of Tribunals, a judge of the Court of Session or the Chairman of the Scottish Land Court may act as a member of the Upper Tribunal only if authorised to do so by the President of Tribunals.

(5) By reason of holding office within the Scottish Tribunals, each of the Lord President and the President of Tribunals is a member of the Upper Tribunal and needs no further authorisation to act as such.

(6) An authorisation for the purpose of subsection (3)(a) or (b) or (4)—

(a) requires—

(i) the Lord President’s approval (including as to the person to be authorised), and

(ii) the agreement of the person concerned,

(b) in the case of a sheriff (apart from a sheriff principal), also requires the concurrence of the relevant sheriff principal.

(7) An authorisation for the purpose of subsection (3)(a) or (b) or (4) remains in effect until such time as the President of Tribunals may determine (with the same approval, agreement and concurrence as is relevant by virtue of subsection (6)).
17 **Authorisation of others**

(1) If requested to do so by the President of Tribunals, the Scottish Ministers may issue a temporary authorisation for a person falling within subsection (2) to assist in the disposal of the business of the Upper Tribunal.

(2) A person falls within this subsection if the person is—

(a) a retired judge of the Court of Session, or

(b) a judge of the Upper Tribunal established by section 3(2) of the UK Act who is of a kind mentioned in section 5(1)(b) or (c) of that Act.

(3) Any request for the purpose of subsection (1) may not be made without—

(a) the Lord President’s approval, and

(b) the agreement of the person concerned.

(4) In the case of a person mentioned in subsection (2)(b), agreement for the purpose of subsection (3)(b) may not be sought without the consent of the Senior President of Tribunals as appointed under section 2(1) of the UK Act.

(5) An authorisation under subsection (1) is for the person concerned to act as if a judicial member of the Upper Tribunal during the period for which it is issued.

(6) The period mentioned in subsection (5)—

(a) requires the same approval, agreement and consent as is relevant in connection with subsections (1) to (4), and

(b) may be extended by the Scottish Ministers (with such approval, agreement and consent).

(7) The Scottish Ministers may make payments of sums with respect to any time spent by a person while acting as mentioned in subsection (5) by virtue of authorisation under subsection (1).

(8) In addition—

(a) the previous taking by a person mentioned in subsection (2)(a) of the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868 counts as if it were the taking of them in connection with acting as mentioned in subsection (5),

(b) section 3 applies in relation to a person who is authorised to act as mentioned in subsection (5)—

(i) as it does in relation to the members of the Scottish Tribunals, and

(ii) during the period for which the relevant authorisation is issued.

(9) In this section, “the UK Act” means the Tribunals, Courts and Enforcement Act 2007.

18 **Judicial membership**

(1) In this Act, a reference to a judicial member of the First-tier Tribunal is to a sheriff who is authorised for the purpose of section 16(3)(a).

(2) In this Act, a reference to a judicial member of the Upper Tribunal is to—

(a) the Lord President or the President of Tribunals, or
(b) a person who is authorised for the purpose of section 16(3)(b) or (4).

(3) A reference in this Act to a judicial member of the Upper Tribunal does not include an extra judge even where authorised to act as mentioned in section 17(5).

(4) In this Act, a reference to an extra judge in relation to the Upper Tribunal is to a person falling within section 17(2) (as read with section 17(5)).

CHAPTER 2
INTERNAL STRUCTURE

Structure of First-tier Tribunal

19 Chambers in the Tribunal

(1) The First-tier Tribunal is to be organised into a number of chambers, having regard to—

(a) the different subject-matters falling within the Tribunal’s jurisdiction, and
(b) any other factors relevant in relation to the exercise of the Tribunal’s functions.

(2) Accordingly, the Scottish Ministers may by regulations make provision for and in connection with—

(a) the organisation of the Tribunal as required by subsection (1),
(b) the allocation of the Tribunal’s functions between the chambers.

20 Chamber Presidents

(1) Each chamber of the First-tier Tribunal is to have—

(a) a single Chamber President to preside over the chamber, or
(b) two Chamber Presidents to preside over the chamber.

(2) A Chamber President may not preside over more than one chamber of the Tribunal at the same time.

(3) In this Act—

(a) a reference to a Chamber President in the First-tier Tribunal is to a Chamber President of a chamber of the Tribunal,
(b) where a chamber of the Tribunal has two Chamber Presidents, a reference to a Chamber President of such a chamber is to either or both of them (as the context requires).

21 Appointment to post

(1) It is for the Scottish Ministers to make an appointment of a Chamber President to that position.

(2) Before making an appointment under subsection (1), the Scottish Ministers must consult the Lord President (including as to the person to be appointed).

(3) A person is eligible for appointment under subsection (1) only if the person is—

(a) a legal member of the Upper Tribunal, or
(b) if not falling within paragraph (a), eligible to be appointed as such a member of
the Tribunal (whether or not already any type of member of the First-tier or Upper
Tribunal).

(4) An appointment made under subsection (1) is for the Chamber President to preside over
a particular chamber of the Tribunal.

Structure of Upper Tribunal

22 Divisions of the Tribunal

(1) The Upper Tribunal is to be organised into a number of divisions, having regard to—
(a) the different subject-matters falling within the Tribunal’s jurisdiction, and
(b) any other factors relevant in relation to the exercise of the Tribunal’s functions.

(2) Accordingly, the Scottish Ministers may by regulations make provision for and in
connection with—
(a) the organisation of the Tribunal as required by subsection (1),
(b) the allocation of the Tribunal’s functions between the divisions.

23 Vice-Presidents

(1) Each division of the Upper Tribunal is to have—
(a) a single Vice-President to preside over the division, or
(b) two Vice-Presidents to preside over the division.

(2) A Vice-President may not preside over more than one division of the Tribunal at the
same time.

(3) Subsections (1) and (2) are subject to section 24(1)(b).

(4) In this Act—
(a) a reference to a Vice-President of the Upper Tribunal is to a Vice-President of a
division of the Tribunal,
(b) where a division of the Tribunal has two Vice-Presidents, a reference to a Vice-
President of such a division is to either or both of them (as the context requires).

24 Assignment to post

(1) The President of Tribunals may assign himself or herself—
(a) as a Vice-President of the Upper Tribunal,
(b) to preside over one or more than one division of the Tribunal.

(2) Apart from the Lord President, any other judicial member of the Upper Tribunal may be
assigned by the President of Tribunals—
(a) as a Vice-President of the Tribunal,
(b) to preside over a particular division of the Tribunal.

(3) Assignment under subsection (1)—
(a) remains in effect until such time as the President of Tribunals may determine,
(b) does not affect the exercise by the President of Tribunals of the functions arising in that capacity.

(4) Assignment under subsection (2)—

(a) requires—

(i) the Lord President’s approval (including as to the judicial member to be assigned),

(ii) the assignee’s agreement,

(b) remains in effect until such time as the President of Tribunals may determine (with such approval and agreement),

(c) does not affect the exercise by the assignee of any other functions as respects the Scottish Tribunals.

25 Appointment to post

(1) If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a person as a Vice-President of the Upper Tribunal.

(2) Before making an appointment under subsection (1), the Scottish Ministers must consult the Lord President (including as to the person to be appointed).

(3) A person is eligible for appointment as a Vice-President only if the person is—

(a) a legal member of the Upper Tribunal, or

(b) if not falling within paragraph (a), eligible to be appointed as such a member of the Tribunal (whether or not already any type of member of the First-tier or Upper Tribunal).

(4) An appointment made under subsection (1) is for the Vice-President to preside over a particular division of the Tribunal.

PART 3

TRANSFER-IN FROM LISTED TRIBUNALS

26 Listed tribunals

(1) For the purposes of this Part, the listed tribunals are the tribunals for the time being included in the list in Part 1 of schedule 1 as read in conjunction with the further specification in Part 2 of that schedule.

(2) The Scottish Ministers may by regulations modify—

(a) the list in Part 1 of schedule 1,

(b) the further specification in Part 2 of that schedule.

(3) Regulations under subsection (2) may add a tribunal to the list only if it is established by or under an enactment (whenever passed or made).

(4) In this section, the references to a tribunal include any body, office-holder or individual having decision-making functions that are exercisable in the manner of a tribunal (but only in so far as such functions are so exercisable).

(5) But the references in this section to a tribunal do not include—
27 Transfer-in of functions

(1) The functions of each of the listed tribunals are to become the functions of the Scottish Tribunals at such time and in so far as the Scottish Ministers consider appropriate.

(2) Accordingly, the Scottish Ministers may by regulations provide for some or all of the functions of a listed tribunal to be transferred from it—

(a) to the First-tier Tribunal only,
(b) to the Upper Tribunal only, or
(c) to the First-tier Tribunal and the Upper Tribunal.

(3) If regulations under subsection (2) provide for any functions of a listed tribunal to be transferred as mentioned in paragraph (c) of that subsection, the regulations may also—

(a) give particular functions to one of the Tribunals (but not the other), or
(b) make provision of the sort allowed by subsection (5).

(4) Where by virtue of regulations made under subsection (2) any functions of a listed tribunal have been transferred as mentioned in paragraph (a), (b) or (c) of that subsection, the Scottish Ministers may by regulations—

(a) provide for the functions, or particular functions, to be redistributed between the Tribunals by—

(i) transferring them from either of the Tribunals to the other,
(ii) taking them away from one of the Tribunals (but not the other), or
(iii) causing them to be exercisable by both of the Tribunals (instead of one only),

(b) if they are so redistributed by causing them to be exercisable by both of the Tribunals, also make provision of the sort allowed by subsection (5).

(5) This subsection allows provision enabling the question as to which of the Tribunals is to exercise particular functions in a specific case or in specified circumstances to be determined, including as against any prescribed criteria—

(a) in accordance with Tribunal Rules, or
(b) by the President of Tribunals (whether or not by reference to Tribunal Rules).
Regulations under subsection (2) or (4) may include provision for the purposes of or in connection with, or for giving full effect to, a transfer or redistribution of any functions to which the regulations apply.

Provision included in such regulations by virtue of subsection (6) may modify any enactment concerning a listed tribunal.

A particular instrument containing regulations under subsection (2) may not relate to the functions of more than one of the listed tribunals.

Transfer-in of members

Schedule 2 contains provision for the transfer of certain persons from the listed tribunals into the Scottish Tribunals to hold—

(a) particular named positions,

(b) ordinary or legal membership generally.

PART 4

MORE ABOUT MEMBERSHIP ETC.

Appointment and assignment

Scheduled provisions

(1) Schedule 3 contains provision for the First-tier Tribunal about eligibility for and appointment to—

(a) ordinary membership,

(b) legal membership.

(2) Schedule 4 contains provision for the First-tier Tribunal relating to—

(a) appointment or assignment to—

(i) a Deputy position,

(ii) a Temporary position,

(b) assignment of ordinary, legal and judicial members.

(3) Schedule 5 contains provision for the Upper Tribunal about eligibility for and appointment to—

(a) ordinary membership,

(b) legal membership.

(4) Schedule 6 contains provision for the Upper Tribunal relating to—

(a) assignment to a Temporary position,

(b) assignment of ordinary, legal and judicial members.

Assignment policy

(1) The Lord President must publish a document recording the policy adopted in relation to the assignment of the ordinary, legal and judicial members within each of the First-tier Tribunal and the Upper Tribunal.
(2) The Lord President must—
   (a) keep the assignment policy under review,
   (b) re-publish it if it is amended materially.

(3) The assignment policy—
   (a) must be in terms designed to secure that appropriate use is made of the knowledge and experience of the members of the Scottish Tribunals (including their expertise in a particular area of the law),
   (b) may include—
      (i) specific provision for each of the Tribunals,
      (ii) different provision for different purposes in any other respects.

Training, conditions and conduct

31 Training and review

(1) The Lord President is responsible for making and maintaining appropriate arrangements for the training and guidance—
   (a) of the ordinary members, legal members and judicial members of the Scottish Tribunals,
   (b) for the purpose of acting as mentioned in section 17(5), of any extra judges who are authorised to act as so mentioned.

(2) The Lord President may make arrangements for the review of the ordinary members and legal members of the Scottish Tribunals.

(3) Arrangements under subsection (1) or (2) may (in particular) require participation in activities for the purpose of training, guidance or review.

(4) For the purpose of subsection (2), “review” includes ad hoc or continuing review of professional competency and development.

32 Conditions of membership etc.

Schedule 7 contains provision for the terms and conditions on which ordinary and legal members of the Scottish Tribunals hold office.

33 Conduct and fitness etc.

Schedule 8 contains provision for and in connection with—
   (a) investigation of members’ conduct and imposition of disciplinary measures,
   (b) assessment of members’ fitness for position and removal from position.
PART 5

DECISION-MAKING AND COMPOSITION

Decisions in First-tier Tribunal

34 Decisions in the Tribunal

5 (1) The First-tier Tribunal's function of deciding any matter in a case before the Tribunal is to be exercised by a member or members of the Tribunal chamber to which the case is allocated.

(2) The member or members are to be chosen by the Chamber President of the chamber (who may choose himself or herself).

10 (3) The Chamber President's discretion in choosing the member or members is subject to—

   (a) any relevant provisions in regulations made under section 35(1),

   (b) any relevant directions given by virtue of section 42(5)(b).

(4) In this section—

   “Tribunal chamber” means chamber of the Tribunal,

   “member”, in relation to a Tribunal chamber, means ordinary, legal or judicial member of the Tribunal who is assigned to the chamber.

Composition of the Tribunal

35 (1) The Scottish Ministers may by regulations make provision for determining the composition of the First-tier Tribunal when convened to decide any matter in a case before the Tribunal.

20 (2) Where regulations under subsection (1) provide for a matter to be decided by a single member of the Tribunal, the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

(3) Where regulations under subsection (1) provide for a matter to be decided by two or more members of the Tribunal, the regulations must include provision for determining how many (if any) of those members are to be—

   (a) an ordinary member,

   (b) a legal member,

   (c) a judicial member.

30 (4) Regulations under subsection (1) may include provision for determining what relevant criteria are to be met by an ordinary member of the Tribunal for the member’s involvement in decision-making in particular types of case.

(5) In subsection (4), “relevant criteria” includes criteria as to qualifications, experience and training.

Decisions in Upper Tribunal

36 Decisions in the Tribunal

35 (1) The Upper Tribunal's function of deciding any matter in a case before the Tribunal is to be exercised by a member or members of the Tribunal division to which the case is allocated.
(2) The member or members are to be chosen by the Vice-President of the division (who may choose himself or herself).

(3) The Vice-President’s discretion in choosing the member or members is subject to—
   (a) subsection (4),
   (b) any relevant provisions in regulations made under section 37(1),
   (c) any relevant directions given by virtue of section 44(5)(b).

(4) Each of the Lord President and the President of Tribunals has the right to be chosen and may exercise that right as he or she considers appropriate (but this is also subject to any relevant provisions in regulations made under section 37).

(5) In this section—

   “Tribunal division” means division of the Tribunal, 

   “member”, in relation to a Tribunal division—
   (a) means ordinary, legal or judicial member of the Tribunal who is assigned to the division,
   (b) while assigned to the division, also includes an extra judge who is authorised to act as mentioned in section 17(5).

37 Composition of the Tribunal

(1) The Scottish Ministers may by regulations make provision for determining the composition of the Upper Tribunal when convened to decide any matter in a case before the Tribunal.

(2) Regulations under subsection (1) may treat separately the Tribunal’s decision-making functions—
   (a) at first instance,
   (b) on review or appeal.

(3) Where regulations under subsection (1) provide for a matter to be decided by a single member of the Tribunal, the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

(4) Where regulations under subsection (1) provide for a matter to be decided by two or more members of the Tribunal, the regulations must include provision for determining how many (if any) of those members are to be—
   (a) an ordinary member,
   (b) a legal member,
   (c) a judicial member.

(5) Regulations under subsection (1) may include provision about the involvement in decision-making of—
   (a) a judicial member of a particular description,
   (b) an extra judge who is authorised to act as mentioned in section 17(5).

(6) Regulations under subsection (1) may include provision for determining what relevant criteria are to be met by an ordinary member of the Tribunal for the member’s involvement in decision-making in particular types of case.
(7) In subsection (6), “relevant criteria” includes criteria as to qualifications, experience and training.

PART 6
REVIEW OR APPEAL OF DECISIONS

CHAPTER 1
TRIBUNAL DECISIONS

38 Review of decisions

(1) Each of the First-tier Tribunal and the Upper Tribunal may review a decision made by it in any matter in a case before it.

(2) A decision is reviewable—
   (a) at the Tribunal’s own instance, or
   (b) at the request of a party in the case.

(3) But—
   (a) there can be no review under this section of an excluded decision,
   (b) Tribunal Rules may make provision—
      (i) excluding other decisions from a review under this section,
      (ii) otherwise restricting the availability of a review under this section (including by specifying grounds for a review).

(4) The exercise of discretion whether a decision should be reviewed under this section cannot give rise to a review under this section or to an appeal under section 41 or 43.

(5) A right of appeal under section 41 or 43 is not affected by the availability or otherwise of a review under this section.

39 Actions on review

(1) In a review by the First-tier Tribunal or the Upper Tribunal under section 38, the Tribunal may—
   (a) take no action,
   (b) set the decision aside, or
   (c) correct a minor or accidental error contained in the decision.

(2) Where a decision is set aside by the First-tier Tribunal in a review, it may—
   (a) re-decide the matter concerned,
   (b) refer that matter to the Upper Tribunal, or
   (c) make such other order as the First-tier Tribunal considers appropriate.

(3) If a decision set aside by the First-tier Tribunal in a review is referred to the Upper Tribunal, the Upper Tribunal—
(a) may re-decide the matter concerned or make such other order as it considers appropriate,
(b) in re-deciding that matter, may do anything that the First-tier Tribunal could do if re-deciding it.

(4) Where a decision is set aside by the Upper Tribunal in a review, it may—
(a) re-decide the matter concerned, or
(b) make such other order as it considers appropriate.

(5) In re-deciding a matter under this section, the First-tier or Upper Tribunal may reach such findings in fact as it considers appropriate.

40 Review once only

(1) A particular decision of the First-tier Tribunal or the Upper Tribunal may not be reviewed under section 38 more than once.

(2) These are to be regarded as different decisions for the purpose of subsection (1)—
(a) a decision set aside under section 39(1)(b),
(b) a decision made by virtue of section 39(2)(a), (3)(a) or (4).

(3) Nothing in this section prevents the taking, after a review in which the decision concerned is not set aside, of administrative steps by the First-tier or Upper Tribunal to correct a minor or accidental error made in disposing of the review.

41 Appeal from the Tribunal

(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.

(2) An appeal under this section is to be made—
(a) by a party in the case,
(b) on a point of law only.

(3) An appeal under this section requires the permission of—
(a) the First-tier Tribunal, or
(b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.

(5) This section—
(a) is subject to sections 38(4) and 50(2),
(b) does not apply in relation to an excluded decision.
42 Disposal of an appeal

(1) In an appeal under section 41, the Upper Tribunal may uphold or quash the decision on the point of law in question.

(2) If the Upper Tribunal quashes the decision, it may—

(a) re-make the decision,

(b) remit the case to the First-tier Tribunal, or

(c) make such other order as the Upper Tribunal considers appropriate.

(3) In re-making the decision, the Upper Tribunal may—

(a) do anything that the First-tier Tribunal could do if re-making the decision,

(b) reach such findings in fact as the Upper Tribunal considers appropriate.

(4) In remitting the case, the Upper Tribunal may give directions for the First-tier Tribunal’s reconsideration of the case.

(5) Such directions may relate to—

(a) issues of law or fact (including the Upper Tribunal’s opinion on any relevant point),

(b) procedural issues (including as to the members to be chosen to reconsider the case).

Appeal from Upper Tribunal

43 Appeal from the Tribunal

(1) A decision of the Upper Tribunal in any matter in a case before the Tribunal may be appealed to the Court of Session.

(2) An appeal under this section is to be made—

(a) by a party in the case,

(b) on a point of law only.

(3) An appeal under this section requires the permission of—

(a) the Upper Tribunal, or

(b) if the Upper Tribunal refuses its permission, the Court of Session.

(4) Such permission may be given in relation to an appeal under this section only if the Upper Tribunal or (as the case may be) the Court of Session is satisfied that there are arguable grounds for the appeal.

(5) This section—

(a) is subject to sections 38(4) and 50(2),

(b) does not apply in relation to an excluded decision.

44 Disposal of an appeal

(1) In an appeal under section 43, the Court of Session may uphold or quash the decision on the point of law in question.
(2) If the Court quashes the decision, it may—
   (a) re-make the decision,
   (b) remit the case to the Upper Tribunal, or
   (c) make such other order as the Court considers appropriate.

(3) In re-making the decision, the Court may—
   (a) do anything that the Upper Tribunal could do if re-making the decision,
   (b) reach such findings in fact as the Court considers appropriate.

(4) In remitting the case, the Court may give directions for the Upper Tribunal’s reconsideration of the case.

(5) Such directions may relate to—
   (a) issues of law or fact (including the Court’s opinion on any relevant point),
   (b) procedural issues (including as to the members to be chosen to reconsider the case).

45 Procedure on second appeal

(1) Section 43(4) is subject to subsections (3) and (4) as regards a second appeal.

(2) Section 44 is subject to subsections (5) and (6) as regards a second appeal.

(3) For the purpose of subsection (1), the Upper Tribunal or (as the case may be) the Court of Session may not give its permission to the making of a second appeal unless also satisfied that subsection (4) applies.

(4) This subsection applies where, in relation to the matter in question—
   (a) a second appeal would raise an important issue of principle or practice, or
   (b) there is another compelling reason for allowing a second appeal to proceed.

(5) For the purpose of subsection (2), subsections (2)(b) and (3)(a) of section 44 have effect in relation to a second appeal as if the references in them to the Upper Tribunal include, as alternative references, references to the First-tier Tribunal.

(6) Where, in exercising the choice arising by virtue of subsection (5) (and instead of re-making the decision in question), the Court of Session remits the case to the Upper Tribunal rather than the First-tier Tribunal—
   (a) the Upper Tribunal, instead of reconsidering the case itself, may remit the case to the First-tier Tribunal,
   (b) if the Upper Tribunal does so, it must send to the First-tier Tribunal any directions accompanying the Court’s remittal of the case to the Upper Tribunal.

(7) In this section, “second appeal” means appeal under section 43 against a decision in an appeal under section 41.
Excluded decisions

46 Excluded decisions
A decision falling within any of sections 47 to 49 is an excluded decision for the purposes of—
(a) a review under section 38,
(b) an appeal under section 41 or 43.

47 Decisions on review
(1) Falling within this section is—
(a) a decision set aside in a review under section 38 (see section 39(1)(b)),
(b) a decision in such a review, except a decision of the kind mentioned in subsection (2).
(2) That is, a decision made by virtue of section 39(2)(a), (3)(a) or (4) (and accordingly a decision so made is not an excluded decision).

48 Other appeal rights
(1) Falling within this section is a decision against which there is a right of appeal under an enactment apart from this Act.
(2) The Scottish Ministers may by regulations make provision to which subsection (1) is subject (for example, by specifying an exception to what falls within this section).

49 Position on transfer-in
(1) Where any functions are transferred to the First-tier Tribunal or Upper Tribunal by virtue of regulations made under section 27(2), a decision made in the exercise of the functions falls within this section if it is specified in regulations made by the Scottish Ministers under this subsection.
(2) Regulations under subsection (1) may specify a decision only if, immediately before the transfer of the functions in the exercise of which it is made, there is no right of appeal against the decision.

Miscellaneous procedure

50 Process for permission
(1) The Scottish Ministers may by regulations specify a time limit within which the permission required by section 41(3) or 43(3) must be sought.
(2) A refusal to give the permission required by section 41(3) or 43(3) is not—
(a) reviewable under section 38, or
(b) appealable under section 41 or 43.

51 Participation of non-parties
(1) Subsection (2) applies for the purposes of—
(a) a review under section 38,
(b) an appeal under section 41 or 43.

(2) The Scottish Ministers may by regulations make provision extending any reference to a party in a case so that it also includes a person falling within a specified description.

CHAPTER 2
SPECIAL JURISDICTION

52 Judicial review cases

(1) Subsection (2) applies where a petition is made to the Court of Session for judicial review.

(2) The Court may by order remit the petition to the Upper Tribunal if—

(a) both of Conditions A and B are met, and
(b) having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition, the Court considers that it is appropriate to do so.

(3) Condition A is that the petition does not seek anything other than the exercise of the Court’s judicial review function.

(4) Condition B is that the petition falls within a category specified by an act of sederunt made by the Court for the purpose of this subsection.

53 Decision on remittal

(1) The Upper Tribunal is to determine the issues raised in each petition remitted to it under section 52.

(2) In relation to a petition so remitted, the Upper Tribunal—

(a) has the same powers as the Court of Session has on a petition to it for judicial review,
(b) is to apply the same principles as the Court applies in the exercise of its judicial review function.

(3) An order made by the Upper Tribunal on a petition so remitted has the same effect as an order made by the Court of Session on a petition for judicial review (and the order is therefore enforceable accordingly).

(4) Subsection (3) does not limit the operation of section 43 in connection with a determination under subsection (1).

54 Additional matters

(1) Where a petition is remitted to the Upper Tribunal under section 52, any order made or step taken by the Court of Session in relation to the petition is to be treated as if made or taken by the Tribunal (except the order by which the petition is so remitted (or an associated step)).

(2) Tribunal Rules may make further provision with respect to the exercise by the Upper Tribunal of its functions under this Chapter.
55 Meaning of judicial review

In this Chapter—

(a) a reference to a petition to the Court of Session for judicial review is to an application to the supervisory jurisdiction of the Court,

(b) a reference to the exercise of the Court of Session’s judicial review function is to the exercise of the Court’s supervisory jurisdiction (and includes the making of any order in connection with or in consequence of the exercise of that function).

56 Venue for hearings

(1) Each of the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear or decide a case or for any other purpose relating to its functions.

(2) Subsection (1) is subject to any provision made by Tribunal Rules as to the question of where in Scotland the Scottish Tribunals are to be convened.

57 Conduct of cases

(1) In relation to the things mentioned in subsection (3), each of the First-tier Tribunal and the Upper Tribunal has such powers, rights, privileges and other authority with respect to any case before it as are provided for in Tribunal Rules.

(2) Rules making provision for the purpose of subsection (1) may (in particular) do so in relation to any kind of authority by reference to any authority of a relevant description exercisable by the sheriff or the Court of Session.

(3) The things are—

(a) the attendance or examination of witnesses,

(b) the recovery, production or inspection of relevant materials,

(c) the commissioning of reports of any relevant type,

(d) other procedural, evidential or similar measures.

(4) In subsection (3)(b), “materials” means documents and other items.

58 Enforcement of decisions

(1) A decision made by the First-tier Tribunal or the Upper Tribunal in any matter in a case before it is enforceable by the means provided for in Tribunal Rules.

(2) Subsection (1) applies to a decision—

(a) on the merits of such a case,
(b) as to—
   (i) payment of a sum of money, or
   (ii) expenses by virtue of section 59, or
   (c) otherwise affecting the rights, obligations or interests of a party in such a case.

(3) Subsection (1) is subject to section 53(3) as respects a determination to which that section relates.

(4) Rules making provision for the purpose of subsection (1) may (in particular) do so in relation to a relevant order by reference to the means of enforcing an order of the sheriff or the Court of Session.

(5) In subsection (4), “relevant order” means order of either of the Tribunals giving effect to a decision to which subsection (1) applies.

59 Award of expenses

(1) In connection with proceedings in a case before the First-tier Tribunal or the Upper Tribunal, the Tribunal may award expenses so far as allowed in accordance with Tribunal Rules.

(2) Where such expenses are awarded, the awarding Tribunal may specify by and to whom they are to be paid (and to what extent).

(3) Tribunal Rules may make provision—
   (a) for scales or rates of such expenses,
   (b) for—
      (i) such expenses to be set-off against any relevant sums,
      (ii) interest at the specified rate to be chargeable on such expenses where unpaid,
   (c) for—
      (i) disallowing any wasted expenses,
      (ii) requiring a person who has given rise to any wasted expenses to meet them,
      (d) stating the general or particular factors to be taken into account when exercising discretion as to such expenses,
      (e) about such expenses in other respects.

(4) Rules making provision as described in subsection (3) may also prescribe meanings for “relevant sums”, “specified rate” and “wasted expenses” as used in that subsection.

Supplementary provisions

60 Additional powers

(1) The Scottish Ministers may by regulations confer on the First-tier Tribunal and the Upper Tribunal such additional powers as are necessary or expedient for the proper exercise of their functions.

(2) Regulations under subsection (1) may include provision—
(a) relying on the effect of an act of sederunt made by the Court of Session,
(b) causing Part 1 of the Scottish Civil Justice Council and Civil Legal Assistance Act 2013 to apply to the making of a relevant act of sederunt as it does to the making of Tribunal Rules.

(3) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

61 Application of enactments

(1) The Scottish Ministers may by regulations modify the application of any enactment so far as they consider to be necessary or expedient for the purposes of or in connection with the matters to which this subsection applies.

(2) Regulations under subsection (1) may include provision—

(a) relying on the effect of an act of sederunt made by the Court of Session,
(b) causing Part 1 of the Scottish Civil Justice Council and Civil Legal Assistance Act 2013 to apply to the making of a relevant act of sederunt as it does to the making of Tribunal Rules.

(3) Subsection (1) applies to—

(a) the making of Tribunal Rules,
(b) the effect of—
   (i) this Part, or
   (ii) Tribunal Rules.

(4) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

CHAPTER 2

PRACTICE AND PROCEDURE

Tribunal Rules

62 Tribunal Rules

(1) There are to be rules regulating the practice and procedure to be followed in proceedings at—

(a) the First-tier Tribunal,
(b) the Upper Tribunal.

(2) Rules of the kind mentioned in subsection (1) are to be known as Scottish Tribunal Rules (and in this Act they are referred to as Tribunal Rules).

(3) Tribunal Rules are to be made by the Court of Session by act of sederunt.

(4) Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 includes further provision about the making of Tribunal Rules.
63 **Exercise of functions**

(1) Tribal Rules may, in relation to any functions exercisable by the members of the Scottish Tribunals—

(a) state—

(i) how a function is to be exercised,

(ii) who is to exercise a function,

(b) cause something to require further authorisation,

(c) permit something to be done on a person’s behalf,

(d) allow a specified person to make a decision about any of those matters.

(2) Tribunal Rules may make provision relying on the effect of directions issued, or to be issued, under section 68.

64 **Extent of rule-making**

(1) Tribunal Rules may make—

(a) provision applying—

(i) equally to both of the First-tier Tribunal and the Upper Tribunal, or

(ii) specifically to one of them,

(b) particular provision for each of them about the same matter.

(2) Tribunal Rules may make particular provision for different—

(a) chambers or divisions,

(b) types of proceedings.

(3) Tribunal Rules may make different provision for different purposes in any other respects.

(4) The generality of section 62(1) is not limited by—

(a) sections 65 to 67, or

(b) any other provisions of this Act about the content of Tribunal Rules.

(5) As well as Chapter 1, see (for example) sections 27(5), 38(3)(b) and 54(2).

**Particular matters**

65 **Proceedings and steps**

(1) Tribal Rules may make provision about proceedings in a case before the Scottish Tribunals.

(2) Rules making provision as described in subsection (1) may (in particular)—

(a) provide for the form and manner in which a case is to be brought,

(b) allow for the withdrawal of a case (with or without restrictions on subsequent proceedings as respects the same matter),

(c) set time limits for—
(i) making applications,
(ii) taking particular steps,
(d) specify circumstances in which the Tribunals may take particular steps of their own initiative.

56 **Hearings in cases**

1. Tribunal Rules may make provision about hearings in a case before the Scottish Tribunals.

2. Rules making provision as described in subsection (1) may (in particular)—
   (a) provide for certain matters to be dealt with—
      (i) without a hearing,
      (ii) at a private hearing,
      (iii) at a public hearing,
   (b) require notice to be given of a hearing (and for the timing of such notice),
   (c) specify persons who may—
      (i) appear on behalf of a party in a case,
      (ii) attend a hearing in order to provide support to a party or witness in a case,
   (d) specify circumstances in which particular persons may appear or be represented at a hearing,
   (e) specify circumstances in which a hearing may go ahead—
      (i) at the request of a party in a case despite no notice of it having been given to another party in the case,
      (ii) in the absence of a particular member chosen to exercise the function of deciding any matter in a case,
   (f) allow for an adjournment of a hearing for the purpose of giving the parties in a case an opportunity to use a process of negotiation, mediation, arbitration or adjudication for resolving a dispute to which the case relates,
   (g) allow for the imposition of reporting restrictions for particular reasons arising in a case.

67 **Evidence and decisions**

1. Tribunal Rules may, in connection with proceedings before the Scottish Tribunals—
   (a) make provision about the giving of evidence and the administering of oaths,
   (b) modify the application of any other rules relating to either of those matters so far as they would otherwise apply to such proceedings.

2. Tribunal Rules may, in connection with proceedings before the Scottish Tribunals, provide for the payment of expenses and allowances to a person who—
   (a) gives evidence,
   (b) produces a document, or
(c) attends such proceedings (or is required to do so).

(3) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals, make provision by way of presumption (for example, as to the serving of something on somebody).

(4) Tribunal Rules may make provision about decisions of the Scottish Tribunals (in particular, as to the recording and publication of such decisions).

Issuing directions

68 Practice directions

(1) The President of Tribunals may issue directions as to the practice and procedure to be followed in proceedings in—

(a) the First-tier Tribunal,
(b) the Upper Tribunal.

(2) A Chamber President in the First-tier Tribunal may issue directions as to the practice and procedure to be followed in proceedings in the chamber over which the Chamber President presides.

(3) A Vice-President of the Upper Tribunal may issue directions as to the practice and procedure to be followed in proceedings in the division over which the Vice-President presides.

(4) Directions under subsection (2) or (3) may not be issued without the approval of the President of Tribunals.

(5) Directions under subsection (1), (2) or (3) may include instruction or guidance on—

(a) the application or interpretation of the law,
(b) the manner of making of any decision in a case.

(6) Directions under subsection (1), (2) or (3) may—

(a) vary or revoke earlier such directions,
(b) make different provision for different purposes (in the same respects as Tribunal Rules).

69 Reconciling differences

(1) If (and to the extent that) any conflict arises between—

(a) directions issued under section 9(1), and
(b) directions issued under section 68(1) to (3),

those issued under section 9(1) are to prevail.

(2) If (and to the extent that) any conflict arises between—

(a) directions issued under section 68(1), and
(b) directions issued under section 68(2) or (3),

those issued under section 68(1) are to prevail.
CHAPTER 3
FEES AND ADMINISTRATION

70 Tribunal fees

(1) The Scottish Ministers may by regulations make provision for the reasonable fees that are to be payable in respect of any matter that may be dealt with by the Scottish Tribunals.

(2) Regulations under subsection (1) may provide for (in particular)—
   (a) scales or rates of fees,
   (b) in relation to fees—
       (i) reduction in amount,
       (ii) exemption or waiver.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult the Lord President.

71 Administrative support

(1) The Scottish Ministers must ensure that the Scottish Tribunals are provided with such property, services and personnel as the Scottish Ministers consider to be reasonably required for—
   (a) the proper operation of the Tribunals, and
   (b) the discharge of the Lord President’s responsibility as to the efficient disposal of business in the Scottish Tribunals (see section 7(1)).

(2) The Scottish Ministers must have regard to any representations made to them by the Lord President in relation to the fulfilment of the duty under subsection (1).

(3) In fulfilling the duty under subsection (1), the Scottish Ministers may—
   (a) fund or supply property, services and personnel for use by the Tribunals,
   (b) appoint persons as members of staff of the Tribunals.

(4) The Scottish Ministers may make arrangements as to—
   (a) the payment of remuneration or expenses to or in respect of persons so appointed,
   (b) the payment of pensions, allowances and gratuities to or in respect of persons so appointed,
   (c) contributions or other payments towards provision for such pensions, allowances and gratuities.

(5) The references in subsection (4) to pensions, allowances and gratuities include pensions, allowances and gratuities to be paid by way of compensation for loss of office.

72 Annual reporting

(1) The President of Tribunals is to prepare an annual report about the operation and business of the Scottish Tribunals.

(2) An annual report is to be given to the Lord President at the end of each financial year.
(3) An annual report—
   (a) must explain how the Scottish Tribunals have exercised their functions during the financial year,
   (b) may contain such other information as—
   (i) the President of Tribunals considers appropriate, or
   (ii) the Lord President requires to be covered.

(4) The Lord President must—
   (a) publish each annual report in a manner suitable for bringing it to the attention of persons having an interest in the operation and business of the Scottish Tribunals,
   (b) before so publishing it, send a copy of the report to the Scottish Ministers.

PART 8
FINAL PROVISIONS

General and ancillary

73 Regulation-making

(1) Regulations under the preceding Parts of this Act may—
   (a) make different provision for different purposes,
   (b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations under the following provisions of those Parts are subject to the affirmative procedure—
   (a) section 19(2) or 22(2),
   (b) section 26(2) or 27(2),
   (c) section 35(1) or 37(1),
   (d) section 60(1) or 61(1).

(3) Regulations under any other provisions of those Parts are subject to the negative procedure.

74 Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—
   (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act (including this Act),
   (b) otherwise, are subject to the negative procedure.

75 Transitional and consequential

For the purposes of or in connection with this Act, schedule 9 contains—
(a) transitional and other provision,
(b) modification of enactments.

*Interpretation, commencement and short title*

76  **List of expressions**

5  (1) In this Act, “Lord President” means Lord President of the Court of Session.
(2) Schedule 10 is a list of expressions used in this Act together with a note of some key provisions.

77  **Commencement**

(1) Section 76, this section and section 78 come into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.
(3) An order under subsection (2) may include transitional, transitory or saving provision.

78  **Short title**

The short title of this Act is the Tribunals (Scotland) Act 2013.
### SCHEDULE 1

(introduced by section 26)

LISTED TRIBUNALS

#### PART 1

**LIST OF TRIBUNALS**

<table>
<thead>
<tr>
<th>No.</th>
<th>List of Tribunals</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>An Additional Support Needs Tribunal</td>
</tr>
<tr>
<td>2</td>
<td>A Scottish Charity Appeals Panel</td>
</tr>
<tr>
<td>3</td>
<td>The Crofting Commission</td>
</tr>
<tr>
<td>4</td>
<td>An Education Appeal Committee</td>
</tr>
<tr>
<td>5</td>
<td>In relation to certain Housing and other Acts—</td>
</tr>
<tr>
<td></td>
<td>(a) a private rented housing committee</td>
</tr>
<tr>
<td></td>
<td>(b) a homeowner housing committee</td>
</tr>
<tr>
<td>6</td>
<td>The Lands Tribunal for Scotland</td>
</tr>
<tr>
<td>7</td>
<td>The Mental Health Tribunal for Scotland</td>
</tr>
<tr>
<td>8</td>
<td>In relation to the National Health Service—</td>
</tr>
<tr>
<td></td>
<td>(a) the NHS National Appeal Panel</td>
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<tr>
<td></td>
<td>(b) the NHS Tribunal</td>
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<tr>
<td>9</td>
<td>A Parking Adjudicator</td>
</tr>
<tr>
<td>10</td>
<td>A Police Appeals Tribunal</td>
</tr>
<tr>
<td>11</td>
<td>A Valuation Appeal Committee</td>
</tr>
</tbody>
</table>

#### PART 2

**FURTHER SPECIFICATION**

12 The operation of section 27(1) and (2) is informed by and subject to the further specification in paragraph 13 (and the entries above are to be construed accordingly).

13 (1) The entry in paragraph 1 relates to the functions exercisable by any of the Additional Support Needs Tribunals for Scotland by virtue of section 17(1A) of the Education (Additional Support for Learning) (Scotland) Act 2004.

(2) The entry in paragraph 2 relates to the functions exercisable by a Scottish Charity Appeals Panel by virtue of section 75(1) of the Charities and Trustee Investment (Scotland) Act 2005.

(3) The entry in paragraph 3 relates to the functions exercisable by the Crofting Commission by virtue of the Crofters (Scotland) Act 1993 or any other enactment, but only in so far as they are decision-making functions—

(a) for the resolution of disputes, and

(b) exercisable in the manner of a tribunal.
The entry in paragraph 4 relates to the functions exercisable by an education appeal committee set up under section 28D(1) of the Education (Scotland) Act 1980.

In the entry in paragraph 5—

(a) paragraph (a) relates to the functions exercisable by a private rented housing committee by virtue of section 21(3) of the Housing (Scotland) Act 2006,

(b) paragraph (b) relates to the functions exercisable by a homeowner housing committee by virtue of section 16(1) of the Property Factors (Scotland) Act 2011.

The entry in paragraph 6 relates to the functions exercisable by the Lands Tribunal for Scotland by virtue of the Lands Tribunal Act 1949 or any other enactment.

The entry in paragraph 7 relates to the functions exercisable by the Mental Health Tribunal for Scotland by virtue of section 21(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

In the entry in paragraph 8—

(a) paragraph (a) relates to the functions exercisable by the NHS National Appeal Panel or its chair by virtue of paragraph 5(4) to (6) in Schedule 3 to the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (S.S.I. 2009/183),

(b) paragraph (b) relates to the functions exercisable by the NHS Tribunal by virtue of sections 29 to 32E of the National Health Service (Scotland) Act 1978.

The entry in paragraph 9 relates to the functions exercisable by a parking adjudicator by virtue of section 72(2) and 73(3)(a) of the Road Traffic Act 1991.

The entry in paragraph 10 relates to the functions exercisable by a police appeals tribunal by virtue of section 56(3) of the Police and Fire Reform (Scotland) Act 2012.

The entry in paragraph 11 relates to the functions exercisable by a valuation appeal committee by virtue of section 29(1)(a) of the Local Government etc. (Scotland) Act 1994.

SCHEDULE 2
(introduced by section 28)

TRANSFER-IN OF MEMBERS

The Scottish Ministers may by regulations provide for some or all of the transferable persons to become the holders of any of the particular named or other membership positions within the Scottish Tribunals specified in paragraph 4(1) or (2).

In sub-paragraph (1), the transferable persons are the persons who—

(a) are members—

(i) of any of the listed tribunals, or

(ii) of any panel or other body from which the members of any of the listed tribunals are drawn,

(b) are authorised decision-makers for any of the listed tribunals, or

(c) by reason of holding particular offices, constitute any of the listed tribunals.

But sub-paragraph (2) does not apply in relation to—
Schedule 2—Transfer-in of members

(a) any—
   (i) judges of the Court of Session, or
   (ii) sheriffs, or

(b) if appointed by reason of holding judicial office, the President of the Lands Tribunal for Scotland.

2 Subject to the relevant provisions of schedule 7, regulations under paragraph 1(1) may contain provision for the terms and conditions under which the persons concerned are to hold those positions, including by—

(a) preserving or altering the terms and conditions under which they are members of a listed tribunal, or

(b) replacing those terms and conditions with new ones.

3 (1) Regulations under paragraph 1(1) may be made only where some or all functions of the tribunal have been, or are to be, transferred by regulations under section 27(2) (whenever made).

(2) Regulations under paragraph 1(1) must not cause any of the persons concerned to become the holder of any particular or other position to which the person would not be eligible for appointment under the relevant provisions of schedules 3 to 6.

(3) A particular instrument containing regulations under paragraph 1(1) may not relate to the members of more than one of the listed tribunals.

4 (1) In relation to the First-tier Tribunal—

(a) the particular positions are—
   (i) Chamber President in the Tribunal,
   (ii) Deputy Chamber President in the Tribunal,

(b) the other positions are—
   (i) ordinary member of the Tribunal,
   (ii) legal member of the Tribunal (apart from Chamber President (or Deputy)).

(2) In relation to the Upper Tribunal—

(a) the particular position is Vice-President of the Tribunal,

(b) the other positions are—
   (i) ordinary member of the Tribunal,
   (ii) legal member of the Tribunal (apart from Vice-President).
SCHEDULE 3  
(introduced by section 29)  
APPOINTMENT TO FIRST-TIER TRIBUNAL  

PART 1  
ORDINARY MEMBERS  

Appointment and eligibility  

1 (1) It is for the Scottish Ministers to appoint a person as an ordinary member of the First-tier Tribunal.  

(2) A person is eligible for such appointment only if the person meets such relevant criteria as are prescribed by the Scottish Ministers in regulations.  

2 In paragraph 1(2), “relevant criteria” includes criteria as to qualifications, experience and training.  

PART 2  
LEGAL MEMBERS  

Application of Part  

3 (1) This schedule Part applies in relation to appointment of the legal members of the First-tier Tribunal other than—  

(a) a Chamber President in the Tribunal, or  

(b) a Deputy Chamber President in the Tribunal.  

(2) The references in this schedule Part to a legal member of the First-tier Tribunal are to be read accordingly.  

Appointment and eligibility  

4 (1) It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal.  

(2) A person is eligible for such appointment only if qualifying under paragraph 5(1) or (2).  

5 (1) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 5 years, as—  

(a) a solicitor or advocate in Scotland, or  

(b) a solicitor or barrister in England and Wales or Northern Ireland.  

(2) A person qualifies under this sub-paragraph if the person falls within a description specified by the Scottish Ministers by regulations.  

Eligibility under regulations  

6 (1) Regulations under paragraph 5(2) may specify a description of a person by reference to the matters mentioned in sub-paragraph (2) or (3).  

(2) That is—
Tribunals (Scotland) Bill
Schedule 3—Appointment to First-tier Tribunal
Part 2—Legal members

(a) previous engagement in practice for a period of not less that 5 years, as—
   (i) a solicitor or advocate in Scotland, or
   (ii) a solicitor or barrister in England and Wales or Northern Ireland, and
(b) subsequent engagement in any of the activities listed in sub-paragraph (4).

(3) That is, suitability attributable to experience in law through engagement in—
   (a) any of the activities listed in sub-paragraph (4),
   (b) an activity that is of a broadly similar nature to any of the activities listed in that
       sub-paragraph.

(4) The activities are—
   (a) exercising judicial functions in any court or tribunal,
   (b) practice or employment as a lawyer of any kind,
   (c) whether or not in the course of practice or employment as a lawyer—
       (i) advising on the application of the law,
       (ii) drafting documents intended to affect rights or obligations under the law,
       (iii) assisting persons involved in a legal or other process for the resolution of
            disputes as to the law,
       (iv) acting as a mediator or arbitrator for the purpose of resolving disputes that
            are (or could be) the matter of legal proceedings,
   (d) teaching or researching law at or for an educational institution.

(1) The Scottish Ministers may by regulations make provision—
   (a) as regards the calculation of the 5-year period mentioned in paragraph 5(1) or
       6(2)(a) (for example, by reference to recent or continuous time),
   (b) to which paragraph 6(2)(a) is subject (for example, by reference to debarment
       from practice),
   (c) for the purpose of paragraph 6(3), about—
       (i) the criteria for suitability (for example, by reference to equivalence to past
           or present practice as a solicitor),
       (ii) the nature of experience required (for example, by reference to engagement
           for a particular period of time (within the United Kingdom or elsewhere)).

(2) The Scottish Ministers may by regulations modify the list in paragraph 6(4).
SCHEDULE 4  
(introduced by section 29)  

POSITIONS IN FIRST-TIER TRIBUNAL  

PART 1  

DEPUTY OR TEMPORARY PRESIDENT  

Deputy President  

1 If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a person as a Deputy Chamber President of a particular chamber in the First-tier Tribunal.  

2 (1) A person is eligible for appointment as a Deputy Chamber President only if the person is—  

(a) a legal member of the First-tier Tribunal (other than a Chamber President), or  

(b) if not falling within paragraph (a), eligible to be appointed as such a member (whether or not already any type of member of the First-tier or Upper Tribunal).  

(2) Before requesting that a person be appointed as a Deputy Chamber President, the President of Tribunals must consult the Chamber President of the chamber concerned.  

(3) If the Scottish Ministers decide not to make an appointment as a Deputy Chamber President, they must give the President of Tribunals written reasons.  

3 (1) The functions of a Chamber President are exercisable by a Deputy Chamber President to such extent and in such manner as the Chamber President may direct.  

(2) Except where the context otherwise requires, a reference in a provision in or under this Act to a Chamber President excludes a Deputy Chamber President.  

Temporary President  

4 If there is a temporary vacancy in the presidency of a particular chamber, the President of Tribunals may assign a person as a Temporary Chamber President during the vacancy.  

5 (1) A person is eligible to be assigned as a Temporary Chamber President only if the person is a legal or judicial member of the First-tier Tribunal (other than a Chamber President).  

(2) The functions of a Chamber President are exercisable by a Temporary Chamber President.  

(3) Except where the context otherwise requires, a reference in or under this Act to a Chamber President includes a Temporary Chamber President.  

PART 2  

ASSIGNMENT INTERNALLY  

Assignment by the President of Tribunals  

6 (1) The President of Tribunals has the function of assigning the members of the First-tier Tribunal among the chambers (including re-assignment or ending assignment).  

(2) The President of Tribunals is to assign those members among the chambers in accordance with paragraphs 7 to 9.
Assignment of Chamber Presidents

7  (1) A Chamber President of a chamber—
   (a) is to be assigned to that chamber,
   (b) may be assigned to act as a legal member also in another chamber.

   (2) A Deputy Chamber President of a chamber—
   (a) is to be assigned to that chamber,
   (b) may be assigned to act as a legal member also in another chamber,
   (c) is to act as such under the direction of the Chamber President of any chamber to which assigned.

   (3) Assignment under sub-paragraph (1)(b) or (2)(b) is to act otherwise than as a Chamber President or Deputy Chamber President in the other chamber.

   (4) Assignment under sub-paragraph (1)(b) or (2)(b) requires—
   (a) the concurrence of the Chamber President of the other chamber, and
   (b) the agreement of the member concerned.

Assignment of other members

8  (1) This paragraph applies in relation to an ordinary member or legal member by virtue of—
   (a) appointment as such, or
   (b) transfer-in as such.

   (2) Each member to whom this paragraph applies—
   (a) is to be assigned to at least one of the chambers,
   (b) may be assigned to different chambers at different times.

   (3) Any such member may be assigned to a particular chamber only with—
   (a) the concurrence of its Chamber President, and
   (b) the agreement of the member concerned.

   (4) The assignment of any such member to a particular chamber may be ended only with the concurrence of its Chamber President.

   (5) This paragraph does not apply to a legal member to whom paragraph 7(1) or (2) relates.

Assignment of judicial members

9  (1) A judicial member is to be assigned to at least one of the chambers.

   (2) A judicial member—
   (a) may be assigned to different chambers at different times,
   (b) may be assigned to a particular chamber only with—
   (i) the concurrence of its Chamber President, and
   (ii) the agreement of the assignee concerned.
(3) The assignment of such a member to a particular chamber may be ended only with the concurrence of its Chamber President.

SCHEDULE 5
(introduced by section 29)

APPOINTMENT TO UPPER TRIBUNAL

PART 1
ORDINARY MEMBERS

Appointment and eligibility

1 (1) It is for the Scottish Ministers to appoint a person as an ordinary member of the Upper Tribunal.

2 (2) A person is eligible for such appointment only if the person meets such relevant criteria as are prescribed by the Scottish Ministers in regulations.

In paragraph 1(2), “relevant criteria” includes criteria as to qualifications, experience and training.

PART 2
LEGAL MEMBERS

Application of Part

3 (1) This schedule Part applies in relation to appointment of the legal members of the Upper Tribunal other than—

(a) a Vice-President of the Tribunal,

(b) a legal member of the Tribunal by reason of being a Chamber President in the First-tier Tribunal.

(2) The references in this schedule Part to a legal member of the Upper Tribunal are to be read accordingly.

Appointment and eligibility

4 (1) It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal.

(2) A person is eligible for such appointment only if qualifying under paragraph 5(1) or (2).

5 (1) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 7 years, as—

(a) a solicitor or advocate in Scotland, or

(b) a solicitor or barrister in England and Wales or Northern Ireland.

(2) A person qualifies under this sub-paragraph if the person falls within a description specified by the Scottish Ministers by regulations.
Eligibility under regulations

6 (1) Regulations under paragraph 5(2) may specify a description of a person by reference to the matters mentioned in sub-paragraph (2) or (3).

(2) That is—

(a) previous engagement in practice for a period of not less than 7 years, as—

(i) a solicitor or advocate in Scotland, or

(ii) a solicitor or barrister in England and Wales or Northern Ireland, and

(b) subsequent engagement in any of the activities listed in sub-paragraph (4).

(3) That is, suitability attributable to experience in law through engagement in—

(a) any of the activities listed in sub-paragraph (4),

(b) an activity that is of a broadly similar nature to any of the activities listed in that sub-paragraph.

(4) The activities are—

(a) exercising judicial functions in any court or tribunal,

(b) practice or employment as a lawyer of any kind,

(c) whether or not in the course of practice or employment as a lawyer—

(i) advising on the application of the law,

(ii) drafting documents intended to affect rights or obligations under the law,

(iii) assisting persons involved in a legal or other process for the resolution of disputes as to the law,

(iv) acting as a mediator or arbitrator for the purpose of resolving disputes that are (or could be) the matter of legal proceedings,

(d) teaching or researching law at or for an educational institution.

7 (1) The Scottish Ministers may by regulations make provision—

(a) as regards the calculation of the 7-year period mentioned in paragraph 5(1) or 6(2)(a) (for example, by reference to recent or continuous time),

(b) to which paragraph 6(2)(a) is subject (for example, by reference to debarment from practice),

(c) for the purpose of paragraph 6(3), about—

(i) the criteria for suitability (for example, by reference to equivalence to past or present practice as a solicitor),

(ii) the nature of experience required (for example, by reference to engagement for a particular period of time (within the United Kingdom or elsewhere)).

(2) The Scottish Ministers may by regulations modify the list in paragraph 6(4).
SCHEDULE 6
(introduced by section 29)

POSITIONS IN UPPER TRIBUNAL

PART 1

TEMPORARY VICE-PRESIDENT

Temporary Vice-President

1 If there is a temporary shortage in the number of Vice-Presidents of the Upper Tribunal or a temporary vacancy in the position, the President of Tribunals may assign a person as a Temporary Vice-President of a particular division during the shortage or vacancy.

2 (1) A person is eligible for assignment as a Temporary Vice-President only if the person is a legal member of the Upper Tribunal (other than a Vice-President).

(2) The functions of a Vice-President are exercisable by a Temporary Vice-President.

(3) Except where the context otherwise requires, a reference in or under this Act to a Vice-President includes a Temporary Vice-President.

PART 2

ASSIGNMENT INTERNALLY

Assignment of and by the President of Tribunals

3 (1) The President of Tribunals has the function of assigning the members of the Upper Tribunal among the divisions (including re-assignment or ending assignment).

(2) The President of Tribunals is to assign those members among the divisions in accordance with paragraphs 4 to 7.

Assignment of Vice-Presidents etc.

4 (1) A Vice-President of a division—

(a) is to be assigned to that division,

(b) may be assigned to act—

(i) in the case of a judicial member assigned as a Vice-President, as a judicial member also in another division,

(ii) in any other case, as a legal member also in another division.

(2) Assignment under sub-paragraph (1)(b) is to act otherwise than as a Vice-President of the other division.

(3) Assignment under sub-paragraph (1)(b) requires—

(a) the concurrence of the Vice-President of the other division, and

(b) the agreement of the member concerned.

5 (1) This paragraph applies in relation to a legal member by reason of being a Chamber President in the First-tier Tribunal.

(2) Each member to whom this paragraph applies may be assigned to—
(a) one or more of the divisions, and
(b) different divisions at different times.

(3) Any such member may be assigned to a particular division only with—
   (a) the concurrence of its Vice-President,
   (b) the agreement of the member concerned.

(4) The assignment of any such member to a particular division may be ended only with the concurrence of its Vice-President.

Assignment of other members

6 (1) This paragraph applies in relation to an ordinary member or legal member by virtue of—
   (a) appointment as such, or
   (b) transfer-in as such.

(2) Each member to whom this paragraph applies—
   (a) is to be assigned to at least one of the divisions,
   (b) may be assigned to different divisions at different times.

(3) Any such member may be assigned to a particular division only with—
   (a) the concurrence of its Vice-President, and
   (b) the agreement of the member concerned.

(4) The assignment of any such member to a particular division may be ended only with the concurrence of its Vice-President.

(5) This paragraph does not apply to a legal member to whom paragraph 4 or 5 relates.

Assignment of judicial members etc.

7 (1) A judicial member is to be assigned to at least one of the divisions.

(2) An extra judge who is authorised to act as mentioned in section 17(5) is to be assigned to at least one of the divisions.

(3) A judicial member or such an extra judge—
   (a) may be assigned to different divisions at different times,
   (b) may be assigned to a particular division only with—
       (i) the concurrence of its Vice-President, and
       (ii) the agreement of the assignee concerned.

(4) The assignment of a judicial member to a particular division may be ended only with the concurrence of its Vice-President.

(5) Concurrence under sub-paragraph (3)(b)(i) or (4) is not required in relation to the assignment of the Lord President or the President of Tribunals.

(6) This paragraph does not apply to a judicial member to whom paragraph 4 relates.
SCHEDULE 7  
(introduced by section 32)  

CONDITIONS OF MEMBERSHIP ETC.

Application of schedule

1 (1) This schedule applies in relation to the positions of ordinary member and legal member of the Scottish Tribunals (but not the position of judicial member of the Tribunals).

(2) The references in this schedule to—
(a) a position in the Scottish Tribunals, or
(b) a member of the Scottish Tribunals,
are to be read accordingly.

Initial period of office

2 (1) A person who is appointed to a position in the Scottish Tribunals holds the position for the period of 5 years beginning with the date of the appointment.

(2) A person who is transferred-in to a position in the Scottish Tribunals holds the position for the period mentioned in sub-paragraph (3).

(3) That period is the first-ending of either—
(a) the period for which the member would have continued to hold office in the listed tribunal in question if the transfer to the Scottish Tribunals had not taken place, or
(b) the period of 5 years beginning with the date on which the person becomes a member of the Scottish Tribunals.

3 (1) Sub-paragraph (2) applies where a person—
(a) holds a position in the Scottish Tribunals, and
(b) is appointed to hold another such position in addition.

(2) The person holds the position mentioned in sub-paragraph (1)(b) for a period which expires on the same date as does the period for which the person holds the position mentioned in sub-paragraph (1)(a).

Reappointment

4 (1) Unless sub-paragraph (3) applies, a member of the Scottish Tribunals is to be reappointed as such at the end of each period for which the position is held.

(2) Reappointment under sub-paragraph (1) is to the position for the period of 5 years beginning with the date of the reappointment.

(3) This sub-paragraph applies if—
(a) the member has declined to be reappointed,
(b) the member is ineligible for reappointment,
(c) the President of Tribunals has recommended to the Scottish Ministers that the member should not be reappointed.

(4) In sub-paragraph (1), the reference to the period for which a position is held is to—
(a) the period for which the position is held in accordance with paragraph 2 or 3, or
(b) any further period for which the position is held by virtue of reappointment in accordance with sub-paragraphs (1) and (2).

(5) A reference in this paragraph to reappointment includes appointment at the end of a period for which a position is held by virtue of paragraph 2(2) as well as reappointment at the end of a period for which a position is held by virtue of any relevant appointment (or reappointment).

For the purpose of paragraph 4(3)(b), a member is ineligible for reappointment only if the member would not be eligible for appointment to the position in accordance with the relevant provisions of schedule 3 or (as the case may be) schedule 5 were the member being appointed to the position for the first time.

For the purpose of paragraph 4(3)(c), the President of Tribunals may recommend to the Scottish Ministers that a member should not be reappointed only if satisfied that—

(a) the member has failed to comply with—

(i) any of the relevant terms and conditions of membership, or
(ii) any other requirement imposed on the member by or under this Act, or

(b) the Tribunal concerned no longer requires—

(i) a member with the qualifications, experience and training of that member, or
(ii) the same number of members for the efficient disposal of its business.

Reappointment by virtue of paragraph 4 is not subject to any process of appointment arising in relation to a position within the Scottish Tribunals by virtue of section 10(2A) of the Judiciary and Courts (Scotland) Act 2008.

Termination of appointment

A member of the Scottish Tribunals ceases to hold the position to which the member was appointed or transferred-in if the member—

(a) becomes disqualified from holding the position (see paragraph 11),
(b) is removed from the position under paragraph 23 of schedule 8,
(c) resigns the position by giving notice in writing to the Lord President, or
(d) vacates the position in accordance with section 26 of the Judicial Pensions and Retirement Act 1993.

Nothing in paragraphs 2 to 4 affects the operation of section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 in relation to a member of the Scottish Tribunals.

Accordingly, such a member’s continuation in office by virtue of that section may have the effect of extending the period for which the member is appointed or (as the case may be) reappointed by virtue of those paragraphs.

Sub-paragraph (2) applies where—

(a) a legal member of the First-tier Tribunal by virtue of appointment or transfer-in as such is appointed as Chamber President or Deputy Chamber President,
(b) a legal member of the Upper Tribunal by virtue of appointment or transfer-in as such is appointed as Vice-President.
(2) If a person appointed as Chamber President, Deputy Chamber President or Vice-President is at the time of the appointment already appointed or transferred-in as a member of the Scottish Tribunals in another capacity, the later appointment supersedes the earlier appointment or (as the case may be) transfer-in in all respects.

Disqualification from office

11 A person is disqualified from appointment or transfer-in, and from holding a position, as a member of the Scottish Tribunals if the person is or becomes—

(a) a member of the House of Commons,
(b) a member of the Scottish Parliament,
(c) a member of the European Parliament,
(d) a Minister of the Crown,
(e) a member of the Scottish Government,
(f) a civil servant.

Pensions etc.

12 (1) The Scottish Ministers may make arrangements as to—

(a) the payment of pensions, allowances and gratuities to or in respect of members of the Scottish Tribunals or former members,
(b) contributions or other payment towards provision for such pensions, allowances and gratuities.

(2) The references in sub-paragraph (1) to pensions, allowances and gratuities include pensions, allowances and gratuities paid by way of compensation for loss of office.

Oaths

13 (1) Each of the members of the Scottish Tribunals must take the required oaths in accordance with this paragraph.

(2) A Vice-President of the Upper Tribunal is to take them in the presence of the President of Tribunals.

(3) A Chamber President in the First-tier Tribunal is to take them in the presence of the President of Tribunals.

(4) A Deputy Chamber President in the First-tier Tribunal is to take them in the presence of either the President of Tribunals or a Chamber President in the First-tier Tribunal.

(5) An ordinary or legal member of the Upper Tribunal by virtue of appointment or transfer-in as such is to take them in the presence of either the President of Tribunals or a Vice-President of the Upper Tribunal.

(6) An ordinary or legal member of the First-tier Tribunal by virtue of appointment or transfer-in as such is to take them in the presence of either the President of Tribunals or a Chamber President in the First-tier Tribunal.

(7) If a member of the Scottish Tribunals has previously taken the required oaths in the circumstances mentioned in sub-paragraph (8), the previous taking of the oaths counts as if it were the taking of them in accordance with this paragraph.
(8) The circumstances are—
   (a) in the case of a member who is transferred-in as such, in connection with the
       office from which the person is transferred-in,
   (b) in the case of a member whose position changes within the Scottish Tribunals, in
       connection with appointment or transfer-in to the previous position.

(9) In this paragraph, “the required oaths” means the oath of allegiance and the judicial oath
    as set out in the Promissory Oaths Act 1868.

Other conditions

14 (1) Other than as provided for in this Act, the Scottish Ministers may determine the terms
       and conditions on which a member of the Scottish Tribunals holds the position.

   (2) Under sub-paragraph (1), the determination may (in particular)—

       (a) include provision for sums to be payable by way of remuneration, allowances and
           expenses,
       (b) make different provision for different categories of member or other different
           purposes.

SCHEDULE 8
(introduced by section 33)

CONDUCT AND FITNESS ETC.

PART 1

CONDUCT AND DISCIPLINE

Application of Part

1 (1) This schedule Part applies in relation to the ordinary members and legal members of the
       Scottish Tribunals (but not the judicial members of the Tribunals).

   (2) The references in this schedule Part to a member of the Scottish Tribunals are to be read
       accordingly.

Conduct Rules

2 The Lord President is responsible for making and maintaining appropriate arrangements
   for the things for which Rules under paragraph 3(1) may make provision.

3 (1) The Lord President may make Rules for the purposes of or in connection with—

       (a) the investigation and determination of any matter concerning the conduct of
           members of the Scottish Tribunals,
       (b) the review of any such determination.

   (2) Rules under sub-paragraph (1) may include provision about (in particular)—

       (a) the circumstances in which an investigation must or may be undertaken,
       (b) the making of a complaint by any person,
(c) the steps that are to be taken by a person making a complaint before it is to be investigated,

(d) the carrying out of an investigation (including any steps to be taken by the member whom it concerns or by any other person),

(e) the time limits for taking steps and procedures for extending such time limits,

(f) the person by whom an investigation (or part of an investigation) is to be carried out,

(g) the matters to be determined by the person carrying out an investigation (or part of an investigation), the Lord President or any other person,

(h) the making of recommendations by the person carrying out an investigation (or part of one),

(i) the obtaining of information relating to a complaint,

(j) the keeping of a record of an investigation,

(k) the confidentiality of communications or proceedings,

(l) the publication of information or its supply to any person.

Rules under paragraph 3(1)—

(a) may make different provision for different purposes,

(b) are to be published in such manner as the Lord President may determine.

Reprimand etc.

5 (1) Where the condition in sub-paragraph (2) is met in relation to a member of the Scottish Tribunals, the Lord President may, for disciplinary purposes, give the member—

(a) formal advice,

(b) a formal warning, or

(c) a reprimand.

(2) The condition is that—

(a) an investigation has been carried out with respect to the member in accordance with Rules made under paragraph 3(1), and

(b) the person carrying out the investigation has recommended that the Lord President exercise the power conferred by sub-paragraph (1).

6 Paragraph 5 does not limit what the Lord President may do—

(a) informally,

(b) for other purposes, or

(c) where no advice or warning is given in a particular case.

Suspension of membership

7 (1) If the Lord President considers that it is necessary for the purpose of maintaining public confidence in the Scottish Tribunals, the Lord President may suspend a member of the Tribunals.
(2) Suspension under sub-paragraph (1)—

(a) is for such period as the Lord President may specify when suspending the member,

(b) may be revoked or extended subsequently by the Lord President.

Suspension under paragraph 7(1) does not affect any remuneration payable to, or in respect of, the member concerned during the period of suspension.

Judicial Complaints Reviewer

9 (1) The Judicial Complaints Reviewer has the functions mentioned in sub-paragraph (2).

(2) The functions are—

(a) on the request of a relevant person, to review the handling of an investigation carried out in accordance with Rules made under paragraph 3(1) to consider whether the investigation has been carried out in accordance with the Rules,

(b) in any case where the Reviewer considers that such an investigation has not been carried out in accordance with such Rules, to refer the case to the Lord President,

(c) as directed by the Scottish Ministers, to prepare and publish reports on the investigations carried out in pursuance of such Rules, and

(d) to make written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of members of the Scottish Tribunals.

(3) The Lord President is to have regard to any written representations made under sub-paragraph (2)(d).

(4) In sub-paragraph (2)(a), “relevant person” means—

(a) person whose complaint led to the carrying out of the investigation, or

(b) member of the Scottish Tribunals with respect to whom the investigation has been carried out.

Sub-paragraph (2) applies where a case is referred to the Lord President by virtue of paragraph 9(2)(b).

(2) The Lord President may—

(a) vary or revoke wholly or partly the determination made in the case to which the investigation relates,

(b) cause a fresh investigation to be carried out,

(c) confirm the determination in the case, or

(d) deal with the referral in such other way as the Lord President considers appropriate.
PART 2

FITNESS AND REMOVAL

Application of Part

11 (1) This schedule Part applies in relation to the ordinary members and legal members of the Scottish Tribunals (but not the judicial members of the Tribunals).

(2) The references in this schedule Part to a member of or position in the Scottish Tribunals are to be read accordingly.

12 In this schedule Part, the references to unfitness to hold the position of member of the Scottish Tribunals are to unfitness by reason of inability, neglect of duty or misbehaviour.

Constitution and procedure

13 (1) The First Minister must constitute a fitness assessment tribunal when requested to do so by the Lord President.

(2) The First Minister may constitute a fitness assessment tribunal—

(a) in such other circumstances as the First Minister thinks fit, and

(b) following consultation with the Lord President.

(3) The function of a fitness assessment tribunal is to investigate and report on whether a member of the Scottish Tribunals is unfit to hold the position of member of the Tribunals.

14 The Court of Session may by act of sederunt make provision as to the procedure to be followed in proceedings at a fitness assessment tribunal.

Composition and remuneration

15 (1) A fitness assessment tribunal is to consist of—

(a) one person who—

(i) is, or has been, a sheriff (including a part-time sheriff) or a judge of the Court of Session, or

(ii) practises, and has practised for a period (whether or not continuous) of at least 10 years, as a solicitor or advocate in Scotland,

(b) one person who is—

(i) an ordinary member, where the person under investigation is an ordinary member,

(ii) a legal member, where the person under investigation is a legal member, and

(c) one person who does not fall (and has never fallen) within a category of person who may be a member of the tribunal by virtue of sub-paragraph (a) or (b).

(2) The selection of persons to be members of the tribunal is to be made by the First Minister with the agreement of the Lord President.

16 (1) The Scottish Ministers—
(a) must pay such expenses as they consider are reasonably required to be incurred to enable a fitness assessment tribunal to carry out its functions,

(b) may pay such remuneration to, and expenses of, any member of such a tribunal as they think fit.

(2) Sub-paragraph (1)(b) does not apply in relation to such a member if the member is a sheriff or a judge of the Court of Session.

Proceedings before tribunal

17 (1) A fitness assessment tribunal may require any person—

(a) to attend its proceedings for the purpose of giving evidence,

(b) to produce documents in the person’s custody or under the person’s control.

(2) A person on whom such a requirement is imposed is not obliged to answer any question or produce any document which the person would be entitled to refuse to answer or produce in a court of law in Scotland.

18 (1) Sub-paragraph (2) applies where a person on whom a requirement has been imposed under paragraph 17(1)—

(a) refuses or fails, without reasonable excuse—

(i) to comply with the requirement,

(ii) while attending the tribunal proceedings to give evidence, to answer any question,

(b) deliberately alters, conceals or destroys any document which the person is required to produce.

(2) The Court of Session may, on an application made to it by the tribunal—

(a) make such order for enforcing compliance or otherwise as it thinks fit, or

(b) deal with the matter as if it were a contempt of the Court.

Suspension during investigation

19 (1) Sub-paragraph (2) applies if the Lord President requests the First Minister to constitute a fitness assessment tribunal to investigate whether a member of the Scottish Tribunals is unfit to hold the position of member of the Tribunals.

(2) The Lord President may suspend the member from the position at any time before the tribunal submits its report as required by paragraph 22(2).

(3) Suspension under sub-paragraph (2) lasts until (whichever is earlier)—

(a) the Lord President revokes it, or

(b) the report is laid as required by paragraph 22(3).

20 (1) Sub-paragraph (2) applies if a fitness assessment tribunal—

(a) recommends that a member of the Scottish Tribunals who is subject to its investigation should be suspended from the position as member of the Tribunals,

(b) does so in writing at any time before the tribunal submits its report as required by paragraph 22(2).
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(2) The First Minister may suspend the member from the position at any time before laying the report as required by paragraph 22(3).

(3) Suspension under sub-paragraph (2) lasts until (whichever is earlier)—
   (a) the First Minister revokes it, or
   (b) the report is laid as required by paragraph 22(3).

Suspension under paragraph 19(2) or 20(2) does not affect any remuneration payable to, or in respect of, the member concerned during the period of suspension.

Report and removal

22 (1) A report by a fitness assessment tribunal must—
   (a) be in writing, and
   (b) contain reasons for its conclusions.

(2) As soon as reasonably practicable after it is completed, such a report must be submitted by the tribunal to—
   (a) the First Minister, and
   (b) the Lord President.

(3) The First Minister must lay before the Scottish Parliament each report submitted under sub-paragraph (2).

23 (1) If the relevant condition is met, the First Minister may remove a member of the Scottish Tribunals from the position of member of the Tribunals.

(2) The relevant condition is that a fitness assessment tribunal has submitted a report under paragraph 22(2) concluding that the member is unfit to hold the position.

SCHEDULE 9
(introduced by section 75)

TRANSITIONAL AND CONSEQUENTIAL

PART 1

TRANSITIONAL AND OTHER MATTERS

Exercise of functions

1 (1) Sub-paragraph (2) applies for the purposes of—
   (a) the exercise of functions by a member of the Scottish Tribunals by virtue of this Act, and
   (b) the operation of provisions in or under this Act to which such a member is subject.

(2) Except where the context otherwise requires, it is immaterial whether a person who is, or who is acting as, such a member is in place by virtue of appointment, assignment, transfer-in or other means under this Act.
Rules of listed tribunals

2 (1) Sub-paragraph (2) applies where some or all of the functions of a listed tribunal have been, or are to be, transferred by regulations under section 27(2).

(2) The Scottish Ministers may by regulations provide for the procedural rules of a listed tribunal that are in force immediately before the transfer to have effect for the purposes of either or both of the First-tier Tribunal and the Upper Tribunal.

(3) Regulations under sub-paragraph (2) may provide for the procedural rules to which the regulations relate to have such effect subject to such modifications as appear to the Scottish Ministers to be necessary or expedient with respect to the purposes mentioned in that sub-paragraph.

(4) In this paragraph—

“listed tribunal” is to be construed in accordance with Part 3 (see section 26(1)),

“procedural rules” means provision for the purposes of a listed tribunal (whether or not contained in an enactment and irrespective of whether called rules)—

(a) regulating the practice or procedure to be followed in proceedings at a listed tribunal, or

(b) otherwise applying in relation to the exercise by a listed tribunal of its functions.

3 (1) Regulations under paragraph 2(2) may—

(a) make different provision for different purposes,

(b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations under paragraph 2(2) are subject to the negative procedure.

Pre-SCJC rule-making

4 (1) Until the Scottish Civil Justice Council and the Court of Session are involved in the making of Tribunal Rules by virtue of the coming into force of paragraph 12(2) to (5)—

(a) section 62(3) is of no effect,

(b) instead of that section, sub-paragraph (2) applies for the purpose of making rules regulating the practice and procedure to be followed in proceedings at the Scottish Tribunals.

(2) The function of making such rules is exercisable by the Scottish Ministers by setting them out in regulations.

(3) Before making regulations under sub-paragraph (2), the Scottish Ministers must consult—

(a) the President of Tribunals, and

(b) such other persons as they consider appropriate.

5 (1) Regulations under paragraph 4(2) may—

(a) modify rules having effect for the purposes mentioned in paragraph 2(2) (that is, by virtue of regulations made under that paragraph),
(b) do anything that may be done by Tribunal Rules by virtue of Chapter 2 of Part 7 (including the making of different provision for different purposes).

(2) Regulations under paragraph 4(2) are subject to the negative procedure.

Adoption of inherited rules

6 (1) Sub-paragraph (2) applies to—

(a) rules having effect as mentioned in paragraph 2(2) (by virtue of regulations made under that paragraph),

(b) rules set out in regulations made by virtue of paragraph 4(2).

(2) Once the Scottish Civil Justice Council and the Court of Session are involved in the making of Tribunal Rules by virtue of the coming into force of paragraph 12(2) to (5)—

(a) all rules to which this sub-paragraph applies are to be regarded as if made as Tribunal Rules under Chapter 2 of Part 7,

(b) all such rules have effect accordingly (and may therefore be revoked, amended or remade by Tribunal Rules under Chapter 2 of Part 7).

Chambers and divisions

7 (1) For as long as it appears to the Scottish Ministers that the acquisition of functions by the First-Tier Tribunal for the time being is such that there is justification for not organising it into a number of chambers as required by section 19(1), regulations under section 19(2)—

(a) need not be made, or

(b) may provide for the Tribunal to have a single chamber only.

(2) For as long as it appears to the Scottish Ministers that the acquisition of functions by the Upper Tribunal for the time being is such that there is justification for not organising it into a number of divisions as required by section 22(1), regulations under section 22(2)—

(a) need not be made, or

(b) may provide for the Tribunal to have a single division only.

8 (1) Sections 19(1) and (2) and 22(1) and (2) are subject to paragraph 7(1) and (2) (until it appears to the Scottish Ministers that the relevant justification no longer exists).

(2) Any provision of this Act (apart from this schedule Part) that mentions a chamber or more than one chamber of the First-tier Tribunal is, for as long as by virtue of paragraph 7(1) the First-tier Tribunal has no chambers or a single chamber, to be read with such modifications as are necessary for the effective operation of the provision while the Tribunal is not organised into a number of chambers.

(3) Any provision of this Act (apart from this schedule Part) that mentions a division or more than one division of the Upper Tribunal is, for as long as by virtue of paragraph 7(2) the Upper Tribunal has no divisions or a single division, to be read with such modifications as are necessary for the effective operation of the provision while the Tribunal is not organised into a number of divisions.
For the purposes of paragraph 7(1) and (2), the Scottish Ministers must have regard to the following matters so far as relevant for the time being—

(a) the different subject-matters falling within the jurisdiction of the First-tier Tribunal or (as the case may be) the Upper Tribunal, and

(b) any other factors relevant in relation to the exercise of the functions of the First-tier Tribunal or (as the case may be) the Upper Tribunal.

**PART 2**

**CONSEQUENTIAL MODIFICATIONS**

*Judicial Pensions and Retirement Act 1993*

10 (1) The Judicial Pensions and Retirement Act 1993 is amended as follows.

(2) In section 26 (retirement date for certain judicial officers)—

(a) in subsection (12), in the definition of “the appropriate person”, after paragraph (e) there is inserted—

“(f) the Scottish Ministers, in the case of a relevant member of the Scottish Tribunals;”,

(b) after subsection (15) there is inserted—

“(16) The Scottish Ministers must consult the President of Tribunals before exercising any function arising by virtue of subsection (12)(f) in relation to a relevant member of the Scottish Tribunals.

(17) In paragraph (f) of the definition of “the appropriate person” in subsection (12), and in subsection (16) above, a reference to a relevant member of the Scottish Tribunals is to an ordinary or legal member of either or both of the Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

(3) In section 30 (interpretation), after subsection (1) there is inserted—

“(1A) For the purposes of section 26(12)(f), (16) and (17), and the related entry in Schedule 5, “Scottish Tribunals” or “President of Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013.”.

(4) In Schedule 5 (relevant offices in relation to retirement provisions), at the end there is inserted—

“Ordinary or legal member of either or both of the Scottish Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

*Judiciary and Courts (Scotland) Act 2008*

11 (1) The Judiciary and Courts (Scotland) Act 2008 is amended as follows.

(2) In section 10 (judicial offices within the Board’s remit)—

(a) in subsection (1), the word “and” immediately following paragraph (f) is repealed,

(b) after paragraph (f) of that subsection there is inserted—

“(fa) the positions within the Scottish Tribunals mentioned in subsection (2A), and”,
(c) after subsection (2) there is inserted—

“(2A) The positions within the Scottish Tribunals are—

(a) Vice-President of the Upper Tribunal, if to be appointed under section 25(1) of the Tribunals (Scotland) Act 2013,

(b) Chamber President in the First-tier Tribunal, if to be appointed under section 21(1) of that Act,

(c) Deputy Chamber President in the First-tier Tribunal, if to be appointed under the relevant provisions of schedule 4 to that Act,

(d) ordinary member or legal member of the First-tier Tribunal or the Upper Tribunal, if to be appointed under the relevant provisions of schedule 3 or (as the case may be) schedule 5 to that Act.”.

(3) In section 30 (Judicial Complaints Reviewer), in subsection (5), after paragraph (h) there is inserted—

“(i) an ordinary or legal member of either or both of the Scottish Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

(4) In paragraph 3 of schedule 1—

(a) in sub-paragraph (1), the word “and” immediately preceding paragraph (c) is repealed,

(b) after that paragraph there is inserted—

“, and

(d) one person holding the position of Chamber President or of Vice-President within the Scottish Tribunals.”;

(c) after sub-paragraph (5) there is inserted—

“(6) For the purposes of sub-paragraph (1)(d)—

“Scottish Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013,

“Chamber President” means Chamber President in the First-tier Tribunal as referred to in that Act and “Vice-President” means Vice-President of the Upper Tribunal as referred to in that Act.”.

(5) After paragraph 16 of schedule 1, there is inserted—

“Proceedings relating to the Scottish Tribunals

16A(1) Sub-paragraph (2) applies where the Board is exercising any function under this Act in connection with a position mentioned in section 10(2A).

(2) At least one member of the Scottish Tribunals is to take part in any proceedings relating to the function (whether or not also a member of the Board).

(3) It is for the President of Tribunals to select a member of the Scottish Tribunals to take part as mentioned in sub-paragraph (2).

(4) Before making a selection under sub-paragraph (3), the President of Tribunals must consult the Chairing Member.
(5) Sub-paragraph (6) applies where a person taking part as mentioned in sub-paragraph (2) is not a member of the Board.

(6) The person is to be treated as if a member of the Board for the purposes of—

(a) sections 11 to 15 and 17, and

(b) paragraphs 5, 12 and 13 of this schedule.

(7) The Board may not make a determination under paragraph 15 which is inconsistent with this paragraph.

(8) In this paragraph, “President of Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013 and the references to a member of the Scottish Tribunals are to be construed in accordance with section 12(3) of that Act.”.

Scottish Civil Justice Council and Criminal Legal Assistance Act 2013

12 (1) The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 is amended as follows.

(2) In subsection (1) of section 2 (functions of the Council)—

(a) after paragraph (b) there is inserted—

“(ba) to review the practice and procedure followed in proceedings in the Scottish Tribunals,”,

(b) in paragraph (c)—

(i) the words “draft civil procedure rules” become sub-paragraph (i),

(ii) after that sub-paragraph (as so numbered) there is inserted—

“(ii) draft tribunal procedure rules,”.

(3) In subsection (3) of section 2, after paragraph (c) there is inserted—

“(ca) practice and procedure should, where appropriate, be similar in both of the Scottish Tribunals (and in different chambers or divisions within them),”.

(4) After subsection (6) of section 2 there is inserted—

“(7) For the purpose of this Part, “draft tribunal procedure rules” are draft rules prepared with a view to the making by the Court of Session by act of sederunt of Tribunal Rules with respect to the Scottish Tribunals.”.

(5) In section 4 (Court of Session to consider rules)—

(a) in subsection (1), after the words “draft civil procedure rules” there is inserted “or draft tribunal procedure rules”,

(b) in subsection (2), after the words “draft civil procedure rules” there is inserted “or draft tribunal procedure rules”.

(6) In section 6 (composition of the Council), in subsection (1)—

(a) for the word “20” there is substituted “22”,

(b) after paragraph (a) there is inserted—
“(aa) the President of Tribunals,”,

(c) after paragraph (e) there is inserted—

“(ea) from the membership of the Scottish Tribunals, 1 Chamber President or 1 Vice-President (“Tribunal representative member”),”.

(7) In section 8 (tenure)—

(a) in subsection (1), after the words “Lord President,” there is inserted “the President of Tribunals,”,

(b) after subsection (3) there is inserted—

“(3A) A Tribunal representative member holds office for a period of 3 years unless, prior to the expiry of that period, the Lord President replaces the representative with another Tribunal representative member or requires the member to leave office.”.

(8) The title of section 13 becomes “Committees generally”.

(9) After section 13 there is inserted—

“Tribunals committee

(1) The Council must establish a particular committee under section 13(1) in connection with the exercise by it of the functions arising by virtue of section 2(1)(ba) and (c)(ii).

(2) The committee is to be chaired by the President of Tribunals or the Tribunal representative member.

(3) The other members of the committee are to be selected by the President of Tribunals.

(4) In selecting those members of the committee, the President of Tribunals is to have particular regard to the need to ensure that its membership includes persons with knowledge of how the Scottish Tribunals exercise their functions.

(5) The Council may not make a determination under section 12(3)(b) which is inconsistent with subsections (2) to (4).”.

(10) In section 16 (interpretation of Part 1)—

(a) the existing text becomes subsection (1),

(b) in that subsection (as so numbered), after the entry relating to draft civil procedure rules there is inserted—

“draft tribunal procedure rules” has the meaning given in section 2(7),”,

(c) after that subsection (as so numbered) there is inserted—

“(2) In this Part—

“Scottish Tribunals”, “President of Tribunals” and “Tribunal Rules” are to be construed in accordance with the Tribunals (Scotland) Act 2013,
“Chamber President” means Chamber President in the First-tier Tribunal as referred to in that Act and “Vice-President” means Vice-President of the Upper Tribunal as referred to in that Act (with “chamber” and “division” in relation to the Scottish Tribunals to be construed in accordance with that Act.”).

SCHEDULE 10
(introduced by section 76)

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Tribunals (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to establish the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland; and for connected purposes.

Introduced by: Kenny MacAskill
On: 8 May 2013
Bill type: Government Bill
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

TRIBUNALS (SCOTLAND) BILL

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EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Tribunals (Scotland) Bill introduced in the Scottish Parliament on 8 May 2013:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 30–PM.
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

3. The Bill creates a new structure for tribunals dealing with devolved matters under the judicial leadership of the Lord President of the Court of Session as Head of the Scottish Tribunals.

4. The main features covered by the Bill are:

   - The creation of a First-tier Tribunal and an Upper Tribunal. The First-tier Tribunal will be divided into chambers, and the Upper Tribunal into divisions. The Bill creates a simplified framework to provide coherence across the tribunals system. The Bill allows the new structure to be capable of taking on new jurisdictions over time.
   - The First-tier Tribunal will deal with cases in the first instance to which a general right of appeal will lie to the Upper Tribunal. The Bill does, however, allow for the functions of a listed tribunal to be transferred to either or both Tribunals and it is envisaged that the Upper Tribunal may receive first-instance functions which are particularly complicated or controversial. The Upper Tribunal also has an express function, which is set out in section 41 of the Bill, to hear appeals from the First-tier Tribunal. It may also decide on petitions for judicial review which are transferred to it from the Court of Session under section 52.
   - The creation of a new office, the President of the Scottish Tribunals (“President of Tribunals”). The Lord President will be able to delegate some of the Lord President’s functions as Head of the Scottish Tribunals to the President of Tribunals.
   - The Bill enables the First-tier Tribunal and the Upper Tribunal to review their own decisions where, for example, simple administrative errors have occurred. This does not affect the rights of appeal available.
   - The Bill amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, to provide the Scottish Civil Justice Council (“SCJC”) with the power to propose rules of procedure for devolved Scottish tribunals.
   - Each tribunal is to be composed of its members and the Bill provides a common system for appointing both legally qualified and lay members. The Bill also allows for the transfer-in of members of a listed tribunal at the point when its functions are transferred-in to the Scottish Tribunals. Members of the judiciary are also enabled to be assigned to act as tribunal members. Reflecting the primary functions of both
tribunals, a sheriff will be eligible to act as a member of both the First-tier Tribunal and the Upper Tribunal while a judge of the Court of Session will be eligible to act as a member of the Upper Tribunal.

OVERVIEW OF THE STRUCTURE OF THE BILL

5. The Bill has 78 sections and 10 schedules. Section 76 contains definitions used in the Bill and schedule 10 is an index of expressions used in the Bill. The Bill is organised into 8 Parts and these explanatory notes are organised likewise. A brief overview of the structure of the Bill is set out below which is followed by a detailed description of the provisions of the Bill in the commentary on the sections. Terms are defined when first used but not otherwise. An explanation to accompany each schedule is contained within the section that introduces that schedule.

6. Part 1 makes provision for the establishment and leadership of the Scottish Tribunals.

7. Part 2 makes provision for the composition of the Scottish Tribunals and their internal structure.

8. Part 3 makes provision so that the functions and members of a tribunal listed in schedule 1 can be transferred-in to the Scottish Tribunals.

9. Part 4 contains more detail in relation to membership of the Scottish Tribunals. Schedules 3 to 6 deal with the appointment and assignment of members. Schedule 7 sets out the terms and conditions of membership including period in office, re-appointment, termination of appointment, disqualification from office, pensions and remuneration. Schedule 8 makes provision as to the training and fitness of members including the process for removing a member from office.

10. Part 5 makes provision as to the composition of the Scottish Tribunals when exercising their decision-making functions.

11. Part 6 enables both the First-tier Tribunal and Upper Tribunal to review their own decisions and to correct or set-aside those decisions. It also provides for a general right to appeal against a decision of the First-tier Tribunal to the Upper Tribunal and against a decision of the Upper Tribunal to the Court of Session. Chapter 2 of Part 6 also enables the Court of Session to remit an application for judicial review to the Upper Tribunal for determination.

12. Chapters 1 and 2 of Part 7 make provision in respect of the practice and procedure to be followed in proceedings before the Scottish Tribunals. Chapter 3 of Part 7 makes provision for the charging of fees by the Scottish Tribunals as well as the duty of the Scottish Ministers to ensure that the Scottish Tribunals are provided with the necessary property, services and personnel which are required for their proper operation, and reporting.

13. Part 8 contains general and ancillary provisions.
COMMENTARY ON SECTIONS

PART 1 – THE SCOTTISH TRIBUNALS

Establishment and Leadership

Section 1 – Establishment of the Tribunals

14. Section 1 establishes two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland.

Section 2 – Head of the Tribunals

15. Section 2 designates the Lord President as the Head of the Scottish Tribunals. The Bill confers a number of functions on the Lord President in this capacity. See, for example, section 4(2) (assigning a person to the office of the President of the Scottish Tribunals), section 6 (representation of interests), section 7 (business arrangements), section 30 (assignment policy) and section 31 (training and review).

Section 3 – Upholding independence

16. Section 3 places a duty on the First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament and any other person having responsibility for matters relating to the Scottish Tribunals or the administration of justice to uphold the independence of the members of the Scottish Tribunals. It also imposes two particular duties on the First Minister, the Lord Advocate and the Scottish Ministers for the purpose of upholding that independence.

17. The first is a duty not to seek to influence the decisions of the Scottish Tribunals through special access to its members which would not be afforded to the general public.

18. The second is a duty to have regard to the need for members of the Scottish Tribunals to have the support necessary to enable them to carry out their functions.

Sections 4 and 5 – President of the Tribunals

19. Section 4 establishes the office of the President of the Scottish Tribunals. It is the responsibility of the Lord President to assign a judge of the Court of Session (other than a temporary judge) to the office who will be the senior member of the Scottish Tribunals. Once assigned to office, the President of Tribunals continues in that office for such time as the Lord President considers appropriate.

20. Where no person is assigned to act or the person assigned to act as the President of Tribunals is unable to act in that capacity, the Lord President may nominate a Vice-President of the Upper Tribunal to act temporarily as the President of Tribunals provided that that person is also a judge of the Court of Session (other than a temporary judge).

21. The Bill confers a number of functions directly on the President of Tribunals (see, for example, section 24(2) by which the President of Tribunals may assign a judicial member of the
Upper Tribunal as a Vice-President of that Tribunal) and also enables the Lord President to delegate a number of his or her functions to the President of Tribunals (see sections 8 and 9).

**Overarching Responsibilities**

**Section 6 – Representation of interests**

22. Under this section, the Lord President is responsible for representing the views of the members of the Scottish Tribunals to the Scottish Parliament and to the Scottish Ministers and for laying written representations before Parliament on matters of importance relating to the Scottish Tribunals. The Lord President is not authorised to delegate these specific duties under section 8.

**Section 7 – Business arrangements**

23. Under section 7, the Lord President is responsible for making and maintaining appropriate arrangements to ensure the efficient disposal of business by the Scottish Tribunals and the welfare of their members. The Lord President may delegate the discharge of these responsibilities to the President of Tribunals (see section 8).

**Section 8 – Delegation of functions**

24. Section 8 authorises the Lord President to delegate to the President of Tribunals the exercise of any of the functions listed in section 7(1) or (2) (business arrangements), section 30(1) and (2) (assignment policy) or section 31(1) or (2) (training and review). Section 8 should be read with section 9 which enables the Lord President to issue directions as to the exercise of any functions which are delegated under section 8.

**Section 9 – Directions on functions**

25. This section enables the Lord President to issue directions as to the exercise of the functions of the President of Tribunals in relation to the Scottish Tribunals. This would include any functions conferred directly on the President of Tribunals by the Bill or any functions which are delegated to the President of Tribunals by the Lord President under section 8.

**Section 10 – Authority under regulations**

26. Section 10 makes provision as to the exercise of the regulation-making powers contained in section 19(2) (chambers in the First-tier Tribunal), section 22(2) (divisions of the Upper Tribunal), section 35(1) (composition of the First-tier Tribunal) and section 37(1) (composition of the Upper Tribunal) by the Scottish Ministers. These are more fully explained in the explanatory notes relating to those sections.

**Section 11 – Consultation on regulations**

27. This section imposes a consultation requirement on the Scottish Ministers before the exercise of the regulation-making powers contained in sections 19(2), 22(2), 35(1) and 37(1). These are more fully explained in the explanatory notes relating to those sections.
PART 2 – ORGANISATIONAL ARRANGEMENTS

Membership types

Section 12 – Overview of membership

28. Section 12 specifies the categories of member of the First-tier and Upper Tribunals. These are defined as ordinary members, legal members and judicial members. As can be seen from the more detailed provisions, judicial members will be those members of the courts judiciary who are authorised to act as members of the Scottish Tribunals (see section 16), legal members will be solicitors, advocates or persons possessing some other form of legal qualification (see Part 2 of schedule 3 and Part 2 of schedule 5) and ordinary members will comprise persons with such other qualifications, experience or training as are necessary for the Tribunals to exercise their functions (for example, doctors, surveyors, teachers or other lay persons) (see Part 1 of schedule 3 and Part 1 of schedule 5).

29. Subsection (2) provides that a member of one of the Scottish Tribunals (by virtue of being a member of that Tribunal) is not prevented from being a member of the other.

Section 13 – Capacity of members

30. The effect of section 13 is to clarify that all members of the Scottish Tribunals, when exercising the decision-making functions of the Tribunals are doing so with judicial status and capacity, regardless of the category of membership which they possess. Subsection (1) makes provision with respect to ordinary and legal members and subsection (2) clarifies that this does not affect the general status of judicial members (see section 16) and extra judges (see section 17).

Section 14 – First-tier members

31. Section 14 makes provision as to the membership of the First-tier Tribunal.

32. Under subsection (1), persons will become ordinary members of the First-tier Tribunal if they are transferred-in as ordinary members by virtue of section 28(b) or appointed as ordinary members by virtue of section 29(1). Similarly, subsection (2)(a) provides that persons will become legal members of the First-tier Tribunal if they are transferred-in as legal members by virtue of section 28(b) or are appointed as legal members by virtue of section 29(1).

33. Section 28(b) gives effect to paragraph 1 of schedule 2 which enables the Scottish Ministers, by regulations, to provide for a transferable person of a listed tribunal to transfer-in to the First-tier Tribunal as an ordinary or legal member. Further details are provided in the commentary on that section.

34. Section 29(1) gives effect to schedule 3 which enables the Scottish Ministers to appoint a person as an ordinary or legal member of the First-tier Tribunal. Further details are provided in the commentary on that section.

35. Subsections (2)(b) and (3) of section 14 provide that a person is also a legal member of the First-tier Tribunal if that person holds the position of Chamber President or Deputy Chamber
Presidential. Where a legal member of the First-tier Tribunal is assigned as a Temporary Chamber President under paragraph 4 of schedule 4, that Temporary Chamber President will also be regarded as a legal member of the First-tier Tribunal but where a judicial member of the First-tier Tribunal is assigned as a Temporary Chamber President, that person will continue to be a judicial member.

Section 15 – Upper members

36. Section 15 makes provision as to the membership of the Upper Tribunal.

37. Under subsection (1), persons will become ordinary members of the Upper Tribunal if they are transferred in as ordinary members by virtue of section 28(b) or appointed as ordinary members by virtue of section 29(3). Similarly, subsection (2)(a) provides that persons will become legal members of the Upper Tribunal if they are transferred in as legal members by virtue of section 28(b) or are appointed as legal members by virtue of section 29(3).

38. Section 28(b) gives effect to paragraph 1 of schedule 2 which enables the Scottish Ministers, by regulations, to provide for a transferrable person of a listed tribunal to transfer in to the Upper Tribunal as an ordinary or legal member. Further details are provided in the commentary on that section.

39. Section 29(3) gives effect to schedule 5 which enables the Scottish Ministers to appoint a person as an ordinary or legal member of the Upper Tribunal. Further details are provided in the commentary on that section.

40. The effect of subsection (2)(b) of section 15 is that a Chamber President of the First-tier Tribunal, by virtue of holding that position, will also be a legal member of the Upper Tribunal (without the requirement to be separately appointed as a legal member of the Upper Tribunal). This provision does not have the effect of making Deputy Chamber Presidents or Temporary Chamber Presidents of the First-tier Tribunal legal members of the Upper Tribunal.

41. Subsections (2)(c) and (3) of section 15 provide that a person is also a legal member of the Upper Tribunal if that person is transferred in or appointed as a Vice-President of the Upper Tribunal. Where a member of the courts judiciary is assigned as a Vice-President or a Temporary Vice-President of the Upper Tribunal that person remains a judicial member of the Upper Tribunal rather than becoming a legal member.

Judiciary eligible to sit

Section 16 – Sheriffs and judges

42. Section 16 provides for the circumstances in which members of the courts judiciary can be assigned to act as members of the Scottish Tribunals. Such persons make up the judicial members of the Scottish Tribunals (see section 18).

43. By virtue of subsection (1), sheriffs principal, sheriffs and part-time sheriffs are eligible to act as members of the First-tier Tribunal. Such persons may only act as members of the First-tier Tribunal with the authorisation of the President of Tribunals (subsection (3)). Such
authorisation can only be given with the Lord President’s approval and the agreement of the sheriff concerned (and, if that person is not a sheriff principal, the sheriff principal of the sheriffdom to which that sheriff is appointed) (subsection (6)).

44. By virtue of subsection (2), judges of the Court of Session (including temporary judges) together with the Chairman of the Scottish Land Court, sheriffs principal and sheriffs (but not part-time sheriffs) are eligible to act as members of the Upper Tribunal. Such persons may only act as members of the Upper Tribunal with the authorisation of the President of Tribunals (subsections (3) and (4)). Such authorisation can only be given with the Lord President’s approval and the agreement of that person (subsection (6)). Where the person is a sheriff (but not a sheriff principal), the authorisation of the President of Tribunals can only be given with the agreement of the sheriff principal of the sheriffdom to which that sheriff is appointed.

45. Subsection (2) does not apply to the Lord President and the President of Tribunals. Subsection (5) makes express provision for both the Lord President and President of Tribunals to act as members of the Upper Tribunal without any requirement for authorisation.

46. Any authorisation given by the President of Tribunals for a member of the courts judiciary to act as a member of the Scottish Tribunals remains in effect until such time as the President of Tribunals determines (which again requires the consent of the Lord President and the agreement of the person acting as a member (subsection (6)). Where the person is a sheriff (but not a sheriff principal), the determination of the President of Tribunals can also only be made with the agreement of the sheriff principal of the sheriffdom to which that sheriff is appointed.

Section 17 – Authorisation of others

47. Section 17 enables the Scottish Ministers, on receiving a request from the President of Tribunals, to authorise a retired judge of the Court of Session or a judge of the UK Upper Tribunal (established by section 3(2) of the Tribunals, Courts and Enforcement Act 2007) to assist in the disposal of the business of the Upper Tribunal by temporarily acting as a judicial member of the Upper Tribunal. It does not enable such a person to act as a member of the First-tier Tribunal.

48. The President of Tribunals cannot make a request for such an authorisation without the approval of the Lord President and the agreement of the person concerned (subsection (3)). A judge of the UK Upper Tribunal also requires the consent of the Senior President of Tribunals appointed under the 2007 Act (subsection (4)).

49. Subsection (7) enables the Scottish Ministers to make payments in respect of any person authorised to act under section 17.

50. Subsection (8) provides that the requirement to uphold the independence of the Scottish Tribunals in section 3 applies to any persons authorised to act under section 17 as it does in relation to the other members of the Scottish Tribunals. It also makes provision so that any previous oath taken by such a person will continue to apply in the person’s role in the Scottish Tribunals.
Section 18 – Judicial membership

51. Section 18 clarifies the people who are to be regarded as judicial members of the Scottish Tribunals. Any reference to a judicial member of the Upper Tribunal does not include a reference to a judge authorised to act as such under section 17.

Structure of the First-tier Tribunal

Section 19 – Chambers in the Tribunal

52. Section 19 provides for the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal’s functions among those chambers. The chambers are to be organised according to the subject-matter of the Tribunal’s functions as well as any other factors which are relevant to the exercise of the Tribunal’s functions.

53. The organisation into chambers and the allocation of the Tribunal’s functions are to be effected by regulations made by the Scottish Ministers (subsection (2)). By virtue of section 10(1), those regulations may make provision authorising the Lord President, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 19(2).

54. Paragraph 7(1) of schedule 9 makes transitional provision so that the First-tier Tribunal need not be organised into chambers or may have only one chamber for such period until it has acquired sufficient functions so as to merit this.

Section 20 – Chamber Presidents

55. Section 20 provides that each chamber of the First-tier Tribunal must have one or two Chamber Presidents to preside over it. Subsection (2) prohibits a Chamber President from presiding over more than one chamber at the same time.

Section 21 – Appointment to post

56. This section provides that the Scottish Ministers, after consultation with the Lord President, are to appoint a Chamber President to preside over a particular chamber (subsections (1), (2) and (4)).

57. By virtue of section 15(2)(b), a Chamber President of the First-tier Tribunal is also a legal member of the Upper Tribunal. Section 21(3), therefore, makes provision so as to ensure that any person appointed to the position of Chamber President also meets the eligibility criteria which would be required of a person to be appointed as a legal member of the Upper Tribunal. The effect of subsection (3) is to provide that a person will only be eligible to be appointed as a Chamber President if he or she is, or meets the eligibility criteria for being appointed as, a legal member of the Upper Tribunal.

58. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.
Structure of the Upper Tribunal

Section 22 – Divisions of the Tribunal

59. Section 22 provides for the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal’s functions among those divisions. The divisions are to be organised according to the subject-matter of the Tribunal’s functions as well as any other factors which are relevant to the exercise of the Tribunal’s functions (for example, whether or not the function relates to a decision at first instance or an appeal from a decision of the First-tier Tribunal).

60. The organisation into divisions and the allocation of the Tribunal’s functions are to be effected by regulations made by the Scottish Ministers (subsection (2)). By virtue of section 10(1), those regulations may make provision authorising the Lord President, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 22(2).

61. Paragraph 7(2) of schedule 9 makes transitional provision so that the Upper Tribunal need not be organised into divisions or may have only one division for such period until it has acquired sufficient functions so as to merit this.

Section 23 – Vice-Presidents

62. Section 23(1) and (2) provides that each division of the Upper Tribunal must have one or two Vice-Presidents to preside over it. Subsection (2) prohibits a Vice-President from presiding over more than one division at the same time.

63. Section 23 is subject to section 24(1)(b) which enables the President of Tribunals to assign himself or herself as a Vice-President of one or more divisions of the Upper Tribunal.

64. Section 24 sets out the procedure where the President of Tribunals or another judicial member of the Upper Tribunal may be assigned to act as a Vice-President. Section 25 sets out the procedure by which a person who is not a judicial member of the Upper Tribunal may be appointed to that position.

Section 24 – Assignment to post

65. Section 24 provides for the assignment of a judicial member of the Upper Tribunal as a Vice-President.

66. Subsection (1) enables the President of Tribunals to assign himself or herself as a Vice-President. As a Vice-President, the President of Tribunals may preside over more than one division of the Upper Tribunal.

67. Subsection (2) enables the President of Tribunals to assign any other judicial member of the Upper Tribunal (other than the Lord President) as a Vice-President to preside over a particular division. Such an assignment can only be made with the Lord President’s approval and the assignee’s agreement (subsection (4)).
Section 25 – Appointment to post

68. Section 25(1) enables the Scottish Ministers, following a request by the President of Tribunals and after consultation with the Lord President, to appoint a person as a Vice-President to preside over a particular division of the Upper Tribunal (subsections (1), (2) and (4)).

69. By virtue of section 15(2)(c) and (3) a person appointed as a Vice-President is a legal member of the Upper Tribunal. Section 25(3), therefore, makes provision so as to ensure that any person appointed to the position of Vice-President meets the eligibility criteria which would be required of a person to be appointed as a legal member of the Upper Tribunal. The effect of subsection (3) is to provide that a person will only be eligible to be appointed as a Vice-President if he or she is, or meets the eligibility criteria to be appointed as, a legal member of the Upper Tribunal. It excludes a person who is already appointed as Vice-President of the Upper Tribunal.

70. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.

PART 3 – TRANSFER-IN FROM LISTED TRIBUNALS

Section 26 and schedule 1 – Listed tribunals

71. Section 26(1) gives effect to schedule 1 which sets out a list of tribunals from which the functions and members can be transferred-in to the Scottish Tribunals by virtue of regulations made under sections 27 and 28.

72. Part 1 of schedule 1 contains the list of tribunals. Part 2 of that schedule contains further elaboration to assist in identifying the tribunal and the functions which may be the subject of transfer. For example, in relation to the entry for a Scottish Charity Appeals Panel, paragraph 12(2) of schedule 1 provides that it is only the functions exercisable by virtue of section 75(1) of the Charities and Trustee Investment (Scotland) Act 2005 which may be transferred-in to the Scottish Tribunals. Similarly, the Crofting Commission exercises a number of executive functions under the Crofters (Scotland) Act 1993 which it is not intended to transfer-in to the Scottish Tribunals. In relation to the entry for the Crofting Commission, paragraph 12(3) of schedule 1 provides that it is only the Commission’s functions in relation to the resolution of disputes which are exercisable in the manner of a tribunal that may be transferred-in to the Scottish Tribunals.

73. Subsection (2) allows the Scottish Ministers to modify the listed tribunals and further details of those tribunals as set out in schedule 1.

74. Subsection (3) provides that regulations can only add a tribunal to the list in Part 1 of schedule 1 if it is established by or under an enactment. Subsection (4) makes provision in order to clarify what is meant by the term tribunal for this purpose and to clarify that a body may be listed if, and to the extent that, it has decision-making functions which are exercisable in the manner of a tribunal. The effect of this is that a body can only be added to the list in schedule 1 if, and to the extent that, it has functions for the independent resolution of disputes in a similar fashion to those traditionally exercised by tribunals.
75. Subsection (5)(a) and (b) makes express provision to make it clear that the Scottish Land Court or any other Scottish court cannot be added to the list in schedule 1. Accordingly, the Bill does not enable any functions of the Scottish Land Court or the other Scottish courts to be transferred-in to the Scottish Tribunals. Subsection (5)(c) also prevents the functions of the tribunals mentioned in that subsection from being transferred-in to the Scottish Tribunals.

Section 27 – Transfer-in of functions

76. Section 27(2) enables the Scottish Ministers, by regulations, to provide for some or all of the functions of a listed tribunal to be transferred to the Scottish Tribunals. The regulations may provide for the functions to be transferred to the First-tier Tribunal, the Upper Tribunal or both Tribunals.

77. Where regulations made under subsection (2) provide for the functions of a listed tribunal to be transferred to both of the Scottish Tribunals, the regulations may make provision transferring certain functions to one Tribunal and certain functions to the other. They can also provide for a particular function to be transferred to both Tribunals but, where they do so, subsections (3) and (5) require the regulations to make provision so that it can be ascertained when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules (see commentary on section 62) or by the President of Tribunals.

78. Subsection (4) enables the Scottish Ministers, by regulations, to provide for a redistribution of any functions which have been transferred-in to the Scottish Tribunals between those Tribunals.

79. Subsection (6) provides that any regulations made under subsection (2) or (4) may make further provision in order to give full effect to the transfer or redistribution of functions. This includes the modification of any enactment which makes provision in relation to a listed tribunal (subsection (7)).

80. Regulations made under subsection (2) may only relate to one of the listed tribunals (subsection (8)). This will require separate regulations to be made in respect of each listed tribunal.

Section 28 and schedule 2 – Transfer-in of members

81. Section 28 introduces schedule 2 which makes provision enabling the transfer of members of the listed tribunals to the Scottish Tribunals where some or all of their functions are, similarly, transferred.

82. Paragraph 1 of schedule 2 enables the Scottish Ministers, by regulations, to make provision to transfer some or all of the transferable persons to a position or positions in the Scottish Tribunals.
83. In relation to a listed tribunal, a transferable person is a member (of the tribunal or any panel or other body from which the tribunal members are selected) or an authorised decision-maker of that tribunal, or a person who constitutes the tribunal (paragraph 1(2) of schedule 2).

84. Paragraph 1(3) of schedule 2 excludes from transfer, a sheriff or judge of the Court of Session or the President of the Lands Tribunal for Scotland (if he or she holds another judicial office) who may, otherwise, fall within the definition of transferable persons. Rather than transferring-in as a legal or ordinary member of the Scottish Tribunals, it is anticipated that such persons will be authorised to act as judicial members in accordance with sections 16 and 18.

85. Paragraph 2 of schedule 2 enables regulations made under paragraph 1(1) of schedule 2 to make provision preserving, altering or replacing the terms and conditions on which a transferable person is transferred to the Scottish Tribunals.

86. Paragraph 3 of schedule 2 sets out limitations on the regulation-making power contained in paragraph 1(1) of schedule 2. Such regulations may only be made where some or all of the functions of a listed tribunal have been or are to be transferred to the Scottish Tribunals (paragraph 3(1)). The regulations may not transfer a person to a position in the Scottish Tribunals for which he or she would not be eligible to be appointed (paragraph 3(2)). The regulations may also make provision in relation to members of only one listed tribunal at a time (paragraph 3(3)).

87. Paragraph 4 of schedule 2 sets out the positions in the Scottish Tribunals to which a transferable person may be transferred.

PART 4 – MORE ABOUT MEMBERSHIP ETC.

Section 29 – Scheduled provisions

88. Section 29 introduces schedules 3 to 6.

Schedule 3 – Appointment to First-tier Tribunal

Schedule Part 1 – Ordinary members

89. Section 29(1) introduces schedule 3 which makes provision as to the eligibility and appointment of ordinary and legal members of the First-tier Tribunal.

90. Paragraphs 1 and 2 of schedule 3 provide that it is for the Scottish Ministers to appoint a person as an ordinary member of the First-tier Tribunal. A person may only be appointed as such, if the person has the qualifications, experience and training which are prescribed by the Scottish Ministers in regulations made under paragraph 1(2). The effect of this provision will be to allow the Scottish Ministers to prescribe a wide range of criteria by which a person will qualify to be appointed as an ordinary member. Regulations made under section 35(1) providing for the composition of the First-tier Tribunal when convened to exercise its decision-making functions may also make reference to these criteria. See the commentary on that section.
Schedule Part 2 – Legal members

91. Paragraphs 3 to 7 of schedule 3 make provision as to the eligibility and appointment of legal members of the First-tier Tribunal other than Chamber Presidents (about whom section 20 makes provision) and Deputy Chamber Presidents (about whom paragraphs 1 to 3 of schedule 4 make provision).

92. It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal (paragraph 4(1)).

93. A person may be appointed as a legal member if he or she is practising as a solicitor or advocate in Scotland or as a solicitor or barrister in England and Wales or Northern Ireland and has been practising for a period of not less than 5 years (paragraphs 4(2) and 5(1)).

94. A person may also be appointed as a legal member if he or she falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 3 (paragraphs 4(2) and 5(2)).

95. Paragraph 6(2) enables regulations made under paragraph 5(2) of schedule 3 to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have engaged in another law-related activity. Paragraph 6(3) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(4) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(4) include the exercise of judicial functions, practice as a lawyer, teaching or researching law at an educational institution and certain other legal activities such as advising on the application of the law, drafting legal documents and assisting in the resolution of disputes.

96. Paragraph 7 also enables the Scottish Ministers to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the First-tier Tribunal including the calculation of the 5 year qualification period and modifying the list of activities set out in paragraph 6(4).

Schedule 4 – Positions in the First-tier Tribunal

97. Section 29(2) introduces schedule 4 which makes provision as to the appointment and assignment of Deputy Chamber Presidents and Temporary Chamber Presidents as well as the assignment of the members among chambers.

Schedule Part 1 – Deputy or Temporary President

Deputy President

98. Paragraph 1 provides that the Scottish Ministers may appoint a person as a Deputy Chamber President of a particular chamber if they are requested to make such an appointment by the President of Tribunals.

99. A person is eligible for appointment as a Deputy Chamber President if the person is already a legal member of the First-tier Tribunal (other than a Chamber or Deputy Chamber President) or if the person is not already a legal member of the First-tier Tribunal but is eligible
to be appointed as a legal member in accordance with paragraph 4(2) of schedule 3 (paragraph 2(1)).

100. The President of Tribunals may only request the Scottish Ministers to appoint a person as a Deputy Chamber President after consultation with the Chamber President of the chamber to which the appointment is to be made (paragraph 2(2)).

101. Paragraph 2(3) places a duty on the Scottish Ministers to give written reasons to the President of Tribunals where they do not make an appointment of a Deputy Chamber President following such a request.

102. Paragraph 3 makes provision so that a Deputy Chamber President can assist with the exercise of the functions of the Chamber President.

**Temporary President**

103. Paragraphs 4 and 5 enable the President of Tribunals to assign a legal or judicial member of the First-tier Tribunal as a Temporary Chamber President in the event of a temporary vacancy in the presidency of a chamber. A Chamber President cannot be assigned as a Temporary Chamber President of another chamber.

**Schedule Part 2 – Assignment internally**

104. Schedule Part 2 makes provision for assigning the various members of the First-tier Tribunal among the chambers.

105. The function of assigning the members of the First-tier Tribunal vests in the President of Tribunals (paragraph 6(1)) but is subject to the provision made in paragraphs 7 to 9 (paragraph 6(2)).

106. A Chamber President is to be assigned to the chamber to which he or she is appointed to preside over and may also be assigned to act as a legal member in another chamber (but cannot be assigned to another chamber to act as a Chamber President or Deputy Chamber President) (paragraph 7(1)). Any assignment of a Chamber President to act as a legal member of another chamber requires the concurrence of the Chamber President of that chamber as well as the agreement of the member being assigned.

107. A Deputy Chamber President is to be assigned to the chamber to which he or she is appointed and may also be assigned to act as a legal member in another chamber (but cannot be assigned to another chamber to act as a Chamber President or Deputy Chamber President) (paragraph 7(2)). Any assignment of a Deputy Chamber President to act as a legal member of another chamber requires the concurrence of the Chamber President of that chamber as well as the agreement of the member being assigned.

108. All other legal members of the First-tier Tribunal and its ordinary members are to be assigned to at least one chamber but may be assigned to more than one chamber (paragraph
8(2)). Any assignment to a chamber under paragraph 8 requires the concurrence of the Chamber President and the agreement of the member to be assigned (paragraph 8(3)).

109. Judicial members of the First-tier Tribunal are to be assigned to at least one chamber but may be assigned to more than one chamber (paragraph 9(1)). Any assignment to a chamber under paragraph 9 requires the concurrence of the Chamber President and the agreement of the member being assigned (paragraph 9(2)).

Schedule 5 – Appointment to Upper Tribunal

Schedule Part 1 – Ordinary members

110. Section 29(3) introduces schedule 5 which makes provision as to the eligibility and appointment of ordinary and legal members of the Upper Tribunal.

111. Paragraphs 1 and 2 of schedule 5 provide that it is for the Scottish Ministers to appoint a person as an ordinary member of the Upper Tribunal. A person may only be appointed as such, if the person has the qualifications, experience and training which are prescribed by the Scottish Ministers in regulations made under paragraph 1(2). The effect of this provision will be to allow the Scottish Ministers to prescribe a wide range of criteria by which a person will qualify to be appointed as an ordinary member. Regulations made under section 37(1) providing for the composition of the Upper Tribunal when convened to exercise its decision-making functions may also make reference to these criteria. See the commentary on that section.

Schedule Part 2 – Legal members

112. Paragraphs 3 to 7 of schedule 5 make provision as to the eligibility and appointment of legal members of the Upper Tribunal other than Vice-Presidents (about whom section 23 makes provision) or a person who is a legal member of the Upper Tribunal by virtue of being a Chamber President in the First-tier Tribunal by virtue of section 15(2)(b).

113. It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal (paragraph 4(1)).

114. A person may be appointed as a legal member if he or she is practising as a solicitor or advocate in Scotland or as a solicitor or barrister in England and Wales or Northern Ireland and has been practising for a period of not less than 7 years (paragraphs 4(2) and 5(1)).

115. A person may also be appointed as a legal member if he or she falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 5 (paragraphs 4(2) and 5(2)).

116. Paragraph 6(2) enables regulations made under paragraph 5(2) of schedule 5 to make provision in relation to persons previously practising as solicitors, advocates or barristers who have engaged in another law-related activity. Paragraph 6(3) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(4) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(4) include the exercise of judicial functions, practice as a lawyer, teaching or researching law at an
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educational institution and certain other legal activities such as advising on the application of the law, drafting legal documents and assisting in the resolution of disputes.

117. Paragraph 7 also enables the Scottish Ministers to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the Upper Tribunal including the calculation of the 7 year qualification period and modifying the list of activities set out in paragraph 6(4).

Schedule 6 – Positions in Upper Tribunal

118. Section 29(4) introduces schedule 6 which makes provision for assigning a Temporary Vice-President and the assignment of the members of the Upper Tribunal among the divisions.

Schedule Part 1 – Temporary Vice-President

119. Paragraphs 1 and 2 enable the President of Tribunals to assign a legal member of the Upper Tribunal as a Temporary Vice-President in the event of a temporary shortage in the number of Vice-Presidents or a temporary vacancy in a position. A Vice-President cannot be assigned as a Temporary Vice-President of another division.

Schedule Part 2 – Assignment internally

120. Schedule Part 2 makes provision for assigning the various members of the Upper Tribunal among the divisions.

121. The function of assigning the members of the Upper Tribunal vests in the President of Tribunals (paragraph 3(1)) but is subject to the provision made in paragraphs 4 to 7 (paragraph 3(2)).

122. A Vice-President is to be assigned to the division to which he or she is appointed or assigned to preside over. A judicial member who is assigned to act as a Vice-President under section 24(2) may also be assigned to act as a judicial member in another division (but cannot be assigned to another division to act as a Vice-President) while a legal member who is appointed to act as a Vice-President under section 25(1) may also be assigned to act as a legal member in another division (but cannot be assigned to act as a Vice-President of that Division) (paragraph 4). This requires the concurrence of the Vice-President of the division to which the member is being assigned.

123. All other legal members of the Upper Tribunal (including a person who is a legal member of the Upper Tribunal by virtue of being a Chamber President in the First-tier Tribunal) and its ordinary members are to be assigned to at least one division but may be assigned to more than one division (paragraphs 5 and 6). Any assignment to a division under paragraphs 5 and 6 requires the concurrence of the Vice-President and the agreement of the member to be assigned (paragraph 5(3) or 6(3)).

124. All other judicial members of the Upper Tribunal are to be assigned to at least one division but may be assigned to more than one division (paragraph 7(1)). A person who is authorised to act as a judicial member of the Upper Tribunal under section 17(5) is also to be
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assigned to at least one division but may be assigned to more than one division (paragraph 7(2)). Any assignment to a division under paragraph 7 requires the concurrence of the Vice-President and the agreement of the member being assigned (paragraph 7(3)).

Section 30 – Assignment Policy

125. This section places a duty on the Lord President to publish, and keep under review, a document setting out the policy to be adopted in relation to the assignment of the members of the Scottish Tribunals within each Tribunal.

126. Subsection (3) requires the policy to be designed to ensure that appropriate use is made of the knowledge and experience of the members.

127. The Lord President’s functions under section 30(1) and (2) may be delegated to the President of Tribunals under section 8.

Section 31 – Training and review

128. Section 31(1) confers the responsibility for making and maintaining arrangements for the training and guidance of the members of the Scottish Tribunals (including any extra judges authorised to act under section 17(5)) on the Lord President.

129. Section 31(2) also enables the Lord President to make arrangements for the review of the competence and development of the ordinary and legal members of the Scottish Tribunals. The review of the competence and development of the judicial members is to continue to be assessed in their capacity as members of the courts judiciary in accordance with arrangements made under the Judiciary and Courts (Scotland) Act 2008.

130. The Lord President’s functions under section 31 may be delegated to the President of Tribunals under section 8.

Section 32 and schedule 7 – Conditions of membership etc.

131. Section 32 introduces schedule 7 which makes provision as to the terms and conditions on which the ordinary and legal members of the Scottish Tribunals hold office as such. The terms of schedule 7 do not apply to judicial members (paragraph 1(1) of schedule 7).

Initial period of office

132. Where a person is appointed as a member of the Scottish Tribunals, paragraph 2(1) of schedule 7 provides for that person to hold that position for an initial period of 5 years.

133. Where a person is transferred-in as a member of the Scottish Tribunals, paragraph 2(2) and (3) of schedule 7 provides for that person to hold that position either until the end of the unexpired period of the appointment to the listed tribunal or the period of 5 years from the date of transfer (whichever comes first).
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134. Paragraph 3 of schedule 7 provides that where a person holds a position in the Scottish Tribunals and is appointed to hold an additional position then the initial period of appointment for the additional appointment is to expire on the same date as the period of the earlier appointment.

Reappointment

135. Where a member’s period of appointment expires (or, in the case of a member who is transferred-in, the initial period of office expires), paragraph 4 provides for that person to be reappointed for a period of 5 years unless the member declines to be reappointed, is no longer eligible for reappointment or the President of Tribunals has recommended to the Scottish Ministers that the member should not be reappointed. Paragraph 5 also requires the member to meet the eligibility criteria set out in schedule 3 or 5 as if that person was being appointed to the position for the first time.

136. Paragraph 6 sets out the bases on which the President of Tribunals can recommend to the Scottish Ministers that a member should not be reappointed.

137. Paragraph 7 clarifies that the re-appointment of a member is not subject to the same process as the initial appointment as set out in section 10(2A) of the Judiciary and Courts (Scotland) Act 2008. The act of re-appointing a member is, therefore, for the Scottish Ministers alone.

Termination of appointment

138. Paragraphs 8 and 9 set out the circumstances in which a person ceases to hold a position in the Scottish Tribunals. A member ceases to hold that position upon becoming disqualified from acting as a member of the Scottish Tribunals (see paragraph 11 of schedule 7); being removed from the position by the First Minister under paragraph 23 of schedule 8 following a conclusion by a fitness assessment tribunal that the member is unfit to hold that position; or resigning or retiring.

139. Section 26 of the Judicial Pensions and Retirement Act 1993 applies to the legal and ordinary members of the Scottish Tribunals which requires such a member to retire at the age of 70 subject to continuing in office in accordance with the provisions of subsections (4) to (6) of that section. See the commentary on paragraph 10 of schedule 9.

140. Where an existing member of the Scottish Tribunals is appointed as a Chamber President, Deputy Chamber President or Vice-President, that person will cease to hold the previous position (paragraph 10).

Disqualification from office

141. Paragraph 11 sets out those persons who are disqualified from being a member of the Scottish Tribunals.
Pensions etc.

142. Paragraph 12 enables the Scottish Ministers to make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, members or former members of the Scottish Tribunals.

Oaths

143. Paragraph 13 sets out a requirement for all legal and ordinary members of the Scottish Tribunals to take the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868. It also makes provision regarding the person before whom the oaths are to be taken and for oaths which have been previously taken to continue to apply.

Other conditions

144. Paragraph 14 is a general provision that enables the Scottish Ministers to determine the terms and conditions of a member of the Scottish Tribunals which are not provided for in the Bill including the payment of remuneration, expenses and allowances.

Section 33 and schedule 8 – Conduct and fitness etc.

145. Section 33 introduces schedule 8 which makes provision in connection with the conduct and fitness of the legal and ordinary members of the Scottish Tribunals.

146. Schedule 8 only applies to the legal and ordinary members of the Scottish Tribunals and not to the judicial members (paragraphs 1(1) and 11(1)). The conduct and fitness of the judicial members of the Scottish Tribunals will continue to be covered by the provision made in the Judiciary and Courts (Scotland) Act 2008.

147. The functions of the Lord President under schedule 8 may not be delegated under section 8.

Conduct and discipline

148. Paragraph 2 confers responsibility for making and maintaining appropriate arrangements for the investigation and determination of any matter concerning the conduct of the members of the Scottish Tribunals and the review of any such determination on the Lord President. The Lord President may make provision to this effect through Conduct Rules (paragraph 3). Paragraph 3(2) sets out a non-exhaustive list of the matters that may be covered by the Conduct Rules, which are required to be published under paragraph 4.

149. Paragraph 5 enables the Lord President to administer one of three types of disciplinary sanction where an investigation has been carried out and the investigator has recommended a disciplinary sanction. The disciplinary sanctions are set out in sub-paragraph (1) and are, in ascending order of severity: formal advice, a formal warning and a reprimand. This is a discretionary power and paragraph 6 makes it clear that this does not restrict what the Lord President may do informally.
150. Paragraph 7 provides for the suspension of a member of the Scottish Tribunals where the Lord President considers it necessary for the purpose of maintaining public confidence in the Scottish Tribunals. Such suspension does not affect any remuneration payable to, or in respect of, the suspended member. An example of a situation where this might be used is when an allegation of a serious nature is made against a member of the Scottish Tribunals. This power is separate from the suspension provisions in paragraph 19 of schedule 8 which applies during an investigation by a fitness assessment tribunal.

151. Paragraph 9 confers the following functions on the Judicial Complaints Reviewer (established under section 30 of the Judiciary and Courts (Scotland) Act 2008): on the request of the person who had made the complaint which was the subject of an investigation or the member whose conduct has been investigated, to review the handling of an investigation in terms of procedure; where the procedure has not been followed, to refer such a case to the Lord President; to prepare and publish reports on investigations; and to make written representations to the Lord President about such procedures (to which the Lord President must have regard). The functions of the Judicial Complaints Reviewer only relate to the procedure adopted in an investigation and not the merits of the findings of the investigation.

152. Where the Reviewer refers a case to the Lord President under paragraph 9(2)(b), the Lord President may vary or revoke the determination (or part of it); cause a fresh investigation to be carried out; confirm the determination; or deal with the referral in such other way as the Lord President considers to be appropriate (paragraph 10).

153. Section 32 of the 2008 Act requires the Reviewer to comply with any guidance issued by the Scottish Ministers on the functions of the Reviewer set out in the Bill.

Fitness and removal

154. Paragraphs 11 to 22 provide for fitness assessment tribunals to be set up to investigate and report on whether a member of the Scottish Tribunals is unfit to hold the position by reason of inability, neglect of duty or misbehaviour.

155. The First Minister must constitute a tribunal when requested to do so by the Lord President (paragraph 13(1)). The First Minister may (but is not required to) constitute a tribunal in other circumstances if the First Minister thinks fit but only after consultation with the Lord President (paragraph 13(2)).

156. Paragraph 14 enables the Court of Session to make provision, by act of sederunt, with regard to the procedure to be adopted by a tribunal.

157. Paragraphs 15 and 16 provide for the composition and voting, and remuneration and expenses of the tribunal. Paragraph 15(2) provides for the members of a fitness assessment tribunal to be selected by the First Minister with the agreement of the Lord President. In selecting the members, the First Minister must ensure that the composition of the tribunal reflects the requirements set out in paragraph 15(1). Paragraph 16 enables the Scottish Ministers to pay remuneration and expenses to the members of a fitness assessment tribunal. Remuneration
cannot, however, be paid to those members of a fitness assessment tribunal who are sheriffs or judges of the Court of Session.

158. Paragraphs 17 and 18 make provision with regard to the conduct of proceedings of a tribunal. Paragraph 17 enables a fitness assessment tribunal to require the attendance of persons to give evidence and the production of documents in the same fashion as a court of law in Scotland. Where these requirements are not fulfilled, paragraph 18 provides for the tribunal to make an application to the Court of Session. The Court of Session may make such order as it thinks fit to ensure compliance with the requirements of the tribunal or deal with the matter as if it were a contempt of the Court.

159. Paragraphs 19 to 21 set out the circumstances in which a member of the Scottish Tribunals can be suspended pending a decision of a tribunal. Paragraph 19 enables the Lord President to suspend a member of the Scottish Tribunals if the Lord President has made a request to the First Minister to constitute a fitness assessment tribunal to investigate whether that member is unfit to hold the position of member of the Scottish Tribunals. The Lord President may suspend the member at any time prior to the point that the fitness assessment tribunal submits its report to the First Minister and the Lord President under paragraph 22(2). Such a suspension will terminate on being revoked by the Lord President or, if not revoked, when the report is laid in the Scottish Parliament. Paragraph 20 enables the First Minister to suspend the member of the Scottish Tribunals where the fitness assessment tribunal has recommended that the member is suspended. The First Minister may suspend the member at any time prior to the tribunal’s report being laid in the Parliament. Such a suspension will terminate on being revoked by the First Minister or, if not revoked, when the report is laid in the Parliament. Paragraph 21 provides that any suspension under paragraph 19 or 20 does not affect any remuneration payable to the suspended member.

160. Paragraph 22 makes provision for the form and content of a tribunal’s report. The First Minister must lay the report before the Scottish Parliament.

161. Paragraph 23 provides that the First Minister may remove a member of the Scottish Tribunals from his or her position if a fitness assessment tribunal has submitted a report concluding that the member is unfit to hold office by reason of inability, neglect of duty or misbehaviour.

PART 5 – DECISION-MAKING AND COMPOSITION

Decisions in First-tier Tribunal

Section 34 – Decisions in the Tribunal

162. Section 34 makes provision as to the exercise of the First-tier Tribunal’s function of deciding any matter in a case within its jurisdiction. This function is to be exercised by the member or members of the chamber to which the case is allocated. It is for regulations made under section 19(2)(b) (chambers in the Tribunal) to make provision for the allocation of the First-tier Tribunal’s functions among the chambers.
163. The Chamber President has the responsibility for selecting the members but, in so doing, must comply with any relevant provision made by regulations under section 35 (composition of the Tribunal).

164. If the First-tier Tribunal is exercising a function in a case which has been remitted to it by the Upper Tribunal under section 42(2)(b) (disposal of an appeal by the Upper Tribunal), the Chamber President must also comply with any directions given by the Upper Tribunal under section 42(5)(b) as to the members to be chosen to reconsider the case.

Section 35 – Composition of the Tribunal

165. This section provides for the Scottish Ministers to make regulations providing for the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. Such regulations may provide for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be.

166. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (4)).

167. By virtue of section 10(2), regulations made under section 35 may make provision authorising the President of Tribunals, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(2), the Scottish Ministers must consult the President of Tribunals before making regulations under section 35.

Decisions in Upper Tribunal

Section 36 – Decisions in the Tribunal

168. Section 36 makes provision as to the exercise of the Upper Tribunal’s function of deciding any matter in a case falling within its jurisdiction. This function is to be exercised by the member or members of the division to which the case is allocated. It is for regulations made under section 22(2)(b) (Divisions of the Tribunal) to make provision for the allocation of the Upper Tribunal’s functions among the divisions.

169. The Vice-President has the responsibility for selecting the members but, in so doing, the Vice-President must comply with any relevant provision made by regulations under section 37 (composition of the Tribunal).

170. The Vice-President must also comply with subsection (4) which enables the Lord President and the Tribunals President to exercise a right to be selected (provided that this complies with the provisions of any regulations made under section 37 (composition of the Tribunal)).

171. If the Upper Tribunal is exercising a function in a case which has been remitted to it by the Court of Session under section 44(2)(b) (disposal of an appeal by the Court of Session), the
Vice-President must also comply with any directions given by the Court of Session under section 44(5)(b) as to the members to be chosen to reconsider the case.

Section 37 – Composition of the Tribunal

172. This section provides for the Scottish Ministers to make regulations providing for the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction. Such regulations may provide for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members should be.

173. Such regulations may also make separate provision depending on whether the Upper Tribunal is exercising functions at first instance or on review or appeal (subsection (2)).

174. Where the regulations provide for a judicial member to be part of the convened Tribunal, the regulations may also make provision requiring the judicial member to be of a particular type (whether a sheriff, sheriff principal or judge of the Court of Session) as well as for the involvement of any extra judge who is authorised to act under section 17(5) (subsection (5)).

175. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (6)).

176. By virtue of section 10(2), regulations made under section 37 may make provision authorising the President of Tribunals, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(2), the Scottish Ministers must consult the President of Tribunals before making regulations under section 37.

PART 6 – REVIEW OR APPEAL OF DECISIONS

Internal review

Section 38 – Review of decisions

177. Section 38 provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. The power is discretionary and it will be for each Tribunal to decide whether or not it should review one of its own decisions.

178. Under section 38(2), a decision may be reviewed at the Tribunal’s own instance or, with the Tribunal’s agreement, at the request of a party in the case.

179. Under section 38(3), no decision may be the subject of a review if it is an excluded decision (see sections 46 to 49 on excluded decisions). Tribunal Rules (see commentary on section 62) made under section 38(3)(b) may also make provision excluding other decisions from being reviewed or otherwise restricting the powers of the Scottish Tribunals to review their own decisions.
180. A decision to review or not to review a prior decision of the Tribunal may not, itself, be reviewed or appealed (section 38(4)) and the fact that a decision has been reviewed does not affect a party’s rights of appeal under the Bill (section 38(5)).

Section 39 – Actions on review

181. Section 39 sets out the courses of action which are available to the Tribunals in determining any review. These include taking no action, setting the decision aside, and correcting minor or accidental errors. If the First-tier Tribunal sets aside a decision of its own it must either re-decide the matter concerned or refer the matter to the Upper Tribunal to re-decide. Where the Upper Tribunal sets aside a decision of its own, it must re-decide the matter itself.

Section 40 – Review only once

182. Section 40 provides that no decision of the First-tier or Upper Tribunal may be reviewed on more than one occasion. A decision on review to set aside an earlier decision and a re-made decision are, however, to be regarded as separate decisions from the earlier decision which was subjected to review and can, therefore, be the subject of a further review. Subsection (3) provides that the power of the Scottish Tribunals to review their own decisions does not affect their powers to correct minor or accidental errors in a decision administratively.

Appeal from First-tier Tribunal

Section 41 – Appeal from the Tribunal

183. Section 41 makes provision for a general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal. Such an appeal can only be made by a party in the case on a point of law and with the permission of the First-tier Tribunal or (if refused by the First-tier Tribunal) the Upper Tribunal.

184. The general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal under section 41 is not universal and does not apply to excluded decisions (see sections 46 to 49) or a decision of the First-tier Tribunal to review or not to review one of its own decisions (see section 38(4)). Section 50 (process for permission) also prevents a decision of the First-tier Tribunal to refuse permission to appeal to the Upper Tribunal from being appealed to the Upper Tribunal (a separate application can, however, be made to the Upper Tribunal under section 41(3)(b) should the First-tier Tribunal refuse permission to appeal).

185. Permission to appeal to the Upper Tribunal under section 41 is only to be granted if the Tribunal whose permission is sought is satisfied that there are arguable grounds for the appeal (section 41(4)).

Section 42 – Disposal of an appeal

186. Section 42 provides that, in determining an appeal made under section 41, the Upper Tribunal may uphold or quash the decision of the First-tier Tribunal on a point of law. Where the Upper Tribunal quashes the decision of the First-tier Tribunal it may re-make the decision, remit the case back to the First-tier Tribunal to be re-decided or make such other order as the Court considers is appropriate.
187. Where the Upper Tribunal elects to re-make a decision, subsection (3) enables the Upper Tribunal to make findings in fact and, otherwise, to do anything that could have been done by the First-tier Tribunal if it was re-making the decision.

188. Where the Upper Tribunal elects to remit the case to the First-tier Tribunal, it may direct the First-tier Tribunal as to issues of fact, law and procedure (subsections (4) and (5)).

**Appeal from Upper Tribunal**

*Section 43 – Appeal from the Tribunal*

189. Section 43 makes provision for a general right to appeal a decision of the Upper Tribunal to the Court of Session. Such an appeal can only be made by a party in the case on a point of law and with the permission of the Upper Tribunal or (if refused by the Upper Tribunal) the Court of Session.

190. The general right to appeal a decision of the Upper Tribunal to the Court of Session under section 43 is not universal and does not apply to excluded decisions (see sections 46 to 49) or a decision of the Upper Tribunal to review or not to review one of its own decisions (see section 38(4)). Section 50 (process for permission) also prevents a decision of the Upper Tribunal to refuse permission to appeal to the Court of Session from being appealed to the Court of Session (a separate application can, however, be made to the Court of Session under section 43(3)(b) should the Upper Tribunal refuse permission to appeal).

191. Permission to appeal to the Court of Session under section 43 is only to be granted if the Upper Tribunal or Court of Session is satisfied that there are arguable grounds for the appeal (section 43(4)) except in relation to permission to make a second appeal (see commentary on section 45).

*Section 44 – Disposal of an appeal*

192. Section 44 provides that, in determining an appeal made under section 43, the Court of Session may uphold or quash the decision of the Upper Tribunal in question on a point of law. Where the Court of Session quashes the decision of the Upper Tribunal it may re-make the decision, remit the case back to the Upper Tribunal to be re-decided or make such other order as the Court considers appropriate.

193. Where the Court of Session elects to re-make a decision, subsection (3) enables the Court of Session to make findings in fact and, otherwise, to do anything that could have been done by the Upper Tribunal if it was re-making the decision.

194. Where the Court of Session elects to remit the case to the Upper Tribunal, it may direct the Upper Tribunal as to issues of fact, law and procedure (subsection (4) and (5)).
Section 45 – Procedure on second appeal

195. Section 45 makes provision in relation to a ‘second appeal’ which is an appeal to the Court of Session under section 43 against a decision of the Upper Tribunal on an appeal from a decision of the First-tier Tribunal under section 41 (see the definition in subsection (7)).

196. The effect of subsections (1), (3) and (4) is to prevent the Upper Tribunal and the Court of Session from giving permission to make a second appeal unless the Tribunal or Court (as appropriate) is satisfied that the appeal would raise an important issue of principle or practice or there is another compelling reason for allowing the appeal to proceed.

197. The effect of subsections (2), (5) and (6) is to enable the Court of Session, where it quashes the decision of the Upper Tribunal in relation to a second appeal, to do anything in re-making the decision that could have been done by the First-tier Tribunal or the Upper Tribunal if either of them was re-making the decision. It also enables the Court of Session to remit the case back to either the Upper Tribunal or the First-tier Tribunal with directions as to issues of fact, law and procedure. In addition, if the Court of Session remits the case to the Upper Tribunal, the Upper Tribunal itself may remit the case to the First-tier Tribunal with the directions from the Court of Session.

Excluded decisions

Section 46 – Excluded decisions

198. Sections 46 to 49 make provision with respect to decisions of the Scottish Tribunals which may not be the subject of a review under section 38 or the subject of the general right of appeal contained in sections 41 and 43. By virtue of section 46, such decisions are known as “excluded decisions”.

Section 47 – Decisions on review

199. Section 47 provides that certain decisions and determinations in a review under section 38 are excluded decisions. The effect of section 47 is to exclude decisions which have already been set aside under a review under section 38 as well as any decision or determination made as part of such a review (other than any matter which has been re-decided) from being appealed or further reviewed.

Section 48 – Other appeal rights

200. Section 48 provides that any decision against which there is a right of appeal under any enactment other than the right to review contained in section 38 or the rights of appeal in sections 41 and 43 is an excluded decision. The effect of section 48 is to create a general rule excluding from the rights of review and appeal established by the Bill, any decision for which another enactment makes express provision for a right of appeal. Subsection (2) enables the Scottish Ministers, by regulations, to make exceptions to that general rule.

Section 49 – Position on transfer-in

201. Section 49 provides that any decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal which is specified by the Scottish Ministers in regulations made
under subsection (1) is an excluded decision. Subsection (2) provides that a decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal may only be specified in regulations if the functions were transferred-in from a listed tribunal by regulations made under subsection 27(2) and, immediately prior to the transfer of those functions, there was no statutory right of appeal against the decision.

202. The effect of section 49 is to enable the Scottish Ministers, by regulations, to exclude the rights of review and appeal established by the Bill in relation to decision-making functions which have been transferred-in to the Scottish Tribunals from a listed tribunal from which there was previously no statutory right of appeal.

Miscellaneous procedure

Section 50 – Process for permission

203. Section 50(1) enables the Scottish Ministers, by regulations, to specify time limits within which permission to appeal must be sought.

204. Section 50(2) provides that a decision of the First-tier Tribunal or the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal to the Upper Tribunal cannot be the subject of review or appeal under the Bill. Similarly, a decision of the Upper Tribunal to refuse permission to appeal a decision of the Upper Tribunal to the Court of Session cannot be reviewed or appealed under the Bill.

Section 51 – Participation of non-parties

205. It is only a party in a case who can apply for a review of a Tribunal decision under section 38 or appeal a Tribunal decision under section 41 or 43. Section 51(2) enables the Scottish Ministers, by regulations, to make provision so that persons falling within a specified description can be regarded as a party to a case for the purposes of sections 38, 41 and 43.

Special jurisdiction

Section 52 – Judicial review cases

206. Section 52 makes provision so that the Court of Session may, by order of the Court, remit a petition for judicial review to the Upper Tribunal for determination. The Court may only remit a petition for judicial review to the Upper Tribunal where the petition does not seek anything other than the exercise of the Court’s judicial review function (section 52(3)) and it falls within a category specified by an act of sederunt made by the Court for the purposes of section 52(4). The effect of subsection (4) is that no petition for judicial review will be able to be transferred unless an act of sederunt has been made specifying the categories of petitions which may be transferred and the petition falls within one of those categories.

207. In addition, the Court may only remit a petition to the Upper Tribunal if it considers it appropriate to do so having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition (subsection (2)(b)).
Section 53 – Decision on remittal

208. Section 53 provides that the Upper Tribunal has the same powers and should apply the same principles as the Court of Session when determining a petition for judicial review. Subsection (4) makes it clear that a determination of a petition for judicial review remitted to the Upper Tribunal under section 52 is not an excluded decision and can be appealed to the Court of Session in accordance with section 43.

Section 54 – Additional matters

209. Section 54 makes further provision so that where a petition for judicial review is remitted to the Upper Tribunal, any order made or steps taken by the Court of Session are to be treated as if made or taken by the Tribunal. Subsection (2) enables the procedural rules of the Upper Tribunal to make further provision as to the exercise of the Upper Tribunal’s functions in relation to a petition for judicial review.

Section 55 – Meaning of judicial review

210. Section 55 provides that references in sections 52 to 54 to judicial review are to the supervisory jurisdiction of the Court of Session.

PART 7 – POWERS, PROCEDURE AND ADMINISTRATION

Powers and enforcement

Section 56 – Venue for hearings

211. Section 56 enables the Scottish Tribunals to be convened anywhere in Scotland. Tribunal Rules may make further provision in this respect.

Section 57 – Conduct of cases

212. Section 57 enables Tribunal Rules to make further provision in respect of the conduct of cases before the Scottish Tribunals. The Tribunal Rules may make provision so as to ensure that the Scottish Tribunals have the necessary powers, rights, privileges and authority regarding the attendance or examination of witnesses, the production of evidence, the preparation of reports and other matters relating to the conduct of a case.

213. Subsection (2) enables the Tribunal Rules to make provision by reference to the authority which is exercisable by a sheriff or the Court of Session.

Section 58 – Enforcement of decisions

214. This section enables Tribunal Rules to provide for the means by which an order of the Scottish Tribunals giving effect to a decision of the Tribunals is to be enforced.

215. Subsection (3) makes provision so that an order made by the Upper Tribunal under section 53 (judicial review cases) continues to have the same effect as an order made by the Court of Session on a petition for judicial review. Subsection (4), otherwise, enables the Tribunal
Rules to make provision by reference to the means by which an order of a sheriff or the Court of Session is enforced.

Section 59 – Award of expenses
216. Section 59 enables the Scottish Tribunals to award expenses only where this is provided for in Tribunal Rules. Where Tribunal Rules make provision for the award of expenses these may include provision as to the scales or rates of the expenses that are to be awarded; for the Tribunals to set-off the expenses against specified other sums; for interest to be paid at a rate to be specified in Tribunal Rules in the event of the expenses remaining unpaid; for wasted expenses to be disregarded (and to specify what constitutes wasted expenses); as well as such other factors that the Tribunals may take into account (subsections (3) and (4)).

Section 60 – Additional powers
217. This section enables the Scottish Ministers, by regulations, to confer such additional powers on the Scottish Tribunals as are necessary or expedient for the proper exercise of their functions. Such regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules (see section 62(4)). The Lord President’s approval is required before making any such regulations.

Section 61 – Application of enactments.
218. The effect of this section is to enable the Scottish Ministers, by regulations, to modify the application of any enactment so far as they consider is necessary or expedient for the purposes of making or giving effect to Tribunal Rules. Such regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules (see section 62(4)). The Lord President’s approval is required before making any such regulations.

Practice and procedure
Section 62 – Tribunal rules
219. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals which are to be known as Scottish Tribunal Rules (but are referred to in the Bill as Tribunal Rules).

220. Subsections (3) and (4) of section 62 set out the process for making Tribunal Rules. Tribunal Rules are to be made by the Court of Session by act of sederunt and in accordance with Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

221. Paragraph 12 of schedule 9 amends Part 1 of the 2013 Act so that the SCJIC has the function of reviewing the practice and procedure used in the Scottish Tribunals (section 2(1)(ba) of the 2013 Act) and the function of preparing and submitting draft Tribunal Rules to the Court of Session (section 2(1)(c)(ii) of the 2013 Act). Section 4(1) and (2) of the 2013 Act also sets out
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

the role of the Court of Session in approving, approving with modification, or rejecting the rules proposed by the SCJC.

222. Sub-paragraphs (6) to (10) of paragraph 12 of schedule 9 amend the 2013 Act with the effect of increasing the membership of the SCJC so as to include members representing the Scottish Tribunals and providing for the SCJC to establish a committee in pursuance of its functions in relation to the Scottish Tribunals under section 13A of the 2013 Act. The Committee is to be chaired by one of the members of the SCJC representing the Scottish Tribunals, and its members are to be selected by the President of Tribunals.

Section 63 – Exercise of functions

223. Section 63 allows Tribunal Rules to make provision about how a function of the Tribunals is to be exercised and by whom, or allow a specified person to make a decision about those matters. Such Rules may provide for something to require further authorisation, allow something to be done on a person’s behalf, or allow a specified person to make a decision about those matters. They may rely on the effect of practice directions issued under section 68.

Section 64 – Extent of rule-making

224. The extent of the provision which may be made by Tribunal Rules is set out in section 64. In particular, the generality of the power to make provision regulating the practice and procedure followed in the Scottish Tribunals is not limited by any other more specific provisions in the Bill regarding the content of Tribunal Rules (subsection (4)). Tribunal Rules may also make equal or different provision in respect of the First-tier Tribunal and the Upper Tribunal (subsection (1)), particular provision for different chambers or divisions or different types of proceedings (subsection (2)) and, more generally, different provision for different purposes (subsection (3)).

Section 65 – Proceedings and steps

225. Sections 65 to 67 set out specific matters on which Tribunal Rules may make provision.

226. Section 65 allows Tribunal Rules to make provision for the purpose of proceedings in a case before the Tribunals, including as to the form and manner in which a case is to be brought before them, withdrawal of a case, time limits for making a referral of a matter to the Scottish Tribunals for decision or for taking steps as part of the proceedings, and circumstances in which the Tribunals may act of their own initiative.

Section 66 – Hearings in cases

227. Section 66 allows Tribunal Rules to make provision about hearings, including as to when matters can be dealt with without one, whether a hearing is to be held in private or public, appearance and representation at hearings, notice of hearings, adjournment with a view to resolution, and the imposition of reporting restrictions.
**Section 67 – Evidence and decisions**

228. Section 67 allows Tribunals Rules to make provision about evidence given before the Scottish Tribunals, including as to the administering of oaths and presumptions to apply, and about their decisions (for example, how they are recorded and published).

229. Sections 10(1)(b) and (2)(b) (authority under regulations), 27(3) (transfer-in of functions), 38(3) (review of decisions), 54(2) (additional matters), 56(2) (venue for hearings), 57(1) (conduct of cases), 58(1) (enforcement of decisions) and 59(1) and (3) (award of expenses) also deal with matters on which Tribunal Rules may make provision.

**Section 68 – Practice directions**

230. This section sets out the process for issuing directions as to the practice and procedure to be followed in the Scottish Tribunals. Directions may include instruction or guidance as to the application or interpretation of the law and the making of decisions by the members of the Scottish Tribunals (subsection (5)).

231. Directions by the President of Tribunals may make provision with regard to both the First-tier Tribunal and the Upper Tribunal (subsection (1)).

232. Directions by a Chamber President may only make provision in respect of the chamber over which the Chamber President presides (subsection (2)) and can only be issued with the approval of the President of Tribunals (subsection (4)).

233. Directions by a Vice-President may only make provision in respect of the division over which the Vice-President presides (subsection (3)) and can only be issued with the approval of the President of Tribunals (subsection (4)).

234. Directions may also make different provision for different purposes as well as vary and revoke earlier directions (subsection (6)).

**Section 69 – Reconciling differences**

235. Section 69 makes provision in the event of any conflict arising between Tribunal Rules and directions issued by the Lord President under section 9 or by the President of Tribunals, a Chamber President or a Vice-President under section 68. The effect of section 69 is, in the event of any conflict, to provide for Tribunal Rules to prevail over any directions, directions of the Lord President to prevail over directions of the President of Tribunals, a Chamber President or Vice-President and directions of the President of Tribunals to prevail over directions of a Chamber President or Vice-President.

**Fees and administration**

**Section 70 – Tribunal fees**

236. This section allows the Scottish Ministers by regulations to make provision for the Scottish Tribunals to charge reasonable fees in respect of any matter dealt with by the Scottish
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

Tribunals. The Scottish Ministers are required to consult the Lord President before exercising this power.

Section 71 – Administrative support
237. Section 71 places a duty on the Scottish Ministers to provide property, services and personnel to the Scottish Tribunals so as to ensure their proper operation and the discharge of the Lord President’s responsibility for the efficient disposal of business in the Tribunals. The Scottish Ministers are obliged to have regard to any representations made to them by the Lord President in this respect (subsection (2)).

Section 72 – Annual reporting
238. Section 72 places a duty on the President of Tribunals to prepare an annual report for the Lord President on the operation and business of the Scottish Tribunals which must explain how the Tribunals have exercised their functions during the financial year (and may contain other information). The report is to be sent to the Scottish Ministers as well as published.

PART 8 – FINAL PROVISIONS
Section 73 – Regulation-making
239. Section 73 makes further provision with regard to the various regulation-making powers set out in the Bill including details as to the parliamentary procedure to be adopted.

Section 74 – Ancillary regulations
240. Section 74 allows the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider is necessary or expedient for the purposes or in connection with the Bill.

Section 75 and schedule 9 – Transitional and consequential
241. Section 75 introduces schedule 9 which makes transitional arrangements and consequential modifications to other enactments.

Transitional and other matters
242. Part 1 of schedule 9 sets out the transitional arrangements for the transfer of functions from existing tribunals to the Scottish Tribunals. Where the functions of a listed tribunal are transferred to the Scottish Tribunals by regulations made under section 27(2), paragraph 2 enables the Scottish Ministers to make provision, by regulations, for the procedural rules of the listed tribunal to continue to apply (with such modification as the Scottish Ministers consider to be necessary or expedient) to the exercise of those functions by the Scottish Tribunals.

243. The effect of paragraph 4 is to enable the Scottish Ministers, by regulations, to make Tribunal Rules until such time as the provisions conferring responsibility on the SCJC and the Court of Session for the making of Tribunal Rules are commenced. The Scottish Ministers are to consult the Lord President, the President of Tribunals and such other persons as they consider appropriate before making any such regulations.
244. Once the provisions conferring responsibility on the SCJC and the Court of Session for the making of Tribunal Rules are commenced, paragraph 6 has effect so that all rules applying by virtue of regulations made under paragraphs 2 and 4 are to be regarded as Tribunal Rules.

245. Paragraphs 7 to 9 of schedule 9 make provision so as to enable the First-tier Tribunal not to be organised into chambers and the Upper Tribunal not to be organised into divisions until such time as they have acquired sufficient functions from the listed tribunals.

Consequential modifications

246. Paragraph 10 of schedule 9 amends the Judicial Pensions and Retirement Act 1993 so that the ordinary and legal members of the Scottish Tribunals are added to the list of offices set out in Schedule 5 to that Act. By virtue of the operation of section 26 of that Act, those members of the Scottish Tribunals are required to retire from office on reaching the age of 70. Subsections (4) to (6) of that provision, however, enable those members to continue in office on an annual rolling basis up until the age of 75 if the Scottish Ministers, after consultation with the President of Tribunals, consider it is desirable in the public interest to allow those persons to continue in office.

247. Paragraph 11 amends the Judiciary and Courts (Scotland) Act 2008 to bring the ordinary and legal members of the Scottish Tribunals within the remit of the Judicial Appointments Board for Scotland (JABS) and to exclude them from holding office as the Judicial Complaints Reviewer.

248. Sub-paragraph (2) amends section 10 of that Act so that any persons appointed to the positions of Vice-President or ordinary or other legal member of the Upper Tribunal, or Chamber President, Deputy Chamber President or ordinary or other legal member of the First-tier Tribunal fall within the remit of JABS. By virtue of section 11 of the 2008 Act, an individual cannot be appointed to one of these positions unless recommended for appointment by JABS.

249. Sub-paragraph (3) amends section 30 of the 2008 Act so that the ordinary and legal members of the Scottish Tribunals are disqualified from being appointed as the Judicial Complaints Reviewer.

250. Sub-paragraph (4) amends the composition of JABS so as to include representation from the Scottish Tribunals and sub-paragraph (5) sets out the proceedings that are to apply in respect of an appointment to the Scottish Tribunals.

251. Paragraph 12 amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. These amendments are explained in the commentary on Tribunal Rules (section 62).

Section 76 and schedule 10 – List of expressions

252. Section 76 defines “Lord President” for the purposes of the Bill, and introduces a list of expressions used in the Bill in schedule 10.
Section 77 – Commencement

253. Section 77 makes provision as to the commencement of the Bill. Sections 76 to 78 come into force on the day after Royal Assent. All other provisions are to come into force on such day as the Scottish Ministers may, by order, appoint. Any such order may include transitional, transitory or saving provision.
FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Tribunals (Scotland) Bill, introduced to the Scottish Parliament on 8 May 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament. The purpose of the Financial Memorandum is to set out the costs associated with the measures proposed by the Bill. It should be read in conjunction with the Bill and the other accompanying documents.

BACKGROUND

2. The Bill seeks to address the complexity and fragmentation of the current tribunal structure. It will establish a First-tier Tribunal, for taking first decisions and an Upper Tribunal primarily for hearing further appeals. The Bill will enable the functions (and members) of existing tribunal jurisdictions within devolved competence to be transferred into the new First-tier or Upper Tribunals by an order of the Scottish Ministers. The Bill also provides for new rule making powers and new arrangements for the selection and appointment of devolved tribunal members. The Policy Memorandum, which is published separately, explains in detail the background and policy intention of the Bill.

3. The Scottish Government has given detailed consideration to the impact of the policy reforms and has consulted with those likely to be affected, including the Lord President’s Office, tribunal members and the Judicial Appointments Board for Scotland (“the Board”), as well as the wider stakeholder community.

4. There are very few provisions within the Bill which commit the Scottish Administration to new costs. Using information from a range of sources it has been possible to identify three areas in which the Bill will have financial implications. The main areas covered in this memorandum relate to the financial implications of provisions relating to:
   - the new judicial appointments process for tribunals;
   - the President of the Scottish Tribunals; and
   - the making and amendment of tribunal rules.

5. The Scottish Government does not anticipate any new costs associated with other aspects of the Bill’s provisions, for example by the creation of the Upper Tribunal; the transferring-in of tribunal functions or members; or the addition of new bodies to Schedule 1.

COSTS ON THE SCOTTISH ADMINISTRATION

6. The operational budgets for the tribunals listed in Schedule 1 of the Bill are estimated to be around £12.5m per annum. This is set against an estimated spend of around £12.0m per annum. These figures are the current operational budgets for the individual tribunals and are not a consequence of this Bill. Table 1 provides a breakdown of these costs.
Table 1: Cost of Tribunals listed in Schedule 1 of Tribunals (Scotland) Bill.

<table>
<thead>
<tr>
<th>Tribunal</th>
<th>Budget 2011-2012</th>
<th>Spend 2011-2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additional Support Needs Tribunals for Scotland</td>
<td>£296,000</td>
<td>£294,000</td>
</tr>
<tr>
<td>Scottish Charity Appeals Panel*</td>
<td>£0</td>
<td>£0</td>
</tr>
<tr>
<td>Crofting Commission#</td>
<td>£2,726,000</td>
<td>£2,798,000</td>
</tr>
<tr>
<td>Education Appeal Committees**</td>
<td>Not held centrally</td>
<td>Not held centrally</td>
</tr>
<tr>
<td>Private Rented Housing Panel/Homeowner Housing Panel</td>
<td>£429,000</td>
<td>£430,000</td>
</tr>
<tr>
<td>Lands Tribunal for Scotland</td>
<td>£311,000</td>
<td>£286,000</td>
</tr>
<tr>
<td>Mental Health Tribunal for Scotland</td>
<td>£8,415,000</td>
<td>£8,033,000</td>
</tr>
<tr>
<td>NHS National Appeal Panel</td>
<td>£93,100</td>
<td>£119,707</td>
</tr>
<tr>
<td>NHS Tribunal</td>
<td>£61,000</td>
<td>£49,345</td>
</tr>
<tr>
<td>Scottish Parking Appeals Service</td>
<td>£240,000</td>
<td>£209,000</td>
</tr>
<tr>
<td>Police Appeals Tribunals***</td>
<td>Not held centrally</td>
<td>Not held centrally</td>
</tr>
<tr>
<td>Valuation Appeal Panels****</td>
<td>Not held centrally</td>
<td>£336,233 (for 2010-11)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£12,571,100</strong></td>
<td><strong>£12,219,052</strong></td>
</tr>
</tbody>
</table>

1 This figure is not included in the total spend.

* There is no budget for SCAP and that the cost of any hearings is absorbed by the main Scottish Tribunals Service budget.

** These figures are not held centrally. Funding is provided to local government by means of a block grant and spend is determined by local authorities in light of local circumstances and priorities.’

***This is a new tribunal established by the Police and Fire Reform (Scotland) Act 2012

**** These figures are not held centrally. Funding is provided to local government by means of a block grant and spend is determined by local authorities in light of local circumstances and priorities’.

# This figure is the total allocation for the budget and spend for the Crofting Commission as a whole. It is estimated that the proportion associated with the operation of the tribunal is £1,515k.

7. There are new costs associated with the provisions contained in the Bill. These are estimated to be between £175k and £181k per annum in the first year (2016/17) and £145k to £151k per annum thereafter. Table 2 provides a breakdown of these costs with further detail provided in
paragraphs 8-30. All additional costs will be met from existing resources. The functions of existing tribunals will transfer into the new structure with their existing budgets.

Table 2: Summary of estimated new costs associated with the Bill provisions

<table>
<thead>
<tr>
<th>In relation to:</th>
<th>Est. cost 2016/17</th>
<th>Est. annual recurring costs from 2017/18</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointments support</td>
<td>£30,000</td>
<td>£30,000</td>
<td>Support staff 1.0 FTE @ B1.(see para 19)</td>
</tr>
<tr>
<td>2 new Board members for JABS*</td>
<td>£17,000 [to £23,000]</td>
<td>£17,000 [to £23,000]</td>
<td>To cover fees and sitting days, estimated at between 30-40 days (see para 19)</td>
</tr>
<tr>
<td>Tribunal rules – legal support</td>
<td>£32,000</td>
<td>£32,000</td>
<td>Lawyer 0.5 FTE @ C1 (see para 30)</td>
</tr>
<tr>
<td>Judicial support</td>
<td>£96,000</td>
<td>£66,000</td>
<td>Backfill for President of Scottish Tribunals and admin support (see paras 22-24)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>£175,000</strong> [£181,000]</td>
<td><strong>£145,000</strong> [£151,000]</td>
<td>Per annum - which will be funded from existing resources</td>
</tr>
</tbody>
</table>

(costs rounded to the nearest thousand)

*JABS – Judicial Appointments Board for Scotland

** There will also be some costs associated with judicial training. These will be met from existing budgets as is currently the practice. Details of training budgets can be found in table 3.

The new appointments process

8. The Bill will confer responsibility for recommending individuals for appointment to tribunals to the Judicial Appointments Board for Scotland (“the Board”). The Board became an advisory non-departmental public body on 1 June 2009 under the relevant provisions of the Judiciary and Courts (Scotland) Act 2008.

9. The role of the Board is to make recommendations to the Scottish Ministers on individuals suitable for appointment to judicial offices including Judge of the Court of Session, Sheriff, and Sheriff Principal.
10. The Bill makes provision for tribunal members to also be appointed under a process supervised by the Board. Currently, the cost of recruitment for new tribunal members is met from the existing budgets of individual tribunals. The creation of a new structure would not require an increase in the total number of tribunal members currently appointed as the Bill does not create any new jurisdictions or affect the operation of the current tribunals. Therefore any costs arising from future recruitment would be broadly in line with current costs, notwithstanding any unforeseen changes in the volume of tribunal business or the establishment of new tribunals.

11. Arrangements for providing additional funding to the Board for the recruitment of tribunal members will be on a case-by-case basis. It is envisaged that funds will be reimbursed for each specific exercise the Board will undertake for the recruitment of tribunal members. It is not possible to accurately estimate how much a recruitment exercise would cost as these vary from jurisdiction to jurisdiction. For example, the Mental Health Tribunal for Scotland (MHTS) currently has 332 members as opposed to the Scottish Charity Appeals Tribunals which has 19. Membership requirements of each tribunal also varies e.g. the Private Rented Housing Panel (PRHP) require surveyor members and MHTS require medical members.

Costs to Board arising from recruitment exercises

12. Estimated costs would be based on the fees of members of the appointment panel and the number of days they would be required to sit on the panel. Fees for the appointment panel will be paid at the same rate as all JABS fee-paid Board members (£290 daily). The time needed for each appointment exercise would also depend on the number of appointments required. There would also be some costs associated with advertising the posts. While these would be new costs to the JABS they are not new costs to the Scottish Administration and provision has been made within the individual tribunals budget, as regardless of the Bill members still require to be appointed to tribunals.

13. In 2010, the Scottish Tribunals Service (STS) took over responsibility for tribunal appointments for four of the tribunals supported by them. Since then there have been three occasions where it has been necessary to conduct an appointment exercise. The first was in December 2011 to appoint a new President for the Additional Support Needs Tribunals for Scotland following the resignation of the previous President. Secondly, a more recent exercise (2012) was undertaken to recruit 32 members for the PRHP in respect of appointments to the new Homeowner Housing Panel. On this occasion, a significant number of new appointments were required for this new jurisdiction. Thirdly there is an on-going recruitment exercise for the MHTS to recruit 35 legal and medical members to replenish the current membership. It is anticipated however, that unless there are any new jurisdictions emerging, new appointments to tribunals will be low.

14. The Bill proposes that current legislation in relation to judicial retirement will apply to members of the Scottish Tribunals. This would effectively set a retirement age of 70. Table 3 provides data on the number of members in existing tribunals who are approaching 70 to illustrate the impact that a retirement age will have on the work of the Board. The data demonstrates that the number of tribunal members in this category is not significant enough to give rise to considerably

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1 STS supported tribunals include, the Additional Support Needs Tribunals for Scotland; the Mental Health Tribunal for Scotland; the Private Rented Housing/Homeowner Housing Panels; and the Scottish Charity Appeals Panel.

2 The Homeowner Housing Panel is a devolved Scottish Tribunal set up under the Property Factors (Scotland) Act 2011. It expands the jurisdiction of the Private Rented Housing Panel.
increased costs. It will not necessarily be the case, however, that members will retire when they are 70 as individual members could remain on an annual rolling basis until the age of 75 in accordance with section 26 of the Judicial Pensions and Retirement Act 1993.

15. There is no role for JABS in reappointments which would continue to be made by the Scottish Ministers.

16. The Bill enables cross-ticketing over chambers. Although, there will be no automatic right to assignment to hear cases in another chamber except in relation to members who currently hold an appointment in a jurisdiction in a chamber other than their chamber of primary assignment. Members will be eligible to be assigned to hear a case in another chamber if they can demonstrate they meet the criteria for the jurisdiction and can demonstrate they have the skills, knowledge and experience, as well as the agreement of both the Chamber President of their primary assignment and the Chamber President of the chamber where they would be hearing the case. Individuals can hear cases in more than one jurisdiction at the moment (where they have multiple appointments). Members who are assigned to another chamber would not need to go through a formal appointment process by way of the Judicial Appointments Board. They would, however, still have to demonstrate that they meet all the criteria and have the necessary skills, knowledge and experience. The ability to be able to do this could result in fewer new appointments being necessary with tribunal members who meet the criteria and have the relevant skills, knowledge and experience being drawn from the existing tribunal community.

17. Table 3 sets out the estimated number of new tribunal appointments required from 2014 to 2017. It is expected that the new structure will be operating from 2016/17. It is difficult to say how many appointments JABS may be expected to undertake during that timescale as it depends on a number of factors including: whether the jurisdiction requiring members has been transferred into the new structure; the intention of the new leadership for tribunals to recruit from within the available tribunal community and therefore not require a JABS process; or whether or not the recruitment exercise has already taken place. For example MHTS have already undertaken a recruitment exercise for the vacancies expected in 2014 and 2015.

18. The estimated cost to JABS also depends on how they decide to operate the recruitment exercises. Interviews are currently undertaken by a three member panel, for example if a three member recruitment panel was convened for one day to appoint two new members of the Private Rented Housing Panel the total cost of that exercise would be 3 x £290 (the daily fee for a JABS Board member). However JABS may decide on a different model which will have implications for the costs of running a recruitment exercise.

Costs arising from administrative support to the Board

19. In addition to specific funding for recruitment exercises, it is likely that the Board would require additional administrative support corresponding to one full-time equivalent member of staff equivalent to Scottish Government pay grade B1. The average cost of this is £30k per annum. The Scottish Government would also anticipate increasing the Board membership by two to cover the interests of tribunals. This is likely to cost between £17k to £23k per annum. These figures cover Board meetings, estimated number of sitting days (between 30-40) and ad hoc Board duties, such as attending conferences or contributing to publications. These costs could be met from existing budgets.
Table 3: Projection of number of members approaching 70, and number of resignations

<table>
<thead>
<tr>
<th>Tribunals supported by STS that will be transferring into the new system.</th>
<th>Number of members due to reach age 70 in year (estimated new members required)</th>
<th>Total Number of Resignations in 2011 and 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2014</td>
<td>2015</td>
</tr>
<tr>
<td>Mental Health Tribunal for Scotland</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>Private Rented Housing Panel/Homeowner Housing Panel</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Scottish Charity Appeals Panel</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Additional Support Needs Tribunals for Scotland</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6</td>
<td>14</td>
</tr>
</tbody>
</table>

The duties of the Lord President of the Court of Session and the President of Scottish Tribunals

20. The Bill confers responsibilities on the Lord President of the Court of Session in relation to the efficient disposal of business in the new tribunal system. The Lord President will have the power to delegate these responsibilities and functions (except for making representations, on behalf of the Scottish Tribunals, to the Scottish Parliament or Scottish Ministers) to the President of Scottish Tribunals.

21. The Bill requires that the President of the Scottish Tribunals should be a Senator of the College of Justice. Whilst the direct cost of the President of Scottish Tribunals will be covered by the salary he or she is already paid as a Senator, there will be associated costs that will have to be borne by the court service. Court business will be managed in such a way that the gap created by the time the Senator spends on tribunal business can be filled by a part-time sheriff in the Sheriff Court. The Judicial Office for Scotland has been consulted on this matter and has indicated that it would be necessary to provide for part-time sheriffs to backfill the time that the President of Scottish Tribunals is occupied in tribunals work so that the business of the courts is not unduly delayed or affected.

22. While precise figures are difficult to reach at this stage, it is envisaged that the role of the President of the Scottish Tribunals would initially occupy 40% of a Senator’s time in the first year that the new structure is in operation. After the initial stages of implementation of the new system it is likely that the role would only require an estimated 20% of a Senator’s time. The estimates on the amount of time the role will occupy are derived from comparisons with the Senior President of
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

Tribunals (in the UK tribunal system\textsuperscript{3}). Although the following figures are based on the time spent by the Senior President of Tribunals in the UK system it should be borne in mind that there are many more tribunals in that structure. The Scottish system may not require the same time commitment.

23. The Scottish Government is able to estimate the costs associated with the role of the President of Scottish Tribunals using the rate for a part-time sheriff (court business being managed in such a way that the gap will be in the Sheriff Court rather than the Court of Session). The current daily rate for a part-time sheriff is £583. On an assumption of 250 working days a year, the cost for backfill when the President’s role occupies 40\% of a Senator’s time would be £59k per annum. The cost when the role occupies 20\% of a Senator’s time would be £29k per annum.

24. The Judicial Office for Scotland provides support to the Lord President and it is expected that this office will also provide support to the President of the Scottish Tribunals. An increase in staffing resource for the Judicial Office may be necessary to account for the increased responsibilities relating to the tribunals system. It is proposed that the Office would require additional administrative support corresponding to one full-time member of staff equivalent to Scottish Government pay grade B2. The average cost of this is £37k per annum.

The making and amendment of Tribunal Rules

25. It is proposed that the existing rules of tribunals transferring into the new system are retained until such time as they are required to be reviewed or amended. The rules of each of the listed tribunals will require a degree of modification so as to fit with the transfer of functions to the new tribunals.

26. In 2009 Lord Gill, then the Lord Justice Clerk, delivered the Scottish Civil Courts Review\textsuperscript{4} which was heralded as the "most far-reaching reform of Scotland’s civil justice system in nearly two centuries". One of the recommendations from Lord Gill’s 206 proposals was the establishment of a new Scottish Civil Justice Council (“the Council”) to draft rules of procedure for civil proceedings in the Court of Session and sheriff court (Chapter 15). Whilst Lord Gill’s proposal covered Civil Courts it did not address the need for independent rule making procedures for tribunals. Presently there is no single body that writes or amends rules for tribunals. Tribunal rules are currently made by Scottish Ministers (acting on the advice of government officials) by order, under various rule making powers. However, in response to Lord Gill’s review the Scottish Government noted that the Council’s remit could be extended to cover tribunals\textsuperscript{5}.

27. The Bill proposes that the Council take over responsibility for the making and amendment of tribunal rules. The Council is established by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 which gives the Council the responsibility for formulating policy, and drafting court procedure rules, in relation to civil justice matters.

\textsuperscript{3} The Tribunals, Courts and Enforcement Act 2007 reformed the structure of reserved tribunals operating in the UK.


28. However, it is likely that the Council will be unable to assume responsibility for tribunal rule-making in the first instance as it will be concentrating on court business, rather the Scottish Government envisages that the Council will take on tribunal work when it is ready to do so. Until that time the Scottish Ministers would continue to make rules for tribunals as is currently the practice. As the Scottish Government does not intend to rewrite tribunal rules comprehensively the Scottish Government does not expect there to be a substantial workload for the Council to undertake.

29. An exercise to make rules for the Upper Tribunal would be necessary at an early stage but would have to take place before the Council is in a position to take on this role. Therefore these rules would be made by the Scottish Ministers. There will be staff time associated with this work. This will be built into the implementation project following this Bill.

30. The Council would likely require further resource to perform the additional functions relating to tribunal rules. It is difficult to provide an accurate or detailed analysis of the potential cost as the Council has not yet been created. However, initial discussions with the Judicial Office for Scotland indicate that a part-time lawyer (0.5 full-time equivalent) at Scottish Government pay grade C1 would be required. The average cost of this is £32k per annum. This cost would be met from existing resources. It is not expected that this additional cost will be required before 2017/18.

Judicial training

31. The Bill does not require the provision of new training. It does, however place the responsibility for the training of tribunal members on the Lord President. Currently training is provided by each tribunal individually. It is not expected that this will change significantly in the new structure.

32. The Judiciary and Courts (Scotland) Act 2008 transferred the responsibility for judicial training to the Lord President. That training is provided by the Judicial Institute for Scotland which was established (originally as the Judicial Studies Committee) in 1997. As the Tribunals Bill proposes that the Lord President is responsible for the training of tribunal members it is likely that the Institute will assume some responsibility for training of tribunal members. However, this will be for the Lord President to determine.

33. Specific jurisdictional training would rest with individual chambers or jurisdictions and would continue to be provided from the individual jurisdictions’ budgets. The majority of jurisdictions that are transferring into the new structure in the initial stages each have their own training budgets. However, training budgets vary from year to year depending on requirements. Details of budgets for 2012-13 are given in Table 4.

Table 4: Training budgets for 2012-13 for existing STS tribunals

<table>
<thead>
<tr>
<th>Tribunal</th>
<th>Number of members</th>
<th>Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental Health Tribunal for Scotland</td>
<td>332</td>
<td>£90,000</td>
</tr>
<tr>
<td>Private Rented Housing Panel/</td>
<td>70</td>
<td>£26,000/</td>
</tr>
</tbody>
</table>
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

<table>
<thead>
<tr>
<th>Panel/Panel</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homeowner Housing Panel</td>
<td>£49,000</td>
</tr>
<tr>
<td>Additional Support Needs Tribunals for Scotland</td>
<td>35</td>
</tr>
<tr>
<td>Lands Tribunal for Scotland</td>
<td>4</td>
</tr>
<tr>
<td>Scottish Charity Appeals Panel</td>
<td>19</td>
</tr>
<tr>
<td>TOTAL</td>
<td>460</td>
</tr>
</tbody>
</table>

(costs rounded to the nearest thousand)

Authorisation of others

34. The Bill proposes to provide the Scottish Ministers with the power, if requested, to authorise the deployment of retired judges of the Court of Session or judges of the UK Upper Tribunal to the Scottish Upper Tribunal. This would allow a tribunal judge from England and Wales or Northern Ireland to be authorised to hear cases in the Upper Tribunal for Scotland. It is intended that this power would be used to assist with the disposal of business in the Upper Tribunal if the required expertise was not readily available in a particular case. It is expected that this power would be used on very rare occasions.

35. The Bill makes provision for the Scottish Ministers to make payment of sums in respect to any time spent by the authorisation of others in the Upper Tribunal for Scotland. It is not possible to estimate what the cost of using this power would be. The UK Upper Tribunal has a mix of fee-paid and salaried members. Fees for UK Upper Tribunal Members range from £203 to £589. The Scottish Government would have to negotiate with the relevant UK Department on a case by case basis dependent on whether the tribunal member was fee-paid or salaried and on the number of days they would be required to sit in the Upper Tribunal for Scotland to hear a particular case. It is expected that this power would only be used in exceptional circumstances (for example if there was any devolution of currently reserved matters that would currently be appealed to the UK Upper Tribunal) and any costs associated with the use of this power would be met from existing budgets. It is difficult to estimate if and when this power would be required. There are no plans to authorise the use of UK Upper Tribunal judges in the new structure until the need arises.

Upper Tribunal

36. Although the Bill creates a new Upper Tribunal the Scottish Government does not expect new costs to be associated with this. The appeal work that currently goes to the Sheriff Court or the Court of Session will merely be redistributed to the Upper Tribunal where cases will be heard by the same people i.e. senators, sheriffs etc, sitting as the Upper Tribunal as opposed to the court. However, there may be unforeseen costs associated with this new tribunal once it is in operation.

COSTS ON LOCAL AUTHORITIES

37. The Scottish Government does not expect local authorities to incur any additional costs as a result of the changes to tribunals.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

38. The Bill makes provision for the Scottish Ministers by regulation to set fees for any matter that may be dealt with by the Scottish Tribunals. This provision is aimed at allowing the setting of fees in the future in order to recover some of the costs associated with the operation of a tribunal. Where there are currently fees charged these will continue to be applied, but there are no current plans to set new fees for the work currently carried out by any of the tribunals listed in Schedule 1 of the Bill.

39. The Lands Tribunal for Scotland currently charges fees for all areas of their business. The average annual fee income over the last ten years has been around £60k (2001-2012)\(^6\). Fees are set well below full cost recovery level and vary from one jurisdiction to another. Fees have not been increased since 1996. Application fees vary from £52 for a tenant’s right to buy case to £500 for an appeal against a valuation for rating. This income is paid into the Scottish Consolidated Fund. The Scottish Government is not aware of any other devolved tribunals which currently charge fees.

40. The Scottish Government does not expect other bodies, individuals or businesses to incur any additional costs as a result of the changes provided for in this Bill.

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\(^6\) This includes two particularly ‘bumper’ years (2009 and 2010) where a total of £356k was received due to the high volumes of rating appeals. This is not untypical following the 5-yearly revaluation of non-domestic premises. Annual fee totals of £35k - £40k are typical out-with revaluation years.
These documents relate to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 8 May 2013, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Tribunals (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 8 May 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Tribunals (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
TRIBUNALS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Tribunals (Scotland) Bill introduced in the Scottish Parliament on 8 May 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 30–EN.

POLICY OBJECTIVES OF THE BILL

2. The main policy objective of this Bill is to create a new structure for devolved tribunals in Scotland. Over the years, these tribunals have been established in an ad hoc fashion, with no common system of leadership, appointments, practice and procedure or reviews and appeals (see Diagram 1).

3. The system described above can lead to a narrowness of outlook and it allows for a variation of standards and performances across the tribunals landscape. This Bill seeks to address these issues by creating a structure that will reduce overlap, eliminate duplication, ensure better deployment and allow for the wider sharing of available resources. The new structure will also provide users with the reassurance that tribunal hearings are being heard by people with no links to the body whose decision they are challenging by providing for greater independence for the new tribunals. By establishing a more coherent framework for tribunals opportunities will be created for improvement in the quality of services that cannot be achieved by tribunals operating separately.

4. The creation of a new tribunal structure is supported by advice prepared by independent expert reports addressing the tribunals and administrative justice systems in Scotland including the Franks Report (1957)\(^1\), the Leggatt Report (2001)\(^2\) and the Philip Reports (2008\(^3\) and 2009\(^4\)).

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\(^1\) Sir Oliver Franks, *Report of the Committee on Tribunals and Inquiries* (1957)
\(^3\) Administrative Justice Steering Group (AJSG), *Options for the Future Administration and Supervision of Tribunals in Scotland* (Scottish Consumer Council, September 2008)
5. Of particular note is the report by Lord Philip published in September 2008, ‘Options for the Future Administration and Supervision of Tribunals in Scotland’. The key findings from the report were that:

- the present tribunal system in Scotland is “extremely complex and fragmented”;
- many tribunals are not sufficiently independent of the Scottish Government;
- there is no consistent system of appointment of tribunal chairs and members; and
- all of Scotland’s tribunals work in isolation, leading to duplication of effort, a variation of standards and performance, and a lack of good value for the taxpayer.

**Diagram 1**: The following diagram is illustrative and not comprehensive. It represents a sample of the varied and diverse tribunals in Scotland and demonstrates the differing processes, different bodies involved and a lack of a coherent structure which currently exists.

6. The Bill establishes a coherent structure within which to bring the functions and members of the devolved tribunals, which will be supported by strong leadership from the Lord President. Backed by the expert reports mentioned above, reform is long overdue, is logical, sensible, and the right thing to do. The Bill sets out a framework for the new structure.

**OVERVIEW**

7. The Bill will create a simple two-tier structure - a First-tier Tribunal for first instance decisions (into which most tribunal jurisdictions will be transferred) and an Upper Tribunal
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

(where the primary function will be to dispose of appeals from the First-tier tribunal) - under the leadership of the Lord President of the Court of Session. The First-tier Tribunal and Upper Tribunal are collectively referred to as the Scottish Tribunals.

8. The Bill contains a list of devolved tribunals in schedule 1 (which are known as “listed tribunals”) from which the functions and members may be transferred-in to the new structure. The listed tribunals which the Scottish Government anticipates will be among the first to have their functions transferred are: the Additional Support Needs Tribunals for Scotland; the Mental Health Tribunal for Scotland; the Private Rented Housing Panel/Home Owner Housing Panel; the Lands Tribunal for Scotland; and the Scottish Charity Appeals Panel. The functions of each listed tribunal will transfer in separately in a phased programme over the next few years. It is expected the first of these tribunals will have had its functions transferred-in by the end of 2015. The remaining listed tribunals would follow thereafter.

9. The Bill allows the list of tribunals set out in schedule 1 to be added to, or modified by, regulations. Over time, the new structure will be capable of acquiring the functions of new or other jurisdictions which are not currently listed.

10. The functions and members of a listed tribunal will transfer-in to the new structure by regulations. These regulations will also be able to modify the functions of the listed tribunal which are set out in an enactment so as to ensure that they are exercisable by the new Scottish Tribunals rather than the listed tribunal.

11. The Scottish tribunals will be composed of members who are either transferred-in or appointed. Existing members of the listed tribunals will transfer-in at the same time as the functions of their tribunal are transferred, along with their current caseloads. There will be a necessity to write some new procedural rules to allow the Scottish tribunals to operate effectively. Existing procedural rules of a listed tribunal will continue to apply after the transfer-in of functions (although they will require some modification to account for the new structure and appeal routes). The Scottish Tribunals can also draw on the resources of the court judiciary as the Bill enables certain members of the court judiciary to act as tribunal members.

12. The Bill requires the First-tier Tribunal to be organised into chambers and the Upper Tribunal to be organised into divisions. The functions and members of the Scottish Tribunals will be assigned among the chambers/divisions.

TRIBUNALS PERSONNEL

Head of the Scottish Tribunals

13. The Bill designates the Lord President of the Court of Session as the Head of the Scottish Tribunals. This is a significant change in the leadership structure for devolved tribunals. Strong judicial leadership will be provided across both the First-tier and the Upper Tribunals to ensure that:

5 The Upper Tribunal is also able to hear cases in the first instance and it is intended to transfer the devolved functions of the Lands Tribunal for Scotland to the Upper Tribunal rather than the First-tier Tribunal – see para 46.
• there is cohesion and continuity of purpose across both tiers;
• the new tribunal structure has a strong identity within the justice system as a whole;
• the efficient disposal of business is maintained; and
• the views of tribunal members are represented and their welfare respected.

14. In providing leadership, the Lord President will be able to ensure, amongst other things, that specialism, ethos and desirable distinctiveness are retained, in addition to supporting coherence across the new structure where this is required. The Lord President also has direct responsibility for representing the views of the members of the Scottish Tribunals to the Scottish Parliament (including as to the administration of justice) and the Scottish Ministers, as well as producing rules on conduct and discipline of tribunal members. These functions cannot be delegated.

15. The Lord President is also responsible for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals and ensuring the welfare of its members. These functions may, however, be delegated to the President of the Scottish Tribunals.

16. The Bill also confers other responsibilities on the Lord President. These are in relation to training, guidance and professional development of members of the Scottish Tribunals. The Lord President also has responsibility for assigning and deploying the members among chambers within the First-tier Tribunal and among divisions in the Upper Tribunal and has a duty to produce guidance outlining the procedure for those arrangements. This provision will reassure stakeholders as to how tribunal members will be deployed, for example in the new structure a sheriff can sit in the First-tier Tribunal when authorised to do so. This would allow the Mental Health Tribunal for Scotland, which currently has a duty to use a sheriff as a convenor in specific hearings, to be able to continue to do so in the new structure (see paragraph 20).

President of the Scottish Tribunals

17. The Bill creates a new office – the President of the Scottish Tribunals (referred to in the Bill and hereafter as the ‘President of Tribunals’). It is anticipated that the Lord President will delegate the responsibility for the efficient disposal of business of the Scottish Tribunals to the President of Tribunals. The Lord President is to assign the President of Tribunals from among the Senators of the College of Justice. This will give the office the appropriate status both in relation to delegation from the Lord President and in relation to dealings with members of the court judiciary, including on matters of guidance and conduct. It will also bring to the tribunal leadership a wide range of judicial skills and experience.

18. The Bill will allow the Lord President to delegate the functions outlined at paragraphs 14 and 15 above to the President of Tribunals.

Members of the First-tier Tribunal

19. The Bill provides for both legal and ordinary members of the First-tier Tribunal. The legal members (those considered to be legally qualified) will consist of Chamber Presidents, Deputy Chamber Presidents and those other persons appointed, or transferred-in from a listed tribunal, as
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legal members. The legal membership will ensure that the First-tier Tribunal has an array of legal expertise at its disposal. Each chamber within the new structure will have a Chamber President (or for job-sharing purposes and to increase diversity, two Chamber Presidents) who will be responsible for arrangements of business within that chamber. Chamber Presidents may also be assisted by Deputy Chamber Presidents. The Chamber Presidents and Deputy Chamber Presidents will be expected to have expertise in the jurisdictions over which they will preside.

20. The ordinary members (those not considered to be legally qualified) will consist of those persons appointed, or transferred-in from a listed tribunal as ordinary members. The ordinary membership will likely consist of persons with professional qualifications in a number of areas for which the First-tier Tribunal requires specialist expertise – for example, doctors, psychologists, teachers and surveyors as well as lay members with the appropriate knowledge and expertise. The ordinary membership will ensure that the First-tier Tribunal has an array of non-legal expertise at its disposal which can be assigned to hear cases where a particular expertise is necessary or expedient.

21. The Bill allows for members of the court judiciary to be assigned to the First-tier Tribunal. The members of the court judiciary who are able to act as members of the First-tier Tribunal are limited to sheriffs principal, sheriffs and part-time sheriffs. No judge of the Court of Session may act as a member of the First-tier Tribunal. This will allow the First-tier Tribunal to have access to the court judiciary when it is exercising decision-making functions for which it would be appropriate to use them rather than just the legal and ordinary members. Certain functions of the Mental Health Tribunal for Scotland already utilise sheriffs (see, for example paragraph 2 of schedule 2 to the Mental Health (Care and Treatment) Act 2003). The Bill will allow this arrangement to continue when the functions of the Mental Health Tribunal for Scotland are transferred-in to the Scottish Tribunals.

22. The Bill prevents a member of the court judiciary from being appointed as a Chamber President or a Deputy Chamber President. Coupled with the exclusion of judges of the Court of Session, the Scottish Government has adopted this approach to protect the distinct ethos of the listed tribunals and prevent them from becoming too court-like (while still allowing them to benefit from the expertise and experience of sheriffs). Sheriffs are, however, permitted to act as Temporary Chamber Presidents in order to fill a temporary vacancy.

23. The different leadership roles of office holders in the First-tier Tribunal (Lord President, President of Tribunals and Chamber Presidents) will provide an important mechanism to safeguard the particular and distinctive ethos of individual jurisdictions which are transferred-in to the First-tier Tribunal. At the same time we would expect the leadership to work together across jurisdictions to bring coherence to the structure where this will benefit the delivery of a high quality service to users.

24. When sitting in tribunals all members, whether ordinary or legal, have the same status and capacity as the judiciary, as they are all making judicial decisions.

Upper Tribunal members

25. The Bill provides for both legal and ordinary members of the Upper Tribunal. The legal members (those considered to be legally qualified) will consist of Vice-Presidents (where the
Vice-Presidents are appointed or transferred-in from a listed tribunal) and those other persons appointed, or transferred-in from a listed tribunal, as legal members. Chamber Presidents of the First-tier Tribunal will also, by virtue of holding that position, be legal members of the Upper Tribunal. The legal membership will ensure that the Upper Tribunal has an array of legal expertise at its disposal which can be assigned to hear cases within its jurisdiction, whether these are appeals or first-instance cases. Each division within the Upper Tribunal will have a Vice-President who will be responsible for arrangements of business within that division.

26. The Upper Tribunal will also be able to appoint or transfer-in ordinary members. It is not anticipated that the ordinary membership will have a role in any appellate functions of the Upper Tribunal but ordinary members may be required where the Upper Tribunal is to exercise first-instance functions.

27. The Bill allows for members of the court judiciary to be assigned to the Upper Tribunal. The members of the court judiciary who are able to act as members of the Upper Tribunal are judges of the Court of Session, sheriffs principal and sheriffs (but not part-time sheriffs). This will allow the Upper Tribunal to have access to the appropriate level of judicial expertise when it is exercising appellate or review functions. Members of the court judiciary (including the President of Tribunals) may also be assigned to hold the position of Vice-President. Again, this will ensure appropriate leadership in the Upper Tribunal and given the appellate functions of the Upper Tribunal, the Scottish Government considers that it is appropriate to draw on the expertise of Scotland’s most senior judges.

28. The Bill also makes provision for the Scottish Ministers to authorise retired court judges and members of the tribunal judiciary from other jurisdictions in the UK, to assist in the disposal of business in the Upper Tribunal for Scotland. For example, this would allow certain members, who are currently hearing cases in the UK Upper Tribunal (established by section 3(2) of the Tribunals, Courts and Enforcement Act 2007), to sit and hear appeals in the Upper Tribunal for Scotland. This will enable the Upper Tribunal to have access to the expertise and knowledge of retired court judges and members with a broad experience of hearing appeals of tribunal decisions. It is intended that these authorised members would only be used where there is a need for a particular expertise which is not readily available from the existing membership of the Upper Tribunal for Scotland. It is envisaged that this may be necessary for particularly complex cases or on matters that may be in the process of being devolved or are considered for devolution in the future.

29. It is not expected that there will be a large volume of business in the Upper Tribunal, at least in the initial years (see Table 1: Tribunal Caseloads). The structure is designed to accommodate growth in the future. For example, if some reserved tribunals were to be devolved or new jurisdictions were created.
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

Table 1: Tribunal Caseloads

<table>
<thead>
<tr>
<th>Tribunal</th>
<th>Number of cases 2011-2012</th>
<th>Number of appeals 2011-2012</th>
<th>Number of cases withdrawn 2011-2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additional Support Needs Tribunals for Scotland (ASNTS)</td>
<td>76</td>
<td>0</td>
<td>46</td>
</tr>
<tr>
<td>Scottish Charity Appeals Panel</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Crofting Commission</td>
<td>8</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Education Appeal Committees&lt;sup&gt;1&lt;/sup&gt;</td>
<td>937</td>
<td>0</td>
<td>422</td>
</tr>
<tr>
<td>Private Rented Housing Panel/Homeowner Housing Panel</td>
<td>304</td>
<td>4</td>
<td>74</td>
</tr>
<tr>
<td>Lands Tribunal for Scotland</td>
<td>247</td>
<td>1</td>
<td>135</td>
</tr>
<tr>
<td>Mental Health Tribunal for Scotland</td>
<td>3506</td>
<td>26</td>
<td>691</td>
</tr>
<tr>
<td>NHS National Appeal Panel (NAP)&lt;sup&gt;2&lt;/sup&gt;</td>
<td>21</td>
<td>—</td>
<td>16</td>
</tr>
<tr>
<td>NHS Tribunal</td>
<td>0</td>
<td>2&lt;sup&gt;3&lt;/sup&gt;</td>
<td>0</td>
</tr>
<tr>
<td>Scottish Parking Appeals Service</td>
<td>1879</td>
<td>—</td>
<td>718</td>
</tr>
<tr>
<td>Police Appeals Tribunals&lt;sup&gt;4&lt;/sup&gt;</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Valuation Appeal Panels</td>
<td>50,726</td>
<td>192</td>
<td>40,903</td>
</tr>
</tbody>
</table>

Source: The Scottish Committee of the Administrative Justice and Tribunals Council’s Annual Report 2011-12 except ASNTS and NAP where the information was sourced directly from the tribunal.

1 excludes data for 7 councils which did not reply to SCAJTC request for information.
2 five cases were heard, 16 were dismissed by the NAP Chair Panel.
3 relates to 2 cases that were decided by the tribunal in the previous year.
4 excludes two police force areas who did not respond to the SCAJTC’s request for information.
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

Judicial Remuneration

30. It is the intention to transfer-in current tribunal members on their existing terms and conditions in a phased programme which will take time to progress. However, the Scottish Government has committed to commission an independent evaluation of the offices of the tribunal members within the new structure once it has been established and bedded in. It is appropriate that the evaluation is held after a period of time to allow workloads and new roles to be properly established, considered and assessed. To begin with the new structure should not impact on current caseloads. It is only when a multi-jurisdictional chamber is created that this should change. It is acknowledged, however, that the office of Chamber President is likely to be most affected, although not initially, by this change and by their new role in the Scottish Tribunals leadership structure.

Appointments process

31. Currently, the majority of appointments to tribunals are made by the Scottish Ministers. They are carried out following the Code of Practice for Ministerial Appointments to Public Bodies published by the Public Appointments Commissioner, although the code does not strictly apply to tribunal appointments because they are not listed for the purposes of the Public Appointments and Public Bodies etc. (Scotland) Act 2003.

32. The appointments are made based on the criteria specified in the founding legislation for the individual tribunals which vary from tribunal to tribunal.

33. The Bill introduces a common system of appointments for the Scottish Tribunals which will continue to ensure that members have security of tenure and independence from the executive. The independence of the tribunal members is expressly guaranteed by the Bill. While the power to make an appointment lies with the Scottish Ministers, the Judicial Appointments Board for Scotland (JABS) established by the Judiciary and Courts (Scotland) Act 2008 will be responsible for recommending persons for appointment. This brings the appointment of tribunal members more in line with the process for appointing members of the court judiciary.

34. The Bill sets out the eligibility criteria for appointment as a legal member of the Scottish Tribunals. A person will be eligible for appointment as a legal member of the First-tier Tribunal (other than as a Chamber President) if the person has been a practising solicitor or advocate for five years. There is the ability for the Scottish Ministers to set out further eligibility criteria in regulations. This may be around suitability attributable to experience in law through engagement in certain activities such as practice and employment as a lawyer or teaching or researching law at or for an educational institution. This will enable the appointment of persons beyond those who are currently practising as solicitors and advocates while ensuring that a legal member’s suitability for exercising the functions of a tribunal are not diminished. It is designed to increase diversity amongst the membership and increase the pool of people eligible to apply. Legal members of the Upper Tribunal (including the Chamber Presidents in the First-tier Tribunal) require to have seven years’ experience of practising law (or equivalent experience). Again, this is to reflect the hierarchical position of the Upper Tribunal and the likely difference in functions it will be exercising.
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

35. Members will be appointed for a term of 5 years and will be eligible for re-appointment at the end of each term up until reaching the age of 70. The Scottish Ministers will be bound to re-appoint a member unless the person does not wish to be re-appointed, is no longer eligible for appointment or the President of Tribunals has recommended to them that the person should not be re-appointed. The scope for the President of Tribunals to make such a recommendation is limited in accordance with the provisions of the Bill. This is designed to ensure continuity in the membership of the Scottish Tribunals and security of tenure for the members. Upon reaching the age of 70, legal and ordinary members will only be eligible to remain in office by virtue of section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993. This allows members to continue in office on an annual rolling basis up until reaching the age of 75 if the Scottish Ministers, following consultation with the President of Tribunals, consider it is in the public interest.

36. The new appointment process will ensure, as it does now, that tribunal members are selected with the relevant skills, knowledge and experience to carry out their particular assignment within the Scottish Tribunals and have the security of tenure to do so independently and impartially.

Conduct of members

37. The Bill sets out provisions for the removal of tribunal members and for standardising the arrangements for investigation into fitness for office in line with what is already in place for members of the court judiciary.

38. The Bill provides for the First Minister, when requested to do so by the Lord President or otherwise when he thinks fit (having consulted the Lord President), to constitute a fitness assessment tribunal to investigate and report on whether a tribunal member is unfit to hold office by reason of inability, neglect of duty or misbehaviour. The procedures to be followed by and before the tribunal will be made by the Court of Session in an Act of Sederunt. Tribunal reports are to be submitted to the First Minister who will lay the report before Parliament. The fitness assessment tribunal is not a tribunal of the type listed in schedule 1 of the Bill.

39. The Bill provides for the Lord President to make rules for the investigation and determination of any matter concerning the conduct of the members of the Scottish Tribunals. Those subject to these conduct provisions (i.e. the complainant and the member whom the complaint has been raised against) would have the right to an independent review of the process adopted in any investigation by the Judicial Complaints Reviewer (as established by the Judiciary and Courts (Scotland) Act 2008).

Deployment

40. The President of Tribunals is responsible for assigning the members of the First-tier Tribunal among its chambers and the members of the Upper Tribunal among its divisions. Chamber Presidents and Deputy Chamber Presidents will be appointed in respect of particular chambers and will automatically be assigned to those chambers. They may also be assigned to act as legal members in other chambers. Vice-Presidents in the Upper Tribunal will be appointed or assigned in respect of a particular division and will be automatically assigned to act as a member of that division. Vice-Presidents may also be assigned to act as members of other divisions. The other legal members, ordinary members and judicial members are to be assigned by the President.
of Tribunals among the chambers/divisions in accordance with the assignment guidance published by the Lord President. It is anticipated that members transferred-in to the Scottish Tribunals from a listed tribunal will be assigned to the chamber/division to which those functions are allocated. Members will, however, be able to be assigned to additional chambers/divisions if they possess the necessary qualifications to do so.

**ORGANISATION OF TRIBUNALS**

*First-tier Tribunal: chambers*

41. The Bill allows the Scottish Ministers to make provision, through regulations, for the First-tier Tribunal to be organised into chambers, and for the allocation of tribunal functions amongst those chambers (see illustration at Diagram 2). This is designed to establish boundaries within the First-tier Tribunal according to the subject-matter of the functions it is to exercise so as to allow similar functions to be grouped together. Before doing so the Scottish Ministers must consult the Lord President and any other interested parties. The regulations must be made by affirmative resolution. This will allow proper parliamentary scrutiny and provide necessary safeguards and future proofing. The regulations may delegate the authority for the organisation of chambers to the Lord President. This would allow the Lord President to adapt the chamber structure within the confines permitted by the regulations. It would also allow this to happen without the need for further legislation, as long as it adhered to the limits of the delegated authority. For example, the regulations could provide for certain core chambers to exist but allow the Lord President to organise the structure out-with those particular chambers. The chamber structure will need to be flexible to allow changes to be made as the Scottish Tribunals acquire more functions and additional functions are conferred on them.

42. The chamber structure is intended to facilitate deployment of the members of the Scottish Tribunals. Each chamber will have a Chamber President who may be supported by a Deputy Chamber President. They will provide judicial expertise within their own chamber. Chamber Presidents will be unable to preside over more than one chamber. Chambers will evolve over time in response to the transfer of functions of other tribunals, the creation of new areas of appeal, the establishment of new chambers or the addition of new jurisdictions to a chamber.

43. During the consultation process there were concerns raised by stakeholders about the organisation of the First-tier Tribunal into chambers, with a number of respondents to the consultation (19 of 86) seeking reassurance that the Mental Health Tribunal for Scotland would occupy a single chamber within the new structure. The Scottish Government has made a commitment that initially mental health will be in a chamber on its own. At the moment there are no other tribunals covering a similar subject matter as mental health. It therefore makes sense to do this for now. The Scottish Government recognises the uniqueness of the Mental Health Tribunal for Scotland and is committed to ensuring that all of its distinctive and valued characteristics can be protected and maintained in the new structure.

44. The Scottish Government is committed to ensuring that safeguards in the new structure in relation to the Mental Health Tribunal for Scotland will:

- continue to keep the patient at the centre of everything it does;
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

- retain the eligibility criteria for non-legal members which ensures that new members have the knowledge, experience and expertise to hear mental health cases;
- retain the tailored and specific training provided to members of the Mental Health Tribunal for Scotland which recognises the patient-centred culture developed by this jurisdiction;
- have a Chamber President who recognises the patient-centric culture and ethos of the Mental Health Tribunal for Scotland and is committed to safeguarding this;
- keep the bespoke rules currently used by the Mental Health Tribunal for Scotland (subject to appropriate modification);
- use, so far as is possible, the same venues for hearings that have been particularly appreciated and uniquely adapted for patients;
- retain the membership of the Mental Health Tribunal for Scotland (including the President) at the time at which its functions are transferred, who have been specifically trained to understand the sensitivities surrounding these particular cases though the provisions in the Bill providing for the transfer-in of members;
- continue to adhere to the Millan Principles\(^6\) – which the Scottish Government believes are a key strength of this jurisdiction; and
- continue to receive a specialist and dedicated administrative support.

Diagram 2: Illustrative diagram of how chambers in the First-tier might look in the new structure:

<table>
<thead>
<tr>
<th>FIRST-TIER TRIBUNAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental Health Chamber</td>
</tr>
<tr>
<td>Chamber President</td>
</tr>
<tr>
<td>(may have a Deputy who could provide expertise in a specific area)</td>
</tr>
<tr>
<td>Mental Health</td>
</tr>
<tr>
<td>Valuation</td>
</tr>
<tr>
<td>Crofting</td>
</tr>
</tbody>
</table>

NB: This diagram is intended to be illustrative and is not a comprehensive list of all the tribunals that will transfer into the new structure. Chamber structure and composition will be made by secondary legislation by affirmative resolution after consultation with interested parties. A full list of the tribunals that can be included in the new structure can be found in schedule 1 of the Bill.

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Upper Tribunal: divisions

45. The Bill allows the Scottish Ministers to make provision through regulations for the Upper Tribunal to be organised into divisions. The term ‘divisions’ as opposed to ‘chambers’ is being used in the Scottish Upper Tribunal to make a clear distinction between the Scottish and the UK structure (where the UK Upper Tribunal is divided into chambers). This will avoid confusion between the two. It also makes a clear distinction between the Scottish First-tier (chambers) and Upper Tribunal (divisions). The regulations allow for the allocation of the Upper Tribunal’s functions between divisions in the same manner as the First-tier Tribunal can be organised into chambers. This will enable the Upper Tribunal’s separate divisions to deal with appeals from the First-tier Tribunal as well as other matters.

46. The policy intention is for the devolved functions of the Lands Tribunal for Scotland to transfer-in to the Upper Tribunal rather than the First-tier Tribunal. The Lands Tribunal has statutory power to deal with various types of dispute involving land or property. These sometimes can be in very complex areas of law or can be around decisions involving large sums of money where the case involves the valuation of land under the Land Reform (Scotland) Act 2003, for example. The Lands Tribunal may hear appeals at first instance or in an appellate capacity. The Scottish Government considers that it can best preserve and enhance the specialist qualities of the Lands Tribunal for Scotland within the Upper Tribunal by allocating its functions to a single division.

47. The Bill allows the creation of further divisions over time, should that become necessary. Each Division will have a Vice-President (or two Vice-Presidents for job-sharing purposes) who will provide judicial expertise within their own Division. Vice Presidents are so called to provide the same clarity between the two tiers for the reasons mentioned earlier for chambers and divisions (see paragraphs 41 and 44). It allows the clear distinction between First-tier Chamber Presidents and Upper Tribunal Vice-Presidents (see paragraph 49).

48. The President of Tribunals may assign himself or herself to act as a Vice-President and may preside over more than one chamber at a time when acting as such. This may be likely to occur where, for example, the Upper Tribunal has only very limited functions.

Distinctive factors of the First-tier and Upper Tribunals

49. As the First-tier and Upper Tribunals will have very different volumes of business we have differentiated between the First-tier Tribunal and Upper Tribunal by using the terms ‘chambers of the First-tier’ and ‘divisions of the Upper Tribunal’. The First-tier is likely to have several chambers for first instance business whereas it is expected that the Upper Tribunal will deal mainly with a small number of appeals and a few first instance cases, for example in the Lands Tribunal. As mentioned previously these differences are aimed at showing clearly which tribunal is being referred to and so as to avoid confusion with the UK Upper Tribunal, where there the ‘divisions’ are called ‘chambers’.

50. There are also distinctions between the role of ‘Chamber President of the First-tier Tribunal’ and ‘Vice-President of the Upper Tribunal’. There are clear differences between the two roles and an element of seniority around the role of Vice-President. For example, the President of Tribunals can assign himself or herself to the role of Vice-President but cannot assign himself or
herself to the role of Chamber President. This ensures that the Chamber Presidents are appointed for their knowledge and expertise in the subject areas within their chamber. In addition, a Chamber President is automatically a legal member of the Upper Tribunal but a Vice-President is not automatically a legal member of the First-tier Tribunal. This is because a Vice-President would be a judicial or legal member of the Upper Tribunal and, whereas the Chamber President has the legal qualification to sit in the Upper Tribunal, there is no requirement for a Vice President to sit in the First-tier, other than for the reasons specified before in paragraphs 20-21.

TRANSFER OF FUNCTIONS

51. The new structure will be populated in a phased programme. The functions of listed tribunals along with their members and caseload will transfer-in separately to the new structure by regulations (which are subject to the affirmative procedure). This enables proper scrutiny as individual jurisdictions are transferred. Many of these tribunals have complex founding legislation and care will need to be taken to ensure functions are transferred-in correctly. This will take time to progress.

52. The Bill provides that the list of tribunals set out in schedule 1 can be amended or added to over time. The structure will, therefore, be able to accommodate new tribunals as well as existing ones. The functions of the listed tribunals will also be able to transfer into one or both tribunals. This will allow for more complicated functions at first instance to be dealt with by the Upper Tribunal (who will have access to members with higher levels of qualifications and experience).

53. The Bill enables the regulations to modify the subject-matter legislation establishing the listed tribunal to allow the jurisdiction to operate effectively within the new structure.

INTERNAL REVIEW, APPEALS AND SPECIALIST JURISDICTION

Internal Review of Decisions

54. The Bill introduces a new measure to allow the First-tier Tribunal and the Upper Tribunal to review their own decisions where, for example, simple administrative errors have occurred.

55. The Bill will allow the First-tier Tribunal and the Upper Tribunal to review a decision made within the tribunal, either of its own initiative or on application by any party with a right of appeal in respect of the decision. The tribunal will have the power to take no action, correct minor or accidental errors or set aside the decision. If the First-tier Tribunal sets aside a decision, it will be able to either re-decide the matter concerned, or refer the matter to the Upper Tribunal. If the latter option is taken, the Upper Tribunal will then be responsible for re-deciding the matter.

56. No decision of the First-tier Tribunal can be reviewed more than once, and a decision of the tribunal not to review a decision is not reviewable or appealable. Further challenge of a decision beyond the single review will only be allowed by appeal on a point of law. The ability to review does not restrict the right of appeal.

57. The aim of this provision is to cut down on the number of appeals generated by administrative mistakes.
Role of the Upper Tribunal

58. The report of the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC), Tribunal Reform in Scotland: a vision for the future (2011)^7, considered the issue of rationalising appeals from tribunals. The SCAJTC thought that standardising the route of tribunal appeals to a single body would:

- facilitate the development of expertise among appellate judges;
- make the appeal process more accessible to tribunal users;
- speed up justice in comparison to taking appeals to the Court of Session;
- streamline and simplify case handling processes, thus supporting the development of expertise among administrative support staff; and,
- make it easier for support organisations to provide advice to tribunal users who wish to appeal a tribunal’s decision.

59. In the White Paper, Transforming Public Services: Complaints, Redress and Tribunals (2004)^8, the UK Government said, ‘the very low level of onward appeals in almost all tribunals could indicate that in general there is a high level of acceptance of the decisions and this is one indicator of the quality of decisions. But equally it could indicate that appellants just give up.’

60. This supports an argument for the need for an onward appeal to an Upper Tribunal, keeping onward appeals within the tribunals structure and avoiding the need to go to court, which many users may find more daunting.

61. In most cases the Scottish Government would expect that decisions taken by the First-tier Tribunal would be accepted. However, tribunal users should have an accessible and affordable method of appealing a First-tier Tribunal’s decision. The Scottish Government believes that the appropriate forum for most appeals from First-tier Tribunal decisions is an appellate tier within the tribunal structure (with some exceptions^9) for the reasons set out by SCAJTC. The Bill, therefore, creates a general right of appeal to the Upper Tribunal. This appeal route would be the default position. An appeal from a First-tier Tribunal is limited to a point of law. The Bill also, enables existing rights of appeal to be preserved when the functions of a listed tribunal are transferred-in. The Scottish Ministers can also make regulations excluding the general right of appeal to functions which have been transferred-in and which prior to the transfer, there was no existing right of appeal.

62. The core function of the Upper Tribunal will be as an appellate body, providing the normal route of appeal on points of law from decisions of the First-tier Tribunal. There will also be

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^9 The Scottish Government accepted in the consultation paper Proposals for a new tribunal structure for Scotland (2012) (paragraph 4.13) that appeals under section 322 of the 2003 Act from MHTS decisions concerning patients subject to restriction orders, transfer for treatment directions or hospital directions should continue to be heard by the Court of Session.
onward appeals from the Upper Tribunal to the Court of Session, and ultimately to the Supreme Court where necessary.

63. The Upper Tribunal’s powers on appeal will be to:

- uphold the decision;
- remit the case to the First-tier Tribunal for the First-tier Tribunal to reconsider, with directions which can relate to law or fact and may be given with procedural guidance which could include composition of the panel when rehearing the case; or
- substitute its own decision, only if it can properly do so on the facts found to be established by the First-tier Tribunal, or having made such further findings of fact as it considers is appropriate.

Appeals from the Upper Tribunal

64. The Bill also provides for a right to appeal a decision of the Upper Tribunal to the Court of Session on a point of law. Permission to appeal must be granted by the Upper Tribunal or the Court of Session itself where they are satisfied there are arguable grounds for appeal. Where the decision of the Upper Tribunal being appealed to the Court of Session concerns a decision of the Upper Tribunal on appeal from the First-tier Tribunal (i.e. a second appeal) then permission to appeal is not to be granted unless it would raise some important point of principle or practice or there is some other compelling reason for the appeal to be heard. The policy intention underlying this position is to limit successive appeals where a reasoned appeal has already been heard.

Judicial Review

65. The Bill also provides for judicial review within the Upper Tribunal in appropriate cases. The Bill provides a mechanism enabling the Court of Session to transfer petitions for judicial review to the Upper Tribunal in limited circumstances. The Scottish Government envisages it could be used to transfer a petition to the Upper Tribunal where it concerns a subject matter over which the Upper Tribunal has developed considerable expertise. The Bill gives the Upper Tribunal the necessary powers to determine the petition once it has been transferred. Petitions would always have to be lodged in the Court of Session first prior to transfer and cannot be initiated in the Upper Tribunal.

66. The petition must not seek anything other than the exercise of the supervisory jurisdiction of the Court of Session. Petitions must fall within a particular category of petitions specified by the Court of Session in an Act of Sederunt made with the consent of the Scottish Ministers.

PRACTICE AND PROCEDURE

Tribunal Rules

67. There are no plans to comprehensively rewrite the rules of procedure applying in respect of each listed tribunal once their functions are transferred-in to the Scottish Tribunals. The Bill enables existing rules to be retained (with appropriate modification) until such time as they require to be amended or new rules are to be introduced. Some modifications will be required to enable the new structure to function correctly.
68. The 1957 Franks Committee on ‘Administrative Tribunals and Enquiries’\(^{10}\) identified certain characteristics that should be reflected in tribunal procedures. These were openness, fairness and impartiality. In the Committee’s view impartiality is achieved by independence from the real or apparent influence of departmental policy.

69. In 2009 Lord Gill, then the Lord Justice Clerk, delivered the Scottish Civil Courts Review\(^{11}\) which was heralded as the "most far-reaching reform of Scotland’s civil justice system in nearly two centuries". One of the recommendations from Lord Gill’s 206 proposals was the establishment of a new Scottish Civil Justice Council (SCJC) to draft rules of procedure for civil proceedings in the Court of Session and sheriff court (Chapter 15) with responsibility for formulating policy, and drafting court procedure rules, in relation to civil justice matters.

70. Whilst Lord Gill’s proposal covered civil courts it did not address the rule-making procedures for tribunals. Presently there is no single body that writes or amends rules for tribunals. The majority of tribunal rules are currently made by Scottish Ministers (acting on the advice of government officials) by subordinate legislation, under various rule making powers. However, in response to Lord Gill’s review the Scottish Government noted that the SCJC’s remit could be extended to cover tribunals\(^{12}\).

71. The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (‘2013 Act’) establishes the SCJC. The SCJC will replace the existing Sheriff Court and Court of Session Rules Councils and have a wider policy role to advise and make recommendations on improving the civil justice system in Scotland. Oversight and direction of the new body will rest with the Lord President.

72. The Bill makes provision to amend the 2013 Act, to provide the SCJC with the power to propose rules of procedure for the Scottish Tribunals. Thereafter, rules would be made by an Act of Sederunt following preparation by the SCJC. The SCJC will also have a role in reviewing the practice and procedure adopted by the Scottish Tribunals. However, as there is a clear distinction between courts and tribunals, the Bill provides for the SCJC to use the powers provided in the 2013 Act (section 13 (1)) to constitute a ‘tribunals committee’ to deal with tribunal rules. The committee would be composed of persons with tribunal experience in the area for which the rules were being made. The tribunals committee would be chaired and panel members would be selected by the President of Tribunals. This will ensure that the distinctiveness and ethos of tribunals is protected in the new structure and the person with the most knowledge of the tribunals within their charge was responsible for ensuring representation from the right people in each case. This is also in recognition of the variation between different tribunals from one subject area to another and that one set of generic rules would not suit all. The tribunals committee’s role will be to draft the rules but the SCJC would be required to sign them off and submit them to the Court of Session in keeping with the intentions of the 2013 Act.

\(^{10}\) Sir Oliver Franks, *Report of the Committee on Tribunals and Inquiries* (1957)


73. As the SCJC will be newly established it is unlikely they will be able to assume responsibility for tribunal rule-making immediately. Until that time, the Bill provides for the Scottish Ministers to make rules for the Scottish Tribunals. At the point when the SCJC receives the responsibility for preparing procedural rules, the Scottish Government anticipate that rules will already be in place, including those for the new Upper Tribunal, and do not, therefore, expect the SCJC to have a substantial workload in making tribunal rules.

**Practice Directions**

74. The Bill also sets out a process for making practice directions. The President of the Scottish Tribunals may issue practice directions as to practice and procedure to be adopted in the Scottish Tribunals while a Chamber President/Vice-President may issue practice directions to his or her particular chamber/division. Practice Directions remain subject to any provision made in the procedural rules.

**EXPENSES**

75. The Bill allows the tribunals rules to provide for the Scottish Tribunals to award expenses in a similar way as courts. It does not require expenses to be awarded in all cases, rather that there would be flexibility as part of the creation of the new structure to determine where an expenses system would be appropriate and whether there should be any limits to such a system.

**ENFORCEMENT**

76. The Bill allows for the tribunal rules to provide the decisions of the tribunals to be enforced in a similar means to that of orders of the Scottish courts.

**ADMINISTRATIVE SUPPORT, FEES AND ANNUAL REPORT**

77. The Scottish Ministers are currently responsible for providing administrative support to a number of devolved tribunals. The administrative support is provided to these tribunals on behalf of Ministers by the Scottish Tribunals Service (which forms part of the Scottish Government). This will continue in the new structure. The long-term aim is for administrative support for tribunals to be merged with administrative support for courts. This is subject to a separate consultation exercise. To allow full and proper consideration of this proposal provision will not be made in the Tribunals Bill to effect a merger.

78. Some of the tribunals whose functions will transfer into the new structure have statutory authorisation to charge fees. For example, the Lands Tribunal for Scotland has the ability to charge fees under section 3(6) of the Land Tribunal Act 1949. The Homeowner Housing Panel can also recover costs which it has incurred in exercising its functions under the Property Factors (Scotland) Act 2011 by virtue of section 26 of that Act. The Bill therefore includes provision for the Scottish Tribunals to be able to charge fees.

79. The Bill places a duty on the President of the Scottish Tribunals to prepare an annual report for the Lord President covering the operation of tribunal business within the new structure. The report is required to be published and copied to the Scottish Ministers.
ALTERNATIVE APPROACHES

Structure

79. The Leggat report looked at a structure for the UK tribunal landscape which was implemented following the Tribunals Courts and Enforcement Act 2007 and has proven to work well. The Scottish Government considered this a good example and was the basis for the consultation on their proposals. This Bill creates a similar structure which would incorporate reserved tribunals easily should there be further devolution of tribunals in Scotland.

80. The report in 2008 by Lord Philip - Options for the Future Administration and Supervision of Tribunals in Scotland - provided five options to address the issues with the tribunals structure in Scotland. These were to:
   - retain the status quo;
   - put mechanisms in place to ensure better integration and co-operation between the UK Tribunals Service and wholly Scottish tribunals;
   - bring all Scottish tribunals within the remit of the existing UK Tribunals Service;
   - establish a new Scottish Tribunals Service to support all Scottish Tribunals; and
   - establish a new Scottish Tribunals Service to support both GB tribunals within Scotland and all Scottish tribunals.

81. All of the five options were considered and some of the recommendations have been adopted prior to the preparation of this Bill. However, the Philip report’s options were more about the supportive elements of the tribunals’ structure than the structure itself. One of the options taken forward was the establishment of the Scottish Tribunals Service in December 2010 to support devolved tribunals and those that were created by an act of the Scottish Parliament.

82. Negotiations have also taken place with the UK Government to transfer the responsibilities for administrative support and judicial leadership of reserved tribunals that sit in Scotland to the Scottish Ministers and the Lord President respectively, which broadly supports bullet point five above. These plans have been put on hold due to delays incurred at a UK level.

83. These recommendations formed part of the solution to address the fragmentation and complexity of the tribunal system as found by Lord Philip’s expert group, but it did not address all the issues. This Bill provides an opportunity to address the issues effectively by establishing a new structure for Scottish tribunals in legislation.

84. The creation of a new structure will reduce the complexity of the system, introduce consistency with the appointments process and provide a degree of standardisation across the structure as a whole. These issues were considered to be as appropriate and as necessary as providing an integrated administrative support service.
Including provisions in Judiciary and Courts (Scotland) Act 2008

85. Consideration was given to amending Section 2 (1) of the Judiciary and Courts Act 2008 in terms of revising the subsection to say that the Lord President would be the Head of the Scottish Judiciary and the Scottish Tribunals.

86. However, not all of the Lord President’s duties as head of the court judiciary are directly applicable to tribunals such as those around tribunal members training and provisions for review. For that reason it was decided that the Bill should reflect the more relevant provisions in the 2008 Act and create an overall more coherent package of provisions for tribunals in the Bill.

Upper Tribunal Scotland

87. As the volume of appeals in devolved tribunals is expected to be low consideration was given to allowing the appeal systems that currently exist to stay in place. This would have meant most appeals would either go to the Sheriff Court or the Court of Session.

88. Creating a new Upper Tribunal for Scotland takes tribunal business out of the courts and into a dedicated tribunal. This creates the ability to develop specialism and expertise in the tribunal and may be a more efficient and cost effective alternative to courts.

President of the Scottish Tribunals

89. Consideration was given to having the role of President of the Scottish Tribunals made in the same way as other judicial appointments, i.e. through JABS.

90. However, the role of President of the Scottish Tribunals is being created in recognition that the Lord President will be unable to undertake his proposed new duties unassisted. While it would have been entirely appropriate for the proposals to have allowed the Lord President to delegate his or her powers however he or she chose, the Bill ensures that there should be a specific position within the new structure with sufficient seniority to secure the proper distinction and separation of tribunals from the courts.

91. The President of the Scottish Tribunals will be exercising functions on behalf of the Lord President and in doing so, will be responsible for the judicial organisation of the proposed First-tier and Upper Tribunal. Since the membership of the Upper Tribunal will consist of judges of the Court of Session, sheriffs principal, sheriffs and Chamber Presidents, it is important that the individual undertaking the role has the appropriate seniority within the judicial hierarchy to manage the business within the structure on the Lord President’s behalf.

92. In creating the role of President of the Scottish Tribunals, the Scottish Ministers must not breach the guarantee of continued judicial independence contained in Section 1 of the Judiciary and Courts (Scotland) Act 2008. This is particularly applicable in relation to the need of the tribunal members to have the support necessary to enable them to carry out their functions. As such, it will be for the Lord President to assign a judge of the Court of Session as the President of the Scottish Tribunals.
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

93. The President of the Scottish Tribunals will ensure that tribunal business is distinct from courts, protecting tribunal specialism and providing a voice for tribunals in Scotland.

CONSULTATION

94. A public consultation on proposals for the Bill closed on 15 June 2012. Around 600 copies of the consultation paper were distributed and 86 responses received in total, 59 from organisations and 27 from individuals. Responses were received from a range of stakeholders with varying backgrounds including, the judiciary, the legal sector, local government, voluntary organisations and the medical profession. There was also extensive engagement with stakeholders during the consultation period. Four meetings were held across Scotland in Dumfries, Edinburgh, Glasgow and Inverness during the consultation process. These were attended by a range of people with an interest in tribunal reform including tribunal members, health care professionals, user representatives, support groups and local government services. The Scottish Government also hosted a specific event facilitated by the Mental Welfare Commission for stakeholders with an interest in the Mental Health Tribunal for Scotland.

95. The consultation set out the background for reform and asked 6 specific questions in relation to the Scottish Government’s proposals for tribunal reform. These questions were to elicit views on the development of component parts of the new structure. The consultation asked about reconsiderations and appeals; leadership; ability to hear cases; remuneration; the making of rules; and it asked a specific question on the how the proposals would affect those with protected characteristics.

96. The majority of consultation respondents and event participants supported reform of the tribunal structure as a whole. Respondents raised particular issues in relation to the proposed chamber structure, appointments system, membership of the Upper Tribunal and tribunals rules. However it was clear from some of the responses that there was a misunderstanding that the proposed new structure sought to take away the specialist ethos of the individual tribunals.

97. A significant number were in favour of the mental health tribunal for Scotland (MHTS) being in a single chamber on its own, although this was generally based on some misunderstanding about what being in a chamber meant in terms of appointments and ticketing within and across chambers.

98. The majority were in favour of judicial leadership becoming the responsibility of the Lord President and also, the creation of a new position, the President of the Scottish Tribunals, to assist him in his role.

99. While most respondents were in favour of appointments coming under JABS a number raised concerns that there would be generic appointments that would not address the specialist needs of individual tribunals. The consultation report clarified that the Bill would introduce the same standard minimum criteria for appointment where appropriate, for example by the

introduction of standard legal criteria for legal members. Individual appointments would still be made to specific jurisdictions maintaining the specialism of members recruited.

100. There were a number of views on how rules should be made in the new system ranging from the status quo, agreement with the proposal that the SCJC should propose new rules, to the establishment of a Tribunal Procedure Committee akin to what was provided for in the UK by virtue of the Tribunal, Courts and Enforcement Act 2007. The vast majority of respondents felt that Chamber Presidents, stakeholders and tribunal users should be included in the process.

101. The consultation report\textsuperscript{14}, published on 31 August 2012, provided more detail and clarified the policy intention on issues raised by respondents. The report can be found at: \url{http://www.scotland.gov.uk/publications/2012/08/1747}.

102. Since the government response was published in August 2012, there has been extensive follow-up meetings carried out with interested stakeholders to address concerns and explain the policy in more detail.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

103. The Bill’s provisions do not discriminate on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

104. The new Tribunals structure aims to develop a fairer more accessible and efficient structure for resolving disputes for all types of person, from across Scotland.

105. An Equality Impact Assessment will be published in relation to the Bill.

Human Rights

106. The establishment of the new Tribunals and the subsequent transfer of functions to them will have an effect on a person’s rights under Article 6 of the European Convention on Human Rights (right to a fair trial). The Scottish Government is of the view that the provisions of the Bill are compatible with the European Convention on Human Rights.

107. Article 6 will be engaged in most of the proceedings before the First-tier Tribunal and the Upper Tribunal and, therefore, requires that the proceedings be heard by an independent and impartial tribunal.

\textsuperscript{14} Scottish Government’s proposals for a new tribunal system in Scotland: Consultation Report: Scottish Government (2012) - \url{http://www.scotland.gov.uk/Publications/2012/08/1747}
108. The Scottish Government considers that the independence and impartiality of the Scottish Tribunals is secured through the following measures:

- the statutory duty contained in section 4 requiring the independence of the members of the Scottish Tribunals to be upheld;
- the process for appointing and selecting members of the Scottish Tribunals; and
- the security of tenure given to members of the Scottish Tribunals.

109. The practice and procedure adopted by the Scottish Tribunals will also need to comply with Article 6 in proceedings where it is engaged. Since the Scottish Tribunals will exercise a wide range of decision-making functions in a diverse range of subject-matters, the detail relating to procedure is left to subordinate legislation. The detail set out in the subordinate legislation will also have to ensure compatibility with Article 6 of the Convention.

Islands and Rural Communities

110. The Bill has no differential impact upon island or rural communities. The provisions of the Bill apply equally to all communities in Scotland.

Local Government

111. The Bill has no detrimental impact of local authorities.

Sustainable Development

112. The Bill will have no negative impact on sustainable development.

Business and Regulatory Impact Assessment

113. The Bill will have no impact on Scottish Business or the Third Sector, nor will it transfer any costs. Therefore, a Business and Regulatory Impact Assessment (BRIA) was not carried out in relation to the Bill.
PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders in relation to the Tribunals (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and the Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

3. In this memorandum, unless the context otherwise requires—

   “the First-tier Tribunal” means the First-tier Tribunal for Scotland to be established by section 1(1)(a) of the Bill;

   “listed tribunal” means a tribunal listed in schedule 1 to the Bill;

   “the Parliament” means the Scottish Parliament;

   “the Scottish Tribunals” means the First-tier Tribunal and the Upper Tribunal;

   “Tribunal Rules” means the Scottish Tribunal Rules made in accordance with section 62 of the Bill regulating the practice and procedure of the Scottish Tribunals; and

   “the Upper Tribunal” means the Upper Tribunal for Scotland to be established by section 1(1)(b) of the Bill.

Outline of Bill provisions

4. The Bill creates a new structure for tribunals dealing with devolved matters.
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

5. Part 1 makes provision for the establishment of the First-tier Tribunal and the Upper Tribunal (collectively known as the Scottish Tribunals). Part 1 also designates the Lord President of the Court of Session as Head of the Scottish Tribunals and creates a new office, the President of the Scottish Tribunals.

6. Part 2 makes provision for the composition of the Scottish Tribunals and their internal structure. The First-tier Tribunal is to be organised into chambers and the Upper Tribunal is to be organised into divisions.

7. Part 3 makes provision so that the functions and members of a tribunal listed in schedule 1 can be transferred-in to the Scottish Tribunals. The Bill allows for the functions of the listed tribunals to be transferred-in to either or both of the Scottish Tribunals. It is anticipated that the First-tier Tribunal will deal with cases in the first instance to which a general right of appeal will lie to the Upper Tribunal. The Bill does, however, allow for first instance functions to be transferred-in to the Upper Tribunal.

8. Part 4 contains more detail in relation to membership of the Scottish Tribunals. Schedules 3 to 6 deal with the appointment and assignment of members. Schedule 7 sets out the terms and conditions of membership including period in office, re-appointment, termination of appointment, disqualification from office, pensions and remuneration. Schedule 8 makes provision as to the training and fitness of members including the process for removing a member from office.

9. Part 5 makes provision as to the composition of the Scottish Tribunals when exercising their decision-making functions.

10. Part 6 enables both the First-tier Tribunal and the Upper Tribunal to review their own decisions and to correct or set-aside those decisions. It also provides for a general right to appeal against a decision of the First-tier Tribunal to the Upper Tribunal and against a decision of the Upper Tribunal to the Court of Session. Chapter 2 of Part 6 also enables the Court of Session to remit an application for judicial review to the Upper Tribunal for determination.

11. Chapters 1 and 2 of Part 7 make provision in respect of the practice and procedure to be followed in proceedings before the Scottish Tribunals. Chapter 3 of Part 7 makes provision for the charging of fees by the Scottish Tribunals as well as the duty of the Scottish Minister to ensure that the Scottish Tribunals are provided with the necessary property, services and personnel which are required for their proper operation, and reporting.

12. Part 8 contains general and ancillary provisions.

Rationale for subordinate legislation

13. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against—
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the need to allow detailed administrative and procedural arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

Delegated powers

14. The delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.

Section 19(2) – Chambers in the First-tier Tribunal

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<tr>
<th>Power conferred on:</th>
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<tr>
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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
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Provision

15. Section 19(2) confers a power on the Scottish Ministers, by regulations, to make provision for and in connection with the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal’s functions between those chambers.

Reason for taking power

16. The First-tier Tribunal will acquire functions from the listed tribunals through regulations made under section 27(2). Future enactments may also confer further functions on the First-tier Tribunal. The facility to organise the First-tier Tribunal into chambers will enable members with specialist expertise to be allocated to particular chambers and to sit on cases for which they are most qualified.

17. It is considered that the organisation of the First-tier Tribunal into chambers and the allocation of its functions among those chambers is best addressed through subordinate legislation for a number of reasons. Firstly, the functions which may be exercised by the First-tier Tribunal may vary over time and it is important not to set out a rigid chamber structure prior to it acquiring any of those functions. Secondly, it is not yet clear how the functions of the listed tribunals which are to be transferred-in to the First-tier Tribunal will fit together – there may be some overlapping functions which can be grouped together but there may be some functions for which it is important that they are dealt with in separate chambers. The Scottish Government, for example, intends to exercise the regulation-making power so that the functions of the Mental Health Tribunal for Scotland are initially allocated to a separate and individual chamber. Thirdly, it will also be important to retain the facility to alter the chamber structure to meet the varying demands that the Tribunal faces over time.
18. It is considered that the Scottish Ministers are the most appropriate persons to make provision regarding the chamber structure of the First-tier Tribunal and the allocation of its functions among those chambers but the Bill also recognises that it may be more appropriate for the Lord President or Tribunal Rules (which are formulated through a process which is independent of the Scottish Ministers) to determine these matters. Section 10(1), therefore, enables the regulations to make provision authorising the Lord President, or relying on Tribunal Rules, to determine certain of these matters.

19. There are a number of limitations and controls on the regulation-making power. Section 19(1) requires the chambers to be organised having regard to the different subject-matters falling within the jurisdiction of the First-tier Tribunal as well as any other factors which are relevant to the exercise of the Tribunal’s functions. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 19(2).

20. Paragraph 7(1) of schedule 9 makes transitional provision so that the First-tier Tribunal need not be organised into chambers or may have only one chamber for such period until it has acquired sufficient functions so as to merit this.

Choice of procedure

21. This power has a potentially significant impact on the way in which the First-tier Tribunal will operate and how its functions will be exercised. It is an area which is likely to be of concern to the members and users of the listed tribunals. This is reflected in the requirement for consultation in section 11(1). It is also considered appropriate that any regulations made using this power be subject to the affirmative procedure in order to ensure a proper level of parliamentary scrutiny.

Section 22(2) – Divisions of the Upper Tribunal

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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
</tr>
</tbody>
</table>

Provision

22. Section 22(1) provides for the Upper Tribunal to be organised into a number of divisions. Section 22(2) confers a power on the Scottish Ministers, by regulations, to make provision for and in connection with the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal’s functions between those divisions.

Reason for taking power

23. The Upper Tribunal will have the functions of disposing of appeals from decisions of the First-tier Tribunal under section 41. Functions of the listed tribunals may also be transferred-in to the Upper Tribunal through regulations made under section 27(2). Future enactments may also confer further functions on the Upper Tribunal. The facility to organise the Upper Tribunal into divisions will enable members with specialist expertise to be allocated to particular divisions and to sit on cases for which they are most qualified.
24. It is considered that the organisation of the Upper Tribunal into divisions and the allocation of its functions among those divisions is best addressed through subordinate legislation for a number of reasons. Firstly, the functions which may be exercised by the Upper Tribunal may vary over time and it is important not to set out a rigid chamber structure prior to it acquiring any of those functions. Secondly, it is not yet clear how the functions of the listed tribunals which will be transferred to the Upper Tribunal will fit together—there may be some overlapping functions which can be grouped together but there may be some functions for which it is important that they are dealt with in separate divisions. Thirdly, it will also be important to retain the facility to alter the structure to meet the varying demands that the Tribunal faces over time.

25. It is considered that the Scottish Ministers are the most appropriate persons to make provision regarding the internal structure of the Upper Tribunal and the allocation of its functions among its divisions but the Bill also recognises that it may be more appropriate for the Lord President or Tribunal Rules (which are formulated through a process which is independent of the Scottish Ministers) to determine these matters. Section 10(1), therefore, enables the regulations to make provision authorising the Lord President, or relying on Tribunal Rules, to determine certain of these matters.

26. There are a number of limitations and controls on the regulation-making power. Section 22(1) requires the divisions to be organised having regard to the different subject-matters falling within the jurisdiction of the Upper Tribunal as well as any other factors which are relevant to the exercise of the Tribunal’s functions. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 22(2).

27. Paragraph 7(2) of schedule 9 makes transitional provision so that the Upper Tribunal need not be organised into divisions or may have only one division for such period until it has acquired sufficient functions so as to merit this.

Choice of procedure

28. This power has a potentially significant impact on the way in which the Upper Tribunal will operate and how its functions will be exercised. It is an area which is likely to be of concern to the members and users of the listed tribunals. This is reflected in the requirement for consultation in section 11(1). It is also considered appropriate that any regulations made using this power be subject to the affirmative procedure in order to ensure a proper level of parliamentary scrutiny.
Section 26(2) – Modification of listed tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

29. Section 26(2) confers the power on the Scottish Ministers, by regulations, to modify the list of tribunals set out in Part 1 of schedule 1 and the further specification set out in Part 2 of that schedule. Part 1 of schedule 1 sets out a list of tribunals from which the functions and members can be transferred into the Scottish Tribunals by virtue of regulations made under section 27(2) and paragraph 1 of schedule 2. Part 2 of schedule 1 makes further specification to assist with the identification of the tribunal and the functions that may be transferred.

Reason for taking power

30. This power has been taken as it may be necessary or desirable to add a tribunal to, or remove one from, the list, or adjust a specification, in view of the manner in which the Scottish Tribunals grow and evolve over time.

31. Subsections (3) and (4) of section 26 restrict the regulation-making power so that a body, office-holder or individual may only be added to the list if it, he or she is established by or under an enactment and is exercising decision-making functions in the manner of a tribunal. Subsection (5) prevents the transfer of any functions from a court or tribunals assessing the fitness or conduct of members of the courts judiciary or members of the Scottish Tribunals.

Choice of procedure

32. The power involves the amendment of primary legislation in a way which will allow for the narrowing and extension of the scope of the Scottish Tribunals. It is, therefore, considered appropriate that the regulation-making power be subject to the affirmative procedure.

Section 27(2) – Transfer-in of functions of the listed tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

33. Section 27(2) confers the power on the Scottish Ministers, by regulations, to provide for the transfer of some or all of the functions from a listed tribunal to the Scottish Tribunals. The regulations may provide for the functions of the listed tribunal to be transferred to the First-tier Tribunal, the Upper Tribunal or both Tribunals.

34. Where regulations made under section 27(2) provide for the functions of a listed tribunal to be transferred to both of the Scottish Tribunals, the regulations may make provision transferring certain functions to one tribunal and certain functions to the other. They can also...
provide for a particular function to be transferred to both Tribunals but, where they do so, subsections (3) and (5) requires the regulations to make provision so that it can be ascertained when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules or by the President of Tribunals.

Reason for taking power

35. This power has been taken as it is not considered necessary or appropriate for the Bill to make provision effecting the transfer of functions from the listed tribunals to the Scottish Tribunals. Legislative provision effecting the transfer of functions will be of a detailed and technical nature and will involve the modification of enactments conferring functions on the listed tribunal from which the functions are being transferred-in. It is considered that this is best effected by subordinate legislation.

Choice of procedure

36. The exercise of this regulation-making power will involve selecting which of the Scottish Tribunals is to exercise the functions of a listed tribunal which are being transferred-in and will likely require the modification of the primary legislation establishing and conferring functions on the listed tribunal. It is, therefore, considered appropriate that the regulation-making power be subject to the affirmative procedure.

Section 27(4) – Transfer of functions between the Scottish Tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

37. Section 27(4) confers the power on the Scottish Ministers, by regulations, to provide for a redistribution of those functions which have been transferred-in from the listed tribunals between the Scottish Tribunals.

38. They can also provide for a particular function to be exercisable by both Tribunals but, where they do so, the regulations must make provision so that it can be ascertained when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules or by the President of Tribunals.

Reason for taking power

39. Following the transfer of functions from a listed tribunal to the Scottish Tribunals, it may become apparent that a function which was transferred to the First-tier Tribunal could be more effectively and efficiently dealt with by the Upper Tribunal or, conversely, a function which was transferred to the Upper Tribunal could be more effectively and efficiently dealt with by the First-tier Tribunal. Section 27(4) would enable this further transfer of functions to be effected by regulations without recourse to primary legislation.
Choice of procedure

40. Although this power may involve the amendment of primary legislation, it would only do so consequentially in connection with the transfer of functions between the Scottish Tribunals or to give full effect to the transfer of functions. It is, therefore, considered appropriate that the regulation-making power be subject to the negative procedure.

Section 35(1) – Composition of First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

41. Section 35(1) confers the power on the Scottish Ministers, by regulations, to make provision for determining the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. The regulations may make provision for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (4)).

42. The regulations will only set out the requirements for the composition of the First-tier Tribunal and it will be for the Chamber President of the chamber to which a case is allocated to choose the actual members – although the Chamber President must choose the members in accordance with the regulations (section 34).

Reason for taking power

43. At present, the various listed tribunals sit in accordance with the legislation governing their constitution and procedure in a wide range of formats with a varying number and composition of members. It is likely that the First-tier Tribunal will come to exercise a large number of those functions and provision will have to be made as to the composition of the First-tier Tribunal when convened to exercise these functions. Different compositions will be appropriate in respect of different functions and it is, therefore, considered appropriate for provision to be made in this respect by subordinate legislation.

44. A key part of the regulation-making power is also to ensure that ordinary members with the appropriate qualifications, experience and training are able and required to sit on the cases where those qualifications, experience and training are necessary or helpful.

45. The aim of the policy is to ensure that when convened to hear a case, the First-tier Tribunal will be composed of an appropriate number of members with the appropriate level of experience and expertise. This will facilitate an effective and efficient use of the members of the First-tier Tribunal. It will also allow flexibility so as to ensure that the composition of the First-tier Tribunal can vary in accordance with the wide range of functions that it is expected to be exercising.
46. In order to ensure flexibility, section 10(2) enables regulations made under section 35(1) to delegate authority to the President of Tribunals to determine the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction or to include provision relying on the effect of Tribunal Rules. This will enable the Scottish Ministers to assess whether it is more appropriate for certain matters to be determined by the President of Tribunals or in Tribunal Rules.

47. By virtue of section 11(2), the Scottish Ministers must also consult the President of Tribunals before making regulations under section 35(1).

**Choice of procedure**

48. The determination of the composition of the First-tier Tribunal when convened to exercise its functions is a power which is key to ensuring that the functions transferred-in from the various listed tribunals are exercised by the First-tier Tribunal in an appropriate manner. For that reason, it is, therefore, considered that the regulation-making power should be subject to the affirmative procedure.

**Section 37(1) – Composition of the Upper Tribunal**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** regulations made by Scottish statutory instrument
- **Parliamentary procedure:** affirmative procedure

**Provision**

49. Section 37(1) confers the power on the Scottish Ministers, by regulations, to make provision for determining the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction. The regulations may make provision for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (6)).

50. The regulations will only set out the requirements for the composition of the Upper Tribunal and it will be for the Vice-President of the division to which a case is allocated to choose the actual members – although the Vice-President must choose the members in accordance with the regulations (section 36).

**Reason for taking power**

51. It is likely that the Upper Tribunal will come to exercise a number of functions of the listed tribunals as well as the function of hearing appeals from decisions of the First-tier Tribunal under section 41. Provision must, therefore, be made as to the composition of the Upper Tribunal when convened to exercise these functions. Different compositions will be appropriate in respect of different functions and it is, therefore, considered appropriate for provision to be made in this respect by subordinate legislation.
52. A key part of the regulation-making power is also to ensure that ordinary members with the appropriate qualifications, experience and training are able and required to sit on the cases where those qualifications, experience and training are necessary or helpful.

53. The aim of the policy will be to ensure that when convened to hear a case, the Upper Tribunal will be composed of an appropriate number of members with the appropriate level of experience and expertise. This will facilitate an effective and efficient use of the members of the Upper Tribunal. It will also allow flexibility so as to ensure that the composition of the Upper Tribunal can vary in accordance with the wide range of functions that it is expected to be exercising.

54. In order to ensure flexibility, section 10(2) enables regulations made under section 37(1) to delegate authority to the President of Tribunals to determine the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction or to include provision relying on the effect of Tribunal Rules. This will enable the Scottish Ministers to assess whether it is more appropriate for certain matters to be determined by the President of Tribunals or in Tribunal Rules.

55. By virtue of section 11(2), the Scottish Ministers must also consult the President of Tribunals before making regulations under section 37(1).

**Choice of procedure**

56. The determination of the composition of the Upper Tribunal when convened to exercise its functions is a power which is key to ensuring that the Tribunals functions are exercised by the Upper Tribunal in an appropriate manner. For that reason, it is, therefore, considered that the regulation-making power should be subject to the affirmative procedure.

**Section 38(3)(b) – Review of decisions**

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<thead>
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<tr>
<td>Power exercisable by:</td>
<td>act of sederunt made by Scottish statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
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57. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

**Section 48(2) – Other appeal rights**

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<tr>
<td>Parliamentary procedure:</td>
<td>negative procedure</td>
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</table>

**Provision**

58. Section 48(1) provides that a decision of the Scottish Tribunals against which there is a right of appeal under another enactment is an excluded decision to which the provisions for review and appeal set out in Chapter 1 of Part 6 do not apply.
Section 48(2) confers a power on the Scottish Ministers, by regulations, to make exceptions to this general rule.

Reason for taking power

While section 41 creates a general right of appeal from a decision of the First-tier Tribunal to the Upper Tribunal and section 43 creates a general right of appeal from a decision of the Upper Tribunal to the Court of Session, it is considered that it will not always be appropriate for these general rights of appeal to apply. The legislation establishing and regulating the procedure of a listed tribunal may, for example, provide for a right to appeal the decision of that tribunal to a sheriff or the Court of Session. When the functions of the listed tribunal are transferred-in to the Scottish Tribunals, it will be open to the Scottish Ministers to leave the previous rights of appeal in place or to remove these and allow the general rights of appeal set out in the Bill to apply. Where the Scottish Ministers consider it appropriate to leave existing rights of appeal in place, section 48(2) will allow the Scottish Ministers, by regulations, to make exceptions so that the general rights of review and appeal set out in the Bill will still be able to apply to certain matters.

It is not possible to make provision about these matters until such time as the relevant functions of the listed tribunals are transferred-in to the Scottish Tribunals which makes the use of subordinate legislation appropriate.

Choice of procedure

Since any regulations made under section 48(2) will simply be enabling the application of the general rights of review and appeal set out in the Bill, it is considered that the regulation-making power should be subject to the negative procedure.

Section 49(1) – Position on transfer-in

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

Section 49(1) confers a power on the Scottish Ministers, by regulations, to specify certain decision-making functions of the Scottish Tribunals in respect of which any decision made by the Tribunals will be regarded as an excluded decision and will not, therefore, be subject to the general rights of review and appeal set out in Chapter 1 of Part 6.

The decision-making functions of the Scottish Tribunals which may be specified in regulations are limited to those which are transferred-in from a listed tribunal and in respect of which, immediately before the transfer of the functions, there was no right of appeal from the decision of the listed tribunal.
Reason for taking power

65. Certain decisions of the listed tribunals are not currently subject to any right of appeal. Where these decision-making functions are transferred to the Scottish Tribunals, it is considered that it may be appropriate to exclude the general rights of review and appeal set out in the Bill. These functions would require to be specified in regulations made under section 49(1) in order that the general rights of review and appeal set out in the Bill are excluded.

66. It is not possible to make provision about these matters until such time as the relevant functions of the listed tribunals are transferred-in to the Scottish Tribunals which makes the use of subordinate legislation appropriate.

Choice of procedure

67. Since regulations made under section 49(1) may only preserve the position which existed prior to the transfer-in of functions, it is considered that the regulation-making power should be subject to the negative procedure.

Section 50(1) – Time limits for applying for permission to appeal

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative procedure

Provision

68. In order to appeal a decision of the First-tier Tribunal to the Upper Tribunal or a decision of the Upper Tribunal to the Court of Session, permission is required under section 41(3) or 43(3) respectively. Section 50(1) confers a power on the Scottish Ministers, by regulations, to specify time limits within which permission to appeal a decision of the Scottish Tribunals must be sought.

Reason for taking power

69. The time limit for applying for permission to appeal is a procedural matter and it is, therefore, considered, to be more appropriate to set out the requirements in subordinate legislation rather than on the face of the Bill. It is, however, considered to be of such importance that it should be set out in regulations made by the Scottish Ministers rather than left to Tribunal Rules.

Choice of procedure

70. Given that the regulation-making power is dealing with procedural matters, it is considered that the regulation-making power should be subject to the negative procedure.
Section 51(2) – Specifying persons who are to be regarded as a party to a case

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

71. Section 51(2) confers a power on the Scottish Ministers, by regulations, to make provision so that persons falling within a specified description can be regarded as a party to a case for the purposes of sections 38, 41 and 43. Under those provisions it is only a party to a case who can apply for a review of a decision of the Scottish Tribunals or appeal a decision of a Tribunal.

Reason for taking power

72. Certain persons or bodies may have an interest in a decision of the Scottish Tribunals but be unable to seek a review or appeal the decision if they were not actually a party to a case. It is, therefore, considered to be prudent to allow subordinate legislation to extend the reference to a party to a case to include persons falling within a specified description. This, for example, may allow certain interest groups to seek the review of, or appeal, a Tribunal decision. Until the full extent of the functions of the Scottish Tribunals are known, it is considered to be appropriate for these matters to be set out in subordinate legislation rather than on the face of the Bill.

Choice of procedure

73. Given that the regulation-making power is dealing with procedural matters, it is considered that the regulation-making power should be subject to the negative procedure.

Section 52(4) – Specification of categories of petition for judicial review which may be remitted to the Upper Tribunal

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

74. Section 52 makes provision so that the Court of Session may, by order of the Court, remit a petition for judicial review to the Upper Tribunal for determination. Under subsection (4) a petition may only be remitted if it falls within a category specified by an act of sederunt made by the Court of Session. Section 52(4), therefore, confers a power on the Court of Session, by act of sederunt, to specify the categories of petitions for judicial review which are appropriate to be remitted to the Upper Tribunal for determination.
75. The membership of the Upper Tribunal and the expertise which it is expected to acquire in relation to the matters which fall within its jurisdiction may make it an appropriate body to determine petitions for judicial review which relate to a subject-matter within the Tribunal’s expertise. Since the Upper Tribunal will be a new body established by the Bill and will only acquire functions, members and expertise over time it is not considered appropriate to set out the categories of petition which should be capable of being remitted to it from the Court of Session on the face of the Bill.

76. It is considered that the Court of Session will be in the best position to assess which categories of petition will be suitable to be remitted to the Upper Tribunal and which categories of petition the Upper Tribunal will have the expertise to determine.

77. Even if a petition falls within a category specified in an act of sederunt made under section 52(4), the Court may only remit the petition to the Upper Tribunal if, in accordance with section 52(2), it considers that it is appropriate to do so having regard to the functions and expertise of the Upper Tribunal in relation to the subject-matter of the petition.

Choice of procedure

78. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 54(2) – Additional matters in relation to judicial review

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

79. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 56(2) – Venue for hearings

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

80. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).
Section 57(1) – Conduct of cases

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

81. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 58(1) – Enforcement of decisions

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

82. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 59 – Award of expenses

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

83. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 60(1) – Conferral of additional powers

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

84. Section 60(1) confers a power on the Scottish Ministers, by regulations, to confer such additional powers on the Scottish Tribunals as are necessary or expedient for the proper exercise of their functions.

Reason for taking power

85. The purpose behind this regulation-making power is to ensure that the Scottish Tribunals will have all the powers and functions which are necessary or expedient in order to properly
exercise the functions transferred-in from the listed tribunals or conferred on them by or under the Bill.

86. Since the Scottish Tribunals will be acquiring functions that are not set out in the Bill, it is appreciated that the Bill may not have conferred all the necessary powers on the Scottish Tribunals to exercise all the functions that will be transferred. It is, therefore, considered to be expedient to include a regulation-making power which will enable additional powers to be conferred on the Scottish Tribunals to ensure the proper exercise of their functions.

87. The regulation-making power may only be exercised so as to confer those additional powers on the Scottish Tribunals which are necessary or expedient for the proper exercise of their functions. The Scottish Ministers must obtain the approval of the Lord President before exercising the regulation-making power.

88. The regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules.

Choice of procedure

89. Given that the regulation-making power will be able to confer additional powers on the Scottish Tribunals to those that are set out in the Bill, it is considered appropriate that they are subject to the affirmative procedure.

Section 61(1) – Application of enactments

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<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tr>
<td>Power exercisable by:</td>
<td>regulations made by Scottish statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
</tr>
</tbody>
</table>

Provision

90. Section 61(1) confers a power on the Scottish Ministers, by regulations, to modify the application of any enactment so far as they consider is necessary or expedient for the purposes of making or giving effect to Tribunal Rules, or giving effect to Part 7 of the Bill.

Reason for taking power

91. The functions of the listed tribunals are set out in a wide array of enactments and once these are transferred-in to the Scottish Tribunals, it may be necessary to modify these functions in order that consistent rules of procedure and practice can be made for the Scottish Tribunals.

92. The regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules.
Choice of procedure

93. Given that the regulation-making power will be able to modify the functions of the Scottish Tribunals, it is considered appropriate that they are subject to the affirmative procedure.

Section 62(1) – Scottish Tribunal Rules

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

94. Section 62 confers a power on the Court of Session, by act of sederunt, to make rules (to be known as Scottish Tribunal Rules) regulating the practice and procedure to be followed in proceedings in the Scottish Tribunals.

95. Sections 63 and 64 make further provision about the extent to which Tribunal Rules may make provision regulating the practice and procedure to be followed in proceedings in the Scottish Tribunals. Section 63 provides that Tribunal Rules may make provision as to the exercise of functions by the members of the Scottish Tribunals as well relying on the effect of practice directions issued under section 68. Section 64 provides that Tribunal Rules may make different provision for different purposes including different provision for different Tribunals, different chambers or divisions or different types of proceedings. It also provides that the generality of section 62(1) is not limited by the specific provisions in the Bill which set out the matters for which Tribunal Rules may make provision.

96. The following provisions make specific provision as to the matters for which Tribunal Rules may make provision:

- section 10(1)(b) enables regulations made under sections 19(2) (regarding the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal’s functions among those chambers) and 22(2) (regarding the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal’s functions among those divisions) to include provision relying on the effect of Tribunal Rules;

- section 10(2)(b) enables regulations made under sections 35(1) (regarding the composition of the First-tier Tribunal when convened to decide a matter falling within its jurisdiction) and 37(1) (regarding the composition of the Upper Tribunal when convened to decide a matter falling within its jurisdiction) to include provision relying on the effect of Tribunal Rules;

- section 27(4) and (5)(a) enables regulations made under section 27(2) or (4) which provide for a transfer of the functions of a listed tribunal to both the First-tier Tribunal and the Upper Tribunal to provide for the question as to which of the Tribunals is to exercise a particular function to be determined in accordance with Tribunal Rules;
This document relates to the Tribunals (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 8 May 2013

- section 38(3) enables Tribunal Rules to make provision excluding other decisions of the Scottish Tribunals from being reviewed under section 38 or otherwise restricting the availability of a review under that section;
- section 54(2) enables Tribunal Rules to make further provision about the exercise by the Upper Tribunal of any functions it has in relation to a petition for judicial review remitted to it under section 52(2);
- section 56(2) enables Tribunal Rules to make provision regarding the venue for hearings;
- section 57(1) enables Tribunal Rules to make further provision in respect of the conduct of cases before the Scottish Tribunals so as to ensure that the Scottish Tribunals have the necessary powers, rights, privileges and authority regarding such things as the attendance or examination of witnesses, the production of evidence and the preparation of reports;
- section 58(1) enables Tribunal Rules to provide for the means by which an order of the Scottish Tribunals giving effect to a decision is to be enforced;
- section 59(1) provides that the Scottish Tribunals may only award expenses in a case where this is provided for in Tribunal Rules;
- section 65(1) enables Tribunal Rules to make provision for the purpose of proceedings in a case before the Scottish Tribunals including as to the form and manner in which a case is to be brought, the withdrawal of a case, and time limits for making a referral;
- section 66(1) enables Tribunal Rules to make provision about hearings including as to when matters can be dealt without a hearing, whether a hearing is to be held in private or public, appearance and representation at hearings, notice of hearing, adjournment with a view to resolution and the imposition of reporting restrictions;
- section 67(1) enables Tribunal Rules to make provision about evidence given before the Scottish Tribunals including as to the administering of oaths and presumptions to apply and about their decisions (for example, how they are recorded and published).

Reason for taking power

97. Rules governing the practice and procedure to be followed in proceedings in the Scottish Tribunals relate to technical procedural matters which will be detailed, will vary according to chambers, divisions or subject-matters and will require to be updated regularly as the Scottish Tribunals acquire functions. It is not, therefore, appropriate to set out these matters on the face of the Bill.

98. The aim of the Bill is for the rules governing the practice and procedure to be followed in proceedings in the Scottish Tribunals to be framed independently of the executive. It is, therefore, considered that it is appropriate for the Tribunal Rules to be made by the Court of Session (thereby ensuring independence from the executive) by act of sederunt (thereby ensuring transparency).
99. Paragraphs 2(2) and 4(2) of schedule 9 do, however, enable the Scottish Ministers to make transitional arrangements, by regulations, in relation to Tribunal Rules. See the commentary on those provisions.

Choice of procedure

100. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 65(1) – Proceedings and steps

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

101. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 66(1) – Hearings in cases

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

102. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 67(1) – Evidence and decisions

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

103. See the commentary on the subordinate legislation-making powers contained in section 62(1) (Scottish Tribunal Rules).

Section 70(1) – Tribunal fees

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

104. Section 70(1) confers a power on the Scottish Ministers, by regulations, to make provision for the Scottish Tribunals to charge reasonable fees in respect of any matter with which they deal.
Reason for taking power

105. Some of the listed tribunals currently charge fees in respect of the exercise of their decision-making functions while others do not. The general rule will be that the Scottish Tribunals cannot charge fees in respect of any matter unless regulations made under section 70(1) authorise them to do so. This provision is made as it is recognised that it will be appropriate, in relation to certain matters, for the Scottish Tribunals to charge reasonable fees.

106. It is not possible to make provision about these matters until such time as the relevant functions of the listed tribunals are transferred to the Scottish Tribunals which makes the use of subordinate legislation appropriate. Any fees charged are likely to vary over time which, again, makes the use of subordinate legislation appropriate so that the fees can be updated without recourse to primary legislation.

107. It is considered that the Scottish Ministers are the appropriate persons to make the provision but they must consult the Lord President before doing so.

Choice of procedure

108. It is considered appropriate that the regulation-making power is subject to the negative procedure.

Section 74(1) – Ancillary regulations

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative/negative procedure

Provision

109. Section 74(1) confers a power on the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill.

Reason for taking power

110. As with any new body of law, the Bill may give rise to a need for a range of ancillary regulations.

111. The power to make ancillary regulations is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, with the Bill creating a new tribunal structure to which the functions and members of existing tribunals can be transferred, it is possible that unforeseen issues will arise which require further provision to be made or the further modification of the existing law. This power would allow such provision to be made without the need to make further primary legislation.

112. The Bill already includes a number of consequential modifications to related legislation (see Part 2 of schedule 9) as well as transitional provisions (see Part 1 of schedule 9) but the power would allow the Scottish Ministers to make further changes should there be any

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unforeseen issues. It may, however, be that the need for further provision is necessary in order to fully and properly implement the Bill’s provisions. The Scottish Government considers that the regulation-making power is necessary to allow for this flexibility, especially in light of previous operational experience. Without this power, it may be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Parliament or the Scottish Government.

113. The power, while potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, or in connection with, the Bill.

Choice of procedure

114. Any regulations made under section 74 which textually amend any Act are subject to the affirmative procedure. Where such regulations do not seek to textually amend any Act, it is considered that negative procedure provides an appropriate degree of scrutiny.

Section 77(2) – Commencement of the Bill

<table>
<thead>
<tr>
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<tr>
<td>Power exercisable by:</td>
<td>order made by Scottish statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>laid no procedure</td>
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</tbody>
</table>

Provision

115. Section 77(2) confers a power on the Scottish Ministers, by order, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 77(3) provides that such an order may include transitional, transitory or saving provision. It is not unusual to allow for such provision in conjunction with a power to make commence the provisions of a Bill.

Reason for taking power

116. It is considered appropriate for the substance provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

117. As is now usual for commencement orders, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies.

Schedule 2, paragraph 1(1) – Transfer-in of members

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<td>Parliamentary procedure:</td>
<td>negative procedure</td>
</tr>
</tbody>
</table>
Provision

118. Paragraph 1(1) of schedule 2 confers a power on the Scottish Ministers, by regulations to provide for the transfer of the members of the listed tribunals to positions in the Scottish Tribunals.

Reason for taking power

119. Where the functions of a listed tribunal are transferred-in to the Scottish Tribunals it is the intention that all of the members of that tribunal will also transfer-in. There may, however, be instances where the functions of a listed tribunal are transferred-in to the Scottish Tribunals in a piecemeal fashion and consequently, it will also be necessary, to allow for the members to transfer-in in a similar fashion.

120. Since the functions of a listed tribunal are to be transferred-in by subordinate legislation, it is also logical for the transfer-in of members to be effected by subordinate legislation.

Choice of procedure

121. It is considered that the negative procedure gives an appropriate degree of scrutiny in relation to the exercise of the regulation-making power contained in paragraph 1(1) of schedule 2. The transfer-in of members to positions in the Scottish Tribunals does not require the amendment of primary legislation.

Schedule 3, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

122. Paragraph 1(2) of schedule 3 confers a power on the Scottish Ministers, by regulations, to prescribe the criteria by which persons will be eligible to be appointed as ordinary members of the First-tier Tribunal.

Reason for taking power

123. The First-tier Tribunal will require ordinary members with a diverse range of qualifications, experience and training depending on the nature of the functions that it is exercising. It will only become apparent as the functions of the listed tribunals are transferred-in to the First-tier Tribunal what types of ordinary member must be appointed. It is anticipated that the ordinary members will include persons from a number of professions (such as medicine, teaching and surveying) as well as other lay members.

124. It is considered that the detail as to the qualifications, experience and training necessary to be appointed as an ordinary member of the First-tier Tribunal is better set out in regulations than on the face of the Bill for reasons of flexibility.
Choice of procedure

125. It is considered that the negative procedure gives an appropriate degree of scrutiny in relation to the exercise of the regulation-making power contained in paragraph 1(2) of schedule 3.

Schedule 3, paragraphs 5(2) and 7(1) and (2) – Further provision about the eligibility of legal members of the First-tier Tribunal

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</table>

Provision

126. Paragraph 5(2) of schedule 3 confers a power on the Scottish Ministers, by regulations to specify further criteria beyond that set out in paragraph 5(1) of that schedule which will enable a person to qualify as a legal member of the First-tier Tribunal.

127. The regulation-making power in paragraph 5(2) of schedule 3 is informed by paragraph 6 of that schedule. Paragraph 6(2) enables those regulations to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have subsequently engaged in another law-related activity that may make them suitable to appointed as a legal member of the First-tier Tribunal. Paragraph 6(3) also enables those regulations to make provision in relation to persons who are not solicitors, advocates or barristers but have engaged in a law-related activity through which they have acquired experience in law which may make them suitable to be appointed as a legal member of the First-tier Tribunal.

128. Paragraph 7(1) of schedule 3 confers a power on the Scottish Ministers, by regulations to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the First-tier Tribunal including the calculation of the 5 year qualification period, the effect of debarment from practice and the criteria and nature of other experiences in law.

129. Paragraph 7(2) of schedule 3 confers a power on the Scottish Ministers, by regulations, to modify the list of activities set out in paragraph 6(4) of that schedule which may be used to assess whether a person has acquired experience in law which would make that person suitable for appointment as a legal member of the First-tier Tribunal.

Reason for taking power

130. The Scottish Government considers that it is appropriate to set out the core eligibility criteria by which a person will qualify to be appointed as a legal member of the First-tier Tribunal on the face of the Bill. That is, through practising as a solicitor or advocate in Scotland or as a solicitor or barrister in England and Wales or Northern Ireland and having practised as such for a period of not less than 5 years.

131. The Scottish Government recognises, however, that it may be, or may become, appropriate for persons who have formerly practised as solicitors, advocates or barristers and...
who have subsequently engaged in another legal activity or for persons who are not solicitors, advocates or barristers but have engaged in another legal activity to be eligible for appointment as legal members of the First-tier Tribunal. The regulation-making power in paragraph 5(2) of schedule 3 would enable the Scottish Ministers to make regulations enabling such persons to be eligible for appointment as such. It, therefore, gives a degree of flexibility so that the eligibility criteria can be adjusted to recognise legal qualifications and experience other than that gained by solicitors, advocates and barristers. The power is not, however, unlimited and is informed by paragraphs 6 and 7 of that schedule which set out the various matters on which those regulations may make provision. The regulation-making power in paragraph 5(2) of schedule 3 is, itself, augmented by the regulation-making powers contained in paragraph 7(1) and (2).

Choice of procedure

132. It is considered that the negative procedure gives the appropriate degree of scrutiny. Even though paragraph 7(2) of schedule 3 enables the modification of the list of activities set out in paragraph 6(4) of that schedule, the fact that those activities must amount to a suitably attributable experience in law restricts the extent of the power and it is considered that the negative procedure will, therefore, give the appropriate degree of scrutiny.

Schedule 5, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the Upper Tribunal

<table>
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<tr>
<td>Parliamentary procedure:</td>
<td>negative procedure</td>
</tr>
</tbody>
</table>

Provision

133. Paragraph 1(2) of schedule 5 confers a power on the Scottish Ministers, by regulations, to prescribe the criteria by which persons will be eligible to be appointed as ordinary members of the Upper Tribunal.

Reason for taking power

134. The Upper Tribunal may require ordinary members with a diverse range of qualifications, experience and training depending on the nature of the functions that it is exercising. It will only become apparent as the functions of the listed tribunals are transferred-in to the First-tier Tribunal what types of ordinary member must be appointed. It is anticipated that the ordinary members will include persons from a number of professions (such as medicine, teaching and surveying) as well as other lay members.

135. It is considered that it is appropriate to leave the detail as to the qualifications, experience and training necessary to be appointed as an ordinary member of the Upper Tribunal is better set out in regulations than on the face of the Bill for reasons of flexibility.
Choice of procedure

136. It is considered that the negative procedure gives an appropriate degree of scrutiny in relation to the exercise of the regulation-making power contained in paragraph 1(2) of schedule 5.

Schedule 5, paragraphs 5(2) and 7(1) and (2) – Further provision about the eligibility of legal members of the Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

137. Paragraph 5(2) of schedule 5 confers a power on the Scottish Ministers, by regulations to specify further criteria beyond that set out in paragraph 5(1) of that schedule which will enable a person to qualify as a legal member of the Upper Tribunal.

138. The regulation-making power in paragraph 5(2) of schedule 5 is informed by paragraph 6 of that schedule. Paragraph 6(2) enables those regulations to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have subsequently engaged in another law-related activity that may make them suitable to be appointed as a legal member of the Upper Tribunal. Paragraph 6(3) also enables those regulations to make provision in relation to persons who are not solicitors, advocates or barristers but have engaged in a law-related activity through which they have acquired experience in law which may make them suitable to be appointed as a legal member of the Upper Tribunal.

139. Paragraph 7(1) of schedule 5 confers a power on the Scottish Ministers, by regulations to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the Upper Tribunal including the calculation of the 7 year qualification period, the effect of debarment from practice and the criteria and nature of other experiences in law.

140. Paragraph 7(2) of schedule 5 confers a power on the Scottish Ministers, by regulations, to modify the list of activities set out in paragraph 6(4) of that schedule which may be used to assess whether a person has acquired experience in law which would make that person suitable for appointment as a legal member of the Upper Tribunal.

Reason for taking power

141. The Scottish Government consider that it is appropriate to set out the core eligibility criteria by which a person will qualify to be appointed as a legal member of the Upper Tribunal on the face of the Bill. That is, through practising as a solicitor or advocate in Scotland or as a solicitor or barrister in England and Wales or Northern Ireland and having practised as such for a period of not less than 7 years.

142. The Scottish Government recognises, however, that it may be, or may become, appropriate for persons who have formerly practised as solicitors, advocates or barristers and
who have subsequently engaged in another legal activity or for persons who are not solicitors, advocates or barristers but have engaged in another legal activity to be eligible for appointment as legal members of the Upper Tribunal. The regulation-making power in paragraph 5(2) of schedule 5 would enable the Scottish Ministers to make regulations enabling such persons to be eligible for appointment as such. It, therefore, gives a degree of flexibility so that the eligibility criteria can be adjusted to recognise legal qualifications and experience other than that gained by solicitors, advocates and barristers. The power is not, however, unlimited and is informed by paragraphs 6 and 7 of that schedule which set out the various matters on which those regulations may make provision. The regulation-making power in paragraph 5(2) of schedule 5 is, itself, augmented by the regulation-making powers contained in paragraph 7(1) and (2).

Choice of procedure

143. It is considered that the negative procedure gives the appropriate degree of scrutiny. Even though paragraph 7(2) of schedule 5 enables the modification of the list of activities set out in paragraph 6(4) of that schedule, the fact that those activities must amount to a suitably attributable experience in law restricts the extent of the power and it is considered that the negative procedure will, therefore, give the appropriate degree of scrutiny.

Schedule 8, paragraph 3(1) – Rules for the investigation and determination of any matter concerning the conduct of members of the Scottish Tribunals and the review of such a determination

Power conferred on: the Lord President
Power exercisable by: Rules made by the Lord President
Parliamentary procedure: not laid no procedure

Provision

144. Paragraph 3(1) of schedule 8 confers a power on the Lord President, by rules, to make provision for the purposes of, or in connection with, the investigation and determination of any matter concerning the conduct of the members of the Scottish Tribunals and the review of any such determination.

145. Paragraph 3(1) of schedule 8 makes analogous provision in relation to the conduct of the legal and ordinary members of the Scottish Tribunals as section 28 of the Judiciary and Courts (Scotland) Act 2008 makes in relation to the conduct of judicial office holders.

146. Paragraph 3(2) makes provision about what the rules may cover in particular. Paragraph 4(a) provides that the Lord President may make different provision for different purposes while paragraph 4(b) provides that the rules are to be published in such manner as the Lord President may determine.

Reason for taking power

147. The Lord President as Head of the Scottish Tribunals will have responsibility for making and maintaining appropriate arrangements about the conduct of the members of the Scottish Tribunals. How those arrangements will operate will be detailed and procedural and it is not considered appropriate for these matters to be set out on the face of the Bill. The Lord
President’s power will enable him or her to set out the arrangements in rules which may be readily modified and updated to reflect best practice and changing circumstances. It means that the conduct of the members of the Scottish Tribunals can be provided for by the Lord President in a similar manner in which he or she makes provision in relation to the conduct of the courts judiciary.

Choice of procedure

148. No parliamentary procedure has been applied. The responsibility for making and maintaining arrangements for the conduct of members of the Scottish Tribunals will rest with the Lord President. These procedures will be subject to scrutiny by the Judicial Complaints Reviewer (see paragraph 9 of schedule 8) who may make written representations to the Lord President. The rules will also be published. These measures are considered to offer the appropriate level of public scrutiny.

Schedule 8, paragraph 14 – Procedure to be followed by a fitness assessment tribunal

Power conferred on: the Court of Session
Power exercisable by: act of sederunt made by Scottish statutory instrument
Parliamentary procedure: laid no procedure

Provision

149. Paragraph 14 of schedule 8 confers a power on the Court of Session, by act of sederunt, to make provision with regard to the procedure to be followed by a fitness assessment tribunal convened under paragraph 13 of that schedule to investigate and report on whether a member of the Scottish Tribunals us unfit to hold that position.

Reason for taking power

150. The procedure adopted in relation to the removal of a member of the Scottish Tribunals from that position must be framed so as to ensure the independence of those members is not compromised. It is considered that it is appropriate for this provision to be made by the Court of Session (thereby ensuring independence from the executive) by act of sederunt (thereby ensuring transparency).

151. The provisions will be setting out the detail on procedural matters and it is not, therefore, considered to be appropriate to do this on the face of the Bill. Similar provision is made in relation to the removal of judges of the Court of Session by section 37(5) of the Judiciary and Courts (Scotland) Act 2008.

Choice of procedure

152. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
Schedule 9, paragraph 2(2) – Continued application of procedural rules of listed tribunals

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision
153. Paragraph 2(2) of schedule 9 confers a power on the Scottish Ministers, by regulations, to provide for the procedural rules of a listed tribunal that are in force immediately before the functions are transferred-in to the Scottish Tribunals to continue to have effect (with such modifications as the Scottish Ministers consider to be necessary or expedient) following a transfer of those functions to the Scottish Tribunals.

Reason for taking power
154. The purpose of this regulation-making power is to enable the smooth transfer of functions from a listed tribunal to the Scottish Tribunals with the procedural rules of the listed tribunal continuing to apply (subject to appropriate modification) until such time as they require to be amended or new procedural rules are introduced.

155. Since the functions of the listed tribunals are being transferred by regulations, it is consistent to allow provision to be made in regulations for the continued application of their procedural rules.

156. The existing rules can only be modified so far as the Scottish Ministers consider to be necessary or expedient with respect to the exercise of the same functions by the Scottish Tribunals.

157. Paragraph 3 allows the regulations to make different provision for different purposes and include supplemental, incidental, consequential, transitional, transitory or saving provision and provides for the regulations to be subject to negative procedure since section 73 does not apply.

Choice of procedure
158. It is considered that the negative procedure gives the appropriate level of scrutiny to the exercise of this regulation-making power. The regulations will simply be enabling the existing procedures which govern the exercise of functions by a listed tribunal to continue to apply to those functions when exercised by the Scottish Tribunals following a transfer of functions.

Schedule 9, paragraph 4(2) – Procedural rules prior to the involvement of the Scottish Civil Justice Council

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Provision

159. Paragraph 4(2) of schedule 9 confers a power on the Scottish Ministers, until such time as the Scottish Civil Justice Council is involved in the making of Tribunal Rules to make such rules by setting them out in regulations.

Reason for taking power

160. It is likely that the Scottish Civil Justice Council will only be very recently established by the time that the Scottish Tribunals begin to acquire their functions from the listed tribunals. In the event that the Scottish Civil Justice Council is not yet in a position operationally to assume its role in the formulation of Tribunal Rules, it is considered appropriate to confer a power on the Scottish Ministers to make those rules by setting them out in regulations.

161. Before making any such regulations, the Scottish Ministers are required to consult the President of Tribunals and such other persons as they consider appropriate.

Choice of procedure

162. It is considered that the negative procedure gives the appropriate level of scrutiny to the exercise of this regulation-making power.
Justice Committee

15th Report, 2013 (Session 4)

Stage 1 Report on the Tribunals (Scotland) Bill

Published by the Scottish Parliament on 14 October 2013
Justice Committee

15th Report, 2013 (Session 4)

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Justice Committee

Remit and membership

Remit:

To consider and report on:
a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
John Pentland
Sandra White

Committee Clerking Team:

Irene Fleming
Joanne Clinton
Ned Sharratt
Christine Lambourne
SUMMARY OF RECOMMENDATIONS

1. The Committee is sympathetic to the concerns raised (as set out in paragraphs 70 to 74). However, we note that the general view expressed is that the Bill's provisions are welcome. Therefore, despite these concerns, we agree that subject to these being addressed the Bill is a welcome development in revising the administrative justice landscape.

2. The Committee notes the concerns regarding postponement of the inclusion of the reserved tribunals within the system. We concur with the position that, for this process to be most effective, reserved tribunals in Scotland should be included within the new structure. We note that this issue is not entirely in the hands of the Scottish Government but we urge it to work with the UK Government to ensure that early progress can be made on this matter. In doing so, we call on the Scottish Government to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals.

3. The Committee welcomes the designation of the Lord President of the Court of Session as Head of the Scottish Tribunals.

4. The Committee notes the intended appointment of Lady Smith to the role of President of the Tribunals. However, we are sympathetic to the concerns raised at the restriction of appointment to the post to a Senator of the College of Justice. While recognising the level of leadership that this appointment will bring, particularly in the early days of the Scottish Tribunals, we believe that consideration should be given, by amendment to the Bill at Stage 2, to extending the pool of eligible candidates.

5. The Committee has reservations that adopting the term judge could over-judicialise this process. However, we note the status that using such language would afford and we accept the Lord President’s point that the nomenclature used would be for the individual tribunals. We therefore
consider that there would be benefit in enabling individual tribunals to use this terminology while leaving it for them to decide whether to do so. We therefore recommend that provision is made in the Bill to give individual tribunals this flexibility.

6. The Committee is strongly of the view that the particular nature and characteristics of the tribunals should be protected. We are therefore sympathetic to the concern that the provision for judicial members could potentially lead to the “judicialisation” of the process. However, we note that this provision would give tribunals access to the court judiciary which may also be of benefit. We welcome the safeguard that such appointments can only be made with the authority of the President of the Tribunals. Therefore on balance, we agree that this provision should be retained in the Bill with the proviso that the President’s discretion is applied in particular to ensure that the judicial members appointed have the necessary experience. We also recommend that consideration be given to the suggestion that the President of the Tribunals consults the President of the relevant Chamber before appointing a judicial member to a tribunal. We also ask the Scottish Government to give consideration to whether section 16 should be amended to remove the automatic entitlement for appointments of judicial members and whether additional safeguards are necessary to avoid the “judicialisation” of tribunals.

7. While the Committee is sympathetic to the need to be able to justify the costs of the Bill’s provisions, we also note the concerns raised by witnesses regarding the appointment of full-time salaried judges. The Minister for Community Safety and Legal Affairs has acknowledged that it is not clear what the circumstances will be in the future. We therefore believe that the Bill should allow for such posts to be created should the need arise. In doing so, we note the provision in section 71(4)(a) of the Bill which enables the Scottish Ministers to make arrangements as to the payment of remuneration or expenses of members of staff of the Tribunals. While this may address this point in the short-term (at least on the assumption that the term “members of staff” covers members of the Tribunals), it does not make provision for such payments to be made on a permanent basis and we therefore recommend that amendment is made to the Bill to enable this to happen in relation to both members of the Scottish Tribunals and members of staff.

8. The Committee notes this concern (as set out in paragraphs 120 and 121) and calls on the Scottish Government to review the appropriateness of this provision and give consideration to tightening up the language to ensure that, in the short-term, only those qualified in Scots law can conduct business in devolved tribunals.

9. The Committee notes that this is not a widespread concern (as set out in paragraphs 124) but recognises the point that the volume of business through the Upper Tribunal will be small. While noting the need to avoid unnecessary restrictions, we consider that there may be merit in retaining the division structure within the Upper Tribunal for the longer term,
particularly if there are future proposals to incorporate the reserved tribunals within the structure

10. The Committee sees merit in the suggestion of including a provision in the Bill setting out what a tribunal is. We are very concerned to protect the character and nature of tribunals and so consider that including this in the Bill would be a step towards achieving that. We therefore call on the Scottish Government to bring forward an amendment, for example in the same terms as section 2(3) and 22(4) of the Tribunals, Courts and Enforcement Act 2007, to set this out on the face of the Bill.

11. The Committee welcomes the provisions in section 30 that aim to ensure that specialism within tribunals is protected under the new structure. We therefore recommend that careful consideration be given to the provisions within this section to ensure that such protection is ensured.

12. In terms of cross-ticketing, the Committee welcomes the reassurance given by the Minister for Community Safety and Legal Affairs that the system currently in place works effectively and that it is not the expectation that tribunals would be assigned members without the necessary specialism. We also note the Lord President’s comments that cross-ticketing allows for career development. Although we welcome these reassurances, we consider that close regard must be paid to whether this works well in practice. We therefore recommend that this is monitored during the early years of the new system being established to ensure that it is working effectively.

13. The Committee welcomes the commitment to ensuring tribunal independence. In particular, we welcome the new structure as a way of ensuring this and the statutory provision placing a duty on key individuals to ensure that independence of tribunals is upheld. We would ask the Scottish Government to give consideration to bring forward an amendment to include provision for judicial governance similar to that contained within the Judiciary and Courts (Scotland) Act 2008.

14. The Committee notes the concerns of witnesses regarding the interim arrangements for producing rules. However, we welcome the Minister for Community Safety and Legal Affair’s reassurance that this is a continuation of the existing arrangements, in particular, that expert input would be made to the drafting of rules of the individual tribunals.

15. We have more serious concerns regarding the production of rules for the Upper Tribunal and the delay in the Scottish Civil Justice Council being in a position to take on this role. We therefore urge the Scottish Government to examine whether there is scope to expedite this transfer of responsibilities, for example, by considering whether the resourcing of the Scottish Civil Justice Council could be reviewed to enable it to undertake this work.

16. The Committee notes the concerns raised by witnesses with regard to the provision set out in section 68(5)(a) regarding the issuing of practice
directions and welcomes the Minister for Community Safety and Legal Affair's commitment to bring forward an amendment at Stage 2 to address these concerns.

17. The Committee notes the concerns raised regarding section 38, however, on balance we agree that such a provision needs to be cast in a general way in order not to restrict the options available to the reviewing body. We therefore do not have any concerns regarding the drafting of this provision. However, we suggest that it be kept under review to ensure that it is applied appropriately.

18. Again, the Committee notes the concerns raised regarding section 39. However, on balance, we recognise the benefits to be made from the Upper Tribunal being able to provide a general view and therefore, note that the provisions need to be drafted in a general way to enable this to happen. We therefore have no concerns regarding the drafting of this section.

19. The Committee notes the concerns raised regarding section 45, in particular, whether such a restriction is necessary in Scotland. We agree that further consideration needs to be given to the wording of the test applied and whether this is too restrictive. At a minimum we propose that this be reviewed in the short-term to ensure that the provision works effectively. We therefore call on the Scottish Government to give further consideration to this provision.

20. The Committee has some concerns regarding the provision to charge expenses and fees. We recognise the need to include this provision in the Bill to allow tribunals with the existing power to charge fees to continue to do so. However, we consider the wording of the provision to be drafted very generally and does not set out the circumstances where it would be appropriate for fees to be charged. We therefore recommend that, where there is a proposal for a tribunal to be given the power to charge expenses and fees where it did not previously, consultation should be carried out with users and stakeholders of the tribunal concerned.

21. The Committee notes the case put forward by the Lands Tribunal for Scotland that it should not be transferred into the new system. We therefore urge the Scottish Government to review its position in this regard.

22. The Committee welcomes the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the First-tier Tribunal. We consider that taking such a step will ensure that the unique nature of the tribunal will be preserved within the new structure. However, we are sympathetic to the Mental Health Tribunal's concerns that this commitment appears to be made of a temporary nature and so we recommend that the Scottish Government bring forward an amendment to preserve the distinctiveness of the Mental Health Tribunal for Scotland.

23. The Committee recognises the complexity and importance of the Children’s Hearing system in Scotland and notes that it has very recently been reformed. We also note that the power given to the Scottish Ministers
under section 26(2)(b) require regulations to be laid before the Parliament which will be subject to the affirmative procedure. It would be for the Scottish Ministers at the time to undertake the required consultation and background work before laying any regulations before the Parliament. We consider this to provide sufficient Parliamentary protection which would prevent Children’s Hearings being transferred into the Scottish Tribunals inappropriately.

24. The Committee is sympathetic to the concerns caused by the lack of detail on the face of Bill. However, we also understand the need for the flexibility afforded by the use of delegated powers given the complexities of the legislation involved. We will therefore pay very close attention to the secondary legislation which will be brought forward under the Bill.

25. The Committee endorses the conclusions drawn by the Delegated Powers and Law Reform Committee on its Stage 1 report on the delegated powers in the Bill and calls on the Scottish Government to give particular consideration to the recommendations in respect of the powers in sections 48(2) and 56(2).

26. The Committee supports the general principles of the Bill. We consider that the Bill brings forward a much-needed restructuring of the tribunals system. In particular we believe that the provisions will simplify the existing process and will make the tribunals more accessible to users.

BACKGROUND

Parliamentary Scrutiny

27. The Tribunals (Scotland) Bill\(^1\) was introduced in the Scottish Parliament on 8 May 2013 by the Cabinet Secretary for Justice, Kenny MacAskill MSP. The Parliamentary Bureau designated the Justice Committee as the lead committee at Stage 1.

28. The Justice Committee issued a call for written evidence on 5 June 2013. The Committee received 25 written submissions. The Committee took evidence on 3, 10 and 17 September 2013, hearing from a range witnesses including representatives of tribunals, users of tribunals, expert legal professionals, the Lord President of the Court of Session and the Minister for Community Safety and Legal Affairs.

29. The Finance Committee also issued a call for written evidence on the financial memorandum of the Bill, receiving six responses, which did not raise any substantial issues. The Finance Committee therefore decided not to undertake further scrutiny of the financial memorandum or to report to the Justice Committee on costs associated with the Bill.

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\(^1\) Tribunals (Scotland) Bill, as introduced (SP Bill 30, Session 4 (2013)). Available at: [http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd.pdf).
30. The Delegated Powers and Law Reform Committee published its report on the delegated powers memorandum on the Bill\(^2\) on 3 September 2013.

**Background to the Bill**

**Tribunals in Scotland**

31. While a definition of tribunals is not included in the Bill or the accompanying documents, the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC), in its 2011 report *Tribunal Reform in Scotland, A Vision for the Future*\(^3\) (the SCAJTC’s 2011 report), defined a tribunal as:

‘A body which resolves disputes between citizens and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it.’

32. The SCAJTC’s 2011 report listed 17 devolved tribunals or types of tribunals, although that total has increased to 18 with the establishment of the Homeowner Housing Panel. The powers, processes and subject matters of the devolved tribunals are very varied, including the making of decisions on compulsory treatment orders under the Mental Health (Care and Treatment) (Scotland) Act 2003 to adjudicating on disputed parking tickets.

33. The Scottish Tribunals Service (STS), part of the Scottish Government’s Justice Directorate, provides administrative support to a number of the devolved tribunals\(^4\). Other tribunals, such as the Education Appeals Panel are supported by local authorities and other public bodies.

34. The majority of tribunals and tribunal cases are heard in UK tribunals with jurisdiction in Scotland on reserved matters, including those tribunals which deal with immigration, welfare and employment cases. The Bill does not apply to these tribunals.

**Reform of UK tribunals**

35. In 2001, Sir Andrew Leggatt carried out a review of the delivery of justice by UK tribunals (the Leggatt Report\(^5\)). The Leggatt Report made a number of recommendations, including the need for increased independence from government and a more coherent and user-friendly system backed up by a single tribunals administration.

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\(^4\) The following tribunals are currently supported by the STS: Additional Support Needs Tribunals for Scotland; Lands Tribunal for Scotland; Mental Health Tribunal for Scotland; Private Rented Housing Panel; Homeowner Housing Panel; Pensions Appeal Tribunals Scotland; Scottish Charity Appeals Panel.

36. In 2006 the UK Government launched a new UK Tribunals Service – an agency of the Ministry of Justice – designed to provide administrative support to a range of UK tribunals and organisations. The setting up of the UK Tribunals Service was followed by the Tribunals, Courts and Enforcement Act 2007 which implemented many of the recommendations in the Leggatt Report.

37. On 1 April 2011, the UK Tribunals Service was merged with HM Courts to create an integrated agency known as HM Courts and Tribunals Service.

38. While these reforms affected reserved tribunals sitting in Scotland, the devolved tribunals were not affected by the reforms.

Reform of Scottish tribunals
39. In 2008 the Administrative Justice Steering Group, chaired by Lord Philip, a retired senior judge, published a report\(^6\) (the Philip report) which reviewed devolved tribunals and presented options for their administration and supervision. Following the Philip report, the Scottish Tribunals Service was established in December 2010.

40. The SCAJTC undertook a further review into the tribunal system in Scotland. This review resulted in its 2011 report\(^7\) where the SCAJTC made the key recommendation that a more coherent and independent tribunals structure should be set up broadly along the lines of the UK system. The Bill broadly follows the main recommendations of this report.

41. In June 2013, after the introduction of the Bill, the Scottish Government launched a consultation on a proposed merger of the STS and the Scottish Court Service (SCS).

Overview of the Bill
Policy objectives
42. The Policy Memorandum of the Bill notes that devolved tribunals have “been established in an ad hoc fashion, with no common leadership, appointments, practice and procedure or reviews and appeals”.\(^9\)

43. The Policy Memorandum goes on to state that this complex and fragmented system can lead to “a narrowness of outlook” and a variation of the standard and performance of tribunals.\(^10\)


\(^9\) Tribunals (Scotland) Bill. Policy Memorandum (SP Bill 30-PM, Session 4 (2013)), paragraph 2. Available at: [http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf).

\(^10\) Policy Memorandum, paragraph 3.
44. The Bill is intended to create a system to improve the independence and perception of independence of the devolved tribunals and also to facilitate improvements in the quality of service offered to users of tribunals.

**New structure**

45. The Bill creates a new, two-tier structure for devolved tribunals. It establishes a First-tier Tribunal and an Upper Tribunal. Together the First-tier and Upper Tribunals will be known as the Scottish Tribunals. It is envisaged that the First-tier tribunal will hear most cases in the first instance and the Upper Tribunal will primarily hear appeals from the First-tier.\(^{11}\)

46. Schedule 1 of the Bill lists the devolved tribunals whose functions (and personnel) can be transferred into the new structure by the Scottish Ministers. In addition, the Scottish Ministers will be able to lay regulations before the Parliament to change the composition of schedule 1.

47. The First-tier will be split into chambers and each chamber will consider business according to subject-matter. The intention of grouping together similar jurisdictions is to “facilitate deployment of the members of the Scottish Tribunals”.\(^{12}\) The Upper Tribunal will be divided into divisions.

48. Each chamber of the First-tier Tribunal will be presided over by a Chamber President and each division of the Upper Tribunal will be presided over by a Vice-President.

49. While the intention is that functions of differing tribunals will share chambers of the First-tier Tribunal, the Policy Memorandum notes the intention that the functions of the Mental Health Tribunal for Scotland (MHTS) will be transferred into a single chamber of the First-tier Tribunal without other jurisdictions.\(^ {13}\) This is in recognition of the unique nature of the MHTS. Similarly, the Policy Memorandum states that the functions of the Lands Tribunal for Scotland (LTS) will be transferred into an individual division of the Upper Tribunal.\(^ {14}\)

**Leadership and membership**

50. The Lord President of the Court of Session will become head of both the First-tier and Upper Tribunals. The Lord President will appoint a President of the Scottish Tribunals from among the Senators of the College of Justice, who it is anticipated will be responsible for the general running of the tribunals.

51. The Policy Memorandum notes that the judicial leadership of the tribunals is intended to ensure that the Scottish Tribunals are well-managed, have a “strong identity with the justice system”, and tribunal members’ welfare and views are given weight.\(^ {15}\)

52. There are three types of membership of the First-tier Tribunal provided for in the Bill:

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\(^{11}\) Policy Memorandum, paragraph 7.

\(^{12}\) Policy Memorandum, paragraph 42.

\(^{13}\) Policy Memorandum, paragraph 43.

\(^{14}\) Policy Memorandum, paragraph 46.

\(^{15}\) Policy Memorandum, paragraph 13.
• legal members, who are legally qualified;

• ordinary members, specialists in the subject areas of the tribunals (e.g. doctors, teachers, surveyors etc.); and

• judicial members, any sheriff, sheriff principal or part-time sheriff.

53. The Upper Tribunal will have the same three categories of membership as the First-tier. However, ordinary members will not be expected to sit on appeal cases and judicial members will include judges from the Court of Session, but not part-time sheriffs.

54. The Bill creates a system of appointment for new ordinary and legal members of tribunals whereby appointments are recommended to Scottish Ministers by the Judicial Appointments Board for Scotland (JABS). This is a similar process as for the appointment of the judiciary.

55. Members will be appointed for a period of five years and will be able to be re-appointed after that period until the age of 70. After reaching the age of 70, tribunal members may be re-appointed on an annual rolling basis up to the age of 75.

**Review and appeal**

56. The Bill provides for either the First-tier or Upper Tribunals to review their own decisions. The power to review is intended to be used when there has been a simple administrative error. A review could result in no action, a minor correction or for the decision to be set aside. The purpose of this provision is to reduce the number of appeals due to administrative errors.\(^{16}\)

57. The Bill creates a general right of appeal, on a point of law, from the First-tier Tribunal to the Upper Tribunal. Decisions of the Upper Tribunal may be appealed to the Court of Session on a point of law.

58. Appeals from the First-tier to the Upper Tribunal will require leave to appeal from the First-tier Tribunal or, failing that, from the Upper Tribunal. Leave will only be granted if there are arguable grounds for appeal. Leave will also be required when an appeal from the Upper Tribunal to the Court of Session is envisaged. If the Upper Tribunal is dealing with a case in first instance (i.e. the case doesn’t stem from a First-tier appeal) then the Upper Tribunal or, failing that, the Court of Session may grant leave if there are arguable grounds for appeal. However, in the case of a so-called “second appeal” (i.e. a case stemming from a First-tier appeal where the Upper Tribunal is acting as an appellate body) then the Upper Tribunal or, failing that, the Court of Session, may only grant leave if the case raises an important issue of principle or practice or if there are compelling reasons for allowing a second appeal.

59. The Bill provides for the Scottish Ministers to make regulations to allow certain exceptions to the default appeal rules.

\(^{16}\) Policy Memorandum, paragraph 57.
Practice and procedure
60. The Scottish Civil Justice Council (SCJC) will be given the power to review the practice and procedure of the Scottish Tribunals. The SCJC will also propose rules for the Scottish Tribunals.

61. The SCJC will not be in a position to immediately undertake the work required to draft the new tribunal rules. As an interim measure, the Scottish Ministers will be able to transfer in the rules of the tribunals listed in Schedule 1 and set out new rules. Both of these powers will require subordinate legislation subject to the negative procedure.

62. The President of the Tribunals may issue practice directions for the Scottish Tribunals. In addition, Chamber Presidents and Vice-Presidents may issue practice directions in their own chambers and divisions, respectively.

63. The Bill seeks to retain the “specialism, ethos and desirable distinctiveness” of the devolved tribunals. For example, it allows for the diversity of locations where tribunals currently sit; the Bill allows for tribunal hearings to take place in any place in Scotland.

64. The Bill allows for the tribunal rules to include provision for the awarding of expenses. The Bill also gives the Scottish Ministers the power to lay regulations to provide for reasonable fees to be payable to the Scottish Tribunals.

PROVISIONS IN THE BILL

Response to the Bill
65. The Bill was generally welcomed as an improvement on the existing system. Witnesses noted that the benefits of the new system would include providing the “opportunity for generic training”, “dealing with questions about the conduct of tribunal judges” as well as “sharing the expertise that has been gained from the tribunals”. The Bill would also “give coherence to what already exists”.

66. Jonathan Mitchell QC from the Faculty of Advocates noted that the benefits from the new provisions may not be immediately apparent, however, this was “the first time that anyone has looked at creating a coherent and integrated structure for civil justice in Scotland. That will not be a big deal for most individuals in the street but they will see the benefits of it as the tribunals develop over the coming 10 years.”

67. The Policy Memorandum states that an intention of the Bill is to facilitate improvements in the quality of service offered to users of tribunals. This need was also identified by a number of witnesses. May Dunsmuir from the Additional

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17 Policy Memorandum, paragraph 14.
19 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3117.
21 Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3160.
23 Policy Memorandum, paragraph 3.
Support Needs Tribunal for Scotland noted that “our concern must be the tribunal user, to whom the primary benefit must apply and who must be at the heart of the system”.  

68. Lauren Wood from Citizens Advice Scotland welcomed the Bill’s provisions, noting that the new structure would mean “a guaranteed baseline standard among all the tribunals, which I think is important to users”.

69. In terms of user accessibility, Iain Nisbet from Govan Law Centre noted that an existing benefit of tribunals is that they are more accessible than going to court. He therefore concluded that the primary benefit of the new structure from a user’s point of view was “that those advantages will be extended to the first tier of appeals.” He noted that “it will be good for users and for the tribunals system, as many of the smaller jurisdictions do not have that flow of appellate decisions, which can be useful for clarifying the law and the process that the tribunals use”.

70. Although the new structure was generally welcomed, a number of reservations were expressed by witnesses. Richard Henderson from the Law Society of Scotland referred to the Bill as “a first step” and Jonathan Mitchell QC from the Faculty of Advocates considered that “the basic idea is good and the way forward is correct, but a number of the details are wrong and some of them are very damagingly wrong”.

71. The Lands Tribunal for Scotland was a major critic of the Bill. It raised fundamental concerns at the general approach taken in the Bill, in particular, the creation of a uniform system.

72. In its written submission, it noted that “to aim for common standards and procedures, including review and appeal, as a significant plank of policy risks creation of a serious impediment to identifying the most efficient way of serving the different needs of individual users.” Furthermore, it was “not persuaded that the approach of putting a number of tribunals into one and then seeking to discover how to preserve the characteristics of each is an efficient use of time and resources.”

73. John Wright QC from the Lands Tribunal for Scotland also had difficulty with the principle that a tribunal was either in or completely out of the new structure. He noted that there were benefits to be gained from the new structure, however, “these would only be available if the tribunal was transferred wholesale into the new system.” This was a particular issue for the Lands Tribunal for Scotland and other bodies which did not “really fit in with the scheme.”

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26 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3129.
29 Lands Tribunal for Scotland. Written submission, paragraph 11.
30 Lands Tribunal for Scotland. Written submission, paragraph 1.
74. Alastair Beattie from the Valuation Appeals Committee also warned against the homogenisation of the system. He noted that this could be a particular issue for the Valuation Appeals Committee as, for example, “if an age limit were imposed before the next revaluation, we would lose 60 per cent of our membership”. He was particularly concerned at the loss of experience this would entail. “Where you would find the successors, I do not know”.

75. The Committee is sympathetic to the concerns raised. However, we note that the general view expressed is that the Bill’s provisions are welcome. Therefore, despite these concerns, we agree that subject to these being addressed the Bill is a welcome development in revising the administrative justice landscape.

Reserved tribunals

76. The Policy Memorandum envisages a structure that will be capable of acquiring the functions of new or other jurisdictions which are not currently listed. It is therefore anticipated that, over time, reserved tribunals would also be accommodated within the new structure.

77. The Lord Chancellor, in communication with the Scottish Government, has however, indicated that the UK Government has put on hold its plans to devolve reserved tribunals for the time being.

78. Jonathan Mitchell QC from the Faculty of Advocates observed that, without the inclusion of reserved tribunals, the Bill would only apply to “something like 2 per cent of Scottish tribunals and the elephant in the room is that the Bill itself puts out of mind the fact that the vast bulk of tribunals will remain in the reserved tribunals system”.

79. He noted that this was an issue that would have to be addressed in the longer term and that it was “critical that the Bill provides a system that is capable of being presented to members of UK tribunals and their users as one that they can come into.”

80. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal was more optimistic, noting that if reserved tribunals were one day devolved to Scotland “there will be a ready-made system into which to slot them”.

81. Lauren Wood from Citizens Advice Scotland emphasised the benefit to users of the inclusion of reserved tribunals, observing that “when somebody comes through the door, it does not matter to them whether an issue is reserved or devolved.”

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33 Policy Memorandum, paragraph 9
36 Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3160.
82. The Minister for Community Safety and Legal Affairs confirmed that it was originally a suggestion of the Ministry of Justice that the administration and organisation of reserved tribunals be transferred into the new Scottish system. However, she indicated that, although there were no ongoing discussions about the issue, she was not willing to hold back on reforming the Scottish structure on “the basis of the completely uncertain future of the reserved tribunals”.

83. The Committee notes the concerns regarding postponement of the inclusion of the reserved tribunals within the system. We concur with the position that, for this process to be most effective, reserved tribunals in Scotland should be included within the new structure. We note that this issue is not entirely in the hands of the Scottish Government but we urge it to work with the UK Government to ensure that early progress can be made on this matter. In doing so, we call on the Scottish Government to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals.

**Judicial leadership**

84. Section 2 of the Bill designates the Lord President of the Court of Session as the Head of the Scottish Tribunals. The Policy Memorandum explains that this will provide strong judicial leadership across the First-tier and Upper Tribunals “to ensure that—

- there is cohesion and continuity of purpose across both tiers;
- the new tribunal structure has a strong identity within the justice system as a whole;
- the efficient disposal of business is maintained; and
- the views of tribunal members are represented and their welfare respected.”

85. It also explains that the Lord President’s leadership would ensure that “specialism, ethos and desirable distinctiveness are retained, in addition to supporting coherence across the new structure where this is required.”

86. The majority of witnesses welcomed this provision. Heather Baillie from the Mental Health Tribunal for Scotland welcomed the Lord President’s overarching leadership as it will “improve overall consistency of delivery of service across tribunals”. Richard Henderson from the Law Society of Scotland also noted that “the only way to emphasise that the tribunals are part of a justice system is to put them in the hand of a justice body”.

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39 Policy Memorandum, paragraph 13.
40 Policy Memorandum, paragraph 14.
87. The Committee welcomes the designation of the Lord President of the Court of Session as Head of the Scottish Tribunals.

President of the Scottish Tribunals
88. A new office of President of the Scottish Tribunals is created by the Bill. Under section 4, it is for the Lord President to assign a person to that office, who will be a judge of the Court of Session.

89. Lord Gill, the Lord President of the Court of Session, indicated in written evidence that it was his intention to nominate Lady Smith to be the first President of the Tribunals.

90. While welcoming Lady Smith’s appointment and the expertise she will bring to the post, a number of witnesses expressed concerns regarding the restriction that the President must be a Senator of the College of Justice. Jonathan Mitchell QC from the Faculty of Advocates explained that, without the inclusion of reserved tribunals, the system would be “miniscule” and he described having someone so senior appointed to the post as “like having a Rolls-Royce for the job” with the consequential costs.

91. He also went on to explain that, should the reserved tribunals be included in the system in the longer term, the restriction to a senator holding the post would also have the unfortunate consequence of very senior people in the wider UK system being barred from the role. For example, he noted that the employment tribunal has approximately five times as many cases as the system currently in the Bill and so “it would be a bit strange to tell them that they were not big enough to run this tiny system”.

92. The Employment Tribunals (Scotland) in its written submission also expressed concerns at this restriction. It recognised the need for seniority in the appointment in order to ensure that it was “a person of sufficient standing and authority to ensure that the interests of the system are addressed and protected”. However, it was of the view that the restriction on the appointment could potentially have an impact on the diversity of the post-holder as that, by doing so, “one automatically builds in a condition which is likely to have a disparate impact by (for example) gender and race, given the current characteristics of the pool from which a candidate will be selected”. It further noted that a high proportion of women can be found from within tribunal judges who are solicitors rather than advocates but would be restricted from the post of President by virtue of the restrictions set out in the Bill.

93. The Lord President indicated that he considered that judicial leadership would be beneficial to the tribunals. It would also be beneficial to judges to extend their experience in that way. He further offered reassurance that necessary experience would not be an issue as it was “highly unlikely that the president of the tribunals would be a person who had no knowledge or experience of how they work”.

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45 Employment Tribunals (Scotland). Written submission, paragraph 15.
94. The Minister for Community Safety and Legal Affairs indicated that, as well as supporting the Lord President, the role of President will be “to champion tribunals in the wider civil justice system, and to ensure the proper distinction and separation of tribunals from courts.” She concluded that drawing the appointment from the Senators of the College of Justice recognises “the scale of the proposed powers of delegation and the substantial leadership and management responsibilities that will come with the role”.47

95. The Committee notes the intended appointment of Lady Smith to the role of President of the Tribunals. However, we are sympathetic to the concerns raised at the restriction of appointment to the post to a Senator of the College of Justice. While recognising the level of leadership that this appointment will bring, particularly in the early days of the Scottish Tribunals, we believe that consideration should be given, by amendment to the Bill at Stage 2, to extending the pool of eligible candidates.

Membership of tribunals

96. Section 12 of the Bill makes provision for membership of tribunals and provides for ordinary, legal and judicial members of the First-tier Tribunal and the Upper Tribunal.

Legal members
97. In his written evidence, the Lord President argued that the legal members of the tribunals should be referred to as judges (in line with the position within reserved tribunals). His view was that there may be an “unfortunate perception that the lawyer members of tribunals are of a lesser status than the courts’ judiciary” if this approach was not adopted.48

98. On the other hand, the Law Society for Scotland was opposed to this suggestion as “certain tribunals in Scotland would be very uncomfortable if there was any move towards introduction of judicial titles as is the case in the reserved tribunals”.49

99. The Employment Tribunals (Scotland) noted that tribunals could become too “court-like” if the legally qualified members of the tribunal were called “tribunal judges”. However, it did acknowledge that this did not appear to have occurred in England and Wales.50

100. It also asserted that “by making it clear through use of the term “judge” that a tribunal is a judicial body one sends out a signal that the system recognises that the type of matters that tribunals deal with are just as important to those affected as the matters dealt with in the civil courts”.51

101. In following up this point, the Lord President noted the educational value of legislation where “if the primary legislation made it clear that legal members’

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48 Lord President of the Court of Session. Written submission, page 2.
49 Law Society of Scotland. Written submission, page 8.
50 Employment Tribunals (Scotland). Written submission, paragraph 8.
51 Employment Tribunals (Scotland). Written submission, paragraph 8.
function is judicial in nature that would be a strong endorsement of the independence of the tribunals as judicial bodies”. He did, however, conclude that it would be a matter for the tribunals to decide what to call their legal members.\textsuperscript{52}

102. The Minister for Community Safety and Legal Affairs noted these points but concurred with the concern that, by using terminology such as “judges”, a perception could be created that tribunals are seen as courts. “I am concerned that, if we began routinely to use the terminology of the courts in tribunal systems, people would behave as if tribunals were courts, and that is something I want to resist.”\textsuperscript{53}

103. The Committee has reservations that adopting the term judge could over-judicialise this process. However, we note the status that using such language would afford and we accept the Lord President’s point that the nomenclature used would be for the individual tribunals. We therefore consider that there would be benefit in enabling individual tribunals to use this terminology while leaving it for them to decide whether to do so. We therefore recommend that provision is made in the Bill to give individual tribunals this flexibility.

Judicialisation of tribunals
104. Section 16 of the Bill allows certain judicial members to be eligible to act as a member of the First-tier and Upper Tribunal if authorised to do so by the President of the Tribunals.

105. The Policy Memorandum explains that this provision will allow the First-tier Tribunal to “have access to the court judiciary when it is exercising decision-making functions for which it would be appropriate to use them rather than just the legal and ordinary members”\textsuperscript{54}.

106. This provision was criticised by a number of witnesses on the grounds that the majority of sheriffs and Court of Session judges would not necessarily have sufficient specialised knowledge and experience of tribunal work to carry out this role. Witnesses therefore considered that their eligibility should not be automatic as this provision could lead to a degree of “judicialisation” of the tribunals.

107. Richard Henderson from the Law Society of Scotland noted that tribunals are generally less formal than courts and are (in the main) established to be “user-friendly and to be a place where justice could be determined without the necessity for lawyers to make an appearance”\textsuperscript{55}. Heather Baillie from the Mental Health Tribunal for Scotland also noted that “as a forum for decision making, tribunals have a flexibility that is quite different and distinct from the courts”.\textsuperscript{56} A strength of the tribunal system is therefore its relative informality which provides greater accessibility to users.

\textsuperscript{54} Policy Memorandum, paragraph 21.
108. In the Law Society of Scotland’s written submission, emphasis was placed on the distinct nature of tribunals as opposed to courts. As well as the specialist nature of tribunal judges and jurisdiction and the relative informality of hearings, it also noted that tribunals were less adversarial, more enabling than is typically encountered in the courts, parties do not have to pay to raise actions and, most importantly, the users’ central position within the tribunal”.\(^{57}\)

109. Other fears regarding judicial membership related to the consequent impact that it could have on the diversity of appointments to tribunals. The Employment Tribunals (Scotland) pointed out that there was the danger that any current gender or other imbalance within the wider judicial system would just be replicated in the new tribunal structure.\(^{58}\)

110. The Lord President, on the other hand, welcomed this provision. Furthermore, he suggested that this provision should be extended to cover retired sheriffs and judges in the first tier of reserved tribunals. He also noted that, although judicial members were automatically eligible to act, the power of the President of the Tribunals to authorise would ensure that judges appointed to act would have to have prior tribunal experience.\(^{59}\)

111. As an additional safeguard, the Law Society of Scotland suggested that the President of the Tribunals should consult with the President of the Chamber within which the judge is to sit before authorising the judge concerned.\(^{60}\)

112. The Minister for Community Safety and Legal Affairs did not consider the fears to be necessary, noting that it was already the case that judicial members sit on tribunals whose functions will be transferred into the first tier. For example, sheriffs were required to sit on the Mental Health Tribunal for Scotland in forensic cases and so there were “some circumstances where judges, sheriffs or part-time sheriffs were required”. She noted therefore that the Bill had to be “flexible in allowing for and covering the variety of practice that already exists in tribunals”.\(^{61}\)

Subsequently in correspondence to the Committee, she clarified that the use of court judiciary is restricted as the Scottish Ministers have the power under section 35 to specify the composition of the First-tier Tribunal when convened to decide any matter in a case before it.

113. The Committee is strongly of the view that the particular nature and characteristics of the tribunals should be protected. We are therefore sympathetic to the concern that the provision for judicial members could potentially lead to the “judicialisation” of the process. However, we note that this provision would give tribunals access to the court judiciary which may also be of benefit. We welcome the safeguard that such appointments can only be made with the authority of the President of the Tribunals. Therefore on balance, we agree that this provision should be retained in the Bill with the proviso that the President’s discretion is applied in particular to ensure that the judicial members appointed have the necessary experience. We also

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\(^{57}\) Law Society of Scotland. Written submission, page 4.

\(^{58}\) Employment Tribunals (Scotland). Written submission, paragraph 13.

\(^{59}\) Lord President of the Court of Session. Written submission, page 2.

\(^{60}\) Law Society of Scotland. Written submission, page 10.

recommend that consideration be given to the suggestion that the President of the Tribunals consults the President of the relevant Chamber before appointing a judicial member to a tribunal. We also ask the Scottish Government to give consideration to whether section 16 should be amended to remove the automatic entitlement for appointments of judicial members and whether additional safeguards are necessary to avoid the “judicialisation” of tribunals.

Judicial tenure and salaried posts

114. The Bill makes no provision for the appointment of full-time salaried judges in any of the tribunals envisaged by the Bill. A number of concerns were therefore raised regarding this perceived gap in the legislation.

115. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal noted that with this omission “even the Upper Tribunal is to be a totally ad hoc tribunal consisting of nominated sheriffs and nominated senators”. Jonathan Mitchell QC from the Faculty of Advocates echoed this, observing that “all that we currently have is people who drop in and out for a day here and week there”. 62

116. The Lord President had similar concerns. He therefore indicated that it would be helpful if the Bill could provide for the possibility of permanent salaried posts as “the ability to attract and retain persons of high calibre in key tribunal roles will be vital and would assist in attracting persons of sufficient calibre and experience.” 63 Alan Gamble concurred, noting that full-time salaried judges would “enhance the quality of justice for the user”. 64

117. The Minister for Community Safety and Legal Affairs was not entirely in favour of this suggestion, noting that “it would be difficult to justify the need for full-time permanent judiciary” as “you would be paying salaries to people who would not necessarily be doing an enormous amount.” 65 She did acknowledge, however, that although this was a continuation of the current situation, it was difficult to predict that further down the line “because, in future, changes might be decided to be appropriate”. 66

118. While the Committee is sympathetic to the need to be able to justify the costs of the Bill’s provisions, we also note the concerns raised by witnesses regarding the appointment of full-time salaried judges. The Minister for Community Safety and Legal Affairs has acknowledged that it is not clear what the circumstances will be in the future. We therefore believe that the Bill should allow for such posts to be created should the need arise. In doing so, we note the provision in section 71(4)(a) of the Bill which enables the Scottish Ministers to make arrangements as to the payment of remuneration or expenses of members of staff of the Tribunals. While this may address this point in the short-term (at least on the assumption that the term “members of staff” covers members of the Tribunals), it does not make provision for such payments to be made on a permanent basis and we

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63 Lord President of the Court of Session. Written submission, page 1.
64 Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3167.
therefore recommend that amendment is made to the Bill to enable this to happen in relation to both members of the Scottish Tribunals and members of staff.

**Eligibility of non-Scottish lawyers**

119. Schedule 3 to the Bill provides for appointments to the First-tier Tribunal.

120. The Lord President raised a point in his submission about the eligibility of non-Scottish lawyers sitting on Scottish tribunals. He argued that the eligibility requirements in paragraph 5(1) of Schedule 3 were too broad as they include legally qualified parties from England and Wales and Northern Ireland.\(^67\)

121. He noted that in the reserved tribunals there was considerable cross-over between members from Scotland, England, Wales and Northern Ireland. However, devolved tribunals dealt with specifically Scottish matters. His view therefore was, with regard to the business of the devolved tribunals, that at least in the short term “we should recruit people who are qualified in Scots law”.\(^68\)

122. The Committee notes this concern and calls on the Scottish Government to review the appropriateness of this provision and give consideration to tightening up the language to ensure that, in the short-term, only those qualified in Scots law can conduct business in devolved tribunals.

**Structure of the Upper Tribunal**

123. Section 22 of the Bill makes provision for the organisation of the Upper Tribunal into divisions, with each division presided over by at least one Vice-President.

124. The Lord President in his written submission indicated that he considered it “unnecessary” and could be “restrictive to programming” to create these divisions. He also noted that there could also be potential confusion with the nomenclature of the Court of Session which is also divided into divisions.\(^69\) John Wright QC from the Lands Tribunal for Scotland concurred, observing that it was not a particularly sensible way of proceeding given that the upper tribunal in Scotland will deal with “a tiny number of appeals”.\(^70\)

125. The Committee notes that this is not a widespread concern but recognises the point that the volume of business through the Upper Tribunal will be small. While noting the need to avoid unnecessary restrictions, we consider that there may be merit in retaining the division structure within the Upper Tribunal for the longer term, particularly if there are future proposals to incorporate the reserved tribunals within the structure.

\(^67\) Lord President of the Court of Session. Written submission, page 3.  
Definition of a tribunal

126. As already noted, tribunals are of a unique and distinct nature and a number of concerns raised during the Committee’s scrutiny of the Bill related to the potential for the Bill’s provisions to compromise this. A number of suggestions were put forward by witnesses in order to safeguard the specific nature of tribunals.

127. May Dunsmuir from the Additional Support Needs Tribunal for Scotland indicated that it would “go some way towards reassuring service users, stakeholders and service user groups if the Bill contained a definition of the function and distinctive nature of a tribunal.”

128. Lauren Wood from Citizens Advice Scotland suggested that the Bill could contain principles similar to the Tribunals, Court and Enforcement Act 2007 (which established the current tribunal system in England). She considered such principles to be a way of “setting out the focus of what we want tribunals to achieve, so as to be user focus” which would “mitigate the impact and […] help guarantee openness, fairness and impartiality.” She suggested that these principles “would give a degree of certainty that it should develop in line with those principles that put users at the core, but not necessarily in a rigid way”.

129. Jon Shaw from the Child Poverty Action Group concurred with the proposal of including an overriding objective of putting the user at the centre of the tribunal system and that “planning a principle in the Bill to secure that would be a real improvement.”

130. Richard Henderson from the Law Society of Scotland echoed this point. As part of general review of civil justice he noted that “if you are going to make reforms in those different areas, you are sooner or later going to have to ask what a tribunal is.” The Law Society of Scotland in its written evidence also noted that “if there is to be a coherent structure within a civil justice legislative framework, the Bill should identify the characteristics which distinguish tribunals from courts”.

131. Alastair Beattie from the Valuation Appeals Committee was not so convinced. He noted that “given the breadth of the issues that [the Valuation Appeals Committees] as a group deal with and the existing procedures, it is very difficult to see how that could be achieved.”

132. The Minister for Community Safety and Legal Affairs indicated that she would not be opposed to the suggestion of including underlying principles in the Bill and would consider it in the context of the other recommendations of the Committee. In doing so, she noted however that, “by their very nature, overarching principles

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71 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3118.
73 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3130.
74 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3126.
75 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3155.
76 Law Society of Scotland. Written submission, page 33.
77 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3118.
must be very general, because each tribunal will have its own specific culture and principles”. 78

133. The Committee sees merit in the suggestion of including a provision in the Bill setting out what a tribunal is. We are very concerned to protect the character and nature of tribunals and so consider that including this in the Bill would be a step towards achieving that. We therefore call on the Scottish Government to bring forward an amendment, for example in the same terms as section 2(3) and 22(4) of the Tribunals, Courts and Enforcement Act 2007, to set this out on the face of the Bill.

Specialism

134. The Bill attempts to strike a balance between setting up a unified tribunals structure and retaining the unique features of the individual tribunals. The Minister for Community Safety and Legal Affairs explained in oral evidence that “the Bill will create a structure that will enable a better service to be provided to those who use it and maintain the specialism and ethos of each individual tribunal that transfers into the system”. 79

135. Many witnesses stressed the importance of retaining the individual specialism, ethos and culture of the existing tribunals. Richard Henderson from the Law Society noted the need for “a structure that will be able to accommodate that vast spectrum of differences.” 80 Lauren Wood from Citizens Advice Scotland also noted that “each area should be allowed to retain its individual characteristics as far as possible”. 81

136. Adrian Ward from the Law Society welcomed the provisions, but noted that “we must safeguard what is valuable in what we have already.” 82 May Dunsmuir from the Additional Support Needs Tribunal for Scotland also emphasised this point, noting that the Additional Support Needs Tribunal was “an incredibly complex jurisdiction” and that the level of specialism developed by caseworkers “would have to be maintained”. 83 Heather Baillie from the Mental Health Tribunal for Scotland noted that, although the new structure offered the opportunity for generic training, “there is also a need for specific training, given the diverse users that the tribunals serve”. 84

137. The Committee therefore sought reassurances that sufficient safeguards were in place to ensure that a degree of protection was afforded to ensure that the specialism of tribunals, such as the Mental Health Tribunal and the Additional Support Needs Tribunal, was not lost in the new system.

81 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3130.
83 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3123.
84 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3116.
138. The Lord President indicated that he did not believe there was a danger that the changes would bring about a loss of experience. The Minister for Community Safety and Legal Affairs was also keen to note there were benefits to be brought about through the new structure which would provide “opportunities for tribunal members to share best practice and learn from one another’s knowledge and experience”.86

139. The Committee notes that, under section 30, the Lord President must produce an assignment policy for the assignment of members within the First-tier and Upper Tribunals. In particular, under subsection (3)(a), “the assignment policy must be designed to secure that appropriate use is made of the knowledge and experience of the members of the Scottish Tribunals (including their expertise in a particular area of law).”87

140. The President of the Tribunals is responsible for assigning members to the First-tier and Upper Tribunals and must assign members in accordance with the assignment policy.

141. The Bill also allows the assignment of tribunal members to work in other tribunals to the one they were initially appointed to. This arrangement is known as “cross-ticketing”.

142. Although the Faculty of Advocates was not opposed to the principle of cross-ticketing, it noted that this could prove difficult in practice. It suggested that the Bill should contain specific provision to ensure judicial control over the issue. It also suggested that there may be considerable cost implications of cross-ticketing as it could entail a great deal of training.88

143. In terms of retaining specialism within individual tribunals, some concerns were raised that the practice of cross-ticketing could erode the culture and ethos built up within each tribunal. However, the Lord President welcomed this arrangement as it would “give tribunal members who are experienced in tribunal practice the opportunity to develop their career and extend their work into other subject areas.”89

144. The Minister for Community Safety and Legal Affairs also offered reassurance that it should not be an issue as “cross-ticketing already happens under the current structure”. However, she did note that some tribunals were so specialised, such as the Mental Health Tribunal, that it was not her expectation that tribunal members with “absolutely no background in the subject would be plucked out of nowhere and plonked down there”.90

145. The Committee welcomes the provisions in section 30 that aim to ensure that specialism within tribunals is protected under the new structure.

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87 Tribunals (Scotland) Bill, section 30.
88 Faculty of Advocates. Written submission, page 2.
We therefore recommend that careful consideration be given to the provisions within this section to ensure that such protection is ensured.

146. In terms of cross-ticketing, the Committee welcomes the reassurance given by the Minister for Community Safety and Legal Affairs that the system currently in place works effectively and that it is not the expectation that tribunals would be assigned members without the necessary specialism. We also note the Lord President’s comments that cross-ticketing allows for career development. Although we welcome these reassurances, we consider that close regard must be paid to whether this works well in practice. We therefore recommend that this is monitored during the early years of the new system being established to ensure that it is working effectively.

Tribunal independence

147. One of the key objectives of tribunal reform is to bring about a greater degree of tribunal independence. The Policy Memorandum states that the new structure will provide “users with the reassurance that tribunal hearings are being heard by people with no links to the body whose decision they are challenging by providing for greater independence for the new tribunals”.  

148. Section 3 of the Bill contains a specific statutory duty on the First Minister, the Lord Advocate, the Scottish Ministers and members of the Scottish Parliament to uphold the independence of members of the Scottish Tribunals.

149. The level of independence varies across tribunals. Two particular cases where concerns have been raised over the level of independence were Valuation Appeals Committees and Education Appeal Committees.

150. Valuation Appeals Committees deal with appeals regarding the valuation of properties for council tax or business rates. The Scottish Committee of the Administrative Justice and Tribunals Council concluded in its report of 2009, in which it analysed Valuation Appeal Committees, that their independence could be compromised by the fact that tribunals were held in local authority premises with members being remunerated by local authorities.

151. Education Appeals Committees hear appeals from parents and older children against decisions to refuse placing requests, or to exclude children from school. Concerns have been expressed that Education Appeals Committees are not independent since a majority of tribunal members is often appointed by local authority education committees.

152. The general view was that the Bill brought forward welcome developments in ensuring the independence of tribunals. Alastair Beattie from the Valuation Appeals Committees noted that the provisions “would improve the perceived independence of valuation appeals committees by transferring responsibility for

91 Policy Memorandum, paragraph 3.
our funding and training from local authority to central sources.” He also noted that bringing the system under the leadership of the Lord President would help to ensure this.93

153. The Lord President welcomed the statutory commitment to ensuring independence set out in section 3 of the Bill. He also welcomed the Bill as a vehicle to ensure tribunal independence by making a clean break “from the days when tribunals were under the aegis of sponsoring departments”.94

154. However, he highlighted in his written evidence that further reform was needed if the independence of tribunals’ judiciary is to be guaranteed.95 He developed this view further in oral evidence noting that the inclusion of a similar provision in the Bill as that in the Judiciary and Courts (Scotland) Act 2008 which provides for judicial governance in the courts would provide for overall judicial governance of the tribunals and would “simply consolidate the official recognition of the tribunals as being part of the judiciary.”96

155. The Committee welcomes the commitment to ensuring tribunal independence. In particular, we welcome the new structure as a way of ensuring this and the statutory provision placing a duty on key individuals to ensure that independence of tribunals is upheld. We would ask the Scottish Government to give consideration to bring forward an amendment to include provision for judicial governance similar to that contained within the Judiciary and Courts (Scotland) Act 2008.

Procedural rules

156. Sections 62 to 67 of the Bill make provision for tribunals rules. In addition paragraph 12 of schedule 9 to the Bill makes provision for the Scottish Civil Justice Council (SCJC) established under the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013 to propose procedural rules for the Scottish Tribunals through a specialised tribunals committee. The Minister for Community Safety and Legal Affairs indicated that taking such an approach would “ensure a consistency in approach across the tribunal landscape and protect specialism in individual jurisdictions”.97

157. The Policy Memorandum indicates that there are no plans to comprehensively rewrite the rules of procedure applying in respect of each listed tribunal and that the Bill enables existing rules of each listed tribunal to be retained until such time as they require to be amended or new rules are to be introduced.98

158. It also notes that, as the SCJC is only newly established, it is unlikely that it will be able to assume responsibility for tribunal rule-making immediately. In the

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93 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3115.
94 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3194.
95 Lord President of the Court of Session. Written submission, page 1.
98 Policy Memorandum, paragraph 67.
interim, the Bill provides for the Scottish Ministers to make rules for the Scottish Tribunals.99

159. The SCJC in its written submission indicated that it considered it appropriate that such functions should be conferred on it. However, as it was unclear from the Bill when the Scottish Ministers intended to commence the SCJC’s role, its view was that there did not appear to be any merit in increasing its membership in advance. It therefore concluded that the provision in paragraph 12 of schedule 9 should be commenced in its entirety.100

160. The Lord President, who chairs the SCJC, confirmed that it would not be producing tribunal rules in the short term as “one of the early priorities of [the SCJC] will be the consideration of a rules rewrite in the civil court” and that it is “simply not geared up at the moment to consider the drafting of a uniform set of rules for tribunals, but in due course that will unquestionably be part of [the SCJC’s] work”.101

161. Jonathan Mitchell QC emphasised the Faculty of Advocates’ concerns regarding the interim arrangements for the rule-making provisions. The Faculty was of the view that it was “undesirable on constitutional grounds” for the Scottish Ministers to be making these rules. It noted that the Scottish Ministers should “have the same rights as other parties to proceedings before the tribunals to comment on proposed rules, but no power to write them.”102

162. This was of particular concern in relation to the Upper Tribunal as rules still had to be written for it and that it was “a more politically sensitive issue, as the Upper Tribunal tends to deal with cases that are of more significance” and that “it was undesirable that Government should be in a position to run so much”.103

163. The Faculty of Advocates proposed a possible alternative of the rules being written by ad hoc committees of tribunal judges for rules relating to appeals and to first-tier business. However, the Lord President considered that this could “introduce another element of complexity”.104

164. The Law Society of Scotland raised a separate concern that the Bill did not contain sufficient details as to the composition of the proposed tribunals committee of the SCJC and that there was a risk that rules could be made with little or no user input. It therefore proposed following the same approach as in England where members of the equivalent committee must have experience of tribunals practice or advisory work.

165. The Minister for Community Safety and Legal Affairs noted that the Scottish Ministers already currently write tribunals rules and that this was done with expert input. She cited the example of the Mental Health Tribunal for Scotland (MHTS) where “if we were going to change the rules of the MHTS, it would be for [the

99 Policy Memorandum, paragraph 73.
100 Scottish Civil Justice Council. Written submission, page 1.
102 Faculty of Advocates. Written submission, page 3.
103 Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3169.
President of the MHTS] to consult the people whom he thought were the most appropriate”. She envisaged that this arrangement would continue on an interim basis. She also clarified that any new rules or revisions to existing rules would be brought forward by the relevant minister and would be considered by the Parliament under the negative procedure.\textsuperscript{105}

166. The Committee notes the concerns of witnesses regarding the interim arrangements for producing rules. However, we welcome the Minister for Community Safety and Legal Affairs’ reassurance that this is a continuation of the existing arrangements, in particular, that expert input would be made to the drafting of rules of the individual tribunals.

167. We have more serious concerns regarding the production of rules for the Upper Tribunal and the delay in the Scottish Civil Justice Council being in a position to take on this role. We therefore urge the Scottish Government to examine whether there is scope to expedite this transfer of responsibilities, for example, by considering whether the resourcing of the Scottish Civil Justice Council could be reviewed to enable it to undertake this work.

Practice directions

168. Section 68 of the Bill sets out the process for issuing directions as to the practice and procedure to be followed in the Scottish Tribunals.

169. Serious concern was expressed by a number of witnesses regarding the scope of the rules envisaged by section 68(5)(a) which enables the President of the Tribunals, and Chamber Presidents and Vice-Presidents of the Upper Tribunal to issue practice directions for the purpose of “the application or interpretation of the law”.\textsuperscript{106}

170. The argument made by witnesses was that this provision would restrict the independence of the judiciary to take their own view of the law. Jonathan Mitchell QC from the Faculty of Advocates described this as an “extraordinary provision” that gives power to the President of the Tribunals “to lay down, completely on his or her own decision, what the law is.”\textsuperscript{107}

171. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal emphasised that “the interpretation of the law should be for a tribunal or a court, not for a senior judge acting administratively rather than judicially”\textsuperscript{108} and that no equivalent power existed for the Senior President of the Great Britain system of tribunals.\textsuperscript{109}

172. The Lord President echoed these concerns stating that practice directions were intended to give guidance to judges and tribunals as to the way that certain

\textsuperscript{105} Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3215.
\textsuperscript{106} Tribunals (Scotland) Bill, section 68.
\textsuperscript{107} Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3156.
\textsuperscript{108} Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3157.
\textsuperscript{109} Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3158.
decisions are gone about and that it was “quite inappropriate for a practice direction to give guidance as to the interpretation of the law”.¹¹⁰

173. There was therefore a general call for section 68(5)(a) to be removed from the Bill.

174. The Minister for Community Safety and Legal Affairs indicated that this provision was unintentional and that she agreed to introduce an amendment at Stage 2 to address this point.

175. The Committee notes the concerns raised by witnesses with regard to the provision set out in section 68(5)(a) regarding the issuing of practice directions and welcomes the Minister for Community Safety and Legal Affairs’s commitment to bring forward an amendment at Stage 2 to address these concerns.

Appeals and review

176. Chapter 1 of Part 6 of the Bill deals with tribunal decisions.

Section 38

177. Section 38 of the Bill contains general review provisions. It provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. Under these provisions, it will be for each tribunal to decide whether or not it should review one of its own decisions.

178. The Faculty of Advocates, in its written submission, expressed concern that the provisions in section 38, though welcome, were incomplete.¹¹¹ Jonathan Mitchell QC developed this point, noting that the section did not appear to articulate the circumstances in which there might be a review. He suggested by way of illustration that, under this section, a First-tier Tribunal judge might make a decision and each party involved would then consider the process completed. However, there would be nothing stopping the judge subsequently reviewing that decision. He accepted there was a need for a rule to deal with typographical or arithmetical errors. However, his view was that the provisions in general were currently too open-ended.¹¹²

179. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal concurred with the Faculty’s position, noting that the grounds for review could be clearer.¹¹³

180. However, Richard Henderson from the Law Society could see sense in the provisions noting that tribunals were different from courts. “The idea that you can review a decision might be novel and unwelcome, but it allows for the mistake to be rectified, which is probably quite a valuable thing.”¹¹⁴

¹¹¹ Faculty of Advocates. Written submission, page 3.
¹¹⁴ Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3171.
181. The Lord President indicated that he was happy with the wording of section 38, noting that “a provision […] in which a review jurisdiction is conferred […] should be expressed as generally as possible in order not to narrow the options of the reviewing body”.

182. The Committee notes the concerns raised regarding section 38, however, on balance we agree that such a provision needs to be cast in a general way in order not to restrict the options available to the reviewing body. We therefore do not have any concerns regarding the drafting of this provision. However, we suggest that it be kept under review to ensure that it is applied appropriately.

Section 39
183. Section 39 sets out the courses of action available to tribunals in determining any review under section 38. These include: taking no action, setting the decision aside, and correcting minor or accidental errors. If the First-tier Tribunal sets aside a decision of its own, it must either re-decide the matter itself or refer it to the Upper Tribunal. Where the Upper Tribunal sets aside a decision of its own, it must re-decide the matter itself.

184. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal raised a concern relating to the provisions in section 39(2)(b) which enables the First-tier Tribunal to refer a whole case to the Upper Tribunal which would entail “facts and law.” He noted that the power existed in the 2007 Act but that it had not been used in Scotland. His concern was that the Upper Tribunal was not set up to hear from and examine witnesses but to “determine what the law is and, if need be remit the case to the first tier”. He therefore considered the provision to be unnecessary and that “retaining the simple right of appeal to the upper tribunal is a better remedy”. He therefore proposed that section 39(2)(b) should be removed.

185. Richard Henderson from the Law Society took a slightly different approach noting that the provision should be left in the Bill if it is not going to be used. “If it is going to be used, it is probably going to be used in circumstances that are relevant. If they are not relevant, I should think that the tribunal would see it off”.

186. Jonathan Mitchell QC from the Faculty of Advocates also considered that there may be merit in cases being referred to the Upper Tribunal by the First-tier Tribunal so that an authoritative view can be made on both fact and law. Difficulties could therefore arise in restricting matters to appeals that can only be made on points of law. “Ultimately, you may end up with a spread of very different first instance facts and decisions when it would have been helpful to everybody to get a general definitive view from above”.

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120 Scottish Parliament Justice Committee, Official Report, 10 September 2013, Col 3172.
187. The Lord President noted that “if the Upper Tribunal is to operate as a review body rather than as an appellate body [...] the legislation should leave it a broad measure of discretion to develop its own rules and principles on the scope of its review function.”

188. Again, the Committee notes the concerns raised regarding section 39. However, on balance, we recognise the benefits to be made from the Upper Tribunal being able to provide a general view and therefore, note that the provisions need to be drafted in a general way to enable this to happen. We therefore have no concerns regarding the drafting of this section.

Section 45

189. Section 45 makes provision in relation to a ‘second appeal’ which is an appeal to the Court of Session under section 43 against a decision of the Upper Tribunal on an appeal from a decision of the First-tier Tribunal under section 41.

190. In order for permission to appeal from the First-tier Tribunal to the Upper Tribunal to be granted, an arguable case has to be shown. However, where the decision of the Upper Tribunal relates to an appeal from the First-tier Tribunal, permission will only be granted for a further appeal to the Court of Session if the case raises an important issue of principle or practice or where there are compelling reasons for allowing a second appeal.

191. Jonathan Mitchell QC from the Faculty of Advocates raised concerns that this “sift” process was overly restrictive and would unnecessarily limit appeals to the Court of Session. He noted that the wording of the provision in section 45(4) appeared to have been lifted from English legislation where such a restriction, he understood, was necessary to guard against “vexatious and frivolous appeals”. He did not consider that this was necessarily the case in Scotland.

192. In practice his concern was that “the provision means that if I win my case at the first tier and it goes to the Upper Tribunal and that tribunal says, “The first-tier got it wrong,” I cannot appeal to the Court of Session unless there is a point of principle.”

193. Iain Nisbet from Govan Law Centre echoed this concern noting that he had no concerns regarding cases that were obviously without merit but “there are not a huge number of appellate cases being brought, and it is good for a tribunal system to have a reasonable flow of those”. He suggested that this was something that the Parliament may wish to monitor to ensure that the “sift” was not being too vigorously applied.

194. The Lord President, however, did not hold this view. He noted that as this related to a second appeal procedure “the idea that, when you get to that stage, you should widen the appeal’s scope seems to me to be entirely

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counterproductive”. He therefore favoured a stringent test for appeal to the Court of Session.

195. The Committee notes the concerns raised regarding section 45, in particular, whether such a restriction is necessary in Scotland. We agree that further consideration needs to be given to the wording of the test applied and whether this is too restrictive. At a minimum we propose that this be reviewed in the short-term to ensure that the provision works effectively. We therefore call on the Scottish Government to give further consideration to this provision.

Expenses and fees

196. Section 59 of the Bill gives the First-tier Tribunal and the Upper Tribunal the power to award expenses “so far as allowed in accordance with the Tribunal Rules”.

197. Although the Policy Memorandum suggests that it would not be appropriate for expenses to be awarded in all situations, the Bill does not appear to set statutory limits on the situations where expenses would be justified.

198. Section 70 of the Bill introduces powers which could be used to charge fees. Under this section, the Scottish Ministers may by regulation make provision for “reasonable fees [...] payable in respect of any matter that may be dealt with by the Scottish Tribunals.”

199. The Lord President in written evidence welcomed the provisions in relation to expenses. He noted that “in the interest of justice, tribunals, a number of which are ‘party-party’ tribunals, ought not necessarily to be regarded as cost free zones.” He also considered it appropriate that tribunals be given a wide measure of discretion as “the assessment of what is a fair determination of an application for an award of expenses depends, in practice, on the facts and circumstances of the individual case.”

200. He did acknowledge, however, that to avoid deterring people from coming forward, the power would have to be “exercised sparingly” and “only in extreme cases”.

201. With regard to fees, he felt that it was a political matter on which he did not wish to express a view.

202. The Faculty of Advocates was opposed to the proposal that expenses and fees be charged noting that these powers may be familiar in a court context “but are not normal for Tribunals”. It went on to observe that in some jurisdictions (for example, the Mental Health Tribunal) the charging of fees would be “unthinkable”.

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125 Tribunals (Scotland) Bill, section 59.
126 Policy Memorandum, paragraph 76.
127 Tribunals (Scotland) Bill, section 70.
128 Lord President of the Court of Session. Written submission, page 4.
The Faculty considered that these powers raised issues of principle and stated that it would welcome the opportunity in the future to comment on any changes proposed.\textsuperscript{130}

203. The Minister for Community Safety and Legal Affairs confirmed that the provisions relating to fees and expenses related to the policy imperatives that set up the individual tribunals. As some tribunals already charged fees, she noted that the Bill had to allow for such scenarios within the new framework. She explained that the provisions relating to fees were contained within the tribunal’s parent legislation, for example, the Lands Tribunal for Scotland and the Homeowner Housing Panel both had the power to charge fees.

204. The Scottish Government provided further clarification regarding the powers in section 70 to allow tribunals to charge fees. On the face of it, it appeared that the power was broad enough to allow all tribunals to charge fees and expenses. However, it was clarified that the section 70 would only allow fees to be charged with the approval of the Parliament. Michael Gilmartin from the Scottish Government confirmed that “no fee can be charged on any matter without Parliament’s approval, and the provision is completely dependent on the powers being exercised sensibly.”\textsuperscript{131} It was also confirmed that this included those tribunals with an existing power to charge fees and/or expenses.

205. The Committee has some concerns regarding the provision to charge expenses and fees. We recognise the need to include this provision in the Bill to allow tribunals with the existing power to charge fees to continue to do so. However, we consider the wording of the provision to be drafted very generally and does not set out the circumstances where it would be appropriate for fees to be charged. We therefore recommend that, where there is a proposal for a tribunal to be given the power to charge expenses and fees where it did not previously, consultation should be carried out with users and stakeholders of the tribunal concerned.

Lands Tribunal for Scotland

206. In its written evidence, the Lands Tribunal for Scotland was strongly opposed to the proposal that it be included within the new structure. As well as its strong opposition to the general approach of the Bill, it raised specific concerns regarding its place within the new structure.

207. In its written submission, it set out its concerns in detail. In summary, it generally functions as a court; it is a small tribunal, working with the equivalent of about two and a half members; and the overall objective of ensuring the independence of tribunals from those whose decisions are being challenged did not apply to it. It therefore concluded that the provisions in the Bill did not necessarily apply to it.\textsuperscript{132}

\textsuperscript{130} Faculty of Advocates. Written submission, page 4.
\textsuperscript{131} Scottish Parliament Justice Committee, Official Report, 17 September 2013, Col 3213.
\textsuperscript{132} Lands Tribunal for Scotland. Written submission, pages 4 and 5.
208. In oral evidence, John Wright QC from the Lands Tribunal noted that “it is difficult to see how all of these matters could be dealt with appropriately in the context of a general overall reform.”

209. The Lord President concurred with this general concern, observing that the Lands Tribunal “is a court of law in all but name. It does highly specialised work and it deals with important cases involving the law of conveyancing, the law of valuation for rating, and the law of compulsory acquisition and compensation.” He indicated that it “operates superbly well” and that “it is not broken and does not require fixing.”

210. There was therefore a general call for the Lands Tribunal to be left in a pillar on its own, outwith the chamber and division structure proposed by the Bill, but under the leadership of the Lord President as Head of the Scottish Tribunals.

211. In the Policy Memorandum it was noted that the policy intention was for the devolved functions of the Lands Tribunal to transfer-in to the Upper Tribunal rather than the First-tier Tribunal. The Scottish Government’s view was that “it can best preserve and enhance the specialist qualities of the Lands Tribunal within the Upper Tribunal by allocating it functions to a single division.”

212. The Minister for Community Safety and Legal Affairs acknowledged the complexity of the Lands Tribunal’s jurisdiction and stated that it was the Scottish Government’s view that adequate provision was made by this intention to situate it in the Upper Tribunal. She was firmly opposed to the proposal that it be in a pillar on its own noting that “positioning tribunals outwith the structure only complicates the system and is contrary to what we seek to address in the Bill.”

213. The Committee notes the case put forward by the Lands Tribunal for Scotland that it should not be transferred in to the new system. We therefore urge the Scottish Government to review its position in this regard.

Mental Health Tribunal for Scotland

214. The Mental Health Tribunal for Scotland (MHTS) raised concerns regarding being place within the First-tier Tribunal. The MHTS’s view was that the tribunal was of a different characteristic from other tribunals and that it, therefore, should be retained in a chamber on its own.

215. In its written submission it noted that it was an expert tribunal in the area of mental health, it was therefore concerned that “after its creation by the 2003 Act with the specific intention of removing mental health cases from the jurisdiction of the “generic” public courts in Scotland and transferring them into an expert jurisdiction, the proposal appeared to envisage the return of the mental health jurisdiction to a “generic” First-tier Tribunal.”

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133 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3114.
135 Policy Memorandum, paragraph 46.
137 Mental Health Tribunal for Scotland. Written submission, page 1.
216. Adrian Ward, Convener of the Law Society’s mental health and disability sub-committee, developed this point in oral evidence, setting out the various powers of the MHTS, including “depriving people of their liberty, imposing treatments on them that they do not want to accept and imposing conditions as to how they may live if they are not deprived of their liberty completely”.  

217. Representations have been made by the MHTS to the Scottish Government seeking a commitment that the MHTS would be preserved in a chamber on its own. The Scottish Government in the Policy Memorandum made a commitment to take this forward.  

218. However, Heather Baillie from the MHTS noted that the commitment was that the MHTS will only “initially” be in a chamber on its own. The Bill delegates powers to the Scottish Ministers to establish the structure of the Scottish Tribunals which includes a chamber within which the MHTS will be. There was therefore a general call that this should be set out on the face of the Bill to provide certainty for the future.  

219. While the Minister for Community Safety and Legal Affairs did reiterate the commitment made in Policy Memorandum, she saw the need for flexibility to be retained and she also committed to “consultation and a high level of parliamentary scrutiny each time the chamber structure is changed. That will ensure that the system is as flexible as possible, while maintaining the committee’s oversight.”  

220. The Committee welcomes the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the First-tier Tribunal. We consider that taking such a step will ensure that the unique nature of the tribunal will be preserved within the new structure. However, we are sympathetic to the Mental Health Tribunal’s concerns that this commitment appears to be made of a temporary nature and so we recommend that the Scottish Government bring forward an amendment to preserve the distinctiveness of the Mental Health Tribunal for Scotland.  

Children’s Hearings System  

221. In its submission, the Scottish Children’s Reporter Administration (SCRA) expressed concern at the power of the Scottish Ministers to make additions to schedule 1 of the Bill, which lists the tribunals whose functions can be transferred in to the Scottish Tribunals.  

222. The SCRA argued that Children’s Hearings should be exempted from this power because of the complexity, size and the fact that the system has recently been reformed. The SCRA was not in principle opposed to Children’s Hearings being included in the Scottish Tribunals at some juncture in the future; however it argued “that if such a move were to be proposed, it would require the time for

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139 Policy Memorandum, paragraph 43.  
140 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3110.  
142 Tribunals (Scotland) Bill, section 26(2)(b).  
143 The Children’s Hearings (Scotland) Act 2011 came into force in June 2013.
consultation, debate, discussion and detailed parliamentary scrutiny which the primary legislative route guarantees”. 144

223. Scotland’s Commissioner for Children and Young People echoed the SCRA’s view and stated that “Scotland’s unique care and justice system for children and young people should be explicitly excluded from the scope of the power in section 26”. 145

224. The Committee recognises the complexity and importance of the Children’s Hearing system in Scotland and notes that it has very recently been reformed. We also note that the power given to the Scottish Ministers under section 26(2)(b) require regulations to be laid before the Parliament which will be subject to the affirmative procedure. It would be for the Scottish Ministers at the time to undertake the required consultation and background work before laying any regulations before the Parliament. We consider this to provide sufficient Parliamentary protection which would prevent Children’s Hearings being transferred into the Scottish Tribunals inappropriately.

Delegated powers

225. The Bill is an enabling piece of legislation which provides a framework for the new tribunal structure. That being the case, much of the detail will be set out in secondary legislation which will include, amongst other things, detail of the establishment of the new structure and determining which tribunals will be transferred in, as well as the rules of the tribunals and the charging of fees.

226. While witnesses in general accepted that the flexibility provided by the use of delegated powers is sometimes necessary, a number of concerns were expressed at the lack of detail set out on the face of the Bill.

227. Lauren Wood from Citizens Advice Scotland noted that the lack of detail meant that it was impossible to guarantee fairness, openness and impartiality. 146 Katie James from Advocard observed that “from a service user’s point of view, accessibility comes from having detail that people can look at, cross-examine and utilise effectively.” 147

228. In evidence, the Minister for Community Safety and Legal Affairs noted the difficulties in including all the provisions on the face of the Bill “given the complexity of the various tribunals that are involved”. 148

229. The Committee is sympathetic to the concerns caused by the lack of detail on the face of Bill. However, we also understand the need for the flexibility afforded by the use of delegated powers given the complexities of the legislation involved. We will therefore pay very close attention to the secondary legislation which will be brought forward under the Bill.

144 Scottish Children’s Reporter Administration. Written submission, page 2.
145 Scotland’s Commissioner for Children and Young People. Written submission, page 2.
146 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3127.
147 Scottish Parliament Justice Committee, Official Report, 3 September 2013, Col 3126.
Delegated Powers and Law Reform Committee

230. As part of the Stage 1 process, the Delegated Powers and Law Reform Committee (DPLR) has produced a report on the delegated powers in the Bill. 149

231. In its report on the Bill, the Committee highlights two points in particular on which it is seeking action from the Scottish Government.

232. The DPLR Committee is seeking amendments to section 48(2) (which relates to excluded decisions in relation to appeal rights) and to section 56(2) (which relates to the venue for tribunal hearings). The details of the DPLR Committee’s concerns are set out in paragraphs 43 to 59 of its report on the Bill.

233. The Committee endorses the conclusions drawn by the Delegated Powers and Law Reform Committee on its Stage 1 report on the delegated powers in the Bill and calls on the Scottish Government to give particular consideration to the recommendations in respect of the powers in sections 48(2) and 56(2).

Policy and Financial Memorandums

234. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the policy memorandum which accompanies the Bill. We consider that the memorandum provides sufficient detail on the policy intention behind the Bill and explains why alternative approaches were not favoured.

235. The same rule also requires the lead committee to report on the financial memorandum. The Committee notes that the Finance Committee was satisfied that no substantive issues were raised in the written submissions it received in response to its call for evidence, and did not opt to undertake any further scrutiny or report to this Committee. We are therefore content with the level of detail provided in the financial memorandum.

GENERAL PRINCIPLES

236. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

237. The Committee supports the general principles of the Bill. We consider that the Bill brings forward a much-needed restructuring of the tribunals system. In particular we believe that the provisions will simplify the existing process and will make the tribunals more accessible to users.

ANNEXE A: REPORTS FROM OTHER COMMITTEES

Finance Committee consideration

The Finance Committee agreed, at its meeting on Wednesday 5 June 2013, to invite written evidence from a number of organisations, seeking a response to specific questions. The call for evidence and the responses received are available at:

Delegated Powers and Law Reform Committee consideration

The Delegated Powers and Law Reform Committee’s report on the Tribunals (Scotland) Bill is available at:
ANNEXE B: EXTRACTS FROM THE MINUTES

17th Meeting, 2013 (Session 4) Tuesday 28 May 2013

Tribunals (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed to further consider its approach at its next meeting.

18th Meeting, 2013 (Session 4) Tuesday 4 June 2013

Tribunals (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

22nd Meeting, 2013 (Session 4) Tuesday 3 September 2013

Tribunals (Scotland) Bill: The Committee took evidence on the Bill at Stage 1
from—
May Dunsmuir, Convener, Additional Support Needs Tribunal for Scotland
Heather Baillie, In-house Convener, Mental Health Tribunal for Scotland
John Wright QC, Member, Lands Tribunal for Scotland
Alastair Beattie, Convener, Scottish Valuation Appeal Committee Forum
Katie James, Advocard
Jon Shaw, Welfare Rights Worker, Child Poverty Action Group in Scotland
Lauren Wood, Policy Officer, Citizens Advice Scotland
Iain Nisbet, Head of Education Law, Govan Law Centre

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

23rd Meeting, 2013 (Session 4) Tuesday 10 September 2013

Tribunals (Scotland) Bill: The Committee took evidence on the Bill at Stage 1
from—
Adrian Ward, and Richard Henderson, Law Society of Scotland
Jonathan Mitchell QC, Faculty of Advocates
Alan Gamble, Judge, Upper Tribunal, Administrative Appeals Chamber, sitting in Scotland

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

24th Meeting, 2013 (Session 4) Tuesday 17 September 2013

Tribunals (Scotland) Bill: The Committee took evidence on the Bill at Stage 1
from—
Rt Hon Lord Gill, Lord President of the Court of Session
Roseanna Cunningham, Minister for Community Safety and Legal Affairs
Michael Gilmartin, Solicitor, Scottish Government

Roderick Campbell indicated that he is a member of the Faculty of Advocates.
26th Meeting, 2013 (Session 4) Tuesday 1 October 2013

Tribunals (Scotland) Bill (in private): The Committee agreed to defer consideration of its draft Stage 1 report to its next meeting.

27th Meeting, 2013 (Session 4) Tuesday 8 October 2013

Tribunals (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.
ANNEXE C: INDEX OF ORAL EVIDENCE

22nd Meeting, 2013 (Session 4) Tuesday 3 September 2013

May Dunsmuir, Convener, Additional Support Needs Tribunal for Scotland
Heather Baillie, In-house Convener, Mental Health Tribunal for Scotland
John Wright QC, Member, Lands Tribunal for Scotland
Alastair Beattie, Convener, Scottish Valuation Appeal Committee Forum
Katie James, Advocard
Jon Shaw, Welfare Rights Worker, Child Poverty Action Group in Scotland
Lauren Wood, Policy Officer, Citizens Advice Scotland
Iain Nisbet, Head of Education Law, Govan Law Centre

23rd Meeting, 2013 (Session 4) Tuesday 10 September 2013

Adrian Ward, and Richard Henderson, Law Society of Scotland
Jonathan Mitchell QC, Faculty of Advocates
Alan Gamble, Judge, Upper Tribunal, Administrative Appeals Chamber, sitting in Scotland

24th Meeting, 2013 (Session 4) Tuesday 17 September 2013

Rt Hon Lord Gill, Lord President of the Court of Session
Roseanna Cunningham, Minister for Community Safety and Legal Affairs
Michael Gilmartin, Solicitor, Scottish Government
ANNEXE D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Additional Support Needs Tribunals for Scotland (94KB pdf)
Child Poverty Action Group (179KB pdf)
Children in Scotland (71KB pdf)
Citizens Advice Scotland (180KB pdf)
Employment Tribunals (Scotland) (113KB pdf)
Faculty of Advocates (175KB pdf)
Glasgow City Council (69KB pdf)
Judicial Appointments Board for Scotland (86KB pdf)
Lands Tribunal for Scotland (201KB pdf)
Law Society of Scotland (333KB pdf)
Lord President (233KB pdf)
May, Douglas J and Gamble, Allan J (26KB pdf)
Mental Health Tribunal for Scotland (111KB pdf)
Office of the Scottish Charity Regulator (72KB pdf)
Private Rented Housing Panel/Homeowner Housing Panel (91KB pdf)
Scotland's Commissioner for Children and Young People (246KB pdf)
Scottish Children's Reporter Administration (198KB pdf)
Scottish Civil Justice Council (211KB pdf)
Scottish Committee of the Administrative Justice and Tribunals Council (400KB pdf)
Scottish Human Rights Commission (100KB pdf)
Scottish Independent Advocacy Alliance (67KB pdf)
Scottish Valuation Appeal Committees Forum (91KB pdf)
Traffic Commissioner for Scotland (66KB pdf)
Voices of Experience Scotland (128KB pdf)
Wright QC, John (105KB pdf)
Wright QC, John (supplement) (63KB pdf)

Written submissions are also published (in the order received) on the Committee’s webpage at:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66140.aspx
Written submissions to the Finance Committee

- Crofting Commission (11KB pdf)
- Fife Council (10KB pdf)
- Judicial Appointments Board for Scotland (71KB pdf)
- Judicial Office For Scotland (111KB pdf)
- Scottish Borders Council (9KB pdf)
- The Mental Health Tribunal for Scotland (78KB pdf)
FINANCE COMMITTEE CALL FOR EVIDENCE
TRIBUNALS (SCOTLAND) BILL: FINANCIAL MEMORANDUM
SUBMISSION FROM CROFTING COMMISSION

Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Due to its specific governing legislation there is limited direct impact of this Bill on the Crofting Commission (CC). The CC did not respond to the consultation. The CC was approached for, and did provide information about its costs for the preparation of the FM but did not comment on the financial assumptions made.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Not applicable.

Did you have sufficient time to contribute to the consultation exercise?
3. Not applicable

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
There are no known financial implications for the CC.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
4. The CC has not reviewed the estimates.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
5. Not applicable

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
6. Not applicable

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
7. The CC provided information about its costs for the preparation of the FM but is not in a position to comment on the FM more generally.
Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

8. The CC is not in a position to comment on these as it is not directly affected.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. I did not participate in the consultation exercises

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Non-Applicable

Did you have sufficient time to contribute to the consultation exercise?
3. Yes sufficient time was provided to facilitate consultation with colleagues

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. It has been assumed as per Paragraph 37 of the Financial Memorandum which states "The SG does not expect local authorities to incur any additional costs as a result of the changes to tribunals" that there will be no financial impact for Fife Council.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. Non-Applicable

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. Non-Applicable

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. Non-Applicable

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill?
If not, which other costs might be incurred and by whom?
8. Non-Applicable

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?
9. Non-Applicable
Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. Yes - the Board was invited to comment on the proposals of the Bill and the Financial memorandum and provided comments in writing.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

2. Yes - The Board has been informed that all additional costs to the Board will be met from existing resources from within the Scottish Tribunal Service or the Scottish Government. These costs will include funds for administrative support and 2 new Board members.

Did you have sufficient time to contribute to the consultation exercise?

3. Yes

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

4. There are no financial implications for JABS. Any new costs to JABS will be borne by the Scottish Administration and provision has been made within the individual tribunal budgets for appointment of new members.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

5. The Board are not best placed to comment.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

6. Not relevant for JABS, additional funding to the Board for recruitment of tribunal members will be given on a case by case basis. Reimbursement will be made after each exercise and the costs will vary depending on the jurisdiction.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

7. Partially – It is difficult to say how many appointments JABS may be expected to undertake when the new structure comes into operation. It will depend on how many of the existing tribunal members seek to transfer into the new structure. Also the Board has expressed a wish to have the option to have tribunal appointment
panels supplemented, where appropriate, with individuals with relevant professional experience and/or of perceived independence from both the Tribunal community and the Board. This would provide the option to co-opt from a pool of approved members to undertake work on behalf of JABS. The Board is currently in correspondence with SG officials on the absence of a provision in the Bill to allow the Board to co-opt specialist or independent panel members. The tribunal’s policy team is considering this issue and the Board understands the Scottish Government may seek an amendment at stage 2 of the Bill to include such a provision. Having a pool of approved members may have modest cost implications depending on the status of the individual, though the Board does not propose to use specialist or independent panel members any more frequently than the Scottish Tribunals Service currently does.

Wider Issues

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. Yes – as far as the appointment process is concerned.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. The Board is not aware of any such future costs associated with the Bill.
1. Thank you for this opportunity to provide evidence to the Finance Committee on the implications of the Tribunals (Scotland) Bill. In general, I agree with the financial implications of the Bill as set out in the Financial Memorandum. I hope that it will be helpful to the committee if I make a few comments relating to my role as Chairman of the Scottish Civil Justice Council and, as proposed in the Bill, Head of the Scottish Tribunals.

President of Scottish Tribunals
2. According to the Financial Memorandum, it is expected that the role of President of Scottish Tribunals will occupy 40% of the relevant Senator’s time in the first year and 20% thereafter but, at this stage, it is difficult to assess how much time will be required if it should be more, a greater allowance for backfill costs would be required.

Courts’ judiciary
3. It is difficult to predict how much pressure will be put on the judicial resources of the courts if the judiciary should be are called on to assist in the work of the tribunals. It could be significant. This matter should be closely monitored.

Judicial Office for Scotland
4. The Financial Memorandum takes account of the added burden to the Judicial Office for Scotland. The Judicial Office exists to support me in my responsibilities as head of the judiciary in Scotland. It is right that this office should also support the President of Scottish Tribunals in the responsibilities proposed by the Bill. The Financial Memorandum suggests that there should be additional administrative support corresponding to one full-time member of staff equivalent to Scottish Government pay grade B2. This seems to be a reasonable provision.

Scottish Civil Justice Council
5. The Financial Memorandum indicates that it is the Scottish Ministers intend to retain functions in respect of tribunal rule-making until the Scottish Civil Justice Council (SCJC) is in a position to take on rule-drafting functions. The reason for delaying commencement of the provisions conferring tribunal rule-making and rule-drafting functions on the Court of Session and the SCJC respectively is that the SCJC will be responsible for the implementation of much of the Courts Reform (Scotland) Bill. The draft Bill, recently subject to public consultation by the Scottish Government, is an enabling Bill, which will leave most of the detail to be implemented through court rules. The SCJC will have the task of preparing the court rules.

6. I expect that the SCJC will be engaged on the rules project work for the next 3-4 years. A further project on tribunal rules revision would require further
resources. I therefore support the proposal to delay commencement of the provisions to transfer the tribunal rule drafting functions to the SCJC.

7. The Scottish Government does not intend to commence provisions in relation to the Court of Session’s tribunal rule-making power or the SCJC’s drafting function for several years, if any functions in relation to tribunals were to be conferred on the SCJC before then, additional resources would be required.

8. The Financial Memorandum (para. 30) estimates that an additional staffing resource (0.5 FTE Government lawyer, at £32,000 p.a.) would be required to support the SCJC’s functions in respect of tribunals. There may be some additional costs arising from, for example, the additional membership of the SCJC and the proposed Tribunals Committee, but these are expected to be small and absorbable. I think that the cost estimated in the Financial Memorandum is reasonably accurate. According to the Financial Memorandum “As the Scottish Government does not intend to rewrite tribunal rules comprehensively the Scottish Government does not expect there to be a substantial workload for the Council to undertake”. If the view were later to be taken by the SCJC, to whom consideration of this matter would fall, that such a rewrite was required, there would be a substantial workload that would require additional funding.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. No, SBC did not respond

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. N/A

Did you have sufficient time to contribute to the consultation exercise?
3. Yes

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. Yes

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. Yes

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. N/A

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. Yes

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
8. Yes

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?
9. No
Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. The Tribunal took part in the Scottish Government consultation exercises relating to the Bill. The Tribunal submitted a detailed response to the Scottish Government consultation commenting on particular areas of the Bill. The Tribunal did not comment in that response on the financial assumptions made.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum (FM)?

2. As noted, the Tribunal did not comment on this aspect of the consultation.

Did you have sufficient time to contribute to the consultation exercise?

3. Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details.

4. The Bill itself does not give rise to any particular financial implications for the Tribunal.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

5. The FM identifies three areas which may give rise to financial implications, these being:

• the new judicial appointments process for tribunals;
• the President of the Scottish Tribunals; and
• the making and amending of tribunal rules.

6. The estimated costs associated with the provisions contained in the Bill referred to above seem to the Tribunal to be reasonable. The Tribunal notes that it is difficult to provide a clear estimate of the likely costs to be incurred as a result of certain provisions. For example it is not clear exactly how much the role of the President of the Scottish Tribunals will occupy a Senator of the College of Justice’s time. The Tribunal agrees that it is likely that considerably more of a Senator’s time will be taken up by the role of President of Tribunals in the initial years of the new Scottish Tribunals being in operation. The Tribunal notes that while it is envisaged that the Scottish Government does not expect new costs to be associated with the creation of the Upper Tribunal, there may be unforeseen costs associated with the Upper Tribunal once it is in operation. This appears to the Tribunal to be likely. It is
often difficult to accurately project the costs of a new institution until that institution has been in operation for some time.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

7. The Tribunal should not incur any new financial costs associated with the provisions of the Bill.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

8. Yes. See response to question 5.

Wider issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

9. The Tribunal is of the view that the pensions litigation in the O’Brien case is likely to give rise to significant further costs in relation to the payment of pensions to judicial office holders. In O’Brien v Ministry of Justice [2013] UKSC 6, the Supreme Court held that the exclusion of fee-paid Recorders from the judicial pension scheme fell within the scope of the Part-time Workers (Prevention of less Favourable Treatment) Regulations 2000 and could not be objectively justified. The Ministry of Justice will now implement a pension scheme for fee-paid recorders. The Supreme Court judgement did not give a definitive ruling on whether the exclusion of other types of fee-paid judicial office holders from the judicial pension scheme was unlawful and further litigation is taking place in relation to such fee-paid posts in the Employment Tribunal.

10. The members of the Tribunal are currently appointed through the public appointments system and not through the Judicial Appointments Board for Scotland. The Bill makes provision for new appointments to involve the Judicial Appointments Board.

11. The existing members of the Tribunal are fee-paid and this will continue under the Bill. The creation of full time and, it can be assumed, salaried posts, such as Chamber President or Deputy Chamber President, in the Bill may assist in the identification of a comparator for the purposes of similar litigation as the O’Brien case which may be brought by fee-paid Tribunal members. The Tribunal simply highlights that the issue of pensions for fee-paid judicial office holders is an issue where it is likely that substantial further expenditure will be required by the Scottish Government.

12. A further issue which the Tribunal would wish to highlight is that, at present, a number of tribunals are provided with administrative support by the Scottish Tribunals Service (STS). The Tribunal is the largest tribunal supported by the STS. The STS was established to improve the effectiveness and efficiency of the administration provided to a number of individual tribunals. The fact that the Tribunal is the largest of the devolved tribunals operating in Scotland has meant that costs for particular STS corporate services such as a Finance Team, an IT Team, a Business
Support and Improvement Team, a Planning and Performance Team and a Training Manager have been retained under the original Tribunal cost centre and come from the Tribunal’s budget. Since the creation of the STS, the Finance Team has been used by other tribunals, and some tribunals have also utilised the IT services. STS has a Senior Operations Manager whose salary comes from the MHTS budget, despite the fact that that manager also covers the Additional Support Needs Tribunals for Scotland and the Private Rented Housing Panel.

13. The Tribunal is of the view that the fact that these services have been paid for from the budget allocated to the Tribunal obscures the fact that in fact they are corporate costs which are incurred by the STS in supporting the various tribunals. The President of the Tribunal has therefore approached the STS with a view to having an appropriate part of these costs disaggregated from the Tribunal’s budget.

*Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?*

14. It appears to the Tribunal that, given the fact that the Bill is an enabling Bill and much of the implementation of the Bill will be left to regulations to be made by the Scottish Ministers, there will be future costs associated with the implementation of the Bill. It is not possible for the Tribunal to quantify these costs.
Delegated Powers and Law Reform Committee

41st Report, 2013 (Session 4)

Tribunals (Scotland) Bill

Published by the Scottish Parliament on 3 September 2013
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
      (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
      (ii) [deleted]
      (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Christian Allard
Nigel Don (Convener)
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Delegated Powers and Law Reform Committee

41st Report, 2013 (Session 4)

Tribunals (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 25 June and 3 September 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Tribunals (Scotland) Bill at stage 1 (“the Bill”)\(^1\). The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)\(^2\).

OVERVIEW OF THE BILL

3. The Tribunals (Scotland) Bill was introduced in the Scottish Parliament on 8 May 2013.

4. The Bill creates a new structure for tribunals dealing with devolved matters. At present, a number of individual tribunals exist, each with an individual specialised remit which is conferred by statute. The Bill creates two new tribunals: a First-tier Tribunal for Scotland and an Upper Tribunal for Scotland. These would be collectively known as “the Scottish Tribunals”. It is intended that the functions of the existing devolved tribunals will transfer to these new tribunals. Schedule 1 to the Bill lists the tribunals whose functions may be transferred.

5. The Lord President of the Court of Session would be the Head of the Scottish Tribunals. A new office would also be created, the President of the Scottish Tribunals, responsible for the efficient disposal of business.

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\(^1\) Tribunals (Scotland) Bill available here: http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd.pdf

6. In the consideration of the DPM at its meeting on 25 June, the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced at the Annex.

DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill.

8. The Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

   Section 9 – Directions on functions
   Section 26(2) – Modification of listed tribunals
   Section 27(2) – Transfer-in of functions of the listed tribunals
   Section 27(4) – Transfer of functions between the Scottish Tribunals
   Section 49(1) – Position on transfer-in
   Section 50(1) – Time limits for applying for permission to appeal
   Section 51(2) – Specifying persons who are to be regarded as a party to a case
   Section 52(4) – Specification of categories of petition for judicial review which may be remitted to the Upper Tribunal
   Section 54(2) – Additional matters in relation to judicial review
   Section 57(1) – Conduct of cases
   Section 58(1) – Enforcement of decisions
   Section 59 – Award of expenses
   Section 60(1) – Additional powers
   Section 61(1) – Application of enactments
   Sections 62 to 67 – Scottish Tribunal Rules
   Section 70(1) – Tribunal fees
   Section 77(2) – Commencement
   Schedule 2, paragraph 1(1) – Transfer-in of members
   Schedule 3, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the First-tier Tribunal
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Schedule 3, paragraphs 5(2) and 7 – Further provision about the eligibility of legal members of the First-tier Tribunal

Schedule 5, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the Upper Tribunal

Schedule 5, paragraphs 5(2) and 7 – Further provision about the eligibility of legal members of the Upper Tribunal

Schedule 8, paragraph 3(1) – Rules for the investigation and determination of any matter concerning the conduct of members of the Scottish Tribunals

Schedule 8, paragraph 14 – Procedure to be followed by a fitness assessment tribunal

Schedule 9, paragraph 2(2) – Continued application of procedural rules of listed tribunals

Schedule 9, paragraph 4(2) – Procedural rules prior to the involvement of the Scottish Civil Justice Council

9. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

Section 19(2) – Chambers in the First-tier Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 22(2) – Divisions of the Upper Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provisions
10. Section 19(1) provides that the First-tier Tribunal is to be organised into a number of chambers, having regard to the subject-matters falling within the Tribunal’s jurisdiction and any other factors relevant to the exercise of the Tribunal’s functions. Section 22(1) makes similar provision with regard to the Upper Tribunal, which is to be organised into a number of divisions. Sections 19(2) and 22(2) confer powers on the Scottish Ministers by regulations to make provision in connection with the organisation of the Tribunals, and the allocation of functions between the chambers or, as the case may be, between the divisions.

11. Before making regulations under either section 19(2) or 22(2), the Ministers must obtain the Lord President’s approval and consult such other persons as they consider appropriate. Both powers are subject to the affirmative procedure.

12. Section 10(1) permits regulations under section 19(2) or 22(2) to make provision delegating authority to the Lord President to make arrangements
regarding the organisation of the First-tier or Upper Tribunals, or to rely on the
effect of Tribunal Rules to make such provision.

Comment
13. The Committee is content in principle with delegation of the powers to
organise the structure of the Tribunals, given the need for flexibility explained in
the DPM.

14. The DPM explains that the Scottish Ministers are considered to be the most
appropriate persons to make provision regarding the chamber structure of the
First-tier and Upper Tribunals and the allocation of functions among those
chambers, but that the Scottish Government also recognises that it may be more
appropriate for the Lord President or Tribunal Rules, formulated through a process
independent of the Scottish Ministers, to determine these matters. It explains that
section 10(1) therefore enables the regulations to make provision authorising the
Lord President, or relying on Tribunal Rules, to determine certain of these matters.

15. In justifying the choice of parliamentary procedure, the DPM explains that
affirmative procedure is considered appropriate as the power has a potentially
significant impact on the way in which the First-tier Tribunal will operate and how
its functions will be exercised. The Scottish Government considers that this is an
area which is likely to be of concern to the members and users of the listed
tribunals, and that this is reflected in the requirement for consultation prior to
making the regulations.

16. Given the stated importance of the organisation of the Tribunals, the
Committee does not consider that it is fully explained in the DPM in what
circumstances it might be considered appropriate to delegate the matter to the
Lord President, or to rely on provision made in Tribunal Rules, or what sort of
provision might be delegated. While the effect of sections 19(2) and 22(2) as read
with section 10(1) is that Parliament would have the opportunity to consider any
regulations which delegated authority to the Lord President, including the terms of
that delegation, the actual provision made by the Lord President would not be
subject to parliamentary scrutiny. Similarly, provision made in the Tribunal Rules
would require to be laid before parliament but would not be subject to further
procedure. There would be no requirement for consultation in either case. The
Committee accordingly sought further clarification from the Scottish Government to
assist the Committee in considering the scope of the powers.

17. The Scottish Government’s response highlights that authority to make
arrangements regarding organisation of the Tribunals may only be delegated to
the Lord President by way of affirmative regulations. Such authority will therefore
be limited to the parameters set out in the regulations. Accordingly no authority
may be delegated to the Lord President to deal with those matters without
parliamentary approval. Similarly, the parameters regarding the provision which
may be made in Tribunal Rules must be clearly set out in the regulations. The
Scottish Ministers will not be able to rely on the effect of Tribunal Rules without
providing for the extent they wish to do so in the regulations and, thus, without
parliamentary approval.
18. The Scottish Government also explains that, as the Head of the Scottish Tribunals, the Lord President will have the responsibility for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals. Once a significant number of functions have been transferred-in from the listed tribunals, the Scottish Government considers it may be that the Lord President is in the best position to identify the best manner for the Tribunals to be organised and their functions allocated among the chambers or divisions.

19. However, the Scottish Government also recognises that the Scottish Ministers and the Scottish Parliament have an overriding interest in the structure of the Scottish Tribunals and may wish to ensure that there are particular chambers which cannot be altered by the Lord President. The Committee notes that such a restriction could be achieved by placing limits on the delegation of authority to the Lord President through the relevant regulations.

20. Tribunal Rules will be made independently of the Scottish Ministers by the Court of Session by act of sederunt under section 62(1) of the Bill, following their preparation by the Scottish Civil Justice Council (“the SCJC”). Under section 2(1)(ba) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (as amended by paragraph 12(2)(a) of schedule 9 to the Bill), the SCJC will have the function of reviewing the practice and procedure used in the Scottish Tribunals. The Scottish Government considers that the SCJC will therefore be in an informed position to consider whether certain functions of a tribunal may be better dealt with by a particular chamber or division rather than the one to which they were originally allocated.

21. The Scottish Government indicates that, at this stage, it does not intend to make regulations under section 19(2) or 22(2) which will include a provision delegating any matter to the Lord President or relying on provision made in Tribunal Rules. However it does consider that it is necessary to allow this to occur in the future, particularly given the responsibilities of the Lord President in relation to the Scottish Tribunals and the role of the SCJC in the formulation of Tribunal Rules.

22. The Committee is content with this response, in light of the explanation regarding the role of the Lord President and SCJC in relation to the Scottish Tribunals, and the fact that the limits of delegation will be contained in subordinate legislation subject to parliamentary approval. The Committee welcomes this clarification and is content with the delegation of the powers in sections 19(2) and 22(2) as read with section 10(1).
Section 35(1) – Composition of First-tier Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 37(1) – Composition of Upper Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provisions
23. Section 35(1) confers power on the Scottish Ministers, by regulations, to make provision for determining the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. Section 37(1) confers a similar power on the Scottish Ministers to make provision for determining the composition of the Upper Tribunal.

24. In each case, the regulations may make provision for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess.

25. Section 10(2) permits regulations under section 35(1) or 37(1) to make provision delegating authority to the President of Tribunals to make arrangements regarding the composition of the First-tier and Upper Tribunals, or to rely on the effect of Tribunal Rules to make such provision.

Comment
26. As in relation to the powers to organise the First-tier and Upper Tribunals discussed above (sections 19(2) and 22(2)), the Committee is content in principle with delegation of the powers concerning the composition of those Tribunals.

27. Once again however, the Committee sought further explanation regarding the circumstances in which the Scottish Government considers that it may be more appropriate for the President of Tribunals, or Tribunal Rules, to determine the composition of the Scottish Tribunals, and what limits are likely to be placed on the delegation of that authority.

28. The response given is similar to the one given in relation to the section 19(2) and 22(2) powers to organise the Tribunals. In relation to the powers to determine the composition of the Tribunals, the Scottish Government highlights the role of the President of Tribunals. It explains that, as the senior member of the Scottish Tribunals, the President of Tribunals will have responsibility for the day-to-day running of the Tribunals. The President of Tribunals will therefore be in the most
informed position to identify the most effective and efficient way of convening the Tribunals to exercise their decision-making functions.

29. The Scottish Government also considers that the SCJC, which will be responsible for reviewing the practice and procedure used in the Scottish Tribunals and for preparing Tribunal Rules, will be in a similarly informed position. It is therefore appropriate for there to be a power enabling those matters to be delegated to the President of Tribunals, or relying on Tribunals Rules to make the relevant provision.

30. The Scottish Government’s response also stresses that delegation of the functions to the President of Tribunals, or placing reliance on Tribunal Rules, can only be achieved through affirmative regulations. The delegation of authority, and the limits of that delegation, will accordingly be subject to parliamentary approval.

31. The Committee is accordingly content with the delegation of powers in sections 35(1) and 37(1), as read with section 10(2), to determine the composition of the Scottish Tribunals.

Section 38(3)(b) – Review of decisions
Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure: laid no procedure

Provision
32. The power in section 38(3)(b) relates to the provisions in the Bill which allow the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. A decision may be reviewed at the Tribunal’s own instance or, with the Tribunal’s agreement, at the request of a party in the case.

33. Section 38(3) provides that no decision may be the subject of a review if it is an “excluded decision”. Sections 46 to 49 set out what is meant by that term. Section 38(3)(b) provides that Tribunal Rules may also make provision excluding other decisions from being reviewed (i.e. decisions other than those set out in sections 46 to 49) or otherwise restricting the powers of the Scottish Tribunals to review their own decisions.

34. Tribunal Rules are rules regulating the practice and procedure to be followed in the Scottish Tribunals, to be made by the Court of Session by act of sederunt under section 62(1) of the Bill.

Comment
35. The DPM explains that Tribunal Rules will relate to technical procedural matters governing the practice and procedure to be followed in Scottish Tribunal cases, and will be detailed, varied and require regular updating. The Committee notes that section 38(3)(b) appears to confer a wide power to specify, by means of Tribunal Rules, decisions of the Scottish Tribunals which are excluded from review, or otherwise to restrict the availability of review. As such, it appears to enable substantive provision to be made as opposed to provision which merely
regulates matters of practice and procedure. The Committee sought clarification regarding the nature of the power conferred by section 38(3)(b).

36. In its response, the Scottish Government refers to the Policy Memorandum and explains that the aim of section 38 is to cut down on the number of appeals generated by administrative mistakes. It is not intended to be an alternative to a formal appeal against a decision of the Scottish Tribunals under section 41 or 43 of the Bill. Excluding further decisions from review or otherwise restricting the availability of the rights of review does not, therefore, have the effect of limiting the rights of a party to a case before one of the Scottish Tribunals. It simply restricts the availability of a mechanism which is designed to reduce the number of appeals generated by administrative mistakes.

37. The Committee notes that the power of review in section 38 is not expressly limited to correcting matters of administrative error. It may also be used to set aside a decision of the Scottish Tribunals. Nonetheless, the Committee accepts that the exercise of the power in section 38(3) to exclude or restrict the availability of review would not affect the availability of a right to appeal against the decision. Accordingly it accepts that the power does not affect the substantive matter of appeal rights.

38. The Committee is content with this explanation and with the delegation of the power in section 38(3)(b) in principle.

39. The Committee also queried why it was considered appropriate for the power to be exercised by way of Tribunal Rules, which are not subject to parliamentary procedure (other than laying), when the principal exclusions are contained on the face of the Bill and may be added to by regulations made by the Scottish Ministers.

40. The Scottish Government explains that, in light of the function of reviewing the practice and procedure of the Scottish Tribunals which is to be conferred on the SCJC by virtue of paragraph 12(2)(a) of schedule 9 to the Bill, it considers that the SCJC will be in the most informed position to determine whether particular types of decision should be excluded from review, or indeed whether the review of particular types of decisions should only be made available on particular grounds. Such matters relate to process more than substance and, given the availability of appeal under section 41 or 43, the Scottish Government does not consider that either the Scottish Ministers or the Scottish Parliament require a role.

41. It also explains that section 49(1) only enables regulations to provide for a decision to be excluded from review and appeal where, prior to the transfer-in of functions to the Scottish Tribunals; the decision made by the listed tribunal was not subject to appeal. Accordingly, section 49(1) enables the position which existed prior to the transfer-in of functions to be preserved. Such provision requires to be made by regulations because it excludes not only the review of the decision but also any appeal of the decision. In the Scottish Government’s view, the exclusion of a right of appeal should only be made by provision which is subject to parliamentary procedure.
42. The Committee is content with that response and considers that it appears to be consistent with the view that the review procedure is intended to be an administrative matter, while the appeal process is a substantive one. It is accordingly content with the level of scrutiny applied to exercise of the power in section 38(3)(b).

Section 48(2) – Other appeal rights
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision
43. Section 48(1) provides that a decision of the Scottish Tribunals against which there is a right of appeal under another enactment is an excluded decision to which the provisions for review and appeal set out in Part 6 of the Bill do not apply. Section 48(2) confers a power on the Scottish Ministers, by regulations, to make exceptions to this general rule.

Comment
44. The Committee notes that where regulations transferring-in the functions of a listed tribunal are made under section 27(2) of the Bill and those regulations preserve an existing right of appeal in respect of a function, the effect of section 48(1) is that a decision taken by a tribunal in respect of that function is an excluded decision, to which the rights of review and appeal set out in the Bill will not apply. In providing for exceptions to that rule to be made, section 48(2) enables the Scottish Ministers to make regulations which potentially circumvent provision made by virtue of regulations under section 27(2).

45. The Committee sought clarification from the Scottish Government regarding whether that was the intended effect of section 48(2), and further, whether the intention was to enable a choice of appeal rights to be created, as between appeal under the existing legislation and appeal under the provisions of the Bill. The Government responded that it envisaged that regulations under section 48(2) would, for example, make provision so that the review procedure under section 38 of the Bill would be available in respect of decisions against which there is a right of appeal under another enactment. The regulations would not make provision making the right of appeal under section 41 or 43 of the Bill available for those decisions.

46. The Committee notes however that section 48(2) is not limited in this way to providing that a decision, against which there is a right of appeal under another enactment, is subject to the review procedure in the Bill. It may also be used to provide that the appeal rights contained in the Bill apply to such a decision. Accordingly, the provision does not reflect the apparent policy intention.

47. The Committee therefore recommends that the Scottish Government give consideration to tabling an appropriate amendment to section 48(2) at Stage 2, to restrict the purposes for which an exception may be made to the rule in section 48(1).
48. The Government’s response also states that the Government does not envisage making provision in regulations under section 48(2) so as to provide for a choice of appeal routes. It will consider whether to propose an amendment to section 48(2) at Stage 2 to clarify this matter.

49. **The Committee welcomes this response and looks forward to sight of an amendment to section 48(2) in due course, if appropriate. It notes that such an amendment may not be necessary if an amendment along the lines of that recommended in paragraph 47 above is tabled.**

50. The Committee also asked why it is considered appropriate that the power in section 48(2) should be subject to negative procedure when the section 27(2) power to transfer-in the functions of a listed tribunal (including power to make provision about appeal rights) is subject to affirmative procedure.

51. The Scottish Government responded that it considers that the negative procedure is appropriate for section 48(2) as the power cannot be used to remove any existing rights of appeal, but only to make use of the review and appeal mechanisms in the Bill where this can sensibly be done.

52. The Committee notes this explanation. It also notes that section 27(2) confers a wide power to make provision about the transfer-in of functions which goes beyond provision regarding the applicable appeals regime, and which may involve the modification of primary legislation.

53. **As such the Committee is content with the level of scrutiny proposed for regulations under section 48(2)**

**Section 56(2) – Venue for hearings**

- **Power conferred on:** the Court of Session
- **Power exercisable by:** act of sederunt
- **Parliamentary procedure:** laid no procedure

**Provision**

54. Section 56(1) provides that the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear cases, or for any other purpose relating to their functions. Section 56(2) states this is subject to any provision made by Tribunal Rules, as to the question of where in Scotland the Scottish Tribunals are to be convened.

**Comment**

55. The Committee considers the effect of section 56 appears to be that provision can be made in the Tribunal Rules by the Court of Session which would determine where in Scotland the First-tier Tribunal and Upper Tribunal are to be convened, or possibly how any questions as to that location are to be resolved.

56. The location of the Scottish Tribunals will of course be a significant matter, for all those attending, and for the disposal of business. The DPM does not explain why the Scottish Government has considered it appropriate that this power is
delegated to the Court of Session in the Rules which are not subject to parliamentary procedure. The Committee sought clarification of these matters.

57. The Scottish Government’s response explains that the power is intended to be exercised so that Tribunal Rules may make provision to the effect that particular types of cases are heard in particular types of venues. Since the Tribunal Rules may vary in respect of particular types of cases, the Scottish Government considers that the Tribunal Rules are the most appropriate instrument to make any such specification. The type of venue relates to the process for a hearing, which the Scottish Government considers is most suitably decided by Rules formulated by the SCJC rather than the Scottish Ministers.

58. The Committee is of the view that this policy intention is not matched by the terms of the power. Section 56(1) enables the Scottish Tribunals to be convened at “any place in Scotland”. Section 56(2) states this is subject to any provision made by Tribunal Rules, as to the question of “where in Scotland” the Scottish Tribunals are to be convened. This clearly appears to be a power enabling the Rules to determine the location in Scotland where the Scottish Tribunals are to be convened, and not merely the types of venue in which they are to be convened.

59. The Committee recommends that the Scottish Government consider the provision made by section 56(2) further in advance of Stage 2, as the explanation of the intended purpose underlying this power does not appear to be reflected in the terms of the power.

Section 68 – Practice directions

Powers conferred on: the President of Tribunals
Powers exercisable by: practice direction
Parliamentary procedure: none

Provision
60. Section 68 enables the President of Tribunals to issue directions as to the practice and procedure to be followed in proceedings in the Scottish Tribunals. These may include instructions or guidance on the application or interpretation of the law, and the manner of making a decision in a case.

61. With approval of the President, (1) a Chamber President in the First-tier Tribunal can issue directions for the proceedings in their own chamber, and (2) a Vice-President of the Upper Tribunal can issue directions for the division over which they preside.

Comment
62. The Committee considers it acceptable for this power to be exercised as a practice direction within the Tribunals system, rather than as a form of subordinate legislation. The power is not discussed in the DPM, as it is a power of direction. However, in relation to Tribunal Rules under section 62 of the Bill, the DPM explains that the Scottish Government considers that matters concerning the practice and procedure of the tribunals should be framed within the courts and
tribunals system and independently of the executive. The Committee assumes that the same considerations would apply in relation to practice directions.

63. However, as regards transparency, the Committee notes that section 68 does not provide for practice directions to be published. The Committee asked the Scottish Government to explain why there was no requirement for publication of the directions, and what the intentions were regarding publication.

64. In its response, the Scottish Government confirmed that the intention is for any practice directions issued under section 68 to be published and stated that it will consider proposing an amendment to the Bill to reflect this at Stage 2.

65. **The Committee welcomes the commitment to considering an amendment at Stage 2 to require publication of practice directions.**

**Section 74 – Ancillary regulations**

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<tr>
<th>Powers conferred on:</th>
<th>the Scottish Ministers</th>
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<tr>
<td>Powers exercisable by:</td>
<td>regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>negative, but affirmative where textual amendment of an Act is proposed</td>
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66. Section 74(1) confers a power on the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill.

67. The DPM explains that the ancillary powers are considered necessary because, in relation to the transferring-in of functions of the existing tribunals for example, there may be unforeseen consequences giving rise to a need for ancillary modification of existing provisions.

68. The Committee asked the Scottish Government to comment on the particular wording of the powers in section 74(1). The powers may be used “for the purposes of, or in connection with” the Bill. This can be contrasted with the wording in other recent Acts of the Scottish Parliament, for example, section 45 of the Regulatory Reform (Scotland) Bill. That section provides that the ancillary powers may be used for “the purposes of, in consequence of, or for giving full effect to, any provision of this Act”.

69. The Committee considers that ancillary matters might have a connection with the Bill provisions, but not be either in consequence of, or giving full effect to, them. Section 74 appears therefore to propose a broader scope to the ancillary powers than is more usual. The Committee queried why a different formulation of the ancillary powers was proposed in this Bill.

70. In its response, the Scottish Government explains that the formulation of the regulation-making power that has been adopted in section 74(1) follows precedent in certain other Acts of the Scottish Parliament, and gives two examples (section 148(1) of the Legal Services (Scotland) Act 2010 and section 54(1) of the Water Resources (Scotland) Act 2013). It also states that the formulation contained in
section 74(1) was considered to be an appropriate formulation for the Tribunals (Scotland) Bill. However it does not explain why that was thought to be the case.

71. The Government’s response adds that standing the wording of section 74(1), it is clear that ancillary regulations may only be made “for the purposes of or in connection with” the Bill. The exercise of the power is therefore strictly confined to the provision made by the Bill and would not permit provision to be made which is too remote from the provision made by it. The Committee agree with that statement, but does not consider that it explains why the wider formulation, which requires only a connection with the Bill, is considered appropriate in this particular case.

72. Having regard to the scope and purposes of the Bill, the Committee is content with the delegation of the power in principle and with the choice of parliamentary procedure. It is also content to accept the particular wording of the provision. Given that the exercise of the power is subject to affirmative or negative procedure, Parliament will be afforded the opportunity whenever the power is used to consider whether the ancillary provision made is genuinely in connection with the Bill.

73. Nonetheless, the Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are expressed in different ways, and which presumably have different meanings, without a justification for that having been provided. The Committee would welcome further discussion with the Scottish Government regarding these matters generally.

Schedule 7, paragraph 14 – Determination of other terms and conditions on which a member of the Scottish Tribunals holds the position

- **Power conferred on:** the Scottish Ministers
- **Exercisable by:** determination
- **Parliamentary procedure:** none

74. Paragraph 14 of schedule 7 confers power on the Scottish Ministers to determine the terms and conditions on which a member of the Scottish Tribunals holds the position, except as provided for in the Bill.

75. A determination can include provision for remuneration, allowances and expenses, and make different provision for different purposes, or categories of member.

76. As this is a power of determination, there is no explanation of the power in the DPM. The Committee required further information in order to consider whether the power might be more appropriately exercised in a form of subordinate legislation, subject to parliamentary procedure.
77. The Committee also noted that paragraph 2 of schedule 2 to the Bill confers power by regulations to provide for terms and conditions of appointment of non-judicial members of the Scottish Tribunals, other than the terms specified in schedule 7 of the Bill. The Committee therefore sought clarification of why the power of determination was considered necessary or appropriate, and why it was required in addition to the power in paragraph 2 of schedule 2 to make regulations.

78. The Scottish Government explains that paragraph 2 of schedule 2 applies only in respect of the members of a listed tribunal who are being transferred-in to the Scottish Tribunals. Regulations made under paragraph 1(1) of schedule 2 will give effect to the transfer of members and the Scottish Government considers it prudent to make provision in those regulations with regard to the terms and conditions of appointment of the members being transferred-in. To that end, paragraph 2 enables those regulations to make provision preserving or altering those members’ terms and conditions, or replacing them with new terms and conditions.

79. The Government’s response explains that paragraph 14 of schedule 7 on the other hand is a separate power which allows the Scottish Ministers to determine the terms and conditions on which any person holding a position in the Scottish Tribunals as an ordinary or legal member is to serve. Such terms and conditions may not prevail over any other provision made in the Bill in relation to terms and conditions (for example, the period of appointment provided for in paragraph 2 of schedule 7) but a determination could make provision about other matters such as the remuneration, allowances and expenses payable to, or in respect of, the member.

80. The Committee notes that it would be possible for a determination to make provision about members’ terms and conditions which was contrary to provision made in regulations under paragraph 1(1) of schedule 2, as read with paragraph 2. However, it accepts that the purpose of the regulation-making power appears to be to make general provision about the position as regards terms and conditions at the point at which a member transfers-in to the Scottish Tribunals, while schedule 7 (including any determination to be made under paragraph 14 of that schedule) will contain the detail of the applicable terms and conditions for members of the Scottish Tribunals. It therefore accepts that the general power to set terms and conditions under schedule 7 appears to be appropriate in principle.

81. As regards the chosen procedure, the Scottish Government explains that it does not consider that it would be necessary or appropriate for matters regarding the terms and conditions of appointment of tribunal members to be set out in subordinate legislation, as the legislation applying in respect of members of the existing listed tribunals does not generally speaking require this. The Committee is satisfied with this explanation and with the level of scrutiny proposed.

82. The Committee welcomes the clarification provided and is content that the power to set terms and conditions of appointment in paragraph 14 of schedule 7 is appropriate in principle, and that the power is appropriately exercised by determination by the Scottish Ministers.
Correspondence with the Scottish Government

On 25 June 2013, the Delegated Powers and Law Reform Committee wrote to The Scottish Government as follows:

Section 19(2) – Chambers in the First-tier Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 22(2) – Divisions of the upper tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

1. Section 19(1) provides that the First-tier Tribunal is to be organised into a number of chambers having regard to the subject-matters falling within the Tribunal’s jurisdiction and any other factors relevant to the exercise of the Tribunal’s functions. Section 19(2) confers power on the Scottish Ministers by regulations to make provision in connection with this structure.

2. Section 22(1) provides that the Upper Tribunal is to be organised into a number of divisions having regard to the subject-matters falling within the Tribunal’s jurisdiction and any other factors relevant to the exercise of the Tribunal’s functions. Section 22(2) confers power on the Scottish Ministers to make provision in connection with this structure.

3. The Committee asks the Scottish Government:

   • In what circumstances it is considered that it may be more appropriate for the Lord President or Tribunal Rules, rather than the Scottish Ministers, to determine matters relating to the structure of, and allocation of, functions within the First-tier Tribunal or the Upper Tribunal (as the case may be);

   • Why it is considered appropriate that provision made by Ministers regarding the structure of, and allocation of, functions within the Tribunal will require consultation and attract a high level of parliamentary scrutiny, but that such provision may be made by the Lord President or by Tribunal Rules under delegated authority, with no consultation or parliamentary procedure required; and

   • What limits, if any, are likely to be placed on the delegation of that authority?
Section 35(1) – Composition of First-tier Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 37(1) – Composition of Upper Tribunal
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

4. Section 35(1) provides for Scottish Ministers, by regulations, to make provision for determining the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction.

5. Section 37(1) confers power on the Scottish Ministers, by regulations, to make provision for determining the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction.

6. The Committee asks the Scottish Government:
   - In which circumstances it is considered that it may be more appropriate for the President of Tribunals or Tribunals Rules, rather than the Scottish Ministers, to determine the composition of the First-tier Tribunal, or the Upper Tribunal (as the case may be).
   - Why it is considered appropriate that provision made by Ministers regarding the composition of the Tribunal should attract the affirmative procedure, but that such provision may be made by the President of Tribunals or by Tribunal Rules under delegated authority, with the result that no or limited parliamentary scrutiny will be required; and
   - What limits, if any, are likely to be placed on the delegation of that authority?

Section 38(3)(b) – Review of decisions
Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure: laid no procedure

7. The power in section 38(3)(b) relates to the provisions in the Bill which allow the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. A decision may be reviewed at the Tribunal’s own instance or, with the Tribunal’s agreement, at the request of a party in the case.

8. The Committee asks the Scottish Government:
   - Why it is considered that the power in section 38(3)(b) to exclude by Tribunal Rules decisions of the Scottish Tribunals from review, or otherwise to restrict
the availability of review of those decisions, is considered to be a power relating to “technical procedural matters”, and;

- Why it is considered appropriate that exclusions may be contained in Tribunal Rules which are not subject to parliamentary procedure (other than laying), when the principal exclusions are contained on the face of the Bill and may be modified or added to by regulations made by the Scottish Ministers?

Section 48(2) – Other appeal rights

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

9. Section 48(1) provides that a decision of the Scottish Tribunals against which there is a right of appeal under another enactment is an excluded decision to which the provisions for review and appeal set out in this Part of the Bill do not apply. Section 48(2) confers a power on the Scottish Ministers, by regulations, to make exceptions to this general rule.

10. The Committee asks the Scottish Government:

- Where the transfer-in power under section 27(2) is exercised in a way which leaves any existing appeal rights in relation to a listed tribunal intact, so that section 48(1) applies to exclude decisions subject to those appeal rights from review or appeal under sections 38, 41 or 43 of the Bill, does the power in section 48(2) enable provision to be made to the effect that those decisions are in fact to be subject to review or appeal under sections 38, 41 or 43?

- If so, can the Scottish Government explain why it is considered appropriate that the power in section 48(2) should be subject to negative procedure when the section 27(2) power is subject to affirmative procedure?

- Can the Scottish Government explain whether, in the circumstances described, it is intended that there will be a choice of appeal rights as between appeal under the existing legislation and appeal under the Bill? If not, which power will be used to specify which of the appeal rights is to apply?

Section 56(2) – Venue for hearings

Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure: laid no procedure

11. Section 56(1) provides that the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear cases, or for any other purpose.
relating to their functions. Section 56(2) states this is subject to any provision made by Tribunal Rules, as to the question of where in Scotland the Scottish Tribunals are to be convened.

12. The Committee asks the Scottish Government:

- Why it has been considered appropriate that the Court of Session may in the Tribunal Rules provide as to the question of where in Scotland the Scottish Tribunals are to be convened, and why it is appropriate that this power is not subject to Parliamentary procedure?

Section 68 – Practice directions

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<thead>
<tr>
<th>Powers conferred on:</th>
<th>The President of Tribunals</th>
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<tbody>
<tr>
<td>Powers exercisable by:</td>
<td>Practice direction</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
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13. Section 68 enables the President of Tribunals to issue directions as to the practice and procedure to be followed in proceedings in the Scottish Tribunals. These may include instructions or guidance on the application or interpretation of the law, and the manner of making a decision in a case.

14. The Committee asks the Scottish Government:

- Why section 68 does not provide that practice directions which may be issued under that section require to be published, and what the intentions are in relation to publication?

Section 74 – Ancillary regulations

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<th>Powers conferred on:</th>
<th>Scottish Ministers</th>
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<tbody>
<tr>
<td>Powers exercisable by:</td>
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</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative, but affirmative where textual amendment of an Act is proposed</td>
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</table>

15. Section 74(1) confers a power on the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill.

16. The section provides that the power to make ancillary regulations can be exercised for the purposes of or in connection with the Bill provisions. This differs from, for example, the ancillary powers provision in section 45 of the Regulatory Reform (Scotland) Bill, which requires the ancillary powers to be “for the purposes of, in consequence of, or for giving full effect to” any provision of the Bill.

17. It seems that ancillary matters might have a connection with the Bill provisions, but not be either in consequence of or giving full effect to them. Section 74 appears, therefore, to propose a broader scope to the ancillary powers than is more usual.
18. The Committee asks the Scottish Government:

- Why, therefore, is this different formulation of the ancillary powers proposed in this Bill?

Schedule 7, paragraph 14 – Determination of other terms and conditions on which a member of the Scottish Tribunals holds the position

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<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
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<tbody>
<tr>
<td>Exercisable by:</td>
<td>Determination</td>
</tr>
<tr>
<td>Parliamentary procedure</td>
<td>None</td>
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19. Paragraph 14 of schedule 7 provides for a power of Ministers to determine the terms and conditions on which a member of Scottish Tribunals holds the position, except as provided for in the Bill.

20. Paragraph 2 of schedule 2 confers power by regulations to provide for other terms and conditions of appointment of members of the Scottish tribunals other than judicial members (apart from the terms specified in schedule 7).

21. The Committee asks the Scottish Government:

- Why is this power necessary or appropriate; and why is it appropriate to be exercisable in the form of determination and not subject to Parliamentary procedure or a requirement for publication?

The Scottish Government responded on 2 August 2013 as follows:

Sections 19(2) and 22(2) Chambers and Divisions in the Scottish Tribunals

1. Overall responsibility for organising the First-tier Tribunal into chambers and the Upper Tribunal into divisions and the allocation of the Tribunals’ functions among those chambers/divisions is vested in and will remain with the Scottish Ministers through the regulation-making powers set out in sections 19(2) and 22(2) which are, of course, subject to parliamentary scrutiny.

2. As highlighted at paragraphs 17 and 24 of the Delegated Powers Memorandum, sections 19(2) and 22(2) (as informed by section 10(1) and (3)) have been drafted in a flexible manner since it is recognised that the Tribunals’ functions may vary over time and it is not entirely clear, at this stage, how all those functions will fit together. Functions from tribunals not currently listed in schedule 1 may be transferred-in and future Acts of the Scottish Parliament may confer further functions. The Scottish Government has, therefore, sought to create a flexible structure which is capable of adapting over time as the Tribunals accumulate functions.

3. For those reasons the Scottish Government considered it appropriate that the Scottish Ministers, by regulations, should bear ultimate responsibility for organising the First-tier Tribunal into chambers and the Upper Tribunal into divisions but that, through those regulations, the Scottish Ministers should be able to make provision for certain of these matters to be dealt with by the Lord
President or in Tribunal Rules. Any such delegation would, of course, require to be authorised by the regulations which would also be required to set out the extent to which the delegation is permitted.

4. Section 10(1)(a) permits the regulations made under section 19(2) or 22(2) to make provision delegating authority on the Lord President to make arrangements regarding these matters but such authority will be limited to the parameters set out in the Regulations. The Scottish Ministers will not, therefore, be able to delegate any authority to the Lord President to deal with those matters without parliamentary approval. As the Head of the Scottish Tribunals, the Lord President has the responsibility for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals. Once a significant number of functions have been transferred-in from the Listed Tribunals, it may, therefore, be the likely scenario that the Lord President is in the best position to identify the best manner for the Tribunals to be organised and their functions allocated among the chambers/divisions and that it may be beneficial for this to occur on a fluid basis.

5. The Scottish Government recognises, however, that the Scottish Ministers and the Scottish Parliament have an overriding interest in the structure of the Scottish Tribunals and may wish to ensure that there are particular chambers which cannot be altered by the Lord President. In the Policy Memorandum, the Scottish Government went into some detail in this respect, committing itself to having a distinct chamber of the First-tier Tribunal to deal with the functions to be transferred-in from the Mental Health Tribunal for Scotland. (see paragraphs 43 and 44).

6. Similarly, section 10(1)(b) permits the regulations made under section 19(2) or 22(2) to include provision relying on the effect of Tribunal Rules. Again, the parameters as to the provision made in Tribunal Rules must be clearly set out in the Regulations. The Scottish Ministers will not be able to rely on the effect of Tribunal Rules without providing for the extent they wish to do so in the regulations and, thus, without parliamentary approval. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals (referred to in the Bill as “Tribunal Rules”).

7. Tribunal Rules are made independently of the Scottish Ministers by the Court of Session by act of sederunt following their preparation by the Scottish Civil Justice Council. Under section 2(1)(ba) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (as amended by paragraph 12 of schedule 9 to the Bill), the Scottish Civil Justice Council will have the function of reviewing the practice and procedure used in the Scottish Tribunals. The Scottish Civil Justice Council shall, therefore, be in an informed position to consider whether certain functions of a tribunal may be better dealt with by a particular chamber/division rather than to the one to which they were originally allocated.

8. At this stage, the Scottish Government does not intend to make regulations under section 19(2) or 22(2) which will include a provision delegating any matter to the Lord President or relying on provision made in Tribunal Rules. The Scottish Government does, however, consider that it is necessary to allow this to occur in
the future, particularly given the responsibilities of the Lord President in relation to the Scottish Tribunals and the role of the Scottish Civil Justice Council in the formulation of Tribunal Rules.

Sections 35(1) and 37(1) – Composition of the Scottish Tribunals

9. Overall responsibility for determining the composition of the Scottish Tribunals vests in and will remain with the Scottish Ministers through the regulation-making powers set out in sections 35(1) and 37(1) which are, of course, subject to parliamentary scrutiny.

10. As highlighted at paragraphs 43 and 51 of the Delegated Powers Memorandum, sections 35(1) and 37(1) have been drafted in a flexible manner since it is recognised that the Tribunals’ functions may vary over time and it is not entirely clear, at this stage, how the Tribunals will be convened to exercise each of their decision-making functions. Functions from tribunals not currently listed in schedule 1 may be transferred-in and future Acts of the Scottish Parliament may confer further functions. The Scottish Government has, therefore, sought to create a flexible structure which is capable of adapting over time as the Tribunals accumulate functions.

11. For those reasons the Scottish Government considered it appropriate that the Scottish Ministers, by regulations, should bear ultimate responsibility for determining the composition of the Tribunals but that, through those regulations, the Scottish Ministers should be able to make provision for certain of these matters to be dealt with by the President of Tribunals or in Tribunal Rules. Any delegation would, of course, require to be authorised by the regulations which would also be required to set out the extent to which the delegation is permitted.

12. Section 10(2)(a) permits the regulations made under section 35(1) or 37(1) to make provision delegating authority on the President of Tribunals to determine these matters but such authority will be limited to the parameters set out in the Regulations. The Scottish Ministers will not, therefore, be in a position to delegate any authority to the President of Tribunals without parliamentary approval. As the senior member of the Scottish Tribunals, the President of Tribunals will have responsibility for the day-to-day running of the Tribunals and will, therefore, be in the most informed position to identify the most effective and efficient way of convening the Tribunals to exercise their decision-making functions. Again, given the likely fact that the Tribunals’ functions will grow over time, the Scottish Government considers that it may be beneficial for the composition of Tribunals to be determined on a more fluid basis.

13. Section 10(2)(a) allows for regulations to provide for this to be done. The Scottish Government recognises, however, that the Scottish Ministers and the Scottish Parliament have an overriding interest in certain aspects of the composition of the Tribunals and may wish to ensure, for example, that when exercising a particular function, the First-tier Tribunal is composed of three members one of which is a legal member and one of which is an ordinary member and may wish to confer authority on the President of Tribunals to determine the category of member that the third member should be. Similarly, it may be desirable
in respect of some less controversial functions to give the President of Tribunals more flexibility as to the number and categories of members required to sit on the Tribunal when convened.

14. Section 10(2)(b) permits the regulations made under section 35(1) or 37(1) to include provision relying on the effect of Tribunal Rules. Again, the parameters as to the provision made in Tribunal Rules must be clearly set out in the Regulations. The Scottish Ministers will not be able to rely on the effect of Tribunal Rules without providing for the extent they wish to do so in the Regulations and, thus, without parliamentary approval. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals (referred to in the Bill as “Tribunal Rules”).

15. Tribunal Rules are made independently of the Scottish Ministers by the Court of Session by act of sederunt following their preparation by the Scottish Civil Justice Council. Under section 2(1)(ba) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (as amended by paragraph 12 of schedule 9 to the Bill), the Scottish Civil Justice Council will have the function of reviewing the practice and procedure used in the Scottish Tribunals. The Scottish Civil Justice Council shall, therefore, be in an informed position to consider how the Tribunals should be convened when exercising their decision-making functions.

16. At this stage, the Scottish Government envisages that it is likely that some delegation of authority to determine the composition of the Tribunals when exercising their decision-making functions will be appropriate and that, as noted above, any such delegation will require to be set out in the regulations and approved by the Parliament.

Section 38(3)(b) – Review of decisions

17. The Scottish Government would like to draw the Committee’s attention to the following matters:

- As highlighted in paragraph 177 of the Explanatory Notes, the power in section 38 which enables each of the Scottish Tribunals to review their own decisions is discretionary. The fact that a particular decision is not an excluded decision does not, therefore, mean that it must be reviewed.
- As highlighted in paragraph 180 of the Explanatory Notes, the availability or otherwise of a review in respect of a decision does not affect a party’s right to appeal under section 41 or 43.
- As highlighted in paragraph 57 of the Policy Memorandum, the aim of section 38 is to cut down on the number of appeals generated by administrative mistakes. It is not intended to be an alternative to a formal appeal under section 41 or 43. Excluding further decisions from review or otherwise restricting the availability of the rights of review does not, therefore, have the effect of limiting the rights of a party to a case on which one of the Scottish Tribunals has decided. It simply restricts the availability of a mechanism which is designed to reduce the number of appeals generated by administrative mistakes.
18. Keeping in mind the role of the Scottish Civil Justice Council under section 2(1)(ba) of the 2013 Act whereby the Scottish Civil Justice Council will have the function of reviewing the practice and procedure used in the Scottish Tribunals, the Scottish Government considers that the Scottish Civil Justice Council will be in the most informed position to determine whether particular types of decision should be excluded from review or indeed, whether the review of particular types of decisions should only be made available on particular grounds. Such matters relate to process more than substance and given the availability of appeal under section 41 or 43, the Scottish Government does not consider that either the Scottish Ministers or the Scottish Parliament require a role.

19. The list of excluded decisions (from both review and appeal) in sections 46 to 49 may not be modified or added to by regulations made by the Scottish Ministers. Section 49(1) only enables regulations to provide for a decision to be excluded from review and appeal where, prior to the transfer-in of functions to the Scottish Tribunals, the decision made by the listed tribunal was not subject to appeal (i.e. it preserves the position that existed prior to the transfer-in of functions). Such provision requires to be made by regulations because it excludes not only the review of the decision but also an appeal. The Scottish Government considers that the exclusion of a right of appeal should always only be able to be made by provision which is subject to parliamentary procedure. Section 48(2) is dealt with below.

Section 48(2) – Other appeal rights

20. Where regulations transferring-in the functions of a listed tribunal are made under section 27(2) and those regulations preserve an existing right of appeal in respect of a function, section 48(1) operates so that a decision taken by a tribunal in respect of that function is an excluded decision. By virtue of section 46, the rights of review and appeal set out in the Bill in sections 38, 41 and 43 will not, therefore, apply.

21. Section 48(2) does, however, enable the Scottish Ministers to make regulations circumventing the effect of section 48(1). It is envisaged that such regulations would, for example, make provision so that the right of review under section 38 would apply but not the right of appeal under section 41 or 43.

22. The Scottish Government does not envisage making provision in regulations made under section 48(2) so as to provide for a choice of appeal routes. It will consider whether to propose an amendment to section 48(2) at Stage 2 to clarify this matter.

23. The Scottish Government considers that the negative procedure is appropriate as the power cannot be used to remove any existing rights of appeal but only to make use of the review and appeal mechanisms in the Bill where this can sensibly be done.
Section 56(2) – Venue for hearings

24. The regulation-making power in section 56(2) is intended to be exercised so that Tribunal Rules may make provision so that particular types of cases are heard in particular types of venues. Since the Tribunal Rules may vary in respect of particular types of cases, the Scottish Government considers that the Tribunal Rules are the most appropriate instrument to make any such specification. Again, the type of venue relates to the process for a hearing, which the Scottish Government considers is most suitably decided by Rules formulated by the Scottish Civil Justice Council rather than the Scottish Ministers.

25. Section 56(2) must also operate in light of section 71(2) whereby it is the responsibility of the Scottish Ministers to provide the Scottish Tribunals with such property as the Scottish Ministers consider to be reasonably required for the proper operation of the Tribunals and the discharge of the Lord President’s responsibility as to the efficient disposal of business in the Scottish Tribunals.

Section 68 – Practice Directions

26. The Scottish Government intends for any practice directions issued under section 68 to be published and will consider proposing an amendment to the Bill to reflect this at Stage 2. Practice Directions made under section 23 of the Tribunals, Courts and Enforcement Act 2007 in relation to the UK First-tier and Upper Tribunals are currently published without any provision requiring this. The Scottish Government does, however, see the value in making such provision.

Section 74 – Ancillary regulations

27. The formulation that has been adopted in section 74(1) of the Tribunals (Scotland) Bill follows precedent in other Acts of the Scottish Parliament. See, for example section 148(1) of the Legal Services (Scotland) Act 2010 and section 54(1) of the Water Resources (Scotland) Act 2013.

28. The formulation of the regulation-making power contained in section 74(1) was considered to be an appropriate formulation for the Tribunals (Scotland) Bill. The wording of section 74(1) is clear that ancillary regulations may only be made “for the purposes of or in connection with” the Bill. Its exercise, therefore, is strictly confined to the provision made by the Bill and would not permit provision to be made which is too remote from the provision made by it.

Schedule 7, paragraph 14 – Determination of other terms and conditions on which a member of the Scottish Tribunal holds the position

29. Paragraph 2 of schedule 2 informs the regulation-making power contained in paragraph 1(1) of that schedule. Paragraph 1(1) of schedule 2 applies only in respect of the members of a Listed Tribunal for which the functions and members are being transferred-in to the Scottish Tribunals. Regulations made under paragraph 1(1) of schedule 2 will give effect to the transfer of members and the Scottish Government considers it to be prudent to make provision in those
regulations with regard to the effect of the terms and conditions on which the members being transferred-in are currently appointed.

30. Paragraph 14 of schedule 7 is a separate power which allows the Scottish Ministers to determine the terms and conditions on which any person holding a position in the Scottish Tribunals as an ordinary or legal member is to serve. Such terms and conditions may not prevail over any other provision made in the Bill in relation to the terms and conditions on which a legal or ordinary member is to serve (i.e. the period of the appointment provided for in paragraph 2 of schedule 7) but they can make provision about other matters such as the remuneration, allowances and expenses payable to, or in respect of, the member.

31. The Scottish Government does not consider that it would be necessary or appropriate for such matters to be set out in subordinate legislation and the legislation applying in respect of members of the Listed Tribunals does not, generally speaking, require this. See, for example, paragraph 6(1) of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 in relation to members of the Mental Health Tribunal for Scotland.
On resuming—

**Tribunals (Scotland) Bill: Stage 1**

**The Convener:** The next item is our first evidence session on the Tribunals (Scotland) Bill. Today we will hear from two panels of witnesses. On our first panel I welcome May Dunsmuir, who is the convener of the Additional Support Needs Tribunal for Scotland; Heather Baillie, who is the in-house convener of the Mental Health Tribunal for Scotland; John Wright QC, who is a member of the Lands Tribunal for Scotland; and Alastair Beattie, who is the convener of the Scottish valuation appeal committees forum. I thank you all for your written submissions; we have done our homework and we have them all here.

If a member asks a question to which you want to respond, indicate that to me. Your microphone will come on automatically. That is the plan anyway, although we are all a bit rusty, having been off for a few weeks.

Members should do the usual; indicate to me when you wish to ask a question and I will put you on the list. For the sake of Elaine Murray, I say that I have two lists. One is for primary questions and one is for supplementaries, so let me know if your question is a supplementary. The first question is from John Lamont.

**John Lamont (Ettrick, Roxburgh and Berwickshire) (Con):** Thank you convener, and good morning panel. The bill is about establishing a framework for reform. Do you share my concern that although there is talk of reform in the bill, it contains no detail, which has been left for another time?

**John Wright QC (Lands Tribunal for Scotland):** Yes. One can appreciate that quite a lot of delegated powers will be necessary for a bill of this sort. However, it would be preferable for the Parliament to use the bill to make decisions on central matters such as whether particular tribunals are in or out. So, yes—in relation to the Lands Tribunal for Scotland, with which I am involved—I share that concern.

**Heather Baillie (Mental Health Tribunal for Scotland):** For the Mental Health Tribunal for Scotland, a great deal of comfort has been taken from various undertakings in the policy memorandum, particularly on the chamber structure. Our concern has been addressed to a certain extent, albeit that the memorandum refers to mental health issues going into a separate chamber “initially”, so there is a concern about the
future. We hope that there would at the very least be consultation if that should change.

**Alastair Beattie (Scottish Valuation Appeal Committees Forum):** I share the views of the other witnesses. As well as the points that they have highlighted, there is also a concern about the onward appeal arrangements. The default is that appeals on points of law against decisions of first-tier tribunals would be to the upper tribunal, but it has already been said as a matter of policy intent that appeals on certain matters—for example, from the Mental Health Tribunal—would still go to the Court of Session, and I think that that is right.

In our case and in the case of the Lands Tribunal for Scotland, it would also be right, as the Lord President has suggested, that appeals continue to go to the lands valuation appeal court. All of those are fairly significant matters that ought to be established from the start in the primary legislation. Parliament ought to have the opportunity to consider those issues in its first look at the issue.

**The Convener:** I see that John Finnie has a question. Is it along the same lines?

**John Finnie:** I have a general question to give the witnesses an opportunity to expand on what they have said.

**The Convener:** Before you ask that, I want to ask about the Lands Tribunal for Scotland’s submission, which is really tough. In the fourth paragraph, under issue 2, you state:

“So the new system is not fatally flawed, simply an unnecessary attempt to demonstrate modernisation.”

That is the Lands Tribunal for Scotland’s submission, is it not?

**John Wright:** Yes. That response was submitted by Lord McGhie on behalf of the Lands Tribunal for Scotland.

**The Convener:** It does not sound as though you think that any of this is a good idea. Such comments are threaded through the submission. As far as the Lands Tribunal for Scotland is concerned, it sees itself as being special.

**John Wright:** I endeavoured to encapsulate certain matters in my individual submission. Certainly, matters of overall policy are not for us, but we have concerns in relation to the Lands Tribunal for Scotland because we think that, although it is entirely appropriate to consider reforming, changing and rationalising a system of tribunals that has developed piecemeal, we are not at all sure that we fit into the scheme, which is a point that others have made.

The slight difficulty with the scheme of the bill is that a body is either in or completely out. There are lots of good things in the bill for lots of tribunals—I deal only with the Lands Tribunal for Scotland, of course—but they will get the benefits of the bill only if they are taken into the unified tribunals scheme that is at the heart of the proposals. It may be that there are some bodies—including, I suggest, the Lands Tribunal for Scotland—which, as you will see when you take a careful look at the issue, do not really fit in with the scheme. To that extent, the bill appears to us to be difficult.

**The Convener:** Let me just press you on that. At paragraph 11 of the submission, you go further:

“We think that to aim for common standards and procedures, including review and appeal, as a significant plank of policy risks creation of a serious impediment to identifying the most efficient way of serving the different needs of individual users.”

You go beyond saying that the proposals do not suit just the Lands Tribunal for Scotland to say that about the bill in general.

**John Wright:** That is in Lord McGhie’s submission on the Lands Tribunal for Scotland’s behalf. It is not for me to—

**The Convener:** Oh, right. I am sorry. I thought that you would speak to that submission. I will leave you to think about it.

**John Wright:** I do not think that it is right for me as an individual member of a tribunal to criticise the bill’s overall policy.

**The Convener:** I beg your pardon.

**John Wright:** However, I appreciate that a response has been made on the Land Tribunal for Scotland’s behalf by its president. I tried to focus matters in a paper that more particularly relates to the Lands Tribunal for Scotland itself.

**The Convener:** It is because the submission says “We think” and was submitted on the Land’s Tribunal for Scotland’s behalf that I thought I could ask you about it.

**John Wright:** I appreciate that. There are views about the bill concerning not so much the detail as the idea of an overarching unified tribunal; there is the view that that is problematic. However, as I said, I would rather deal with the matter that is properly in my field, which is the Lands Tribunal for Scotland.

**The Convener:** I will need to ask Lord McGhie what was meant, because his submission seems to have the biggest go at the policy. I appreciate that there is a range of views and that all the submissions described pluses and minuses, but the Lands Tribunal for Scotland’s submission seems to be the tough cookie. It is the good one—I am not saying that the other submissions are not good, but submissions such as that really test proposals.
John Finnie: Convener, you have obviously been peeking at my notes, because you used exactly the phrases that I was going to use. I will pass and come in again later.

The Convener: Okey-dokey. I am sorry about that. I just thought that we had missed something.

Roderick Campbell: Good morning, panel. I declare my registered interest as a member of the Faculty of Advocates.

Notwithstanding what Mr Wright said, I direct him to paragraph 13 of Lord McGhie’s submission. It would help the committee if you were to expand on the differences between what has happened to the Lands Tribunal south of the border and to the Lands Tribunal for Scotland.

John Wright: The Lands Tribunal of England and Wales was, substantially, an appeals body; it dealt—not entirely, but largely—with appeals and in particular with valuation appeals, with which Mr Beattie is also concerned. It was therefore seen to have a position in an upper tribunal scheme, although it was made a completely separate chamber. I appreciate that such a policy for the Lands Tribunal for Scotland is indicated in the policy memorandum to the bill.

Another point relates to the volume of cases in England and Wales. In a system with a large volume of appeals over the whole field, as in England and Wales, it is easy to imagine splitting the upper tribunal into a number of chambers. However, as I think the Lord President said in his submission, we do not think that splitting up into divisions and chambers the upper tribunal in Scotland, which will deal with a tiny number of appeals—although I know that a particular situation relates to the Mental Health Tribunal—is a particularly sensible way of proceeding.

Roderick Campbell: In a previous committee investigation, we touched on expenses orders at the Lands Tribunal for Scotland. Do you have any views that you would care to share with us about the uniqueness of the Lands Tribunal for Scotland’s approach to expenses, as opposed to what is proposed in the bill?

John Wright: That is quite a good matter to illustrate one of the general points, which is the extent to which you will have to change the general provisions in the bill in order for it to fit the situation within particular tribunals. As far as the Lands Tribunal for Scotland is concerned, I am well aware that the committee was looking at one of our jurisdictions in particular, which was title conditions, in respect of which there is specific provision in the Title Conditions (Scotland) Act 2003 that has been causing a problem. However, we actually have several different jurisdictions, and we have a rule on expenses for compulsory purchase compensation and another position in relation to expenses for valuation for rating cases.

If you are going to bring the Lands Tribunal for Scotland into a general scheme with a general rule about expenses, you must take account of all those different things. I am not saying that it is impossible; you can make all the changes that would need to be made to bring in the Lands Tribunal for Scotland, but it seems to be somewhat inappropriate to do so. If you take our general position on expenses and then consider the three specific examples, there are about four different rules on expenses within our various jurisdictions, so it is difficult to see how all those matters could be dealt with appropriately in the context of a general overall reform. However, I stress, with respect, that I am speaking particularly about the Lands Tribunal for Scotland. Other tribunals will be in different positions.

The Convener: We will leave you alone in a little while. I know that it is odd to be on the receiving end of questions when you usually do the questioning. I have been there myself.

Are we going to ask about another issue? We can come back to the Lands Tribunal for Scotland.

Sandra White: My question is not about the Lands Tribunal, per se.

The Convener: Excellent.

Sandra White: Mine is a general question for all the witnesses to answer, if they want to. In the eyes of your organisations, are the proposals an improvement on the structure that you have at the moment?

Heather Baillie: As far as the Mental Health Tribunal for Scotland is concerned, the current structure works well, but we accept that we can work within a different structure and we can see benefits in terms of savings from having a general administration. Our anxiety is to maintain our particular ethos, our patient-centred approach and the special parts of the Mental Health Tribunal that make it a success. Given that the bill does not change the legislation for the Mental Health Tribunal, and given that there appears to be an undertaking that there will be a separate chamber, which would allow for separate training, we are comfortable that the savings that can be achieved in relation to administration could be a good thing.

May Dunsmuir (Additional Support Needs Tribunal for Scotland): It is a similar position for the Additional Support Needs Tribunal for Scotland, which works effectively in its current shape, although we recognise that there are benefits from the Tribunals (Scotland) Bill. However, those benefits will be achieved only if all the listed tribunals in the bill are transferred in. Otherwise, the haphazard and fragmented system
that we currently have, and which the bill seeks to address, will remain. In fact, we could end up with a far more diverse and haphazard system if the listed tribunals are not all transferred in as planned.

**The Convener:** Before we move on, I would like to ask whether there are conflicts of interests for people who hear cases for support for children with additional needs and who are part of the system.

**May Dunsmuir:** There are provisions for a member—usually a general member—who has a conflict of interests not to sit, and members of the Additional Support Needs Tribunal for Scotland do not ordinarily sit in the education authorities in which they serve or have served.

10:45

Occasionally during a hearing the question of a conflict of interests may arise because a member’s background is relevant to the matter to which the claim refers. That is usually easily addressed by reminding parties of the scope and capacity in which the member sits, which is as a judicial officer who impartially and objectively reaches decisions based on facts and circumstances.

**The Convener:** Thank you. Conflict of interests is sometimes mentioned.

**Alastair Beattie:** There are certainly benefits to come for our sector from what is proposed, but as Mr Wright highlighted, it is unfortunate that they will be available only when everybody is brought into the unified system. For some of us, that may be many years in the future, so the benefits of unified training across the sector, for example, will not be speedily accessed.

The extent of the benefit depends on precisely how the structure is fleshed out, which comes back to the earlier point about the detail not being in the bill. I welcome the Lord President’s suggestion in his written evidence that the valuation appeal committees and the Lands Tribunal for Scotland might be brought within the unified tribunal structure, but as separate pillars, with appeals against decisions of either tribunal in our major rating jurisdictions continuing to be by stated case to the lands valuation appeal court. If I understand correctly, that would improve the perceived independence of valuation appeal committees by transferring responsibility for our funding and training from local authority to central sources. It would give our sector the benefit of judicial leadership and oversight by the president of the Scottish tribunals.

The continuing involvement of the lands valuation appeal court should ensure that the rating jurisdiction remains coherent, notwithstanding the fact that it is shared between the two tribunals in the first instance. The valuation appeal committees could retain their present regional structure in order to ensure that their members are people with local experience, which is very important in this jurisdiction.

Difficulties would still be created in our sector by the introduction of an age limit for membership, as we set out in our written evidence.

**Graeme Pearson:** Mr Beattie has partially answered my question. You have each indicated that the current system works well. However, it seems to me, having read the paperwork, that, when we begin to get into some of the commentary, this is a pretty dense and complex area.

From your perspective, what will be the benefits from going through all this pain? We have heard about unified training and the transfer of finance from local authorities, and the possibility of judicial leadership. Is that the extent of the recognised benefits across the various tribunals, or are there other benefits that you would point out?

**May Dunsmuir:** I reiterate what I have said. The Additional Support Needs Tribunal for Scotland works very well within its existing structure, so perhaps some benefits will come from sharing the expertise that has been gained from the tribunals.

I am aware that other tribunals do not have the same resources available for the delivery of training, for example, but our concern must be the tribunal user, to whom the primary benefit must apply and who must be at the heart of the system. The user ought to be able to approach any of the listed tribunals and know with some certainty what level of service they can expect to receive. As things stand, tribunal users have different experiences, depending on the particular tribunal that they approach. The bill must remain focused on delivering a clear and good quality service for the tribunal service user, as the end user.

**Heather Baillie:** A benefit of having overarching leadership from the Lord President and a president of Scottish tribunals is that it will improve overall consistency of delivery of service across tribunals. There will be an opportunity for generic training, but there is also a need for specific training, given the diverse users that the tribunals serve.

**John Wright:** Even in the case of the Lands Tribunal for Scotland, which I suggest is in a somewhat different area and is outside the area of administrative justice with which the bill is primarily involved, there is benefit in expanding a system of purely administrative support, which has already started under the Scottish tribunals service. In addition to training, which has been mentioned, I
can think of one or two other areas in which the expansion of the system will assist, such as in the recruitment process, dealing with questions about the conduct of tribunal judges and so on.

Those are undoubtedly benefits, but I would like to distinguish them from the idea of standardising case handling and that sort of thing. Case handling—not just the hearing of cases but the handling of cases by our specialist staff—is a very important part of our work. I worry about increasing standardisation of case handling, but I suggest that in terms of purely administrative support the bill will bring real benefits.

Alastair Beattie: The benefits that I highlighted, which Graeme Pearson has picked up on, largely arise because—I think, uniquely among the listed tribunals—my tribunal is not structured on a national basis. The others currently have single national organisations, but we exist as 13 separate regional panels, which are funded locally, although they are appointed by the sheriffs principal. The guarantees of consistent operation and so on therefore exist only within each panel area. In statutory terms, I am responsible only for what happens in the Highlands and Western Isles area. My position in relation to the other panels is as a member of the forum, which is a purely voluntary organisation that pulls all our panels together so that we can come to speak to this committee and to the Scottish Government with one voice.

A benefit of creating a national organisation is that it would bring consistency of standards across the sector, regardless of whether we are brought into the unified tribunal. In a way, I think that it is a step that would have to be taken before we could be brought in, which is why we suggest in our written evidence that, before we are brought into the system, there ought to be a more radical and independent expert review of the sector to determine the needs of the users in the sector who are served by ourselves and, jointly, by the Lands Tribunal for Scotland, before a future framework is determined.

The Convener: I have a supplementary question. I have been digging around trying to find a comment that I knew I had seen somewhere in my papers. It is in the Law Society of Scotland’s submission, which refers to the distinctive character of tribunals and which says:

“The Society believes that, in the context of the proposed merger of the Scottish Tribunals Service and the Scottish Courts Service, these characteristics are important and worth preserving and that they should be entrenched in the bill.”

I know that the characteristics are not uniform across all tribunals, but they include informality, the fact that a tribunal is not a court and that generally, the cases do not involve people for and against who are fighting each other, although that might be the case in the Lands Tribunal, where the practice is much closer to normal court practice.

The Law Society of Scotland’s submission suggests that a provision should be included in the bill about the nature of a tribunal being distinct from that of a court. Is that silly or pointless?

The Law Society’s submission also quotes a comment from the Leggatt report:

“tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases ... tribunals should do all they can to render themselves understandable, unthreatening, and useful to users”.

I exempt the Lands Tribunal from this for the moment, but do the witnesses feel that there should be some attempt to have a culture that embraces flexibility?

Heather Baillie: Yes. It is important to recognise that, as a forum for decision making, tribunals have a flexibility that is quite different and distinct from the courts. In the case of the Mental Health Tribunal, decisions about the detention of the mentally disordered have moved from the court to a tribunal setting and it is very important to recognise that that flexible, informal and patient-centred approach will continue to be taken.

May Dunsmuir: I am conscious that the Law Society’s submission reflects the Administrative Justice and Tribunal Council’s response on the matter. It would go some way towards reassuring service users, stakeholders and service user groups if the bill contained a definition of the function and distinctive nature of a tribunal.

Alastair Beattie: Bringing out that distinction would be a very desirable move but, given the breadth of the issues that we as a group deal with and the existing procedures, it is very difficult to see how that could be achieved. For example, valuation appeal committees in our council tax jurisdiction are almost always faced with lay appellants, whom we have to approach and handle as individuals. However, although some lay appellants come before us in our rating jurisdiction, the vast majority of cases are handled by professional agents, which makes things much more adversarial; indeed, we frequently have senior counsel addressing us on both sides. Things are veering much more towards a court situation—that is just from putting one tribunal in different jurisdictions. In short, I am not sure how such a principle could be enshrined in law, although it would be worth while.

John Wright: My submission draws attention to the “overriding objective” approach, which is used in England and Wales and of which I have some experience in the UK tribunal system. That
approach, which is put into tribunal rules, could also be put into the bill; as in the practice rules of the upper tribunal under the UK system, such a provision would state that the overriding objective is to enable tribunals

"to deal with cases fairly and justly"

and then would set out a number of principles in relation to that, including

"ensuring, so far as practicable, that the parties are able to participate fully in the proceedings".

That is a useful device—indeed, it could also apply in court—and I note that Citizens Advice Scotland’s submission focuses on it as a way of focusing on users’ needs.

Of course, the upper tribunal practice rules set out other principles of dealing with a case “fairly and justly”, including

“avoiding delay, so far as compatible with proper consideration of the issues.”

That sort of general principle could go into the bill; for that matter, I would also accept it for the Lands Tribunal.

The Convener: Given that the Law Society, among others, has raised the issue, we could always ask it to draft an amendment and submit it to members for consideration.

John Finnie: I note that Ms Dunsmuir’s submission expresses concern about “any dilution” of specialisms or “the culture and ethos” of the Additional Support Needs Tribunal or

“any unintended drift towards generalised arrangements”,

which follows on from earlier comments about standardisation. Was that a pre-emptive comment about what could happen, or has anything specific in the legislation led you to believe that that could be the case?

11:00

The Convener: Ms Dunsmuir?

May Dunsmuir: Sorry—I did not realise that I was being addressed.

The Convener: But you were listening.

May Dunsmuir: I was. The word “drift” caught my attention.

The bill can work effectively and deal with the range of concerns that already exist only if we ensure that the listed tribunals are placed carefully into the appropriate chamber system. That in itself will work against any drift towards a generic tribunal, which everyone is so concerned about. There are a range of safeguards over and above that, which include the provision that the chamber president will be expert in the subject of the chamber over which they preside. Not only the Additional Support Needs Tribunal but the Mental Health Tribunal for Scotland and a range of other bodies, including the Scottish Children’s Reporter Administration, stress the importance of maintaining and preventing the dilution of specialisms. Carefully placing tribunals in the appropriate chamber and ensuring that the chamber president remains an expert in that subject will be absolutely crucial to ensuring success and preventing drift.

Heather Baillie: The existing membership and the amount of investment that has gone into training and the development of the different cultures in different tribunals should be recognised. The transfer in of existing members will be important in avoiding the development of a generic tribunal.

Alison McInnes (North East Scotland) (LD): The bill provides for a common system of appointments to tribunals. Do the panel members think that that will increase the independence of tribunal members?

Alastair Beattie: Although that is an interesting development, it is hard to see that it would increase independence. We are appointed by the sheriffs principal, which I think is as good a guarantee of independence as we could have. It is difficult to see that the bill would necessarily increase independence.

The greater risk is that, by straddling the paid appointments that exist in many tribunals and the unpaid appointments that exist in others—such as my own—the common approach might end up not being entirely appropriate to both. I am thinking in particular of the proposal for a retirement age or an age beyond which no appointment could be made. That might have considerable relevance to paid appointments, where those appointed require up-to-date professional qualifications and experience, but it would have less relevance in our case, where members are lay persons with local knowledge, which people of any age can have. Given that we do not have an age limit at present—the previous one having been set aside as it was considered to be inconsistent with EU legislation—if an age limit were imposed before the next revaluation, we would lose 60 per cent of our membership and therefore we would lose the very experience that it would be useful to take into the new system. Where you would find the successors, I do not know.

The Convener: I am glad that it is a matter of capacity, not age, and that there is no age limit on politicians.

Heather Baillie: It is welcome that these are to be judicial appointments. Having one appointments body can ensure that the tribunal
skills that are specific to a flexible and user-centred approach are recognised as part of the appointment process. From that point of view, we welcome the arrangements for appointments.

May Dunsmuir: I agree with my colleagues’ comments. The Judicial Appointments Board for Scotland made a comment in its submission that there is no clarification of whether it would be involved in the reappointment process. That is perhaps something that the bill ought to address, because the initial appointment is only one part of the scheme.

Alison McInnes: The bill lays down the criteria for legal members, but it does not do so for lay members—for ordinary members, as they are called. That will come through in secondary legislation or guidance from the minister. Is that an appropriate way to separate out the appointments?

May Dunsmuir: At the moment, provision through regulations specifies the experience that is required before someone can be appointed as a general member of the Additional Support Needs Tribunal. One would hope that, whatever provision is made in relation to each of the listed tribunals, the arrangements will recognise the distinctive qualities that are necessary for each individual tribunal. It would be disastrous if that approach were to be lost—that would go very much to the heart of the specialism of the tribunal. The bill has to address that much more clearly.


Elaine Murray (Dumfriesshire) (Lab): Thank you.

Perhaps I should have intervened on this issue a little earlier, as it is a fairly general point. The approach to the bill is a generalist one, and the system is set up such that it will cover certain lists of tribunals, with others joining over a period of time. The evidence suggests that some of the benefits will not accrue until the system is completely set up. Is the gradual approach the best one? Should all the tribunals be part of the system and defined from the outset?

John Wright: Mr Beattie has already referred to the effect of the gradual approach being that some tribunals might be left out of the system for a long time. Certain bodies—obviously, the Lands Tribunal is the body that I am talking about, and I know that one or two other organisations such as the children’s hearings have suggested that they should not be in the system—would never get the benefits.

I understand the gradual approach, but it means that provisions that are useful do not apply for a long time—and possibly never, in the case of some bodies.

The Convener: I invite others to comment on the gradualist approach as opposed to a big-bang approach.

Given that many of the provisions will come through subordinate legislation, I will check that that will be subject to the affirmative procedure. Panel members may be concerned about that. If I may use a cliché, we all know that the devil is in the detail, and the committee will return to the matter to consider how the subordinate legislation will interact with the primary legislation.

Are there any further questions?

Roderick Campbell: Yes.

The Convener: I knew as soon as I said that—

Graeme Pearson: There are two of us.

The Convener: I will let Roderick Campbell in first. Graeme Pearson has been in already.

Graeme Pearson: Just with a supplementary.

The Convener: I invite others to comment on comments in the Additional Support Needs Tribunal’s written submission in relation to appeals. You suggest that appeals to the Court of Session have “worked well in practice”. Under the proposals, appeals will go to the upper tribunal, and you say that you are “content with the Bill’s provisions” in that regard. Perhaps you could expand on what you mean by “content”.

May Dunsmuir: The process of taking an appeal to the Court of Session is undoubtedly expensive and can be fairly time consuming. There can be delays in the appeal process. The bill provides that an appeal can go to the upper tribunal, which will remove those impacts. In that respect, the president of the Additional Support Needs Tribunal is satisfied that the bill makes adequate provision and that there will be no loss to the tribunal by virtue of the different appeals route.

Roderick Campbell: Do you hope that the new route will also be cheaper and speedier?

May Dunsmuir: Yes.

John Wright: I appreciate the usefulness of a tribunal—as opposed to a court—hearing administrative justice appeals but, again, that does not apply in relation to the Lands Tribunal. I am not aware of any dissatisfaction in relation to the Lands Tribunal about appeals to the Court of Session. Indeed, a particularly positive area—the
lands valuation appeal court—has already been referred to.

The Convener: I will let Graeme Pearson in now, lest he think that I am ignoring him.

Graeme Pearson: I cannot find the reference, but I thought that I read in the evidence about the prospect that the Scottish tribunals service will have a growing relationship with the Scottish Court Service in the coming years. Do you welcome that, does it cause you any concern, or is it of no import to you?

Heather Baillie: In relation to the route that cases that involve mentally disordered patients take to get to tribunals, I reiterate that the concern would be that we maintain within our courts and tribunal service our specialism and a recognition of our ethos. That extends to administration, because those who deal with the administration of cases that involve the mentally disordered have built up considerable expertise in communication and in the structure of the Mental Health (Care and Treatment) (Scotland) Act 2003.

The other issue is that of venue. We would consider it a retrospective step for the patient to have to come to the tribunal—at the moment, the tribunal goes to the patient.

Graeme Pearson: So you hope that, as the relationship with the Scottish Court Service grows, the environment in which you work will be acknowledged and serviced, rather than your having to fit in with the SCS’s administrative requirements.

Heather Baillie: Absolutely.

The Convener: But there is no proposal for that to happen.

Heather Baillie: No.

The Convener: It is just that you have a concern about that.

May Dunsmuir: A consultation process on the proposed merger is under way, and I know that each of the jurisdictions that are represented here will have responded to it.

The Additional Support Needs Tribunal is an incredibly complex jurisdiction, and the level of specialism that the caseworkers have developed over the years would have to be maintained. I know that Mr Wright has already commented on the level of specialism in the administrative support that is provided to the Lands Tribunal. In the upcoming annual report, the president of our tribunal will report on the efficiencies that have been gained through the development of the casework process. I certainly hope that, in any proposed merger, the special knowledge of the caseworker will not be lost.

I know that the consultation asks questions about how the board can be adapted to recognise the two different jurisdictions, and comments will undoubtedly be made on that.

Alastair Beattie: For our sector, it is very difficult to see what the position will be, largely because, as yet, we have received no indication of the implications for our secretarial and administrative arrangements of being brought into the new system. I am not sure, but I think that we are pretty well unique in the tribunal sector in having an arrangement whereby we have lay chairmen and legal secretaries—rather than the other way round—and a totally different administrative structure. There have been no proposals on how that will be merged into the new system; we do not know how that will be done. Therefore, the implications of further merger are anyone’s guess.

Graeme Pearson: That might be an interesting question for the Scottish Court Service.

The Convener: Are you coming back to ask that interesting question?

Graeme Pearson: I hope that I will be able to encourage someone else to ask it for me.

The Convener: I am teasing—Graeme is leaving the committee and we will miss him.

I thank all the witnesses very much for their evidence, which has been extremely helpful.

I suspend the meeting for six minutes.

11:14

Meeting suspended.

11:22

On resuming—

The Convener: I welcome our second panel of witnesses, who were all sitting listening to the first panel’s evidence. We have Katie James, manager of Advocard’s individual advocacy service at the Royal Edinburgh hospital; Jon Shaw, welfare rights worker with the Child Poverty Action Group in Scotland; Lauren Wood, policy officer for Citizens Advice Scotland; and Iain Nisbet, head of education law at Govan Law Centre. I thank you all for your written evidence. I invite questions from members.

John Lamont: I will start with the same question that I asked the previous panel. The bill is about establishing a framework for reforming tribunals. Do you share my concern that there is not so much detail in the bill?

Iain Nisbet (Govan Law Centre): As has been said, the devil will be in the detail. It would be
useful for members to have at least some indication of the likely content of the subordinate legislation and guidance that is to follow. Having said that, there is something to be said for having the flexibility to make quicker changes when change is needed. For example, rules and questions about appointments and so on are often contained in regulations, and there is nothing particularly objectionable about that. It can be useful, because the legislative timetable is such that it is not always possible to get primary legislative slots when change is needed. As a new system beds in, there might well be a requirement for changes to tribunal rules. For example, the Additional Support Needs Tribunal issued a second set of rules within a year of the first set of rules being published, because some minor amendments needed to be made. That would not have been possible if everything was in the bill.

The Convener: The committee appreciates that the process for secondary legislation is much simpler and more accelerated than that for primary legislation.

Lauren Wood (Citizens Advice Scotland): We are definitely concerned about some of the lack of detail in the bill, but there are ways in which that lack of detail could be mitigated. For example, the bill could include principles to help to guide tribunals, as there are in the Tribunals, Courts and Enforcement Act 2007 in England.

Another way to mitigate would be to use independent review, which is missing from the bill. That would give the Scottish Civil Justice Council the function of overseeing the process and procedures, although not the whole of administrative justice. I know that the Scottish Government and the UK Government are moving to mitigate the impact of the abolition of the Administrative Justice and Tribunals Council, but if the bill does not give someone the power to oversee administrative justice, there will be a risk that all the current good intentions will be missing later on. In five years, will there still be an intention to have a Scottish Government body as an independent advisory committee?

Another aspect is about allowing for the development of new tribunals. The potential new housing tribunal is a good example to use when considering the bill. There is no way for the bill to contain detail about a housing tribunal that does not exist yet, but including the principles in the bill and giving someone the ability to oversee administrative justice would mitigate any negative impact on current tribunals and potential new ones.


To return to the overriding objective, which I was really pleased to hear Mr Wright talk about in the previous evidence session, there is a provision in the Tribunals, Courts and Enforcement Act 2007 that places a duty to put the user at the centre of the tribunal system. Although there is a similar provision in the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, it is a concern that the council has said that it will not draft procedural rules until, I think, 2017-18, which is mentioned in the financial memorandum for the bill. The policy memorandum says that there is no intention to significantly rewrite the rules. So the placing of an overriding objective at the heart of the tribunal system, which has been so helpful in our area of expertise—reserved social security tribunals—is a real area of concern. Placing a principle in the bill to secure that would be a real improvement.

Katie James (Advocard): From a service user’s point of view, accessibility comes from having detail that people can look at, cross-examine and utilise effectively. People want to know the detail so that they can use the bill in the most effective way.

John Lamont: I have a follow-on question for Ms Wood and Citizens Advice Scotland. Your organisation supports users of devolved and reserved tribunals, and extensive reforms have been made south of the border. Are there any lessons that could or should be learned from the experiences of the reforms of reserved tribunals? Will the reforms in Scotland achieve efficiencies, make a better system and meet the same standards as have been achieved south of the border?

Lauren Wood: There are still a few questions to be answered about how efficiently the reserved tribunals are working. To have an echoed system is probably a good thing for users, because we have found that, when somebody comes through the door, it does not matter to them whether an issue is reserved or devolved.

The Convener: We have the same experience as MSPs.

11:30

Lauren Wood: It does not matter where the issue sits. Somebody has a problem and they want it dealt with, and that is the focus. On those terms, it is essential that there is somebody who can carry out an independent review of the whole of administrative justice, including tribunal users. To restrict the functions that are given to the Scottish Civil Justice Council to just the process and procedures could restrict what it looks at in relation to how people access the systems.
There are still questions to be answered. We should strive for the best standard possible, because that is what somebody will experience. People do not care, even once the process is finished, whether the matter is reserved or devolved. Having a body to oversee the whole of administrative justice is the way to ensure that things are good for people at the end of the process.

**John Finnie:** My question is on a number of stark comments in the opening section of Ms Wood’s written evidence about openness, fairness and impartiality. You say:

“There is therefore no guarantee ... as characterised by Franks.”

You also say:

“Without prescription of the Tribunal Rules, fairness, openness and impartiality cannot be said to be guaranteed.”

Can you expand on that, please?

**Lauren Wood:** Those things are guaranteed mostly through the detail of procedure and process, and the bill does not contain any detail about procedure, so we cannot say that the bill can guarantee that procedure will be open, fair and impartial. If there is no detail about the procedure and no safeguards such as overarching principles to guide the development of procedure in an impartial way, we cannot, on a strict reading, say that the bill will guarantee fairness, openness and impartiality, because the detail is missing that would allow those guarantees to be offered.

**John Finnie:** How do you suggest remedying that?

**Lauren Wood:** One way would be by providing principles in the bill as a way of settling out the focus of what we want tribunals to achieve, so as to be user focused. On pages 3 and 4 of our submission, I point out the principles that are in the 2007 act in England. The way to mitigate the impact and to help guarantee openness, fairness and impartiality is by guiding the development of tribunals with principles.

**The Convener:** That is on page 4 of the submission, by the way, for the benefit of other members.

**John Finnie:** Thank you. It is helpful to have that on the record.

**The Convener:** Yes, it is very helpful.

**Roderick Campbell:** My question is addressed to Mr Shaw. I take on board your point about the importance of the overriding objective but, just for the record, the Government’s policy memorandum states:

“There are no plans to comprehensively rewrite the rules of procedure”.

You make a number of comments in your written submission, such as:

“The Tribunal Rules for the UK system are indeed simple and clear”,

but you point out that, for understandable reasons, you have no experience of the devolved tribunals in Scotland. I wonder whether you were being a bit sweeping in taking such a view on the rules of procedure in Scottish tribunals if you do not actually have experience of those rules. I take on board your other points, but I wonder whether you are going a little too far.

**Jon Shaw:** It is clear from our evidence that we are commenting on what we see as the positives in the reforms that were introduced under the 2007 act, and I struggle to remember a point in the written evidence where it makes any sort of explicit criticism.

We do not see ourselves as being expert in any way on the devolved tribunals. The points that we were hoping to get across are that there are real positives from having an overriding objective underpinning the rules, that there is flexibility between the different specialisms and that there are differences within the rules. I am sure that, over time, any system will develop and that it will be possible to learn from the other tribunals.

As regards how the tribunal rules are drafted—if they are drafted—there is no suggestion that there should not be specialisms, particularly with regard to membership, time limits, training and venues, as has been highlighted by the other tribunals. There will always be an opportunity to involve stakeholders and users of tribunals and to get the best out of each without compromising those specialisms.

I did not intend to criticise the rules of any individual tribunal; I wanted to highlight the fact that there is perhaps an opportunity to see where improvements can be made.

**Roderick Campbell:** I agree with your comment that

"the culture of the system"

is

“as important”

as the rules. Your experience is with the UK tribunal system. Where could improvements be made to that system and what can we learn from the experience there?

**Jon Shaw:** A big issue in the UK system, particularly in social security, is that of delay, which we will always find at a time of large-scale welfare reform. There is the potential that the direct lodgement of appeals will eventually improve things and reduce delays in the system. One big improvement that was made when the
procedural rules were drafted was in preventing the automatic strike-out of cases where people did not return an inquiry form that had been sent by the tribunals service. Judge Martin estimated that that improvement led to 1,200 appeals being won that would otherwise have been struck out simply because people had not returned a piece of paper. Come October, an extra stage in the process will be removed, as appeals are lodged directly with the tribunals service. That is one area where an improvement will be made.

Reserved tribunals work well. There is a clear distinction between a tribunal and a court. Tribunals facilitate user access, particularly lay representation, as far as the upper tribunal. The one criticism is that some judges do not necessarily have the soft skills. There might be further opportunities to make appellants part of the process, rather than their feeling that there is an adversarial jurisdiction. That is perhaps a function of the fact that the Department for Work and Pensions rarely sends a presenting officer, which leaves the tribunal judge to fulfil the role of cross-examining the appellant—that is what it will sometimes feel like, depending on their particular interpersonal skills.

**Sandra White:** Like John Lamont, I will pose the same question as I did to the previous panel, which I might then follow up with further questions. My first question is whether the proposals are an improvement on what we have now. Ms Wood says that they are an improvement, but I note the criticisms that the witnesses have advanced—although perhaps “criticisms” is too strong a word. In general, do you think that the proposals are an improvement? I might follow that up with further questions.

**Iain Nisbet:** From a user’s point of view, the primary improvement that I see in the proposals is in accessibility. At present, one of the primary benefits of the tribunals system over the alternatives that involve going to court is that it is more accessible. It is also generally cheaper and it is possible to make use of specialist lay representation.

The primary benefit that I see in the new system from a user’s point of view is that those advantages will be extended to the first tier of appeals. At present, when people disagree with a tribunal decision, and where there is a point of law to argue, the appeal, if the appeal right exists, is very often to court, which often means the Court of Session. However, for most users who do not qualify for legal aid, that will be outwith their means. The ability to take a case to the upper tribunal without those concerns and the access to specialist lay representation will be good for users and for the tribunals system, as many of the smaller jurisdictions do not have that flow of appellate decisions, which can be useful for clarifying the law and the process that the tribunals use. I see that as the primary benefit from a user’s perspective.

**Katie James:** I concur with that, primarily because I think that people sometimes want the opportunity for mediation and negotiation. The upper tier will give people more of a sense of opportunity to negotiate and mediate effectively.

**The Convener:** I think that I am correct in saying that an appeal from the first tier will involve a sifting process in any event. It is hard for some people to accept a decision even when it might be blindingly obvious that the decision is the correct one, but there is a sifting process. I take it that you are content with that, too.

**Iain Nisbet:** I have some concerns about the level of sift. I note that the Faculty of Advocates is concerned about the sift with regard to the second appeal. That will need to be monitored. I have no objection to a sift that is applied to cases that are obviously without merit—addresses the concerns that you have—but there are not a huge number of appellate cases being brought, and it is good for a tribunal system to have a reasonable flow of those. Parliament will wish to monitor that to ensure that the sifting is not being applied too rigorously, which could lead to a lack of appellate decisions.

**Lauren Wood:** I agree with all the comments that Mr Nisbet has made.

To pick up on an earlier comment, the new structure will mean a guaranteed baseline standard among all the tribunals, which I think is important for users. The ad hoc way in which tribunals have been allowed to develop has been a good and a bad thing. It has meant that each area has developed into something that really suits the users of each specialism. It is an improvement to have a baseline standard, but each area should be allowed to retain its individual characteristics as far as possible. If a new tribunal is developed within the new structure, having the principles in the bill would give a degree of certainty that it should develop in line with those principles that put users at the core, but not necessarily in a rigid way. That would be important, particularly for a housing tribunal.

**Sandra White:** I want to pick up on some of the issues. Everyone who made a submission has said that the bill is an improvement but, as we have gone on with the evidence, people have voiced concerns to some extent.

Ms Wood, when you answered Mr Finnie’s question about guarantees and so on, you could not guarantee anything. If we look at some of the figures that CAS has presented, there is not exactly a guarantee there either. There is a wee
bit of an issue with words in this respect. You mention the “650,000 applications made to tribunals across the UK” and you go on to say: “this number continues to rise.”

You state: “In 2015-16, applications to the first tier of the Social Entitlement Chamber alone”—that is another UK body—“are expected to reach a certain figure. That is not a guarantee—they are “expected”. I am making the point that, while you are asking for a guarantee on the principles in the bill, the evidence that CAS has presented is not necessarily guaranteed either, with phrases such as “reasonable to expect.” I wanted to clarify that point.

You also mentioned the other body, the SCJC. We have had—I probably should not say this—guarantees. As you state, “The Minister for Community Safety and Justice in Scotland has expressed her commitment”—which I would say was practically a guarantee—“to an expert independent advisory committee ....”. Would you be content with that expert advisory committee, or would you be looking to another tier again?

11:45

Lauren Wood: The independent advisory committee is a fantastic move. I have been talking to the civil servants who are involved and they have been excellent in their communication and their openness about it. My concern is that the current independent committee will be an interim advisory committee—that is the way in which it is being discussed. My concern is always to do with the five-years-down-the-line test. If there is nothing in the bill that guarantees that administrative justice will be reviewed overall, what will happen when the matter is further down the agenda in five years’ time?

In the last paragraph of my submission, I suggest that that function could possibly be given to the civil justice council. From my understanding of how the civil justice council will work, however—and it is still very early days—that would not necessarily mean that the council should be the body that has to carry out the review, although the council would have to ensure that it is done. In another part of my evidence, I mention that the relationship between the interim advisory committee and the Scottish Civil Justice Council is unclear. I think that it should be a strong relationship.

On a strict reading of the amendments to the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, to insert the power to overview process and procedure but not to insert the power to overview administrative justice will mean—reading between the lines—that, because the Scottish Civil Justice Council has the power to oversee civil justice, somebody else should do that, and not the SCJC. There is a concern that, if the power is not legislated for and given to someone, although the intentions are good and the interim advisory committee will be a positive thing, a question arises as to how long that will last and how high on the agenda the matter will be for the next five or 10 years.

Sandra White: I take on board what you say. Things are moving along. Next year, we will have the referendum for independence. You are talking about five years; I am talking about a year down the line. You say that the current proposals are a good move, but the issue seems to depend on one thing that makes it not a good proposal. I am a bit concerned that it is hung up on that one thing while there are so many other things to consider regarding tribunals, including education—somebody else might pick up on that with Mr Nisbet.

The Convener: We will have representatives of the AJTC with us next week, so we will be able to marry your concerns about the interim period and about what the functions will be should the other body take over. We can raise all those issues next time.

Alison McInnes: I am interested in the panel’s experience of education appeal panels. Would there be benefit in their being incorporated into a tribunals system? Perhaps Mr Nisbet is well placed to deal with that question.

Iain Nisbet: Thank you for asking. This is the aspect of the bill that I am most excited about—the prospect of moving the education appeal committees into an independent structure. You asked about our experience. I have appeared before numerous education appeal committees, and I have advised parents appearing in front of many more. That is possibly one of the largest jurisdictions in the list in terms of the volumes of cases, and important decisions are made about children’s educational futures.

The deficiencies are well known and they were officially recorded by the predecessor to the AJTC, the Council on Tribunals, for well over a decade. The Scottish Executive issued a consultation on proposed reforms, which did not really progress matters. The deficiencies that were marked in the original paper are still evident. It is not an
independent system, and it shows. The tendency of the committees is to confirm authorities' decisions, although it varies between authorities. There are 32 different iterations and some authorities are better than others, but by and large there is a tendency to confirm decisions, in some cases without serious scrutiny of the case. The prospect of that jurisdiction being brought within an independent tribunal service is therefore one of the most exciting and beneficial aspects of the bill.

Alison McInnes: That is helpful. Will there be an opportunity to have a shared chamber with the Additional Support Needs Tribunal? Would that bring further benefits?

Iain Nisbet: Yes. I have no reason to object to that; it would be a good move. A learning chamber or something of that sort would be beneficial. The members of the education appeal committee are not specialist members but councillors and parents. There is an element of choosing, but when it comes to more complex issues such as exclusion or placements for children with additional support needs in mainstream or special schools, the expertise is not there. The proposed approach presents an opportunity to develop that.

Alison McInnes: Glasgow City Council points out in its submission that most of its appeals happen at a particular time. Do you anticipate problems in that regard?

Iain Nisbet: It is true that there is a large seasonal element because most placing requests in Scotland are decided on the last day in April, so the appeal process kicks in after that. Local authorities are aware of that and have to set themselves up to deal with the appeals—they do that well.

The Additional Support Needs Tribunal can experience the same issue, to a lesser extent. We do not want a situation in which parents do not know which school their child will be going to, sometimes until into the new term. We have had cases that have gone to the appeal committee and then the sheriff court, and by the time we are through the process we can be into August. Particular attention will need to be given to the issue.

However, as I said, the appeal committees do a good job in getting throughput, and if a number of cases relate to the same school there are provisions in legislation to allow cases to be at least partly heard together so that the committee does not have to hear the evidence on how many classrooms and teachers the school has more than once.

Graeme Pearson: We heard from a witness on the previous panel that an age limit of 70 would have a substantial impact on his sector's capacity to continue in the years ahead. From your experience of different administrative appeals and tribunals, do you think that an age limit would have an effect? Do you have an opinion to share with us on the age limit that might be applied in relation to appointments to serve in a particular judicial capacity?

The Convener: That question was met by a stunned silence.

Iain Nisbet: I can comment on the jurisdictions in which we appear. The education appeal committees and the Additional Support Needs Tribunal seem to rely heavily on retired professionals, so an age limit could well cut off the potential supply of members.

Jon Shaw: I echo that in relation to the social entitlement chamber. The specialist medical members are often retired general practitioners, so an age limit could have the impact that Iain Nisbet described.

Graeme Pearson: Do the witnesses have a view on what retired people bring or fail to bring to the process—or would you prefer to remain silent on that?

Iain Nisbet: There is no need for me to remain silent. The fact that someone is no longer in the system, working for a local authority and so on, enhances their credibility as a member and increases parents' confidence in the process. It can be a benefit.

The Convener: It is about quality of years, not quantity of years.

Graeme Pearson: Indeed.

The Convener: I knew that we would agree on age.

As there are no further questions, I thank the witnesses for their attendance, which has been useful. If you think of something that you want to add or you want to comment on evidence that we subsequently receive, please write to the committee. We will take evidence next week that you might want to say something about. Thank you.
On resuming—

**Tribunals (Scotland) Bill: Stage 1**

**The Convener:** The next item on the agenda is our second evidence-taking session on the Tribunals (Scotland) Bill. I welcome to the meeting Adrian Ward, convener of the Law Society of Scotland’s mental health and disability sub-committee; Richard Henderson, convener of the Law Society’s administrative justice working party; Jonathan Mitchell QC from the Faculty of Advocates; and Alan Gamble, who is a judge in the administrative appeals chamber of the upper tribunal sitting in Scotland.

I thank the witnesses for their written submissions. I understand that Mr Henderson will be able to speak to the submissions from the Law Society and the Scottish committee of the Administrative Justice and Tribunals Council.

**Richard Henderson (Law Society of Scotland):** That is right, convener.

**The Convener:** Good. I made a mistake last week with Mr Wright and would not want to repeat it.

I do not know whether you have all appeared before the committee before, but I should point out that members will indicate that they wish to ask a question and you should indicate to me whether you wish to respond. Your microphone will come on automatically when I call you.

I seek questions from members.

**Elaine Murray:** The Law Society is concerned that the bill should identify the characteristics that distinguish tribunals from courts; indeed, last week, Citizens Advice Scotland expressed a similar concern and has in its evidence proposed amendments based on the Tribunals, Courts and Enforcement Act 2007 to entrench some of those characteristics in the bill. Do you agree that such an amendment should be lodged?

**Richard Henderson:** I will lead off on this question.

The question whether a tribunal should be defined is related to the relationship between courts and tribunals, whether this country actually has a civil justice system and what its components are. The civil courts and tribunal reform processes are both in train and, as I recollect it, the civil courts reform process involved proposals for a third tier of judiciary that might leach across—“leach across” is the wrong phrase; perhaps “wash across” is better—into a tribunals structure. There is, as a result, a linkage between those two components of a civil justice system.
The current tribunals system is fragmented and comprises subject-related bodies that are nearly all different with regard to their founding legislation and the substantive law that they administer. There are of course common characteristics to what makes a tribunal but whether those characteristics stretch across to what makes a court is another matter. Tribunals were originally established to be less formal than courts, to be user-friendly and to be a place where justice could be determined without the necessity for lawyers to make an appearance. As a result, the nature of the proceedings in tribunals will be quite different to what is generally the case in courts. If you are seeking to create a new tribunal—and we know that in other parts of the forest people are asking whether housing, for example, will go to a tribunal or a court—you will need to think about the characteristics that you are looking for in the adjudication process. Until you have worked out what you can buy, as it were, or what the different components are, you will to some extent be dealing with things in a slightly anarchic fashion.

You could not have had a civil justice review five years ago because, at that stage, we were not talking about the kinds of reform processes that we are talking about now. It is only when you get some way down the road of reforming courts or tribunals that you can begin to think about the other components of a civil justice system, notably ombudsmen and complaints systems, all of which make up what you would call a civil justice system. If you are going to make reforms in those different areas, you are sooner or later going to have to ask yourself about the linkage between them—and if you are going to ask that question, you will sooner or later have to ask yourself, “What is a tribunal?” That is when you will you need to define the term.

The Convener: Does anyone else wish to comment?

Jonathan Mitchell QC (Faculty of Advocates): I wish to make two points. First, we have constantly to bear it in mind that the bill is not, in truth, about Scottish tribunals as a whole; instead, it applies to something like 2 per cent of Scottish tribunals and the elephant in the room is that the bill itself puts out of mind the fact that the vast bulk of tribunals will remain in the reserved tribunals system. About 4,000 cases a year—more or less—will go into the proposed system; however, something like 60,000 cases a year go through the social entitlement chamber, about 20,000 a year go through Scottish employment tribunals, 10,000 go through immigration and asylum and so on. When one considers the complexity and length of such cases, one sees the percentage in the system shifting.

10:30

When we are discussing characteristics that might emphasise or reduce distinctions between tribunals and courts, we must bear it in mind that we are dealing with a very small fringe of the system in the short term. It is therefore important for the bill to go further in the direction of creating a structure that is capable of taking over at least some parts of the remaining 98 per cent.

The bill emphasises that people, who the ordinary citizen would call judges, sitting in a Mental Health Tribunal for Scotland and who are called judges in the UK system, are not to be called that. That is apparently to emphasise some sort of sheep-and-goats distinction between true judges, who sit in Scottish courts, and the hoi polloi, who sit in tribunals and who are really not up to scratch. One problem that I see—

The Convener: I think you are a member of the hoi polloi, Mr Gamble.

Jonathan Mitchell: The UK system has not fallen into that trap. At some points, there has been a failure to learn. Alan Gamble might speak a bit more about this, but it seems to me from outside that one of the great merits of the UK system has been the extent to which it is recognised that one can transfer lessons in both directions. It is often said that a distinction of tribunals is that they are user friendly, and that they have overriding objectives. If that is true, it is a very depressing verdict on the Scottish courts—that we need tribunals to be user friendly.

An absence in the bill is any recognition that the new tribunal system ought to be capable of sending messages through to the rest of the judicial system. The system in the bill very much seems to us to be one of old-fashioned democratic centralism. The system goes up to the Lord President and he nominates a judge of his choice, who runs the tribunal.

One of the most striking, extraordinary provisions in the bill, which a number of people have commented on, is the power of the president of the tribunals to lay down, completely on his or her own decision, what the law is; to tell tribunals, for instance, that there is an issue of statutory interpretation as to section X of act Y and to say, “I am telling you that this is the right interpretation and if you hear submissions that convince you to the contrary, that is tough and you should ignore them.”

As far as the bill is concerned, you must get back to something that does not so much emphasise distinctions between tribunals and courts but recognises the modern status of the tribunal system as it has developed, as shown by Mr Gamble’s tribunal perhaps more than any other.
Alan Gamble (Upper Tribunal, Administrative Appeals Chamber): I broadly support what Mr Mitchell has said. I will deal with a technical point first: as I think the Lord President agrees, we are really concerned about section 68(5), to which Mr Mitchell was alluding, which confers on the senior president or equivalent in Scotland the power to include points of law in a practice direction. We feel that that is quite inappropriate, for the reasons that we have given in our written evidence. I endorse all that Mr Mitchell has said about that. The directions may include matters relating to “the application or interpretation of the law”.

Mr Mitchell has vividly put the potential effect of that. A point of law might conceivably arise when submissions are made to a tribunal judge and, even though the judge may feel that the law is X, if the senior president has, by invocation of the power in that subsection declared it to be Y, that judge must say that it is Y. The interpretation of the law should be for a tribunal or a court, not for a senior judge acting administratively rather than judicially. I strongly endorse what Mr Mitchell has said in that regard.

Adrian Ward (Law Society of Scotland): On that last point, being just a coalface solicitor, I can tell you that, yesterday, I received a written decision from a sheriff making a finding in one direction in law, and part of my submissions were to point out to him that one of his colleagues in the same court had come to precisely the opposite conclusion. I do not complain about that. What do I do if I do not like it? I go to the sheriff principal, and he will determine the matter. That is probably the right way to go.

On the original question, tribunals are different from courts—we only have to go into one to get a feel for the difference. There are differences among tribunals, and there are differences in the way in which sheriffs may conduct their courts. If we have a bill about tribunal reform, it would be helpful to say what a tribunal is.

Elaine Murray: Are you advising that section 68(5) should be removed from the bill entirely, or should it be replaced?

Richard Henderson: My position on that is that, in both the Scottish committee and the Law Society, judicial independence is a precious commodity. We do not want to undermine that at any stage of the process. If there is scope, in section 68(5), for the independence of the judiciary to be undermined by other sections of the judiciary, that is a bad thing.

Jonathan Mitchell: I see no good point in section 68(5). It says:

“Directions may include ... instruction ... on the interpretation of the law”.

If that means guidance as to application or interpretation, I am not sure that that takes things much further than what judges constantly do, and I would not have thought that section 68(5) had any content. I am open to correction, but I am not aware of anything equivalent to that provision anywhere else in the Scottish or English legal systems.

Alan Gamble: It certainly does not apply in the 2007 act, which is the legislation that applies to the Great Britain and, in some cases, United Kingdom tribunals, including the reserved tribunals operating in Scotland, to which Mr Mitchell referred. There is no equivalent power for the senior president of the Great Britain system of tribunals to invoke the proposed provision, and I would strongly agree with Mr Mitchell and submit that subsection (5) should not be part of the bill.

Adrian Ward: I may have misheard the question, but the concern is about section 68(5), not the rest of section 68.

The Convener: We understand that. You have all made your points clear on the matter.

Roderick Campbell: I wish to deal with the appointment of the president. I put on record my entry in the register of interests as a member of the Faculty of Advocates.

I direct this point to Mr Mitchell in particular. In your comments, you make reservations about the suggestion that the new structure should have as its president a senator. In his submission, the Lord President has indicated that he would propose to nominate Lady Smith to the role. Do you have any comment about that?

Jonathan Mitchell: I do not want to get into a personalised debate. It is possibly unfortunate, for the purposes of this debate, that a question as to whether the person should be a senator is a question as to whether a particular person should be president.

I will generalise the matter. There are two problems, which, in a sense, are contradictory of each other. The first problem is to ask what we want for a system that is as minuscule as what is offered in the short term by the bill. It is tiny: it is the Mental Health Tribunal, the Additional Support Needs Tribunal and the education appeal committee—it is a few bits and bobs with no particular relationship to one another. If that is what we are left with five or 10 years along the line, the Parliament will have failed in attempting to rationalise the tribunals system. In that context, I can see the purpose—albeit this is rather anomalous, and we have said that this is like having a Rolls-Royce for the job—of bringing in somebody from the top who can attempt to impose an overall direction on the system, and to have a
senator. It is a bit strange, however. It is a very small system, and it does not really call for one.

You have noticed the economics of the matter, which were put to the Finance Committee, and they are very strange, as they relate to how having a senator doing the job on a package of over £200,000 a year, with pension, magically only costs the same as bringing in a part-time sheriff, because of a series of actings-up. That is an expensive approach.

There is a very different problem in the longer term. In 10 years’ time, I very much hope that we will have a system that all the tribunals in Scotland operate as a part of, including the employment tribunals, which already have a Scottish jurisdiction independent of the English, and the Scottish parts of the UK unified system—Alan Gamble might differ on that. Once we have that, which will require many other changes in the bill, it will seem strange if some of the very senior people in that system are barred from applying for the job of being president.

I commend to the committee the comments of the employment judges in Scotland in their submission. The signatories to that are running a Scottish tribunal system that has approximately five times as many cases as the system in the bill will have. The amount of judicial time that is put into those tribunals must be between 20 and 50 times the amount that the bill contemplates. It would be a bit strange to tell them that they were not big enough to run this tiny system. There is no particular long-term purpose to saying that the president must be a senator.

Roderick Campbell: Mr Gamble, you say in your submission that you “are strongly of the view that the best interests of users in Scotland is that the reserved tribunals should remain intact and there should be no devolution of their functions ... As they are concerned with the application of British Statutes applying throughout the United Kingdom ... it is better to have the coherence that is created by a unified judicial structure than by splitting it.”

Scottish courts deal with British statutes, so what distinction do you make between courts and tribunals?

Alan Gamble: I am expressing a personal view and I will try not to get involved in a party-political issue. Our position is a little different from Jonathan Mitchell’s. First, our view is that, as long as the present devolution settlement or something like it remains in force, there is some logic to having a reserved administrative structure for subjects that are substantively reserved under the Scotland Act 1998. For example, immigration, taxation, social security, child support and employment law are all by and large reserved.

Our second—and perhaps more telling—argument is that we operate in a cross-border way. For example, I can sit in London if asked to do so. My colleagues from London can sit in Edinburgh and do so occasionally. That would not happen if a point of Scots or English common law arose but, in the common statutory system, it is important to have cross-border fertilisation. Even in the proposals—which are no longer live—for devolving the reserved tribunals, provision was intended to be made for maintaining the cross-border link.

The easier way to maintain the cross-border link is to retain essentially the present system, but that is just a personal view. I respect the view that Mr Mitchell expressed and I respect Mr Campbell’s argument that the Scottish courts deal with reserved as well as devolved business. That is why we make our second argument. Given that, in practice, relatively few social security cases go beyond the upper tribunal, there is an argument for the coherence of common interpretation at upper tribunal level that cross-border working requires.

Roderick Campbell: If the system pans out in the way that Mr Mitchell described, we will be left with a small number of cases being covered by the bill. If the situation did not move on, would it be worth going to such effort for the 2 per cent that he identified?

Alan Gamble: To be frank, that is a political point—it is not necessarily party political, but it is a Westminster/Holyrood issue. The Lord Chancellor announced that the UK Government’s position is that the reserved tribunals will not be devolved in Scotland in the immediate future. You might well disagree with that, but that is a statement of fact.

The Convener: I do not think that we can just deem the issue political. It is fair to ask whether we need a hammer to crack a walnut, as it were. Roderick Campbell was just asking you whether the bill is necessary.

Alan Gamble: The bill is necessary for the reasons that Mr Mitchell advanced. First, it will give coherence to what already exists. Secondly, if at some point a change is decided on and the reserved tribunals are to be devolved to Scotland at least to a degree, there will be a ready-made system into which to slot them. We do not object to that. Our personal position is that we would prefer that not to happen—at least immediately—but there is a structure in the bill to fit the reserved tribunals into if ministers in London and Edinburgh decide to make a change.

10:45

Richard Henderson: If your question is whether the proposals are necessary for dealing
with perhaps only 3 per cent of the tribunal work, on the economic level plainly the answer is no. If, asking the question differently, you ask whether we want a Scottish civil justice system—which, after all, we have in part—and the answer to that question is yes, you cannot leave in place the currently fragmented and chaotic structure of tribunals. In the bad old days—pre-Franks or pre-Leggatt anyway—departments perhaps thought that they had ownership of a tribunal, as I think is still the case in Whitehall. The only way to emphasise that the tribunals are part of a justice system is to put them in the hands of a justice body. If you ask what that justice body is, you have one in the bill.

On the question of what to do about the reserved areas, we have a strange arrangement at present, given that an undertaking was made in 2010 that there would be a consultation by the end of 2010 on the devolution of responsibility for not the substantive areas of the law, but the administration of justice aspects, and three years later we are still waiting. It is easily explicable why we are still waiting. However, if we consider the matter in the context of what a justice system is, it would be a nonsense for there to be a long-term position in Scotland in which some of the justice system was not the responsibility of those who have the majority of the justice system within their control.

That is not, I emphasise, a political argument.

The Convener: No, we are talking about administration here.

Richard Henderson: Yes.

Jonathan Mitchell: On pages 65 to 66 of the most recent “Senior President of Tribunals’ Annual Report”, it is pointed out that we have been waiting for years for a consultation document on what is to happen with the reserved tribunals in Scotland. I do not want to read it out at length, but the report comments:

“the governance arrangements for reserved tribunals operating in Scotland might be described as less than ideal”—

which is language that we can all, I think, read. The report continues:

“At some point in the not too distant future it will become necessary to review whether the arrangements ... remain appropriate”.

The problem has been shelved, but it has not been put aside. In reality, whatever the outcome of next year’s vote, we will come back to the question in 2016. Therefore, it is critical that the bill provides a system that is capable of being presented to members of UK tribunals and their users as one that they can come into. People such as Mr Gamble should not be told, “If you shift over, you will lose your job and be put on a short-term contract.”

The Convener: Sorry, what do you mean by “shift over”?

Jonathan Mitchell: The system in the bill makes no provision for permanent judges. They will not be judges at all but people who are brought in on contract for short periods.

Alan Gamble: May I elaborate on that? I have expressed a personal view, but I think that my stronger point would probably be that, if there is devolution of the reserved tribunals, steps should be taken within that to maintain—I think that this would be possible—all the cross-border benefits that we currently have. That is our major point. I do not think that it is beyond the wit of man to devise a system under which that could take place.

I endorse the crucial point that Mr Mitchell has made. The bill makes no provision for the appointment of a full-time salaried judge in any of the tribunals that the bill envisages. We will have these fee-paid judges—I have no problem with that whatever—but even the upper tribunal is to be a totally ad hoc tribunal consisting of nominated sheriffs and nominated senators. For obvious personal reasons, I welcome the provision whereby judges of the UK tribunal could be nominated on occasion to sit in the Scottish upper tribunal. We strongly endorse that and we are very thankful that the draftsman has included that in the bill. However, on the more basic point that Mr Mitchell has made, we think that it is unfortunate that there is no provision for any full-time salaried appointment anywhere in the bill.

The Convener: Does anyone else wish to comment?

Richard Henderson: I agree with that entirely if you are trying to set the template for the future. My understanding is that the bill was prepared in the context of saying, “If we are not going to get something going from Whitehall, we have to start here some time,” and this is it.

Adrian Ward: Simply for the record, I, too, agree. I have not joined in the discussion, as I have nothing useful to add.

The Convener: However, nodding heads do not show up in the Official Report, so it is good if people say, “I agree.”

Adrian Ward: That is why I told you that I agree.

Alan Gamble: I will add a practical point from personal experience. Mr Mitchell and my colleagues from the Law Society would probably agree that the standard and quality of justice have been vastly enhanced by the policy of offering full-
time salaried judges in employment, social entitlement and immigration tribunals. Like Mr Mitchell, I have worked in the tribunals field since I was a very young man and I think that everyone who works in those fields would say that the quality of justice has been greatly enhanced. We strongly submit that that practice should be maintained in any Scottish system.

Jonathan Mitchell: I agree. As an outsider— somebody who just goes into the tribunals rather than sits on them and also goes into the courts—I know that the truth is that the quality of the tribunal judiciary in Scotland across the board is as high as the quality of the courts judiciary.

The Convener: Mr Henderson and Mr Ward nodded. I put that on the record so that they do not need to say that they agree.

Alan Gamble: I think that that has partly been caused by the increase in the number of full-time salaried judges in the system.

Jonathan Mitchell: It has.

Roderick Campbell: I want to broaden out the discussion.

The Convener: If the question is about salaries and permanent judges, you can go on, but Sandra White has another question. You can come in again with a different question, but Sandra has been very patient.

Sandra White: Thank you very much. I have been very patient in listening to the evidence that has been given, which seems to be entirely different from what is in your submissions. Mr Henderson in particular welcomed the bill; the Law Society said that the bill “will provide a coherent and more consistent structure”, and that has been said throughout the evidence sessions. We have also heard, quite rightly, the concerns that exist, but, before hearing the evidence that has been given today, I and perhaps members of the public were always under the impression that the bill was meant to give the best service to people who use tribunals, not necessarily for judges, the Faculty of Advocates or whoever.

I know that you have mentioned salaried judges, courts and so on. You welcome the bill, but why are you so critical of the different movements towards changing? I may be wrong, and I am sure that you will correct me if I am. You have welcomed the bill and said that it is a better way and that the structure has to be looked at and has to be more coherent. I have been at immigration cases supporting asylum seekers, for example, and know that how we perceive asylum seekers in Scotland is entirely different from how they are perceived in England. Therefore, I would like to see the power brought to Scotland. That is a personal opinion. I think that Mr Gamble was a judge at one of the tribunals.

Alan Gamble: I have never sat at an immigration case in my life.

Sandra White: It must have been someone who looks a wee bit like you.

Alan Gamble: It must have been someone else. My jurisdiction is social entitlement or appeals from social entitlement. I also sit as a Mental Health Tribunal convener, but I have never had any experience of immigration.

Sandra White: I apologise.

Alan Gamble: No problem.

Sandra White: The tribunal was very interesting to sit through and listen to.

I would like a wee bit of clarification. I know that you have talked about section 68(5) and various other issues, but do you think that, on the whole, the bill is a good one to go forward? You seemed to imply that we need to look at the matter in a United Kingdom context as well, depending on the result in 2014, obviously.

Jonathan Mitchell: It is a curate’s egg of a bill. The basic idea is good and the way forward is correct, but a number of the details are wrong and some of them are very damagingly wrong, such as section 68(5) and the restriction on the right of appeal in so-called second appeals, which we flagged up, although nobody else did. As always, there is what one might think of as a rather unholy alliance involving the judiciary, the civil service and the Administration to cut down on citizens’ rights of appeal, However, the bill is fundamentally the right way to go.

In a way, our problem with the bill is that it does not go far enough: it is not radical enough. For example, it does not attempt to provide for a full-time judiciary in the tribunals, as it takes a very tepid attitude to what we currently have in saying that all that we currently have is people who drop in and out for a day here and a week there, so that is all that it should provide for. We could do things better.

If there were a straightforward choice to be made between having the bill as it stands on the statute book or not having it, that would be a difficult question, because the bill has a series of flaws. However, in principle, the faculty has no doubt that it is the right way to go.

The Convener: And, of course, this version of the bill is not the one that we will debate at the end of the legislative process, as there will be another two stages. It is therefore helpful for the committee to hear about suggested improvements to the bill—you have listed some—by deletion,
amendment or substitution. Such suggestions are useful when we write our stage 1 report, so feel free to make them.

Jonathan Mitchell: All the problems are curable. None of the problems in the bill is fundamental; it is a fundamentally good bill that has a series of significant flaws.

The Convener: You have mentioned some of those. Are there too many to mention on the spot?

Jonathan Mitchell: One that I will mention, because no one else has mentioned it in their evidence, is the restriction on rights of appeal to the courts.

Section 43(4) provides for the general right of appeal to the Court of Session. Correctly, that is done with a sift. Leave has to be given for the appeal and it can be given only if the court or tribunal is satisfied that it is an arguable appeal. That is the traditional test in Scotland for allowing leave to appeal. During the 100 years or so for which it has been operating, nobody has really had any problems with it in Scotland. There has been a problem in England because, for whatever reason, since world war two the English courts have been flooded with hopeless appeals, commonly run by party litigants and by lawyers of a class that we do not have so much in Scotland. One sees, for example, that the ratio of appeals against—

The Convener: I will not pursue the line about there being lawyers of a class that we do not have in Scotland.

Jonathan Mitchell: There have been continual problems with the English system being flooded with hopeless cases in which clients are told to take it all the way or tell themselves, “I will take this all the way.”

There is not an equivalent problem in Scotland and there never has been. In that context, it is strange that section 45(4) imposes language that is lifted from a provision that in England has been a useful protective measure against what I have described. To be clear, although section 45 refers to a “second appeal”, the provision means that if I win my case at the first tier and it goes to the upper tribunal and that tribunal says, “The first tier got it wrong,” I cannot appeal to the Court of Session unless there is a point of principle. From my point of view it is my first appeal, as I have held the judgment until that stage, but I am told that there is no important issue of principle and that it is just one of those things. We view that as wrong.

It is striking that the only reason for the provision being in the bill is that there has been a recognised need in England to hold the line against vexatious and frivolous appeals. The provision has been lifted, without thinking about it, into our system.

The Convener: Are there any other points?

Adrian Ward: Yes, convener. If you are widening the discussion to cover general concerns about the bill, we have not yet touched on a point that is of considerable concern to the Law Society. We make it clear in our submission that we believe that the Mental Health Tribunal should, by statute, be in a chamber of its own. The issue has been debated. The Bill provides that there is an intention for the Mental Health Tribunal to be in a chamber of its own and that an affirmative resolution would be required to alter that. Nevertheless, for constitutional and human rights reasons, and in terms of the perceptions of those who use the jurisdiction, we still adhere to the view that the fact that the Mental Health Tribunal should be in a chamber of its own should be enshrined in statute and thus alterable by the Parliament by primary legislation and not by any other route.

The minister has courteously consulted on the issue. She has explained her position and met with me and the vice-convener of the committee that I convene. However, we must remember that the Mental Health Tribunal was created by primary legislation of the Parliament following a massive amount of consultation. The tribunal had a few uncertain stages, but it has now bedded in and is working well. Although it might be tiny in terms of the number of cases with which it deals, it is major in its impact and in its jurisdiction, which includes depriving people of their liberty, imposing treatments on them that they do not want to accept and imposing conditions as to how they may live if they are not deprived of their liberty completely. There are major issues.

11:00

The constitutional point is that, as the Parliament created this jurisdiction by primary legislation, it is right that any change should be made by the Parliament. The human rights issue is that, usually, the parties before the Mental Health Tribunal are in essence the state and the patient. In relation to the separation of powers, it is one thing for you as a legislature to set up the tribunal and have the power to change it, which of course you have, and quite different—in fact and in perception—if we have secondary legislation that is proposed by ministers and simply laid before the Parliament.

On perception, there was great concern when, just under five years ago, a significant change in the status of the Mental Welfare Commission for Scotland almost slipped through in the context of the Public Services Reform (Scotland) Bill. That was an issue for the users of services. It would be
a positive message if the Parliament said that it will keep hold of any change in the tribunal that it has created, and it would be a negative message if there was any erosion of that.

For all those reasons, we adhere to the view that the bill when enacted should state that the Mental Health Tribunal should be in a chamber of its own and that any change should therefore be a matter for the Parliament. To my mind, no persuasive reason for not taking that approach has been put to us. If a new jurisdiction were to be created that could possibly be paired with the Mental Health Tribunal or if some existing jurisdiction were to be shifted from elsewhere, that would almost certainly require primary legislation anyway. Therefore, we do not see a great disadvantage, other than perhaps a perception of untidiness, in enshrining that approach in the bill. We remain firmly of that view.

I stress that we bring that point to your attention as the legislature and that we are not having an argument with the Executive. We suggest that you as the legislature should keep control of the tribunal.

The Convener: That is fine. That is what the committee is for. We take views and ponder them when we draft our report. As you know, we then bring to the attention of the Government and the Parliament any concerns that we have with specific aspects of the bill. At the end of the day, we recommend whether the bill should proceed to stage 2. Our job just now is to tease out the problems that might arise.

Does any of the other witnesses dispute what Mr Ward has said? Do the other panel members feel the same way about the Mental Health Tribunal?

Alan Gamble: I entirely agree with Mr Ward—speaking as a convener of the Mental Health Tribunal, I think that the points that he has made are telling.

To respond briefly to Mrs White, I endorse entirely her point that the user should be at the heart of the system. Although we have got into quite a lot of technical matters, you can take it that we are all really concerned about the user. In particular, the point that I think we all made about having full-time salaried judges is important, because that will enhance the quality of justice for the user. That is the reason why we have emphasised that point. It is not to get jobs for the boys for the legal profession—I am being honest and sincere in saying that. The interests of the user are the reason why we have stressed the need for full-time judges.

The Convener: Yes, I understood that your position was to do with quality, experience and expertise.

Alan Gamble: I just wanted to amplify that point.

Richard Henderson: I want to back up that point. In this, I am talking for the Law Society and for the now defunct Scottish committee of the AJT, which was established in the wake of the Leggatt report, which set the user and the user’s interests at the centre. The act that founded the AJT did not say that, but that was the approach that the AJT took. Absolutely, the user has to be at the centre of considerations.

Your original question was about whether we really welcome the bill.

The Convener: I had forgotten what the original question was—thank you for reminding me.

Richard Henderson: I made a wee note of it. Yes, we really welcome the bill. However, to think that you are going to get it right first time—I am not using that phrase just because it is the title of an AJT report—is probably the wrong approach. The bill is a first step. I referred earlier to the other components that do not relate directly to the bill except in that you must see the bill in the context of what else is going to be happening.

The Convener: The committee is aware of the range of radical bills that are going to come before us, including the Criminal Justice (Scotland) Bill and the Victims and Witnesses (Scotland) Bill, which will all be interlocking although it is difficult, at times, to put them all together.

Roderick Campbell has already asked questions, so I will take Alison McInnes next.

Alison McInnes: I wanted to explore concerns about the Mental Health Tribunal, but Mr Ward has eloquently pre-empted my question and I have heard enough on that issue, thank you.

Adrian Ward: I would just like to make another point on that issue, if I may. Do we welcome the tribunal? Yes, but there is a “but”. Somebody used the word “fragmentation”. We are addressing the consequences of fragmentation, but we must balance that against the fact that—certainly, in the case of the Mental Health Tribunal—a great deal of advantage is derived from the specialisation. We need to balance the two factors. Both the Mental Health Tribunal and the staff supporting it have built up specialist knowledge that means that somebody in distress can pick up the phone and get a sensible answer. Again, that is hugely valuable and important for the user. The answer is that, yes, we welcome the tribunal, but we must safeguard what is valuable in what we have already.

The Convener: The committee acknowledges the specialisation across the various tribunals as well as the fragmentation argument about why some cohesive legislation is required. It is not
perfect at this stage, but we hope that it will be better at stage 3 when we get there.

**Roderick Campbell:** I have a couple of questions, the first of which relates to procedural rules. Last week, we heard concerns from witnesses about the fact that there will be no early movement to create a body of rules. We know that the Scottish Civil Justice Council will give priority to rules for the courts. The Faculty of Advocates has said that it is constitutionally not terribly helpful or desirable to have the Scottish Government interfering in making rules for the tribunals. However, given the probably limited number of tribunals that will be affected and leaving the constitutional issue aside, in practical terms, if we are largely working on the basis of the existing procedural rules, how much difficulty is that likely to cause until the Scottish Civil Justice Council addresses the matter properly?

**Jonathan Mitchell:** The difficulty is the upper tribunal. At the moment, the Mental Health Tribunal has sets of rules that you could translate to the chamber and for the ASNTS, but some of them do not, such as education committees. However, the gaping hole is in the upper tribunal, for which rules need to be written. It is a more politically sensitive issue, as the upper tribunal tends to deal with cases that are of more general significance.

It may be unavoidable that the issue cannot be dealt with at the head of the queue by the Scottish Civil Justice Council, so there may be nobody who can make rules but the Government. Nevertheless, that is a bit too much of a theme, and I do not think that it is just a constitutional frolic of the Faculty of Advocates to say that it matters. It is undesirable that Government should be in a position to run so much. Take fees, for example. Section 70 permits the Scottish Government, if the Lord President agrees that it will be a good revenue-raising measure, to say to anyone in Carstairs who is looking to bring an appeal that they must come up with £100. It allows for fees across the board without new primary legislation, and that seems to be too much power to give a Government without parliamentary control.

**Roderick Campbell:** Is there anything that the profession can do to help the Government with this little difficulty that it is having, in the short term?

**Jonathan Mitchell:** In what sense?

**Roderick Campbell:** You talk about ad hoc committees of tribunal judges. There is a problem. How do we get around it?

**Jonathan Mitchell:** One thing that is missing in the bill is provision for user groups, which typically come about without statutory formation. They work well in some courts and tribunals and less well in others. For example, I do not think that they work at all in Scotland in relation to immigration and asylum—well, perhaps they work after a fashion—but they work well in relation to employment and in relation to the Court of Session. It depends on the body.

One thing that would help in that regard is if more attention were given to the concept of user groups that could be driven by users—when I say “users”, I am talking about citizens and legal representatives, which is to say, people who use the body—and could put forward proposals for rules.

**Alan Gamble:** We have no answer to the question but, obviously, the main problem is going to be that the Scottish upper tribunal will be starting from scratch and will have to have new rules, whatever happens to the rules for the tribunals that are transferred over. There is a genuine problem. Priority should be given to the drafting of those rules.

**Roderick Campbell:** I will move on to deal with the review provisions. The submission from the Faculty of Advocates says:

“The proposed provisions for Review at section 38 are welcome, but they seem to be incomplete”.

How would you extend those provisions?

**Alan Gamble:** If I may answer that first, we have a concern in the opposite direction. We are unhappy with the proposals in section 39(2)(b)—sorry to be so precise—which is the rather odd provision that enables the first-tier tribunal to refer a case. That would mean that it would not be an appeal on a point of law to the upper tribunal but a referral of the whole case—facts and law.

It is our submission that that power exists in the 2007 act. It has not been used in Scotland in the five years since that act has been in operation. Our point of principle is that the upper tribunal is not set up to hear from and examine witnesses and make findings of fact. Our role is to determine what the law is and, if need be, remit the case to the first tier to enable it to have another go at finding the facts. We do not think that the provision is necessary. The power in the 2007 act has not been very much used, and we feel that vesting in the first-tier tribunal the power to refer the whole case—facts and law—to the upper tribunal is an unnecessary complication, and we would prefer it not to be there.

**Jonathan Mitchell:** Section 38 does not articulate at all the circumstances in which there might be a review. If I am a first-tier tribunal judge, I might make a decision and tell the parties what it is, and they would go away and think that they had got that under their belts. However, I might sleep
on it and come back the following week and say, “I'm reviewing that decision because I think I got it wrong.” You have to articulate what it is that leads to a review.

There is a clear need in practice for what is sometimes called a slip rule—situations in which I have issued a decision that contains a typographical or arithmetical error. Courts do that. Beyond that, however, the situation becomes quite difficult. There is no doubt that there are policy arguments for saying that, if I think about a matter and come back a week later, my second thoughts might be better than my first, but I doubt it. At the moment, however, the situation is just open-ended.

Richard Henderson: If you are looking at tribunals as being different from courts, you are looking at something that is more flexible and more responsive and, therefore, might very well be portrayed differently. The idea that you can review a decision might be novel and unwelcome, but it allows for the mistake to be rectified, which is probably quite a valuable thing. From the user’s point of view, it is true that some certainty might be sacrificed, but if we are talking about disputes in the state/citizen context, a mistake against a citizen, in favour of the state, is slightly different from a mistake in a citizen/citizen context.

11:15

The Convener: Is the problem the use of the word “matter” in section 39(2)(b)? I do not know whether it is—I am asking what you think.

Alan Gamble: We have no objection to the review provision as such, although I agree with Mr Mitchell that the grounds for review should be spelled out more clearly. Our concern, which I referred to in my answer to Mr Campbell, is more specific; it is to do with one of the remedies that follow after review, which is to refer the whole thing holus-bolus to the upper tribunal. We feel that that is unlikely to be used and is unnecessary, and that retaining the simple right of appeal to the upper tribunal is a better remedy.

We have no objection to the idea of a review, provided that the grounds for it are spelt out. Our concern is to do with one of the specific remedies—I am sorry to have to descend into this technicality, but I guess that that is what we are here for.

The Convener: Well, the law is all technicalities.

Alan Gamble: It is, yes.

The Convener: Are you saying, then, that 39(2)(b) should just be deleted?

Alan Gamble: And the relevant parts of 39(3) that follow on from that. For example, 39(3)(a) says “may re-decide the matter concerned”.

That is more or less a lift from the 2007 act for the UK tribunals. The remedy has not been used very much and I do not think that it is very suitable.

Richard Henderson: The key may be that it is not used very much, if at all. If it is not going to be used, why not leave it? If it is going to be used, it is probably going to be used in circumstances that are relevant. If they are not relevant, I should think that the tribunal would see it off. I would leave it.

The Convener: I thought so. You say it has not been used very much but it has been used.

Alan Gamble: With respect to Mr Henderson, the situation that Mr Mitchell—

The Convener: I love the phrase “with respect”—that is what happens when you get lawyers involved. Just go for it.

Alan Gamble: A situation similar to Mr Mitchell’s example has actually happened in the first year, although we did not consider that the application was competent. A tribunal judge completely rewrote her decision, then reviewed it, set it aside and tried to send it all up to us to start afresh, so such situations can happen. However, as it happened, for technical reasons we dealt with it another way, but that danger was there. Having made a decision, two or three days later the judge rewrote it and purported to refer the case.

Jonathan Mitchell: I have seen that, too. I differ from Mr Gamble on that point, although I agree with him on everything else there. Personally, I think that there is merit in allowing a first-tier tribunal to refer something up to the upper tribunal for a definitive judgment.

A very recent topical example is that of the decisions in Fife last week of the first-tier tribunal on what a bedroom is for the purposes of bedroom tax, which have been quite widely circulated. Without in any way criticising what is in those decisions, those are matters of general importance, and things such as whether a cupboard can be a bedroom really ought to be decided authoritatively. There are difficulties in restricting matters to appeals that can only be on points of law; ultimately, you may end up with a spread of very different first instance facts and decisions when it would have been helpful to everybody to get a general definitive view from above.

The Convener: That is fine; I think that we have teased out that point. The committee will consider the matter.
Elaine Murray: I think that the Lands Tribunal for Scotland and the Law Society argued that the Lands Tribunal should be in a separate chamber too and that it would work fairly well as it is. Should that be on the face of the bill?

Richard Henderson: That is certainly the view that the Lands Tribunal expressed—pretty forcefully, I think—last week. The Law Society would certainly not dissent from that view. Again, the problem that the committee and the Parliament will grapple with is that if you are setting up something and everybody says, "I want out," it is—

The Convener: They are all special.

Richard Henderson: It is potentially a wee bit chaotic, so yes, the nature of that jurisdiction is such that it probably should be on its own. Whether it comes out completely—which may be the Lord President's view—and just deals with things as they are is one option. I think that that would probably be going too far. The job is to try to create a structure into which you can accommodate the existing structures and processes that have similarities; you want to emphasise the similarities and develop them, and try to cluster them together.

Internally, the question whether we should use this chamber or that chamber becomes, I think—I am sorry, we are arguing among ourselves—a secondary issue, although given where we are just now, the nature of mental health issues takes us into a completely different realm. Earlier, we talked about the judicial title. Clearly different considerations come into play when you are talking about the mental health jurisdiction as opposed to other jurisdictions. We must try to create a structure that will be able to accommodate that vast spectrum of differences.

I probably did not answer your question.

The Convener: I think that you did—sort of. You seem to be saying that when we are talking about mental health issues and loss of liberty, we are talking about a far bigger dynamic than the court-based process of the Lands Tribunal. There is a huge amount of flexibility in all the processes across all different tribunals. Did I summarise what you said correctly?

Richard Henderson: Yes, that is fine.

The Convener: I will let you come back in after we have heard from Mr Gamble.

Alan Gamble: I have no views on this at all. The 2007 act put the Lands Tribunal in England and Wales into the upper tribunal. The jurisdiction of that tribunal is therefore part of the upper tribunal. That is a sort of compromise, I guess, between keeping it out altogether and making it part of the general tribunals structure. For what it is worth, that is what the 2007 act does.

Adrian Ward: There might have been some debate about whether the Lands Tribunal should be included in this exercise at all. I make it clear that the Law Society's position is that the Mental Health Tribunal for Scotland should be included but the question is how it should stand within the system. I just want to re-emphasise that point.

The Convener: We understand that.

I was just about to say that there were no further questions, but John Pentland is sneaking up on me with a question.

John Pentland: The panel today has mostly raised technical and academic issues, whereas the committee is concerned about the end result for the general public. Do you believe that there will be significant benefits to the public when the bill is passed, or are we moving from improving the service to creating further confusion?

Jonathan Mitchell: Well, the bill as it stands contains no major advantages for the public. There are some minor advantages—little bits and pieces—but, to be honest, it is not really going to matter very much. It will not justify the effort that is being spent on it.

There would be benefits to the public in a radical rethink of the whole set-up. We have had that—we can see how that has happened in the UK system.

Richard Henderson: I suppose that the major benefit of the bill is that Cinderella will at last go to the ball. Tribunals will become part of—

The Convener: You have to explain that, because I got quite lost. I am all mixed up with mental health tribunals and Cinderella, and I am not good at metaphors at this time of the day.

Richard Henderson: Cinderella is what administrative justice is traditionally called.

The Convener: Is it? We learn something every day.

Richard Henderson: Absolutely. I know that the bill could go way beyond administrative justice into party-party stuff, but this is the first time that anyone has looked at creating a coherent and integrated structure for civil justice in Scotland. That will not be a big deal for most individuals in the street but they will see the benefits of it as the tribunals develop over the coming 10 years.

Adrian Ward: My comments on the Mental Health Tribunal were mainly designed to avoid users and the public seeing things not working so well. On the more general point, it is relevant to consider whether, when Parliament, for some reason, at some time in the future, creates a new jurisdiction, it will know where to put it and how to create it. Do you have a ready-made berth for a new jurisdiction that will work from day one? Will it be clear to you from the original definition that we
are discussing that you are creating something that ought to go to a tribunal? There are advantages there for the future.

**The Convener:** The point is that more of the public will be involved with some kind of tribunal or appeals committee at some time in their lives than will be involved with any civil court. It is terribly important to recognise that.

**Adrian Ward:** Also, people who, because of their circumstances, get themselves before tribunals find themselves before several tribunals of different sorts in quick succession. If the rules of the game are different every time they go along to a tribunal, that is not helpful.

**Alan Gamble:** I will make a point in answer to Mr Pentland. Broadly speaking, I agree with what Mr Mitchell said. Although the changes are perhaps important, they are not going to make an awful lot of difference to the man in the street. However, I highlight that, on the whole, it is better that appeals from first-tier tribunals go to the upper tribunal and not to the courts. One effect of the bill is exactly that—that appeals from the first-tier tribunal, as with the Great Britain tribunals, will go to the upper tribunal and not to the courts.

The upper tribunal is a bit more formal than the first-tier tribunal, but it is considerably less formal than, particularly, the Court of Session. English experience suggests that the effect will be that the number of cases that are taken on appeal from the first-tier tribunal will increase because it is a less expensive, more flexible, more informal appeal process. I hope that you do not think that it is special pleading, but I argue that that change will benefit the user.

**Richard Henderson:** Yes.

**The Convener:** John Finnie has a question. Is it a short one?

**John Finnie:** Yes.

**The Convener:** Excellent.

**John Finnie:** My question is for Mr Mitchell and is about the comments in the Faculty of Advocates submission in relation to section 30, on assignment policy, and particularly the term “cross-ticketing”. You seek the preservation of the right of tribunal members to be appointed between tribunals and chambers, and you comment on the cost of training associated with that. Will you comment on that?

**Jonathan Mitchell:** On cross-ticketing, one needs to bear it in mind that these are all expert bodies. Each of the chambers will be specialist and expert in a manner in which, traditionally, Scottish courts have not been. A sheriff court is, in effect, a court of almost universal jurisdiction. There is always a tension between, on the one hand, the user's requirement and, indeed, the judicial requirement to have proper specialists hearing mental health cases, for example, and, on the other, the administrative pressure, particularly on cost grounds, to say that it is so much cheaper if we can just cross-ticket.

Here, for example, there is provision for, in effect, open-ended cross-ticketing of people coming in as sheriffs. That is strange in a number of ways, but what it means in practice is that, if a tribunal is to take place next week and the so-called legal member—the judge—has chicken pox, a phone call can be made to find out whether a full-time sheriff can come in part time and be parachuted into the tribunal on the basis that, simply by virtue of being a sheriff, they have that expertise.

None of us has any objection in principle to cross-ticketing, as somebody can have more than one expertise, but it has to be kept under control.

**John Finnie:** Do you accept that there is a difference between expertise and training? Everyone has to start somewhere, and all the people who have gained expertise had their first day sitting.

**Jonathan Mitchell:** Oh, yes. Absolutely. Even Court of Session judges are now trained on the job, in effect, for the first six months.

**The Convener:** Is there anything that we have not asked about that the witnesses would like to comment on? We have discussed various sections and you have mentioned issues including the general policies and the mental health issue. Is there anything that we should have asked about but did not?

**Alan Gamble:** I do not think so. Thank you for all your questions and your obvious research into the contents of the bill.

**The Convener:** Mr Mitchell, is there anything that you want to add? Is there any section that you want us to look at or any issue that has not been touched on?

**Jonathan Mitchell:** No—none of substance. I stress that this is fundamentally a good bill. It is going the right way. We have addressed the problems and complaints, and that is really because we all take for granted that it is the right way forward.

**Richard Henderson:** The bill is welcome. Yes, there are glitches in it here and there, but in general terms it is to be welcomed.

**Adrian Ward:** I hope that you have realised that we are not nit-picking because we do not like the bill. We are trying hard to help you to get it right because it should happen.
The Convener: That is all right. We do not mind nit-picking. That is what we want to hear.

Adrian Ward: I was talking about the motive. People can try to destroy something because they do not want it to happen. Certainly from the Law Society’s point of view, we want it to happen, but we want to help you to get it right.

The Convener: That is what we want to hear. Thank you very much.

That ends this evidence session. As I have already said, our next meeting will be on 17 September, when we will hear from the Lord President and the Minister for Community Safety and Legal Affairs on the bill.

Meeting closed at 11:30.
Tribunals (Scotland) Bill: Stage 1

10:01

The Convener: Item 3 is the second evidence session on the Tribunals (Scotland) Bill. Two panels will give evidence today.

I welcome the first panel to the meeting. The Rt Hon Lord Gill is Lord President of the Court of Session—he is now almost the holder of a season ticket to the Justice Committee, for good or bad; Chris Nicholson is deputy legal secretary to the Lord President; and Innes Fyfe is head of strategy and governance at the Judicial Office for Scotland.

I thank Lord Gill for his written submission. We will go straight to questions from members.

John Finnie (Highlands and Islands) (Ind): Lord Gill, many of the representations that we have received have been about experience that has been gained in individual tribunals. How are issues such as service continuity and succession planning ordinarily dealt with, never mind any changes? People seem to invest a lot of kudos in folk having experience from individual tribunals.

Rt Hon Lord Gill (Lord President of the Court of Session): Currently, the arrangements are pretty haphazard. There are differences among tribunals in relation to recruitment and training. One of the big opportunities is that the Judicial Institute for Scotland will be involved in the training of tribunals, which will introduce a degree of uniformity in training, knowledge and experience. However, the key to the success of all the tribunals is that they have non-legal members who have relevant experience of the particular work of the tribunals. I suppose that the employment tribunal is the best example that I could give members. Representatives of both sides of the employment contract are members of that tribunal.

John Finnie: I am sure that there are generic skills, but there might be concern that that uniformity of training would somehow dilute expertise. How would you address that concern?

Lord Gill: I do not think so. I think that the recruitment process, which will also fall under the Judicial Appointments Board for Scotland’s remit, will ensure that people with relevant experience are recruited to specialist tribunals.

John Finnie: Do you have any concerns at all about slippage and the loss of experience as a result of changes?

Lord Gill: I do not think so. Certainly, no particular point has been drawn to my attention in relation to that.
The Convener: If members do not mind, Margaret Mitchell can ask the next question, as this is her inaugural meeting.

Margaret Mitchell: A number of the proposals in the bill are aimed at increasing independence for the judiciary. Lord President, you say in your evidence that “The Bill is an important step”, but you suggest that “further reform is needed if the independence of tribunals’ judiciary is to be guaranteed.”

Will you elaborate on that? Cannot that further reform be contained in the bill?

Lord Gill: There is a statutory commitment in the bill, which I welcome and which acknowledges that the tribunals are independent and judicial. However, in the Judiciary and Courts (Scotland) Act 2008, which governs the judiciary in the Court of Session and in the sheriff courts, there is overall judicial governance in parts 1 and 4. It occurred to me when I was preparing my written submission that, if something of that sort were written into the bill, it would simply consolidate the official recognition of the tribunals as being part of the judiciary. It is not a major point. As the bill stands, it seems quite clear to me that the judicial nature of the tribunals’ work is recognised throughout.

Margaret Mitchell: Can I press you on a further point? During the evidence session on 10 September, some concerns were expressed about the scope of the rules envisaged under section 68(5)(a), concerning the ability of the president of tribunals, the chamber presidents, and the vice-presidents of the upper tribunal to issue practice directions for “the application or interpretation of the law”.

The argument was made that that restricts the independence of the judiciary to take their own view of the law, subject to appellate judgments. Is there a possible conflict with independence there?

Lord Gill: There is, and I feel quite strongly about it. That point really matters. Practice directions are exactly that: they give guidance to judges and tribunals as to the way in which certain decisions are gone about, or the way in which certain procedural steps are to be taken. It is quite inappropriate for a practice direction to give guidance as to the interpretation of the law. That is what the individual tribunals must do in each individual case. A big mistake has been made in the current wording, which speaks of “instruction or guidance on—

(a) the application or interpretation of the law”.

That really is an unwarranted intrusion into the independence of the tribunal.

I had a look at the corresponding English provision, which is in the Tribunals, Courts and Enforcement Act 2007. It is made very clear in section 23 that the power to give guidance relates to “practice and procedure” only. It is rather dangerous to summarise legislation, so I shall read it as shortly as I can. Speaking about the directions, section 23(6) states that sections 23(4) and 23(5)(b), which relate to the giving of directions, with or without the approval of the Lord Chancellor or the senior president, “do not apply to directions to the extent that they consist of guidance about any of the following—

(a) the application or interpretation of the law”.

I interpret that to mean that it is recognised that interpretation of the law is not for practice directions.

Margaret Mitchell: For the avoidance of doubt, is it your view that section 68(5)(a) should be removed from the bill?

Lord Gill: Decidedly, yes.

Margaret Mitchell: Thank you for that.

The Convener: I have a supplementary question, having listened to you talking about defining tribunals as part of the judicial system. Some of our witnesses have suggested that there should be a definition of what a tribunal is, as distinct from a court. Is that a worthwhile pursuit?

Lord Gill: Yes. I do not see the point of that.

The Convener: I like such short answers. That is fine; it is worthless. Some may disagree, but you do not.

Colin Keir (Edinburgh Western) (SNP): I believe that Lady Smith might be appointed as president of tribunals. Is that correct?

Lord Gill: If you give me a moment, I will give you chapter and verse.
The bill contains a provision that the president of the Scottish tribunals, which are what we are talking about here, should be a senator of the College of Justice nominated by me. I think that that deals with the first part of your question.

I found it easy to choose Lady Smith, because she has a wealth of experience in the tribunals system and has been a very effective president of the employment appeals tribunal in Scotland. In doing that work, she has had to liaise closely with her counterpart in the English tribunal system. It just seemed to me that she was the obvious person for the job and I have every confidence that she will be very successful at it.

The Convener: Sandra White and John Pentland wish to ask supplementarys.

Sandra White (Glasgow Kelvin) (SNP): I was going to ask the question that Colin Keir asked but, as a supplementary to that, was there any recruitment process for the post or was Lady Smith simply appointed to the position?

Lord Gill: There was no recruitment process. I had to make the decision and did so using my best judgment.

The Convener: Colin Keir took Sandra White’s question and now Sandra seems to have taken John Pentland’s question. Everyone is now even.

Roderick Campbell (North East Fife) (SNP): I should perhaps refer to my register of interests as a member of the Faculty of Advocates.

Last week, Jonathan Mitchell of the Faculty of Advocates gave evidence to the committee, and the first issue that I want to draw your attention to is the extent of the sift process under section 45(4). Mr Mitchell indicated that the language was lifted from a provision in England and was somewhat critical of the extent of the sift and the fact that it will restrict appeals unless there is a point of principle. Do you have any thoughts on that provision?

Lord Gill: I have read the Faculty of Advocates’ submission on this point and do not agree with it. Section 45 as drafted is the appropriate way of dealing with the matter. We are talking about the procedure for a second appeal and the idea that, when you get to that stage, you should widen the appeal’s scope seems to me to be entirely counterproductive. Experience, particularly in the English courts, shows that repetitive appeals cause problems.

I think that the comment in the faculty’s submission that the English courts have interpreted the rule with “a startling lack of liberality” is an overstatement. All that they have done is to say that this is a stringent test—and so it should be at that stage. The short answer to your question, Mr Campbell, is that I entirely agree with the policy that underlies section 45.

10:15

Roderick Campbell: I will move on to the review provisions under section 38. Again, Mr Mitchell believes that the circumstances in which there might be a review should be spelled out more clearly on the face of the bill. What is your view on that, Lord President?

Lord Gill: I do not think that that is a very wise approach to legislation. A provision of that kind, in which a review jurisdiction is conferred, as opposed to an appellate jurisdiction, should be expressed as generally as possible in order not to narrow the options of the reviewing body. I am quite happy with the wording of section 38.

Roderick Campbell: I will move on to a question about procedural rules. As I understand it, the Scottish Civil Justice Council will concentrate on making rules for courts, rather than tribunals. Again, Mr Mitchell drew attention to concerns about the position in particular of the short-term procedure rules for the upper tribunal and how those would be put together. Do you have any comments on that?

Lord Gill: I am here as Lord President, but I am involved in this also as the chairman of the Civil Justice Council. I do not know whether you have seen the council’s written submission, which is quite short. At the moment, the council is just finding its feet. We began our work only in June this year. One of the early priorities will be consideration of a rules rewrite in the civil courts, where the rules of the Court of Session and those of the sheriff court have always gone their separate ways. We are simply not geared up at the moment to consider the drafting of a uniform set of rules for tribunals, but in due course that will unquestionably be part of the Civil Justice Council’s work.

We touch on that on the second page of our submission, which we put in last week. What we say there is:

“We are content with the proposed rule-making functions”.

We make a point about the “interpretation of the law” in the practice points, but that was covered in an earlier part of the discussion. We note in terms of the financial memorandum that “it is the Scottish Ministers’ intention to retain the tribunal rule-making function until” we are “in a position to take over”
the function. I think that that decision makes itself, because we would be in no position to take that on at the moment. Obviously, at the end of the day, all the rule-making functions throughout the entire judicial pyramid will be part of the council’s work.

Roderick Campbell: Thank you. Lastly—

The Convener: Can you ask about resourcing for the rule making? That is referred to in the last two paragraphs of the submission, Roddy.

Roderick Campbell: Well, I suppose, but I was not particularly going down that route. Would you not like to ask the questions yourself, convener?

The Convener: I am happy for you to do it. I am delegating.

Roderick Campbell: I do not want you to be shy, convener.

The Convener: I am not shy. I have been accused of being many things, but not that.

It seems to me that there is something about resourcing behind this, whether it is resourcing personnel or funding generally from the Government to deal with rule making, whether judicial or tribunal rules. Is that an issue? The SCJC submission states:

“As to whether the financial provision ... in the Financial Memorandum is accurate, we would refer to the Lord President’s response to the Finance Committee. There is likely to be a cost implication ... in implementing the provisions of schedule 9, paragraph 12”.

Is this about resources?

Lord Gill: It is not just a question of money, convener. We simply do not have the manpower to take it on at the moment.

The Convener: I meant resources in the broader sense, including manpower and womenpower—or personpower, as I think we have to say nowadays.

Lord Gill: That is right. You will find that the forthcoming courts reform bill and the repercussions of that will occupy the council for at least the next two to three years.

The Convener: At last week’s Conveners Group meeting, I asked the First Minister certain questions on behalf of the committee. One of our concerns was, given all the changes that are coming our way, what will be the interlocking impact of this bill, the Criminal Justice (Scotland) Bill, and the proposed civil courts bill on resources?

Lord Gill: Three main issues are occupying our minds. One is the proposal to merge the entire Scottish tribunals service into the Scottish Court Service. The feasibility of that is being considered. No firm or final decision has been made about that proposal, and there is a lot to think about, but it is under active consideration by the justice department.

The second question is the short-term priority of rationalising the rules of court in the aftermath of the proposed courts reform bill. That will be a major drafting project that will be undertaken by the Scottish Civil Justice Council. We have already made preliminary arrangements by appointing a working party and there will be a rules rewrite committee as part of the Scottish Civil Justice Council’s structure.

The third issue is that once the tribunals system is rationalised under the Tribunals (Scotland) Bill, we need to consider how its rule-making functions will harmonise with the rule-making functions of the civil courts bill. There is a limit to the extent to which there could be a uniform set of rules, because the nature of tribunal work is so diverse that it is probably impossible to draft a uniform set of rules that would apply throughout the tribunals system. That is my opinion, but there is a lot to think about there and the matter will have to be deferred, simply because the priority is to rationalise the court rules once the new structure comes in.

The Convener: So there really is a resources issue in the broadest sense. We talk about finance, but there are personnel and time pressures to consider.

Lord Gill: Yes, and there is the added problem of draftsmanship; specialist draftsmen are fairly thin on the ground at the moment.

The Convener: What does “at the moment” mean? You cannot throw such things into the pot so casually, Lord Gill.

Lord Gill: We might need a few more draftsmen to be available. That would be the ideal.

Roderick Campbell: Last week, we heard from a number of people who said that the bill would be improved if it contained a provision for the possibility, at least, of permanent salaried posts for tribunal members. What is your view on that?

Lord Gill: I agree with that and I made that point in my written submission to the committee. It is important that there should be full-time salaried judicial posts in the tribunals structure. Having regard to the volume of work that tribunals do and to the importance of that work, I do not see that the tribunals system can be run entirely by part-time judicial officials.

Roderick Campbell: Do you have a view on when would be an appropriate time to merge the tribunals with the Court Service, assuming it is feasible?
Lord Gill: If the merger goes ahead, I would have thought that we were certainly three years away from it.

The Convener: John, do you have another question, given that Roderick Campbell stole one of yours? It is very difficult to deal with children, you know.

John Pentland (Motherwell and Wishaw) (Lab): He did steal one of my questions, but perhaps I can ask another one.

Lord President, given that the new structure will be very dependent on the financial resources being available, do salaried posts need to be part of it? If they are not, will the new structure fail?

Lord Gill: Salaried posts are essential to the success of the legislation; I do not think that there is any doubt about that. You have to have effective, competent administrators who are also able to undertake the judicial side of the work that the tribunals require.

Margaret Mitchell: You are arguing for permanent posts, but the president of tribunals will be a part-time post. How do you rationalise that?

Lord Gill: The president of the tribunals will have a duty of oversight. I would be surprised if the position required the micromanagement of individual tribunals; that can be left to the people who are leading them. What is needed is someone who provides oversight of the whole tribunals system and recognises where resources have to be reallocated if need be and where problems emerge in relation to recruitment, conditions of service and the quality of the output of the tribunals. Those are the sort of general matters that the president will be charged with. I think that that job can be done part time, but who knows what the position may be several years down the line? The position might end up being full time in due course.

Margaret Mitchell: I should probably have asked this earlier. Why do you limit the post of president merely to judges from the Court of Session, given that some of them might not have the relevant experience?

The Convener: I do not think that you should have used the word “merely”. “Exclusively” might have been better.

Margaret Mitchell: Indeed. That might have been a better word.

Lord Gill: The bill does provide for the judiciary sitting in the upper tribunal, as happens at the moment in the reserved tribunals. In fact, it is unlikely that any judge would go through their entire judicial career without having served on one of the upper tribunals on a part-time basis. It is beneficial to the tribunals to have some judicial input and I think it is of benefit to judges to extend their experience in that way. It is highly unlikely that the president of the tribunals would be a person who had no knowledge or experience of how they work. Is that your concern?

Margaret Mitchell: Yes. To turn it around a bit more, I suggest that there might be someone else who was more qualified—heaven forbid. Does restricting the post to judges of the Court of Session not rule out tribunal judges operating in the United Kingdom system who are likely to have equivalent or greater management experience of tribunals than judges coming merely—sorry, exclusively—from the Court of Session?

Lord Gill: I disagree with you about that. Given that we are emphasising the judicial nature of tribunal work, which is after all one of the key features of the legislation, it is entirely right that there be judicial leadership of that kind.

10:30

Margaret Mitchell: On that point about the judicial nature of tribunal work, you are probably aware that the Law Society of Scotland and employment tribunals Scotland have expressed a fear about the judicialisation of Scottish tribunals, referring, I think, to the rule that judicial members may be appointed to the first-tier and upper tribunals so that it begins to sound like the court system as opposed to the tribunal system.

Lord Gill: I know that they have expressed those fears, but I think that they are overstated. All that is happening is that, at long last, a clean break is being made from the days when tribunals were under the aegis of sponsoring departments. They are now free-standing independent judicial bodies, as they should be. I do not see the force of the argument that you could overjudicialise something. The tribunals have clear remits and a clear area of expertise. I do not agree with the fear that the Law Society has expressed.

Margaret Mitchell: Others may want to come in on that point, convener.

The Convener: I think that John Pentland wants to come in.

John Pentland: It is probably a good opportunity to question Lord Gill—

The Convener: Excuse me—I am getting hand signals. What does that signal mean, Sandra? Do you want back in?

Sandra White: No, I will let John Pentland ask his questions, so that we can continue in order.

The Convener: All right. I do not understand hand signals. Sorry, John.

John Pentland: That is okay.
The upper tribunal has been mentioned on a number of occasions. The bill provides the Scottish ministers with powers to organise the upper tribunal, but Lord Gill is quite critical of that in his submission. Will he expand on his comments?

**Lord Gill:** I do not think that I have been critical of that. To which page of the submission do you refer?

**John Pentland:** Page 3 of your submission states that you "consider that it is unnecessary."

**Lord Gill:** Sorry, Mr Pentland. You are talking about the divisions.

It seemed to me when I was writing my submission that we will be dealing with a fairly small upper tribunal, because this is only for the devolved tribunals. It struck me that it was possibly unnecessary to divide the upper tribunal into divisions, and that doing so could also cause confusion in the nomenclature since the Inner House of the Court of Session is divided into divisions. That is all that I was saying. It is not a big point; it was just a comment.

**The Convener:** I will take Elaine Murray next, please.

**Elaine Murray (Dumfriesshire) (Lab):** Thank you, convener. I have already lost two questions.

**The Convener:** I cannot help that.

**Elaine Murray:** I know.

**The Convener:** You must get in early.

**Elaine Murray:** Lord Gill, I want to ask about your view on the Lands Tribunal for Scotland, because the bill suggests that it will go into the upper tier, but you make the alternative suggestion that it should have a pillar of its own. You draw an analogy with the employment tribunals and employment appeals tribunal in the 2007 act. Do you want to say a little bit more about the proposal and whether it might run slightly contrary to the purposes of the bill?

**Lord Gill:** I was going to suggest that you ask me about it.

**The Convener:** Well done.

**Lord Gill:** This is an important point, which I feel quite strongly about. The Lands Tribunal for Scotland is a court of law in all but name. It does highly specialised work and it deals with important cases involving the law of conveyancing, the law of valuation for rating, and the law of compulsory acquisition and compensation. It operates superbly well.

It has no appellate functions of any kind. There is a direct right of appeal from there to the Court of Session and the system works extremely well. I do not see that a body of that nature fits into the upper tribunal. In paragraph 46 of the policy memorandum, there is a perfunctory and rather unconvincing justification for it. The point to be emphasised here is that the present system is working extremely well. In its memorandum, the Lands Tribunal makes its case very convincingly.

Paragraph 46 of the policy memorandum says:

"The policy intention is for the devolved functions of the Lands Tribunal for Scotland to transfer in to the Upper Tribunal rather than the First-tier Tribunal."

It goes on to talk about the various types of case with which the Lands Tribunal deals. It then says:

"The Scottish Government considers that it can best preserve and enhance the specialist qualities of the Lands Tribunal for Scotland within the Upper Tribunal by allocating its functions to a single division."

I do not see the point there. It is not a very closely argued case. The Lands Tribunal is not broken and does not require fixing. I would leave it as a separate pillar of its own.

In conjunction with that, I would make the point that the valuation appeal committees, which do important work throughout Scotland, have a direct appeal to the Court of Session, too. That works well and we give fairly expeditious decisions on all of those cases. The committees also have the power to refer cases to the Lands Tribunal. The system is working extremely well and I would leave it alone.

**Elaine Murray:** If we are changing the tribunals system, do you think that the Lands Tribunal should be renamed, for the avoidance of doubt?

**Lord Gill:** One could certainly do that. Rather than get hung up about names, though, we should look at the essential nature of the functions of these bodies. It is quite obvious to me that the Lands Tribunal is very much a special case here.

**Alison McInnes (North East Scotland) (LD):** On the matter of special cases, we have heard some evidence that the Mental Health Tribunal for Scotland has very extensive powers and is quite distinct. The Law Society has argued that the bill should specifically guarantee that the Mental Health Tribunal be given its own chamber under the new structure. What are your views on that, Lord President?

**Lord Gill:** One could certainly do that. Rather than get hung up about names, though, we should look at the essential nature of the functions of these bodies. It is quite obvious to me that the Lands Tribunal is very much a special case here.

**Alison McInnes (North East Scotland) (LD):** On the matter of special cases, we have heard some evidence that the Mental Health Tribunal for Scotland has very extensive powers and is quite distinct. The Law Society has argued that the bill should specifically guarantee that the Mental Health Tribunal be given its own chamber under the new structure. What are your views on that, Lord President?

**Lord Gill:** You are right to say that the Mental Health Tribunal is highly specialised. It does very sensitive work. However, I have no strong views on that. I can see the force of the argument, though.

**Sandra White:** Convener—

**The Convener:** Sorry, Sandra. You are not on my list.
Sandra White: I was back on it.

The Convener: Oh, you are back on it again.

Sandra White: Is that okay?

The Convener: I am a mere convener.

Sandra White: The judiciary and membership of the tribunals have been mentioned, but I do not think that the issue of tribunal members being treated as judiciary has been raised. Lord Gill, you commented that if they are not, there may be an “unfortunate perception that the lawyer members of tribunals are of a lesser status than the ... judiciary.”

Will you elaborate on that? Would they be seen not as part of a judicial family—which is a point that was raised—but as something less than judges?

Lord Gill: I was trying to emphasise that legislation can have an educational value and that if the primary legislation made it clear that legal members’ function is judicial in nature that would be a strong endorsement of the independence of the tribunals as judicial bodies.

What the tribunals themselves decide to call their legal members would be a matter for them. I am sympathetic to the idea that, in the Mental Health Tribunal for Scotland, it would not be appropriate to refer to the legal member as a judge. People who appear before that tribunal will already have been judged and that would probably be counterproductive. Therefore, I am entirely sympathetic to that argument.

However, I would like to see the role of the legal members being recognised in the bill as being that of judges. As you know, in employment tribunals they are known as judges, and I think that is also so in England in relation to immigration and asylum.

Sandra White: So, you think that they should be called judges in the bill, apart from those in the Mental Health Tribunal.

Lord Gill: They could be referred to in the bill as judges, and it could then be left to the individual tribunals to decide the nomenclature that they think best for themselves.

The Convener: Sometimes I am called convener and sometimes I am given other names, so I understand the sentiment.

Roderick Campbell: I would like to move on to a different subject—the award of expenses, which is provided for in section 59. We have heard from some witnesses concerns about what expenses would be awarded and the change in the nature of tribunals with the introduction of expenses provisions. Do you have any general thoughts on that, Lord Gill? You mention in your written submission that it is essential to define what wasted expenses are. Do you think that defining that in the bill might have wider implications, for cases generally, rather than just for tribunals?

Lord Gill: I agree that there should be a power to award expenses. No doubt, that power would be exercised sparingly. There are situations in tribunals—just as there are in the courts—in which it is appropriate that someone who has caused a litigation in which they have been unsuccessful should run the risk of being found liable for expenses. I think that we could leave it to the good discretion of the tribunals to evolve their own practices in the matter but, in general, I am in favour of that power being there.

Wasted expenses are a familiar concept in the English courts, but the concept is not one that exists in Scottish practice. I think that I know the idea behind wasted costs, and there may be an argument for having something similar here. However, if there is to be such a provision, we really need to have a definition of exactly what it covers.

Roderick Campbell: My point is that if it is defined, it will have wider implications beyond the bill. It might set a precedent elsewhere, so it is quite an important point.

Lord Gill: There is no provision in the rules of court for wasted cost orders such as there are in England. If there were to be, that would require a fairly long consultation exercise not just with the profession.

The Convener: Are there implications for the availability of legal aid? Once one begins to dip a toe in the waters of expenses in tribunals, that might deter applicants from coming forward if they do not have much in the way of funds.

Lord Gill: That is the obvious danger. That is why I said earlier that, if there is to be a power to award expenses, it will have to be exercised sparingly and only in extreme cases. We do not want a situation in which the tribunals system is seen as a cost-free zone where anyone can litigate to their heart’s content with no thought for the consequences.

10:45

The Convener: I will ask a question that nobody else has asked—unless Elaine Murray is about to ask it.

Elaine Murray: I do not know whether it is the same question.

The Convener: Let us find out. I am on tenterhooks.

Elaine Murray: Section 70 also gives ministers the power to enable the charging of fees—
The Convener: That is it; that is good.

Elaine Murray: Might that also deter people from using the tribunals system? There has been concern about the level of fees in the employment tribunals south of the border.

Lord Gill: That is a political question and one that I would not like to get involved in. Fees are charged in the courts, as you know, although we are still some way away from full cost charging. I would not care to express a view on whether tribunal litigants should be subject to that.

Elaine Murray: I will not push you on what you say is a political point, but I wonder whether the power should be subject to the affirmative procedure so that there has to be a degree of consultation before fees are charged.

The Convener: Again, that is probably a political matter. Section 70(3) states: “the Scottish Ministers must consult the Lord President.” Should the provision be stronger than that?

Lord Gill: I think that the idea behind that provision—I hope that I have understood it correctly—is that the Lord President has various responsibilities in relation to court fees, and the consultation with the Lord President would probably be to ensure that there was some degree of uniformity or that the principles were operating on similar lines. However, I would not like to see the Lord President having to set the fees.

The Convener: I have a couple of sweeping-up questions that have not been asked. First, in your written evidence, you argue that the eligibility requirements for legal members in paragraph 5(1) of schedule 3 are too broad as they also include legally qualified parties from England and Wales and Northern Ireland. You say that that is not appropriate as the devolved tribunals deal with Scottish legislation and may have to consider the common law of Scotland. Will you expand on that, please?

Lord Gill: In the reserved tribunals such as employment tribunals, there is considerable crossover between the Scottish and the English, Welsh and Northern Irish members, but in relation to the devolved tribunals we are dealing with specifically Scottish matters. Certainly in the short term, we should recruit people who are practitioners in Scotland and who are qualified in Scots law. That is my view, anyway. It would also enable us to have some crossover within tribunals among the legal members.

To be honest, I said all that I can really say on the point at the foot of page 2 and the top of page 3 of my submission.

The Convener: That is fine. I have a separate question on cross-ticketing—I think that that is the jargon—whereby tribunal members can be assigned within a unified structure to a different tribunal. It has been argued that one of the strengths of the tribunals is the special knowledge and the culture of the different tribunals. Will you comment on the concern that people might, for reasons of having enough personnel to do things, have to be moved to tribunals where they would be like a fish out of water?

Lord Gill: That is an entirely reasonable fear. The idea behind the provision is to give tribunal members who are experienced in tribunal practice the opportunity to develop their career and extend their work into other subject areas. There could be a case for that. Of course, we have a very good judicial training system, which in future will also apply to tribunal work.

The Convener: This is about not just the process but the culture of the tribunal, the manner in which it is chaired, the experience of being a member and so on. Are you saying that you hope that the president of tribunals will ensure that if members are moved to a different tribunal they will not in the first instance be trained on the job, as it were, but will be allowed to sit in to understand its operation, its culture and so on? After all, the Mental Health Tribunal will be very different from, say, the Lands Tribunal for Scotland.

Lord Gill: That is the point. There is a remarkable diversity among tribunals in Scotland.

The Convener: I think that members have no more questions but, whenever I say that, someone pops up. Margaret Mitchell, I see, is not going to let me down this time.

Margaret Mitchell: I wonder whether Lord Gill can clarify his view on the process in the upper tribunal, particularly the sift. Concern has been expressed about the strictness of the approach and the fact that compelling reasons will have to be given before a second appeal can go ahead, and I believe that you share the view that the review provisions in general need to be clarified more.

Lord Gill: You raise two separate issues, I think. As I have explained to Mr Campbell, I favour the adoption of a stringent test for an appeal to the Court of Session, and there are very good reasons for that.

As for the upper tribunal’s review functions, if the upper tribunal is to operate as a review body rather than as an appellate body—in other words, if it is able to look at the whole decision again—the legislation should leave it a broad measure of discretion to develop its own rules and principles on the scope of its review function.

Margaret Mitchell: Under the transitional arrangements, which I do not think anyone has
raised, I believe that ministers will be able to make rules on such matters. Someone wondered whether it was appropriate for ministers to do so given that the upper tribunal deals with very serious cases.

**Lord Gill:** It is a matter of sheer necessity, for the simple reason that the Scottish Civil Justice Council is not in a position to take on such a function. The plan in the long term is that it will be one of the council’s functions but, in the meantime, it is essential that we leave the matter to Scottish ministers.

**Margaret Mitchell:** It was suggested that, as an alternative, a transitional panel comprising user-friendly members could be formed.

**Lord Gill:** That might just introduce another element of complexity.

**The Convener:** Margaret, the minister is giving evidence next and you will be able to ask her about the transitional arrangements.

**Margaret Mitchell:** I was just interested in hearing the Lord President’s position on the matter.

**The Convener:** I am not going to say what I was going to say because I know what will happen. All I will say is that that seems to be the end of the questions, and I thank Lord Gill, Innes Fyfe and Chris Nicholson for attending.

We will now have a seven-minute suspension.

**Lord Gill:** Before I leave, convener, I should say that one of the consequences of the bill is that the Scottish committee of the Administrative Justice and Tribunals Council will cease to exist. It has done extremely valuable work over the years and I want to acknowledge its contribution and thank it for everything that it has done.

**The Convener:** I am sorry that I stopped you, Lord President. Thank you for those comments, which are now on the record.

I now suspend the meeting for seven minutes.

10:54

*Meeting suspended.*

11:00

*On resuming—*

**The Convener:** I welcome the second panel to the meeting. Roseanna Cunningham is the Minister for Community Safety and Legal Affairs; Linda Pollock is head of policy in the tribunals and administrative justice policy branch of the Scottish Government; Sandra Wallace is bill team leader; Delina Cowell is bill team manager; and Michael Gilmartin is a solicitor in the Scottish Government. Good morning to you all.

The minister wants to make a short opening statement. Members will then ask questions.

**The Minister for Community Safety and Legal Affairs (Roseanna Cunningham):** Thank you, convener.

We are discussing a bill whose aim is to create a simplified, flexible framework that will provide coherence across the current disparate tribunals landscape. It will bring improvements to the structure, management and organisation of tribunals; create a simple two-tier structure that will introduce common practices and procedures; and bring judicial leadership under the Lord President.

The case for reform is long overdue. The debates that we had in the chamber in 2010 and 2012 and many independent reports over the years echo that view. The bill is part of the overall vision for justice and is being taken forward under the wider justice strategy through the making justice work programme. It therefore fits into a whole programme of work.

Tribunal reform is being taken forward in a phased programme, which started with the creation of the Scottish tribunals service in 2010 to provide administrative support to some tribunals. The bill is the second stage in the process. We are currently consulting on the next phase, which is on the feasibility of merging the court and tribunal administrations.

Building a structure that is flexible enough to cater for the many different tribunals in Scotland is challenging, but I think that we have achieved the right balance in the bill. It may seem like a lot of work for a few tribunals, but the benefits far outweigh that view.

The current tribunal landscape in Scotland is too complicated. There is no coherence. Some tribunals are not particularly well organised or structured; there is no coherent system of review and appeal; appointment processes vary; and, in some cases, there are no set criteria for appointments. The tribunal users’ experiences are therefore different and varied; some are good and some are not so good. The bill will create a structure that will enable a better service to be provided to those who use it and maintain the specialism and ethos of each individual tribunal that transfers into the system. The structure is simple and clear, and it will make it easier for tribunal users to navigate their way through the system.

The new appointment process to be run by the Judicial Appointments Board for Scotland will ensure that tribunal users benefit from the same high standard of judicial decision making,
regardless of the subject matter. That will be further enhanced by bringing overall responsibility for training standards under the Lord President’s remit.

The bill will create the new position of the president of the Scottish tribunals to support the Lord President with his new duties, to champion tribunals in the wider civil justice system, and to ensure the proper distinction and separation of tribunals from courts. The president will be assigned from among the senators of the College of Justice. That recognises the scale of the proposed powers of delegation and the substantial leadership and management responsibilities that will come with the role.

The new leadership structure will provide opportunities for tribunal members to share best practice and learn from one another’s knowledge and experience. The new upper tribunal will benefit the tribunal user by removing appeals from courts in most cases and providing easier access and a less intimidating process for users. It will also allow specialism and expertise to develop among its members. Bringing tribunal rules under the remit of the Scottish Civil Justice Council will ensure a consistency in approach across the tribunal landscape and protect specialism in individual jurisdictions.

We acknowledge that many of the details will be fleshed out in secondary legislation, but the bill is an enabling one that deals with structure and organisation. It would be difficult to include all the provisions in the bill, given the complexity of the various tribunals that are involved.

I am aware that it has been suggested that the bill should make particular provision for the Mental Health Tribunal for Scotland and the Lands Tribunal for Scotland: specifically that it should state on the face of the bill that the Mental Health Tribunal should be in its own chamber and that the Lands Tribunal should be in a separate pillar, completely outwith the structure. I have committed to the Mental Health Tribunal being in a chamber on its own in the first instance. We have already made very specific provisions that commit to consultation and a high level of parliamentary scrutiny each time the chamber structure is changed. That will ensure that the system is as flexible as possible, while maintaining the committee’s oversight.

As for the Lands Tribunal, we acknowledge the complexity of that jurisdiction and feel that we have made adequate provision in stating our intention to situate that body in the upper tribunal. Positioning tribunals outwith the structure only complicates the system and is contrary to what we seek to address in the bill.

This is a technical bill that provides a framework for the creation of a cohesive system of tribunals as a whole. It is designed to be a manageable process, as it will take time to bring in each of the individual tribunals. That is partly due to the complexity of the tribunals involved and partly to the amount of detail that will be required to ensure that the system works effectively. We have ensured that there will be a high level of parliamentary scrutiny for the majority of secondary legislation attached to the bill. A cohesive tribunal structure with strong leadership, defined common aims and an independent and robust appointment process is what all tribunal users in Scotland deserve.

The Convener: Thank you, minister. We might dispute that it is merely a technical bill, as various issues have arisen in evidence.

Roderick Campbell: Good morning, minister. I will begin with a general question. The bill and the policy memorandum were published in May. Subsequent to that, the UK Government has made it clear that it has no plans for the foreseeable future to transfer reserved tribunals into a new Scottish structure. Can you share with us any discussions that you have had with the UK Government about any possible timetable for that? Has that impacted in any way on the Scottish Government’s view of the bill at this time?

Roseanna Cunningham: There are a couple of questions there. We did have prior discussions with the UK Government. There was correspondence between us and the Ministry of Justice when the suggestion was first mooted that the administration and organisation of reserved tribunals would transfer into our system. There were some delays in that, but the impact on the bill was more about its timing than anything else. For obvious reasons, if we were going to have an imminent transfer, we might have thought about the bill’s timing. However, a transfer was obviously not going to happen. It was clear that we were not going to be proceeding with that original proposal, which I think came from the Ministry of Justice. We did not make the proposal to the Ministry of Justice; it suggested it first.

There are no on-going discussions of any moment on the issue. We understand that it is still an idea with the Ministry of Justice, which raised it in the first place. However, clearly, it is not going to proceed with the idea in the near future. I was not willing to hold back on reform of the tribunal structure in Scotland on the basis of the completely uncertain future of the reserved tribunals.

Elaine Murray: Some witnesses, including those from Citizens Advice Scotland and the Law Society of Scotland, suggested that, because tribunals have particular characteristics, they
should be included on the face of the bill. Indeed, Citizens Advice Scotland suggested some amendments based on the 2007 act that would place such characteristics in the bill. What is your reaction to that suggestion?

Roseanna Cunningham: We are listening to the evidence. Obviously, the stage 1 process is useful for us. We are open to the suggestion and will consider it in the light of any other recommendations that the committee might make. It is not something that we would be absolutely opposed to. By their very nature, overarching principles must be quite general, because each tribunal will have its own specific culture and principles. I guess that we just wanted to be clear that it would be very overarching, but we have not set our face against that, so if it was felt that it was a useful thing to add to the bill, we would be prepared to consider it.

Elaine Murray: I will push you just a little further on the Lands Tribunal, because Lord Gill was quite forceful on that point. Indeed, his proposal is that it should be in a separate pillar, and he says that that would involve bringing the judiciary in the LTS under his leadership with the support of the STS administration but positioning it separately. His argument is that the Lands Tribunal works well at the moment and is not an appellate body, so it is a bit different from the other tribunals—he also made a similar argument about the valuation appeal committee—and he suggested that maybe it should be renamed and not be a tribunal. How would you react to that?

Roseanna Cunningham: The Lands Tribunal is one of our oldest tribunals. It has been around for a long time, so it has a settled way of proceeding, but that does not mean that it is not a tribunal. Each tribunal is different, and the whole rationale behind the bill is not about interfering with individual tribunals, because each tribunal is set up under a specific parenting piece of legislation that arises out of the policy area, so any changes to the specifics of the tribunal would have to emanate from the policy direction.

What we are about is simply addressing the structure of administration and overall organisation and management. Although I acknowledge the complexity of the cases at the Lands Tribunal, I feel that we are starting to hear some of the same arguments being made for each of the tribunals. If we start making exceptions, saying that we will leave this one or that one outside the system, the point about bringing things together as a coherent organisational and administrative whole is lost, so I would resist the suggestion that the Lands Tribunal be left outside the system entirely.

Sandra White: I want to ask the minister the same question that I asked Lord Gill, about tribunal members being treated as judiciary. A number of concerns have been raised about that, and Lord Gill referred to the “unfortunate perception” that legal members of the tribunals are of a lesser status than the judiciary. Representatives of employment tribunals and other witnesses have said that they thought that the bill would create what they called a “judicial family”, but that will not happen as a result of the bill as it is drafted. What are your thoughts on that? Would those people be called judges, apart from in the Mental Health Tribunal, and would that be in the bill, or will it be left to individual tribunals?

Roseanna Cunningham: That is part of striking the balance in the bill between bringing the tribunals together in a coherent structure, as we are doing, and understanding the concerns about—I am not sure whether this is really a word, but it is the only word that I have heard used in connection with this—the courtification of the tribunals.

The Convener: Crumbs, that is a nice word—courtification.

Roseanna Cunningham: People understand the concern about that, because tribunals are structured in a much more informal way. There are concerns that, if you begin to use terminology such as “judges”, you create a sense in which tribunals are seen as courts rather than as tribunals. In tribunals, and particularly in the devolved tribunals, we do not usually call the judicial members or the legally qualified members judges. In some reserved tribunals, that is the case, and some of the pressure is coming from areas where they have been accustomed to being called judges and are concerned about a perceived lack of status in no longer being called judges.

However, my concern has to be about maintaining people’s understanding of and feeling for what the tribunals in general are delivering, and what they are delivering is not courts; they are doing something quite different. I am concerned that, if we began routinely to use the terminology of the courts in tribunal systems, people would behave as if tribunals were courts, and that is something that I want to resist.

11:15

The Convener: I think that Lord Gill’s observation was that, although one might call them judges, it was really up to them, in their particular tribunals, to give themselves different nomenclature if that was relevant to what they were doing.

Roseanna Cunningham: This is one of those areas where we have to strike a balance in setting up new administrative structures and ensuring that people do not begin to get the wrong perception of
what is meant. I think that we have struck a balance there.

Margaret Mitchell: Aside from the term “judges”, what about the provision that allows the Lord President to appoint certain members of court judiciary? There is a feeling that that by itself might lead to what you call “courtification”—I have not come across that term before.

Roseanna Cunningham: If I could find a better phrase, I would use it.

Margaret Mitchell: Judicialisation is slightly different.

Roseanna Cunningham: Is it any better?

Margaret Mitchell: Well, we are talking about judges. You said that the system would be more court based and less informal. A valid point that was raised by the employment tribunals Scotland, which we did not raise with Lord Gill, was that what is proposed could affect diversity by propagating the gender or other imbalances that exist in the judiciary. If more judges were appointed, that imbalance might continue into the new tribunals system.

Roseanna Cunningham: I do not agree with that point. The reserved tribunals are commenting because their own particular culture has been slightly different. I suspect that they are making expressions on the basis that they thought that they might be getting transferred in in early course. I understand that some consultees have questioned the proposal to have court judiciary sitting in the first-tier tribunal, but it needs to be understood that that already happens in some cases, so it is not a new thing. This is an example of why you have to consider the individual tribunals. The Mental Health Tribunal requires a sheriff to sit in forensic cases, so in some circumstances judges, sheriffs or part-time sheriffs have to be called in in any case. The bill has to allow for that to happen, because we cannot go against what is already contained in the rules for the Mental Health Tribunal. The bill has to be flexible in allowing for and covering the variety of practice that already exists in tribunals. That is what we intend to do.

Roseanna Cunningham: I do not agree with that point. The reserved tribunals are commenting because their own particular culture has been slightly different. I suspect that they are making expressions on the basis that they thought that they might be getting transferred in in early course. I understand that some consultees have questioned the proposal to have court judiciary sitting in the first-tier tribunal, but it needs to be understood that that already happens in some cases, so it is not a new thing. This is an example of why you have to consider the individual tribunals. The Mental Health Tribunal requires a sheriff to sit in forensic cases, so in some circumstances judges, sheriffs or part-time sheriffs have to be called in in any case. The bill has to allow for that to happen, because we cannot go against what is already contained in the rules for the Mental Health Tribunal. The bill has to be flexible in allowing for and covering the variety of practice that already exists in tribunals. That is what we intend to do.

I could go into a more detailed discussion of composition orders, but I am not sure that the committee really wants to hear about them. It is more about accepting that not every tribunal is currently the same and that, given that sheriffs are required by law to take part in some of the cases in the Mental Health Tribunal, our legislation has to allow for that to happen as a very minimum.

Margaret Mitchell: That is helpful. I understand that the legislation has to be all-encompassing, but I think that the fear was that, given that you could appoint other members of the judiciary, that might be the first port of call and there might be an imbalance there. We will see what happens as the bill progresses.

Roseanna Cunningham: That is not what is expected. There is a discussion to be had about composition orders, but perhaps it is premature to have that now. I can certainly write to the committee to give you a bit of background on the orders, rather than discussing them here. What you have described is not our intention; it is more that we have to allow for the existing situation in certain tribunals, such as the Mental Health Tribunal.

Margaret Mitchell: I understand. I turn your attention to practice directions and the independence of the judiciary. We put it to the Lord President that concerns had been expressed about the scope of the rules. Section 68(5)(a) provides for the ability of the president of the tribunals, chamber presidents or vice-presidents of the upper tribunal to issue practice directions, for the purpose of the application and interpretation of law.

Roseanna Cunningham: We have listened to that point. There has been a bit of a drafting issue there and we will introduce a stage 2 amendment to fix that. The section that we mirrored in the 2007 act refers to “guidance” only and not “instruction or guidance”. We just need to tidy up the wording, which we will do at stage 2.

Margaret Mitchell: That is very welcome. Thank you, minister.

The Convener: That is why we knew that the bill was not just procedural, because that would be a matter of substance in the legislation.

Colin, did you have a question?

Colin Keir: I am trying to find another one, as somebody else asked my question.

The Convener: Do not complain. They are always complaining. I am deleting you.

Roseanna Cunningham: I remember that, convener.

The Convener: You cannot satisfy them.

Roseanna Cunningham: Nothing changes.

The Convener: Even if I promise them sweeties afterwards.

John Pentland: Good morning, minister. In your opening remarks, you mentioned the benefits that the new structure would bring. Given that the new structure will cover only devolved tribunals, what distinct benefits will accrue to the public using the new structure?
Roseanna Cunningham: It will be as much about the organisation and training of tribunal members. As I indicated in my opening remarks, some of the tribunals are rather less well organised and set up than others. Those who access those tribunals do not get the same very good experience that people accessing some of the other tribunals are getting. That is not a particularly helpful situation.

An enormous number of people go through the tribunal system throughout Scotland in any one year. Arguably, it is at least as important to users as the process of going to court. We want to ensure that, throughout the system, people get the same standard of organisation and administration and the same well-trained people sitting in judgment of their argument, and that we do not have gaps in the system. That is partly what this is about—it is to bring the system into a coherent whole that maintains standards throughout the system and does not allow some of the smaller and perhaps less frequently heard tribunals to lose the expertise that we really still need in a tribunal system.

John Pentland: Can I ask another question, convener?

The Convener: Of course.

John Pentland: It is in case somebody steals it.

The Convener: We are going to park that.

John Pentland: The bill does not currently envisage permanent or salaried posts. Lord Gill’s view is that salaried posts would attract people with sufficient experience and calibre. Do you support what Lord Gill has said or are you still of the view that salaried posts are not needed?

Roseanna Cunningham: The difficulty with the proposal is that it would be difficult to justify the need for full-time permanent judiciary, which is in effect what you would require to show was necessary if you were going to have salaried posts; otherwise, you would be paying salaries to people who would not necessarily be doing an enormous amount.

What we have here is a better balance. We have security of tenure for devolved tribunal members because they will be reappointed automatically every five years until they reach 70. The bill allows for salaried and fee-paid positions that meet the needs of the landscape. Again, this is about allowing as much flexibility as possible. If we were to include in the bill a provision that says that we should have full-time salaried individuals, we would, of necessity, sometimes be paying out salaries for not a great deal of work. That would not be particularly cost effective in terms of governance.

The Convener: Colin Keir has a supplementary question.

Colin Keir: It relates to something that John Pentland raised. Is there any danger that the reforms will mean that tribunals are costed out of the reach of those who currently use them?

Roseanna Cunningham: In what sense?

Colin Keir: The existence of the tribunals has always meant that people have avoided having to go to court. With the judicialisation—I think that is the current buzz word—under the reforms, is there any danger that costs will rise for the people who use the tribunals?

Roseanna Cunningham: The vast majority of tribunals do not charge fees. I am sorry, but I am not entirely certain what you mean by “costed out”. It is always open to people to take along an advocate. That is sometimes a solicitor whom the person has paid, but that is their choice. Often it is not such a person because they have opted for a different form of advocacy.

Colin Keir: That is along the lines of where I was going—

Roseanna Cunningham: You mean that people might feel—

Colin Keir: There are concerns about the advocacy that is required. I heard outside the committee a complaint about what was meant to be the simple act of going to a tribunal. In the instance that I was told about, the person felt that the advocacy that was required was more than they had expected. They went to a third party and ended up having to go to somebody who is pretty seriously legally trained.

Roseanna Cunningham: Without knowing the detail of the specific concern, it is difficult for me to judge.

Colin Keir: Yes. I did not want to bring the actual—

Roseanna Cunningham: I know that with some tribunals—I am thinking particularly of some of the reserved tribunals—there can be a bit of an imbalance, in that one side is usually legally represented and the other side is not. However, that is not necessarily the case with all tribunals. Without knowing the individual circumstances that you are talking about, it is hard for me to make a judgment on whether that is—

Colin Keir: I apologise for being so vague, but I felt that the generalisation was important because of the nature of the question that I was asked.

Roseanna Cunningham: In the Mental Health Tribunal for Scotland, advocacy tends not to be legal but is provided by an independent advocacy service or something similar. People can take
...somebody along to help them. However, each tribunal system has developed a different practice. That is the difficulty.

The Convener: I want to raise the issue of expenses. We appreciate that Lord Gill has said that the winner would get expenses only in extremis and in special circumstances, and that that will not happen in run-of-the-mill cases. Will you comment on that? There is also a power on fees. We do not want to interfere with the discretion of the chair or the judge, of course, but given the imbalance that individuals—punters or whatever—sometimes feel at various tribunals, will there be an impact on legal aid?

Roseanna Cunningham: No. You are straying into the policy imperatives that set up the individual tribunals. Some tribunals already charge fees. I go back to the issue about sheriffs or part-time sheriffs sitting in the Mental Health Tribunal for Scotland. The bill has to allow for such scenarios—and it had to allow for scenarios in which it was decided in the founding legislation that fees are appropriate. For example, the Lands Tribunal for Scotland charges fees and has done so since its inception—in 1949, I think it was. We have to allow that to continue because it is part of that founding legislation. The home owner housing panel has the ability to charge fees, but it has not done so.

Each issue to do with fees is contained within a tribunal’s parent legislation, and the bill does not interfere with that. It simply has to allow for the variation across those pieces of legislation.

The same applies to expenses. I think that I am right in saying that, in most tribunals, people do not get expenses one way or the other.

I have indicated the two tribunals in the current set-up where fees are an issue in one case, and where they could theoretically be an issue in another case but are not at the moment.

That is to do with the nature of the tribunal. Some tribunals are party versus state, and some are party versus party, and the party versus party tribunals are a different animal. They are tribunals but the party is not acting against the state, so there is not that imbalance of the state versus the party.

11:30

The Convener: We appreciate that.

Did John Finnie want to come in here?

John Finnie: I did and then I did not, but I will come back in, in light of what the minister said.

I accept that employment tribunals are a reserved matter. During the earlier witness session, my colleague Elaine Murray alluded to the charging of fees, about which Lord Gill thought that it would be inappropriate to comment. A lot of people have viewed fees as a punitive measure that will deter participation. Section 70 allows for charging, and the minister has explained that that is a continuation of procedure for some. If there is a suggestion of standardisation, are we that far away from saying that if a couple of tribunals charge fees, why do the rest not do it? Again, that could be seen as restricting access.

Roseanna Cunningham: No, because that is not what the legislation is about. It is not about equalising—

John Finnie: But section 70 would facilitate that.

Roseanna Cunningham: No. We have to allow for the charging of fees because one of the tribunals has charged fees from the outset. If we do not allow for the charging of fees, we will cause a major problem for the Lands Tribunal for Scotland. That is really what section 70 is about. In addition, the Homeowner Housing Panel was set up with the discretion to charge fees.

Unless we go back and change the founding legislation for each tribunal, we will have to make the bill allow for the possibility of tribunals charging fees. In the cases of the Lands Tribunal and the Homeowner Housing Panel, Parliament decided that it would be appropriate to give that capacity. It is, of course, ultimately for Government to look at the individual pieces of legislation and amend them to remove the capacity to charge fees, but we did not think that such amendments were appropriate for the Tribunals (Scotland) Bill. The bill has to allow, in the new structure, those tribunals that charge fees to go on doing what they have always done. The Lands Tribunal has always done that, but the practice has not leaked into other tribunals, other than through the decision that was made when the Homeowner Housing Panel was set up.

It depends on the nature of the tribunal, but who knows whether, in future, a tribunal might want that discretionary power to charge fees? Section 70 is just about administration and setting up a structure that will allow tribunals to go on doing what they do. If I change that, I am interfering with individual tribunals.

The Convener: But you are doing that, minister. Section 70(1) says:

“The Scottish Ministers may by regulations make provision for the reasonable fees that are to be payable in respect of any matter that may be dealt with by the Scottish Tribunals.”

It does not say “existing matter” but “any matter”.

Roseanna Cunningham: That is because of the system that will develop when we have some
tribunals that charge fees and some that do not. That is the reality of the system that we will have.

**John Finnie:** The convener made the point that I was going to make. Is it your position that if any of the other tribunals were to consider charging fees, section 70 would not facilitate that?

**Roseanna Cunningham:** I do not know what is in the founding legislation. We would need to look at those pieces of legislation to see whether they allowed those tribunals to charge fees, and then we would need to consult. It could not be done just by fiat. That is not what section 70 is about.

**John Finnie:** So that is a no, is it?

**Roseanna Cunningham:** No Parliament can bind the future. We are saying that, at the moment, we have to accommodate the Lands Tribunal, which charges fees, and another tribunal that has the discretion to charge fees. If there are changes to be made in future, they can be made only through a whole process of proper consultation, and would probably have to be made to the founding legislation for the individual tribunal.

I do not want to interfere with individual tribunals’ founding legislation, unless that is felt to be appropriate.

**John Finnie:** I understand.

**The Convener:** You have clarified that point, minister, but I wonder whether there is a clash between the bill and the parent legislation that you mentioned. Does section 70(1) conflict with any provision in the parent legislation that says that fees can or indeed cannot be charged? Does the bill have to deal with, refer to or amend the parent legislation in some way to ensure that this does not look like some broad-brush provision?

**Michael Gilmartin (Scottish Government):** When the tribunals transfer across and assume their functions, regulations will be made under section 27(2) to fix any issue with the parent legislation. We need a new system that allows fees that had previously been charged to continue to be charged; as framed, section 70 would allow fees to be charged but only at Parliament’s say-so. In other words, no fee can be charged on any matter without Parliament’s approval, and the provision is completely dependent on the powers being exercised sensibly.

**The Convener:** Section 70(3) says:

“Before making regulations under subsection (1), the Scottish Ministers must consult the Lord President”.

I take it, then, that after that requirement is met, an instrument will come before Parliament to impose fees where there were no fees before.

**Michael Gilmartin:** Yes. Even where fees are charged, regulations must be made under section 70 and will come before Parliament. At the moment, such regulations are subject to the negative procedure.

**The Convener:** That helps to explain the interaction between the pieces of legislation. This is simply a broad power.

**Michael Gilmartin:** The Government does not have the authority to charge fees without the Parliament’s approval.

**The Convener:** So the power covers tribunals that charge fees already but makes room, subject to the approval of regulations under the negative procedure, for additional fees to be charged by other tribunals.

**Michael Gilmartin:** Any fees charged under the new system would require regulations to be made under section 70.

**The Convener:** Does that explain things for the committee? I see members’ heads nodding. We understand it now.

**Roderick Campbell:** Minister, I do not know whether you have had the opportunity to consider Lord Gill’s comments on wasted expenses.

**Roseanna Cunningham:** On what?

**Roderick Campbell:** Wasted expenses. Lord Gill pointed to the lack of a definition of “wasted expenses” in section 59.

**Roseanna Cunningham:** I think that we will need to look into that. I am not quite sure what is meant by wasted expenses.

**The Convener:** He was referring to section 59(4).

**Michael Gilmartin:** What was the question again?

**Roderick Campbell:** Basically, Lord Gill pointed out that the phrase “wasted expenses” has been imported from England but the bill itself does not define it. He thinks that it should be clearly spelled out.

**Michael Gilmartin:** The provision enables expenses to be awarded by a tribunal, again to accommodate the diverse range of tribunals that will transfer into the system. We have made provision with regard to wasted expenses and, although no such definition has been set out in the bill itself, one can be set out in the procedural rules. As a result, the matter will be given further thought and consideration in relation to each jurisdiction that is transferring in.

**Roderick Campbell:** Has the Scottish Government considered the implications of February’s Supreme Court judgment on the
O’Brien v Ministry of Justice case, which suggests that part-time members of the judiciary might be entitled to a pension scheme? Have, for example, those participating as members of tribunals been taken fully into account in the financial memorandum?

**Roseanna Cunningham:** We will have to look very carefully at the implications of that case. However, I point out that nothing in the bill prevents or inhibits the payment of pensions if there is such a requirement; indeed, that already happens in some cases. The bill does not look at the detail of pensions and any changes to pensions policy would require to be dealt with separately and perhaps through the Cabinet Secretary for Finance, Employment and Sustainable Growth’s department rather than mine. In short, the implications of the case are being considered and if there is a need for any change it will be made.

**Margaret Mitchell:** I seek some clarification on the transitional arrangements, particularly the provision whereby Scottish ministers can make rules for upper tribunals at an early stage. Will that be subject to the negative procedure?

**Roseanna Cunningham:** No. We currently do that, but it is done within different policy portfolios, depending on the tribunal. For example, the current situation is that if there are to be changes—

Are you talking about the upper tribunal?

**Margaret Mitchell:** Yes.

**Roseanna Cunningham:** Sorry. I thought that you were talking about the first tier.

**Margaret Mitchell:** The question is about the transitional arrangements for the rules until they can be dealt with by the SCJC, which is not likely to happen for three or four years. I ask the question because concern was raised about ministers having that power. It was suggested that perhaps it would be preferable to have a transitional panel, with user-friendly members deciding the rules.

**Roseanna Cunningham:** We currently write the rules. In that sense, we would go on ad interim doing what we already do. However, I need to make clear what I started to say earlier, which is that that is already done with expert input. For example, if we were going to consider changing the rules of the Mental Health Tribunal, it would be for Joe Morrow to consult the people whom he thought were the most appropriate. That would then go to the health minister, who would consider and agree to the rules. That is how it is currently done and we would probably continue doing that rather than set up a separate body. If we did that, we would have the issue of there being different tribunals, and we would probably want to consult very closely with people from the various tribunals.

As I said, we currently write the rules and we would use the current expertise. At the moment, it is expected that that would be done in the future by a negative instrument.

**Michael Gilmartin:** Yes; it is the negative procedure.

**Roseanna Cunningham:** At the moment, while we continue to do it, we would use the negative procedure.

**Michael Gilmartin:** Yes.

**Margaret Mitchell:** So there would be scrutiny of the difficult cases.

**Roseanna Cunningham:** That is what happens at the moment. From time to time, each tribunal makes changes in its rules, but that arises from the tribunal’s own practice. The change then goes to the minister of the particular parent portfolio to consider. I do not sit there signing off on rules across all the tribunals, because that would clearly not be appropriate.

**Margaret Mitchell:** Thank you for the clarification.

**John Pentland:** The financial memorandum identified a figure for delivering the new system. Are you confident that the figure will do that?

**Roseanna Cunningham:** Yes. We have no reason to suspect that it would not. We are not changing the way in which individual tribunals work, so we are not making that different. We hope that we will get a benefit over a period of time from bringing together some of the structures and training. In the longer term, we therefore hope to make a saving, but we believe that the financial figures are robust into the longer term. Obviously, with changes such as those that will be made, there will be a small additional cost at the outset from going through the process of making the changes. However, they will provide better value in the long term.

**John Pentland:** Does that answer mean that salaried posts will not be given consideration?

**Roseanna Cunningham:** We have the capacity to do it in the bill, but it is a question at any point as to whether it is considered to be appropriate. As I said, if we pay salaries to people who do not have enough work to justify those salaries, there would be a question mark over that, and those salaries would have to be contained within the overall costs. At present, we are talking about a continuation of the current situation. However, it is difficult for me to answer for five, 10, 15 or 20 years down the line because, in future, changes might be decided to be appropriate.
11:45

The Convener: I will not be here then, I think.

I want to ask about cross-ticketing, which is the colloquial term that relates to the powers in schedules 4 and 6 and part 2 for the president of tribunals to assign members from one tribunal to another. The minister has rightly pointed out the differences between the cultures and specialisms of the tribunals, which members all appreciate. I hate to paraphrase Lord Gill, but he seemed relatively relaxed about the issue, because he feels that it will be good for people to get expertise. He said that people would not just do training on the job, as there would be advance training. Are you content that the provision will not contaminate the different cultures of the tribunals?

Roseanna Cunningham: If that was a problem, there would be contamination now, because cross-ticketing already happens under the current structure, in which people sit on more than one tribunal. In effect, we will not be changing what currently happens.

The Convener: The current cross-ticketing might involve experienced people, but I am concerned that somebody might be plucked out of one tribunal and put on another without expertise of being on diverse tribunals. However, you share the Lord President’s views.

Roseanna Cunningham: Some tribunals, such as the Mental Health Tribunal, are so specialised that I would be astonished if there was a suggestion that somebody with absolutely no background in the subject would be plucked out of nowhere and plonked down there. That is not what is envisaged, and it does not happen at the moment. Therefore, I do not see that there is an issue.

The Convener: I would not want you to be astonished.

Roseanna Cunningham: Cross-ticketing happens now. It does not contaminate tribunals and it will not do so in future. In any case, the chamber president would have to agree to a member sitting on the tribunal.

The Convener: I believe that that will have to be agreed with other parties, and not just the chamber president.

Roseanna Cunningham: Yes. The aim is to ensure that we do not lose the possibility of using good experienced people who happen to be somewhere else. We do not want to rule out cross-ticketing, because there might be experienced people who just happen not to sit on a particular tribunal. In that case, everybody will know them, and it is unlikely that there will be much dispute about the issue.

The Convener: Are there any other questions?

Members: No.

The Convener: That is a miracle, because usually when I say that somebody puts up their hand, I am not looking now—I am blinkered.

I thank the minister for her evidence. I suspend the meeting for a minute to allow the witnesses to pick up their paperwork.

11:48

Meeting suspended.
The Additional Support Needs Tribunals for Scotland

The Additional Support Needs Tribunals for Scotland (“ASNTS”) was established by section 17 of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”). The ASNTS became operational in November 2005. The ASNTS hears cases involving children and young people who face the biggest barrier to learning. The ASNTS considers appeals (references) made by parents and young people against decisions of education authorities regarding the provision of educational support.

Co-ordinated support plans are now prepared for children with additional support needs, arising from complex multiple factors; requiring a range of support from different services; and enduring for one year or more. The ASNTS hears references involving children and young people who either have, or are potentially entitled to have, a co-ordinated support plan. The ASNTS will also in certain circumstances hear references about placing requests.

From 18 March 2011, the ASNTS can also consider appeals (claims) made by a parent or a child (where the child has capacity to make a claim) against a responsible body, on the basis that the responsible body has discriminated against a child because of a disability in an education setting. Schools must not treat disabled pupils less favourably because of their disability. Discrimination can also occur when a disabled pupil is placed at a substantial disadvantage because reasonable adjustments have not been made to account for their disability.

In March 2012, the Scottish Government published its consultation on the Scottish Government’s Proposals for a New Tribunal System in Scotland. The ASNTS had some concerns in relation to the proposal in the Scottish Government’s consultation document to create “two new, generic tribunals”.

This was on the basis that the ASNTS was only fairly recently created as a specialist tribunal to deal with education matters in relation to children who have additional support needs. Some of these children are among the most vulnerable members of society. The issues involved in the ASNTS cases can be sensitive, emotive and complex. By the time cases are referred to the ASNTS, there is often little scope for resolving the matters as positions have become entrenched and relations between the parents or the child and the education authorities have often broken down. Decisions made by the ASNTS can have a life changing effect in relation to the children and young persons involved. The decision of the ASNTS can also result in substantial expenditure for the education authority concerned.

The ASNTS made a detailed response to the Scottish Government’s Proposals for a New Tribunal System and the ASNTS reiterated its view in that document that it is crucial that tribunal reform does not lead to any loss of identity and expertise within
the ASNTS and that there should be no dilution of the particular culture and ethos within which the ASNTS operates. The maintenance and development of the specialism of the ASNTS is a crucial factor to be considered in any proposal for the reform of the tribunal system.

**The Tribunals (Scotland) Bill**

The ASNTS has considered carefully the provisions in the Tribunals (Scotland) Bill ("the Bill"), its accompanying Explanatory Notes, the Policy Memorandum and the Delegated Powers Memorandum.

The ASNTS is of the view that the Bill forms an important part of the reform of the civil justice system in Scotland. In establishing the Scottish Tribunals (i.e. the First-tier Tribunal and the Upper Tribunal), the Bill provides a coherent and consistent structure within which tribunals judiciary can discharge their functions. Such a structure is also likely to benefit tribunal users, who will not require to navigate through the disjointed and haphazard system of tribunals in operation at present.

**Key issues**

The ASNTS responds to the key issues identified in the call for evidence on the Bill by the Scottish Parliament's Justice Committee as follows:

**(1) Whether the new structure is an improvement on the existing structure?**

The ASNTS recognises that its functions can be discharged effectively within the context of a structure other than the existing structure.

As mentioned, the present system has developed in a haphazard fashion and such a system may not best meet the needs of tribunal users. The ASNTS considers that the provisions of the Bill do represent an improvement on the existing fragmented and confusing structure of tribunals in Scotland. A single First-tier Tribunal divided into chambers should facilitate a more flexible and coherent approach to the delivery of tribunal justice in Scotland. The ASNTS recognises the potential benefits in transferring the functions of a number of disparate tribunals to one institution, namely the Scottish Tribunals. The ASNTS is of the view that these benefits will be best secured by all of the listed tribunals in schedule 1 to the Bill transferring in to a chamber in the First-tier Tribunal or a division in the Upper Tribunal. If this is not the case, then the Scottish devolved tribunal landscape could become just as complex and fragmented as the current system the Bill seeks to address.

The ASNTS is satisfied that it can continue to discharge its functions appropriately within the new structure proposed in the Bill. The ASNTS’s concerns are to ensure that its expertise (i.e. utilising the specialist knowledge of general members with the convenership of an appropriately qualified legal member), its ethos (i.e. keeping the child and young person at the centre of the ASNTS proceedings) and the substantive law (i.e. the provisions of the 2004 Act) are not compromised by the transfer of the ASNTS into a new structure. Any dilution of the specialism of the ASNTS or the culture and ethos within which the ASNTS operates or any unintended drift towards generalised arrangements as a result of tribunal reform in Scotland (or indeed the
amalgamation of the Scottish Tribunals Service and the Scottish Courts Service) would have a detrimental effect on children whose cases come before the ASNTS.

The ASNTS is of the view that the ASNTS should be transferred into a chamber in the First-tier Tribunal whose subject matter is education.

(2) Whether the Bill will guarantee openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?

The ASNTS welcomes the fact that the Lord President of the Court of Session will be designated as the Head of the Scottish Tribunals under the Bill (see section 2 of the Bill). This brings the Scottish Tribunals directly under the judicial leadership of the Lord President, strengthening the perception of the independence of the Scottish Tribunals, and firmly places tribunals within an integrated Scottish civil justice system. The ASNTS also welcomes section 3 of the Bill, which makes provision for upholding the independence of the members of the Scottish Tribunals and imposes specific duties on the First Minister, the Lord Advocate and the Scottish Ministers amongst others to uphold the independence of the members of the Scottish Tribunals.

Independence of members is further strengthened by the provision in section 13 of the Bill, which provides that membership of the Scottish Tribunals as an ordinary or legal member will have the effect of granting all members judicial status and capacity for the purpose of making decisions in cases.

The ASNTS also welcomes the provisions in section 4 of the Bill establishing the office of President of the Scottish Tribunals. The ASNTS considers that it is important for the tribunal system to be overseen by a judicial head with a particular responsibility for tribunals. The existence of this post will help to ensure that there is a proper distinction and separation of tribunals from courts.

The provision in the Bill on the appointments, reappointment and removal from office all provide a consistent approach to these issues for all members of the Scottish Tribunals and ensure the necessary security of tenure for members, again enhancing the independence of tribunal members. These provisions will enhance the standing of tribunals in the Scottish civil justice arena. The ASNTS notes that nothing in the Bill appears to impact on the expertise of the ASNTS, the ethos within which the ASNTS operates or the substantive law applicable to the ASNTS, i.e. the 2004 Act. That, taken with the matters referred to above, means that the ASNTS is satisfied that the Bill will guarantee openness, fairness and impartiality as currently exercised in the additional support needs jurisdiction. In providing leadership as the Head of the Scottish Tribunals, the Lord President will be in a position to ensure that specialism, ethos and desirable distinctiveness are retained, in addition to supporting coherence across the new structure.

The Bill makes provision for the appointment of Chamber Presidents to preside over individual chambers. The ASNTS notes that in paragraph 19 of the Policy Memorandum which accompanied the Bill it is stated that the Chamber Presidents will be expected to have expertise in the jurisdictions over which they will preside. The fact the Chamber Presidents are to be subject experts in the jurisdictions over
which they will preside is an important mechanism in safeguarding the distinctive nature and ethos of the individual jurisdictions which are transferred into the Scottish Tribunals. For these reasons, the ASNTS is satisfied that the Bill will allow for sufficient specialisation.

(3) The rules relating to appeals

Section 41 of the Bill makes provision for a general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal. Such an appeal can only be made by a party in the case on a point of law and with the permission of the First-tier Tribunal. The general right to appeal does not applied to excluded decisions (see sections 46 to 49 of the Bill).

Decisions of the ASNTS can be appealed to the Court of Session under the 2004 Act. The ASNTS is of the view that the route of appeal to the Court of Session has worked well in practice and the ASNTS has received useful opinions from the Court of Session which have clarified the law in the area of additional support needs. The one disadvantage of appeals to the Court of Session tends to be that an appeal to the Court of Session is expensive and it can take some time for an appeal to be heard.

The ASNTS understands that the Scottish Government's intention is that appeals against decisions of the ASNTS will be to the Upper Tribunal. The ASNTS is content with the Bill’s provisions for appeals to be heard by the Upper Tribunal. The composition of the Upper Tribunal will ensure that, when hearing appeals, the Upper Tribunal will provide the level of expertise necessary to ensure appropriate scrutiny of decisions of the ASNTS which are appealed against.

The ASNTS welcomes the provisions of the Bill providing powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal.

(4) The rules relating to appointments/membership

The provisions of section 28 (transfer-in of members) as read with the provisions of schedule 2 to the Bill, – given that paragraph 1(1) of schedule 2 confers a discretion on the Scottish Ministers to by regulations provide for “some or all of the transferable persons” to become holders of the particular named or other membership positions within the Scottish Tribunals” – appears to allow the Scottish Ministers a discretion as to which of the current members of the ASNTS, or indeed any of the other listed tribunals, may be transferred in to the First-tier Tribunal. The ASNTS notes, however, that this does not appear to be the policy intention, given that at paragraph 51 of the Policy Memorandum it is noted that “The functions of listed tribunals along with their members and caseload will transfer-in separately to the new structure by regulations (which are subject to the affirmative procedure)”. On that basis, the ASNTS understands that at the time the ASNTS is transferred in to the First-tier Tribunal, its President and all of its general and legal members will be transferred in to the First-tier Tribunal.
The ASNTS notes that in addition to transfer-in under section 28 of the Bill of existing members, a person is an ordinary or legal member of the First-tier Tribunal through appointment as such by virtue of section 29(1) of the Bill. Schedule 3 contains detailed provision in relation to the First-tier Tribunal about eligibility for an appointment to ordinary or legal membership of the First-tier Tribunal. In relation to ordinary members, a person will be eligible for such appointment only if the person meets relevant criteria as are prescribed by the Scottish Ministers in regulations. It is an important part of retaining the specialism of the ASNTS that the qualifications for general membership of the Tribunal are maintained. These are currently set out in the Additional Support Needs Tribunals for Scotland (Appointment of President, Conveners and Members and Disqualification) Regulations 2005 (SSI 2005/155). Members of the ASNTS require to have knowledge and experience of children or young persons with additional support needs within the meaning of section 1(1) of the 2004 Act or a disability within the meaning of section 6 of the Equality Act 2010. The ASNTS notes, however, that it is not anticipated that the eligibility criteria for non-legal members of the ASNTS will be changed.

The ASNTS notes that sections 16, 17 and 18 of the Bill make provision for the judiciary to be eligible to sit as members of tribunals. For example, a sheriff (including a part-time sheriff) may act as a member of the First-tier Tribunal if authorised to do so by the President of Tribunals. The ASNTS is of the view that it might also be beneficial to include statutory provision to the effect that, before authorising a sheriff to act as a member of the First-tier Tribunal, the President of the Tribunal should consult with the relevant Chamber President in order to ensure that there is no perception that the expertise of the membership of a particular tribunal such as the ASNTS is not being maintained.

Finally, the ASNTS welcomes the fact that the appointment of ordinary and legal members of the First-tier Tribunal or Upper Tribunal will be brought within the remit of the Judicial Appointments Board for Scotland (see paragraph 11 of schedule 9 to the Bill).

(5) The rule-making power granted to the Scottish Civil Justice Council

Sections 62 to 67 of the Bill make provision in relation to rules regulating the practice and procedure to be followed in proceedings before the First-tier Tribunal and the Upper Tribunal. Tribunal rules are to be made by the Court of Session by Act of Sederunt and in accordance with Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The Scottish Civil Justice Council (SCJC) has the function of reviewing the practice and procedure used in the Scottish Tribunals and the function of preparing and submitting draft tribunal rules to the Court of Session (see paragraph 12 of schedule 9 to the Bill, which amends Part 1 of the 2013 Act). Further amendments to the 2013 Act are made in the Bill with the effect of increasing the membership of the SCJC so as to include members representing the Scottish Tribunals and providing for the SCJC to establish a committee in pursuance of its functions in relation to the Scottish Tribunals. That committee is to be chaired by one of the members of the SCJC representing the Scottish Tribunals, and its members are to be selected by the President of Tribunals.
The ASNTS is of the view that it is important that people with specific experience of the area for which the rules are being made are included in the Tribunals committee. There is recognition in the Policy Memorandum at paragraph 72 that one generic set of tribunal rules would not suit all. The inclusion of those with relevant expertise in the particular jurisdiction will help to ensure that the distinctiveness and ethos of Tribunals is protected in the new structure and the tribunal rules.

(6) Any other aspects of the Bill

The ASNTS has no comment to make on any other aspects of the Bill in this written response.

Additional Support Needs Tribunals for Scotland
30 July 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Child Poverty Action Group in Scotland

About CPAG in Scotland and scope of the evidence

Child Poverty Action Group in Scotland provides advice, information and training to frontline advisers on social security and related devolved financial support. In terms of appeals, our work is primarily concerned with social security appeals. As such, we operate within the UK’s HM Courts and Tribunals Service system by supporting advisers who are making appeals. Although the Bill is concerned with devolved tribunals, in none of which do we have any expertise, the proposed structure of Scottish Tribunals is sufficiently like the UK system that we feel able to offer some comment.

1. Is the new structure an improvement?

Except in broad outline, we are not familiar with the existing system of devolved tribunals. However, the UK unified tribunal system commands broad respect, works well overall, and is a good model for the Scottish system. We would therefore welcome such a unified structure for Scottish Tribunals.

Within the UK unified system, placing jurisdictions such as social security into separate chambers allowed for a smooth transition and for the needs of the different jurisdictions to be accommodated appropriately eg, for separate procedural rules, separately identified caselaw, appropriate publicity for users.

2. Openness and fairness

2.1. Tribunal Rules. The Bill provides for the Court of Session to produce Tribunal Rules governing tribunal practice and procedure (clauses 62 to 67). We suggest that the Bill explicitly requires this power to be exercised with a view to securing that the tribunal system is accessible and fair, and that the rules are both simple and simply expressed. Similar provisions are included in the Act setting up the UK tribunal system. The Tribunal Rules for the UK system are indeed simple and clear and underpinned by an overriding objective to deal with cases fairly and justly, avoiding unnecessary formality and ensuring that parties are able to participate fully in the proceedings. This helps lay representatives and appellants understand their role and duties.

While procedural rules can go some way to guaranteeing openness and fairness for the user, as important is the culture of the system and how welcoming it is for users.

2.2. Relative informality. One of the successes of the social security tribunal system, particularly at first-tier level, has always been the relative informality. They manage to be authoritative without being overly intimidating. It would be

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1 s22(4) Tribunals, Courts and Enforcement Act 2007
important to retain this in the transition to a unified system and not import features from the court system. For example, hearings should be heard around a table, with judges called Mr/ Mrs/ Ms/ Miss, with no robes and wigs worn, venues should not be in court buildings, and there should be no strict rules of evidence or need to give evidence on oath.

2.3. **User communications.** All information for users must be in plain English and avoid jargon. The court system is so weighed down with jargon that it often struggles to express itself plainly to users.

2.4. **Public awareness of tribunals.** Making an appeal is a daunting prospect for most people. Most have never been involved in legal proceedings of any sort and are likely to think in terms of the more forbidding end of court proceedings rather than the less formal and more approachable setting of tribunals. There is an opportunity to improve access to justice by promoting awareness and improving the image of tribunals.

2.5. **Lay representatives.** In UK social security appeals, the attendance of a representative makes a significant difference to success rates (on average 63% compared to 47% unrepresented).\(^2\) This is perhaps not a surprise given the complexity of social security law. However, a representative helps in other ways: helping to assess whether an appeal has a reasonable prospect of success, encouraging an appeal when there is a strong case, helping to gather evidence, supporting the person in knowing what to expect at a hearing and to attend the hearing itself. All of this is can be of critical importance, even in those cases where because of the inquisitorial nature of the tribunal hearing, there is less scope for advocacy. Although CPAG’s expertise does not lie in the areas of jurisdiction with which the tribunals in the new structure are dealing, we would urge that Scottish Tribunals should actively welcome and encourage lay representatives, both at first-tier and upper tribunal level, while at the same time adopting an enabling approach to the unrepresented person.

2.6. **Tribunal user forums.** Having user groups meet regularly with members of the judiciary and tribunals administration is an important way to gather feedback on the user perspective of the appeals process. In social security, advice agencies, advocacy organisations and other groups providing lay representation and support are invited to regular meetings.

3. **Retaining specialisms**

3.1. **Recruitment.** In the Bill (clause 30), responsibility for assigning tribunal members to chambers and divisions rests with the President of Tribunals. We would suggest that, in practice, appointment of tribunal members is chamber based, with recruitment being specifically to a particular chamber. In the UK tribunal system, judicial appointments for social security appeals are specifically to the Social Entitlement Chamber. This ensures not only that

recruitment can require lawyers to demonstrate existing knowledge of that area of law, but also that those appointed can gain enough experience of similar tribunals to develop their expertise in that area of law and practice.

3.2. Training. A unified administration allows for a central induction and training programme for tribunal members to develop and maintain skills in, for example, effective evidence gathering from appellants in oral hearings, equality awareness, as well as updating in the relevant law.

4. Appointments and membership

For the First-tier Tribunal, it is not always the case that the judge has any particular skills in showing empathy with people. Many people struggle to present their situation fully under the stress of a tribunal hearing, and having tribunal members who are alert to that and able to draw out a person effectively is obviously very important, particularly for people who are unrepresented. For that reason, the importance of having lay members on the panel from the community with an understanding of the social background of the people appealing should not be underestimated. The policy memorandum relating to the Bill does not pick up this point, but rather concentrates on the value of non-legal ‘expertise’. We would recommend that it would enhance a user-centred approach if attention is also given to the value of lay members from the community.

5. Other issues

5.1. Delays. There remain obstacles to justice, even under the unified tribunal system. Perhaps unsurprisingly given the level of welfare reforms, the number of appeals in the UK social security system is higher than ever. The tribunals service has struggled to keep up with the volume and delays have been increasing. It now takes on average 18 weeks to deal with a case compared with 13 weeks in 2009. This doesn’t include the time it takes for the case to reach the tribunals service, which can add further weeks or months when there is an initial dispute stage to negotiate. This is too long. While we appreciate that some jurisdictions are more time critical for the people appealing than others, Scottish Tribunals should consider how to minimise delays. We would suggest the following based on our experience of social security appeals.

- Ensure people can appeal directly to the tribunal service and that the decision making body is required to respond within a specific time limit. In social security, people have had to lodge their appeals with the decision making body (local authority, Department for Work and Pensions or HMRC). There are no time limits on these bodies to conduct a review, produce a submission or forward on the appeal to the tribunals service, and consequently appeals can get stuck at this point.

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3 Para 20, SP Bill 30-PM
4 Increase of 52% in Jan-March 13 compared to previous year
point. The system is about to change with direct lodgement being introduced widely from October 2013.

- Set challenging targets for clearing appeals, monitor and publish statistics.

5.2. Appeals process. The procedural rules introduced following the introduction of the unified appeal system in the UK paved the way for a real improvement in people’s experience of the system. The new rules meant that some 1,200 people won their appeals who under the old rules would have had their appeal struck out for failure to return an enquiry form. Drawing up new procedural rules for Scottish Tribunals gives an opportunity to identify and overcome any similar blockages or barriers in the system. We would also suggest that there is consultation on draft Tribunal Rules with a view to avoiding inadvertently introducing new barriers, for example, by setting fixed time limits for people to make an appeal without allowing for extending the time limit where there are special circumstances.

Judith Paterson
Welfare Rights Co-ordinator

Jon Shaw
Welfare Rights Worker

30 July 2013

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5 Memorandum submitted by HH Judge Robert Martin, September 2009, [http://www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/memo/decision/ucm2702.htm](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/memo/decision/ucm2702.htm)
Justice Committee
Tribunals (Scotland) Bill
Written submission from Children in Scotland

1. Children in Scotland, Resolve and Enquire are pleased to respond to the Scottish Government’s call for evidence on proposals for a new tribunal system for Scotland. Children in Scotland has a long standing interest and involvement in additional support for learning, hosting both Enquire - the national advice and information service for additional support for learning, and Resolve: ASL, Scotland’s largest independent education mediation service.

2. We support points made in the separate, original consultation response by ASN Mediation Providers Scotland, in particular that user grounds for challenge and appeal should be understandable to them, and information tailored to young people where relevant. We also support the recommendation that mediation should continue to be an option throughout the conflict resolution process.

3. We are reassured that the new system will be as accessible as the Additional Support Needs Tribunals for Scotland currently is - and that there will not be any added complications or hurdles for young people, parents and professionals to navigate. We would like to reiterate our call for supporting documentation explaining how different tribunals work, especially where tribunals follow different legal pathways.

4. During the original consultation, we produced an easy read publication of the consultation document – which can be found here – and following on from this work, would like to continue to advocate for clear and accessible information for users of the tribunals system: any changes should be made clear in a format that is user-friendly for people from BME communities, those with literacy difficulties and those with additional needs who may need support to understand the process.

5. Children in Scotland particularly welcome the fact that mediation is now being embedded and used in the Tribunal landscape e.g. the Housing Panel Private Rented Housing, and is now more accepted, respected and understood as a credible route for dispute resolution than ever before.

6. Enquire received 45 helpline calls or e-mails in 2012-13 in which the Additional Support Needs Tribunals for Scotland was a discussion topic (albeit not always the main focus of the enquiry). There were 15 referrals to the Additional Support Needs Tribunals for Scotland and 15 referrals to Take Note (the National Advocacy Service for Additional Support Needs). Enquire’s approach is to support resolution of disputes and disagreements at the lowest possible level and encourage the uptake of mediation when appropriate. We support the fact that the Additional Support Needs Tribunals for Scotland also adopts this approach, with very few cases reaching a hearing.

7. During 2012/13 -- in relation to over 21 of the 32 education authorities in Scotland -- Resolve:ASL and Common Ground Mediation Services handled 90 mediation
cases of which approximately 25% had: made a referral to ASN Tribunal; been through the full tribunal process and hearing; or, had potential to go to Tribunal.

Children in Scotland
2 August 2013
Citizens Advice Scotland (CAS) welcomes the opportunity to comment on the Tribunals (Scotland) Bill. The Citizens Advice Service in Scotland continues to support and represent users of the civil justice system and strongly advocates the principle of access to justice. Citizens Advice Bureaux (bureaux) across the country contribute an enormous effort in advice, support and representation in almost all areas of civil justice, but predominantly in housing, debt and welfare benefits.

Specifically funded projects and wider advice work undertaken by the bureaux in Scotland in 2011/2012 recorded 380,000 new issues where the resolution had the potential to involve formal legal methods and systems. This included almost 23,000 issues relating to civil legal process, almost 35,000 housing issues and more than 118,000 debt issues. However, many of these problems were solved before the need to engage with formal legal processes (courts and tribunals).

In assisting some of the most vulnerable clients to resolve their problems, bureaux undertake an invaluable role in preventing issues escalating into the legal system (for example in negotiating a payment plan between a landlord and tenant who is in arrears which stops the landlord bringing an action for eviction).

If an issue does reach the stage of tribunal or Sheriff court, bureaux then undertake vital work to support and represent clients. In 2011/2012, bureaux represented clients in over 5,500 civil court and tribunal cases – this included providing representation in housing, debt and small claims work in Sheriff courts as well as in welfare and employment tribunals.

**Introduction**

“It should never be forgotten that Tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them.”

Leggatt¹

In 2010, there were over 650,000 applications made to tribunals across the UK² and this number continues to rise. In 2015-16, applications to the first tier of the Social Entitlement Chamber alone are expected to reach over 800,000.³ Based on past figures, it is reasonable to predict that 96,000 (12%) of these applications will be in Scotland. In comparison, in 2011-2012 there were just over 85,000 civil cases

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initiated in Scotland (including cases initiated in both the Sheriff Court and the Court of Session)\(^4\) and case numbers have fallen over past years.

The delivery of administrative justice through tribunals can, in volume, be considered the largest part of the contemporary legal system. Tribunals are the outlet of justice which people are most likely to access and with the rising number of applications to tribunals, this is increasingly the case.

Tribunals are, for users, a forum which facilitates the pursuit of their rights and are often accessed at times of crisis in a user’s life. It is essential that the framework for tribunals is effective, efficient and capable of ensuring consistent access to justice: both now and in the changing civil justice landscape ahead.

**Key Points**

- Citizens Advice Scotland (CAS) believe that the proposed structure is an improvement on the existing structure.
- In achieving the new structure, CAS are firmly of the view that the spirit of tribunals and the individual and distinctive nature of tribunals should be safeguarded and maintained.
- Without prescription of the Tribunal Rules, fairness, openness and impartiality cannot be said to be guaranteed.
- Process is fundamental to the user experience and it is essential that Tribunal Rules are sensitive to and aware of the needs of users in order to produce rules which place the user at the core of the process.
- By including express principles on the face of the Bill in a similar way to those governing the operation of the Tribunals Courts and Enforcement Act 2007, ss2(3) and 22(4), consumers can be protected and tribunals safeguarded.
- While allowing Tribunal Rules to be written without prescription does provide a degree of flexibility, this flexibility should not be unchecked. Tribunal Rules should be subject to public consultation to ensure unintended consequences are avoided.
- The independent review of tribunals must be safeguarded in light of the abolition of the Administrative Justice and Tribunals Council (AJTC). The Bill makes provision for the Scottish Civil Justice Council to review process and procedure in relation to proceedings, but it does not expressly confer on the Council the duty to keep the whole system under review. There are many questions about the proposed Scottish Government Interim Committee and so consideration must be given to who will help to review tribunals in the same user-focused spirit as the AJTC.

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More consideration should be afforded to Alternative Dispute Resolution. Tribunals, as Courts, should be regarded as forums of last resort and CAS strongly advocate that disputes should be resolved in a forum most proportionate to the dispute.

Response to key Issues

(1) Whether the new structure is an improvement on the existing structure?

CAS believes that the proposed structure has the potential to be an improvement on the existing structure. We welcome the development of a structure which is in line with the framework provided for in the Tribunal, Courts and Enforcement Act 2007 (TCEA).

From a user perspective, it matters little whether a matter is devolved or reserved and so the consistency created through echoed structures between the tribunals which administer reserved and devolved issues is positive. This should ensure a consistent experience for consumers in Scotland who may access tribunals on either reserved or devolved matters. This was also the position of the Administrative Justice Steering Group (ASJG) chaired by Lord Philip, “users are unlikely to be concerned with whether a tribunal is reserved or devolved, or by whom it is administered. However, they should be able to expect a clearly independent and impartial system, within which they will receive the same level of treatment and service, regardless of where a tribunal is located or where responsibility lies for its administration.”

In achieving the common structure however, CAS are firmly of the view that the individual character or tribunals should not suffer as a result, nor should the centralisation of administration lead to the centralisation of outlets. We welcome the flexibility which s56(1) allows in convening tribunals any place in Scotland and would hope that this flexibility is not greatly restricted by virtue of rules as described at s56(2).

While the system of tribunals is undoubtedly fragmented at present, the ad hoc nature in which tribunals have been allowed to develop has allowed for an evolution of specialism which is invaluable to the user experience and should be protected. The aim of the new structure should be to promote continued development within 1st tier chambers to the maximisation of specialist operation, at the same time encouraging and allowing the sharing of best practice between chambers.

In assuring this, CAS would recommend that principles are expressly included on the face of the Bill in a similar way as guiding principles are enshrined in the TCEA:

s2(3): A holder of the office of Senior President of Tribunals must, in carrying out the functions of that office, have regard to—

(a) the need for tribunals to be accessible,
(b) the need for proceedings before tribunals—
   (i) to be fair, and

Administrative Justice Steering Group, Options for the Future Administration and Supervision of Tribunals in Scotland (Glasgow: Scottish Consumer Council, 2008)
(ii) to be handled quickly and efficiently,
(c) 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
(d) the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.

s22(4): Power to make Tribunal Procedure Rules is to be exercised with a view to securing—

(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
(b) that the tribunal system is accessible and fair,
(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
(d) that the rules are both simple and simply expressed, and
(e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

In setting out the principles in this way, users are placed at the centre of consideration of structure and process: the Senior President of Tribunals has responsibility for the organisation of the chamber structure and the character of how rules should be constitutionalised is clearly framed. A ‘whole system’ approach is adopted which centres on the user. While much emphasis is given in the Bill to structure, the importance of process must not be forgotten.

In the context of this Bill the framing of principles is especially important when thinking of the possible changes to the tribunal landscape which may lie ahead. In the proposed merger of the Scottish Tribunals Service (STS) with the Scottish Court Service (SCS), a concern is that in housing the STS within the SCS, the judicial auspices of SCS may influence tribunals. It is vital that tribunals retain their distinctive operational style and continue to provide consumers with a less formal, more accessible and more specialised alternative to courts.

Express principles would help to safeguard the general character of tribunals and further, could help in the safeguarding of the individual character of tribunals. In the possible development of a housing tribunal, for example, a legislated principled framework would greatly assist in developing a forum with the needs of users as its core concern.

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7 As raised in the Scottish Government Consultation Better Dispute Resolution in Housing: Consultation on the Introduction of a New Housing Panel for Scotland which closed in April 2013.
(2) Whether the Bill will guarantee openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?

Openness and fairness

Established by the Franks Report – the 1957 report which was published as the outcome of an inquiry into tribunals and chaired by Sir Owen Franks - the principles of openness, fairness and impartiality in relation to tribunal procedures are keystone principles by which tribunals should operate. The report provided guidance on the scope of the principles:

- Openness: publicity of proceedings and reasoning underlying the decisions;
- Fairness: adoption of a clear procedure which enables parties to know their rights, to present their case fully, and to know which case they have to meet;
- Impartiality: freedom of tribunals from influence, real or apparent, of departments concerned with the subject-matter of their decisions.

As an individual instrument, the Bill does not currently guarantee openness, fairness and impartiality. Neither the Bill nor the Explanatory notes mention the principles expressly, and the provisions of the Bill as they stand cannot be seen to provide assurances that the principles will be met through the fulfilment of their characteristics as outlined by Franks.

In assuring openness, CAS would like to see tribunals subject to an express duty to publish decisions in clear and plain English. As the Bill currently stands, s67(4) directs that the Tribunal Rules may make provisions about the recording and publication of tribunal decisions but framed like this there is no requirement to make such provisions. There is therefore no guarantee of openness as characterised by Franks.

Such a provision would be similar to the duty outlined in s10 of the Tribunals and Enquiries Act 1992, but we would like to see provision for Scottish Tribunals go further in requiring the information to be accessible and easy to understand. Without a requirement under openness to publish the reasons for decisions, fairness is also impacted in parties appealing decisions made – if a party does not know the reasons for the decision made they cannot know the case which they have to meet.

In terms of fairness, again the Bill offers no guarantee that this principle will be fulfilled. With no procedure detailed except mention of what may be drafted (ss62-68), there can be no assurance that the rules as written will offer clear procedure which allows parties to know their rights and present their case. Nor is there any guarantee that other characteristics of tribunals outlined by Franks will be achieved: accessibility of procedure, freedom from technicality, and expedition.

The Bill is not prescriptive enough to offer guarantee that rule-drafters are compelled to undertake any specific rules, or to write rules with any specific principles of guidance in mind. Although this will allow for flexibility in the rules writing process, and the Scottish Civil Justice Council (SCJC) are themselves bound by overarching
principles in composing rules, the lack of guidance affords a significant power to those composing the rules and takes those rules out of the domain of the legislature. In mitigating this delegation, CAS would again recommend that principles similar to those on the face of the TCEA are included on the face of the Bill.

Process is fundamental to the user experience. It is vital that the process of tribunals holds the interest of users at its core and in including similar principles to those outlined above, there will be an assurance that the principles of openness and fairness in process are guaranteed.

Impartiality

Although impartiality was notarised as a principle of tribunals alongside openness and fairness by Franks, it was built upon and taken forward as a core principle of the Leggatt report. Leggatt identified the three ideals of tribunals as having:

1. Independent and impartial process
2. An independent and skilled judiciary
3. A coherent system

It is vital that the last of the Franks principles and the first of the Leggatt principles – impartiality – is upheld. It is also key that the relationship between impartiality and independence is understood. In Gillies, Lady Hale set out the distinction: “Impartiality is the tribunals approach to deciding the cases before it. Independence is the structural framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public.”

Impartiality then requires clear rules to facilitate the impartiality of decisions as well as an independent body to oversee the operation of tribunals as a whole: it is a term of both process and structure. Setting out clear principles on the face of the Bill to guide the writing of procedural rules will greatly assist in ensuring impartiality of process. CAS would again recommend that this is considered.

In ensuring impartiality of structure, the emerging picture in Scotland is complicated. The pending abolition of the Administrative Justice and Tribunals Council, including the Scottish Committee, leaves a gap in terms of overseeing the operation of tribunals in Scotland. Currently charged with keeping under review the constitution and workings of tribunals, reporting on any matter which may relate to tribunals or reporting on any matter referred to the Council by Scottish Ministers, the functions of the AJTC are wide. Further, their position is motivated by promoting the needs of users as of paramount importance:

The Administrative Justice and Tribunals Council keeps under review the administrative justice system as a whole with a view to making it accessible, fair and efficient. We seek to ensure that the relationships between the

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8 Scottish Civil Justice Council and Criminal Legal Assistance Bill, s2(3)
9 Sir Andrew Leggatt, Tribunals for Users, One System One Service: Report on the Review of Tribunals (August 2001)
10 Gillies v Secretary of State for Work and Pensions [2006] UKHL 2 at paragraph 38.
courts, tribunals, ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users.\textsuperscript{11}

The gap left by their abolition will be significant. Partial function for reviewing the practice and procedure followed in proceedings in Scottish Tribunals will fall to the SCJC.\textsuperscript{12} CAS welcomes this as review of procedure will be essential in ensuring the tribunal rules are operating effectively and efficiently. However, this function is a significantly limited function in the context of all the AJTC undertook. There is no provision made for the SCJC to keep the administrative justice system under review as it is charged to keep the civil justice system under review.\textsuperscript{13} The provision to keep civil justice under review is explicit and so it is implied that the function to keep administrative justice under review will fall elsewhere.

The Minister for Community Safety and Justice in Scotland has expressed her commitment to “an expert independent advisory committee for administrative justice and tribunals in Scotland”\textsuperscript{14} but as yet, the constitution and remit of this body has not been confirmed. It is also not clear what, if any, interaction there may be between the Interim Committee and the SCJC.

These may be answered in the detail which emerges about the Interim Committee but CAS believes that any body assuming the broad functions of the AJTC should not apply lower standards, including the standard of independence. Such a body should also have the same power to convey their opinions and reports to Ministers. The functions of the AJTC were of significant importance to the consumer interest and their functions should not be allowed to fall through the gaps of change.

As it stands, the Bill does not guarantee impartiality: of process or structure. In not being explicit about rules, impartiality of process cannot be guaranteed as the processes are currently unknown. In only charging the SCJC with the obligation to review practice and procedure, impartiality of structure cannot be guaranteed. The unknowns about the Interim Committee compound this, and there are still many questions to be addressed.

\textbf{Specialisation}

CAS welcomes the intention that specialisation will continue to be a key feature of the tribunals system. We also welcome the consistency in training which s31 should bring in training and review. A consistent and organised programme of training will greatly help the development of specialism and the achievement of Leggatt’s 2\textsuperscript{nd} ideal of an independent and skilled judiciary.

We would also welcome that as part of that training, experience was gained in environments other than academic ones, to give ordinary, legal and judicial members

\textsuperscript{11} AJTC website, available at \url{http://ajtc.justice.gov.uk/} (last accessed 23\textsuperscript{rd} July 2013)
\textsuperscript{12} By virtue of Schedule 9 s12(2)(a) amending s2(1) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013
\textsuperscript{13} Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, s2(1)(a)
\textsuperscript{14} Reiterated at \url{http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130307_MCSLA_to_CG.pdf}
a consistent grounding in the subject matter they are dealing with. For example, although non-judicial members of the Additional Support Needs Tribunal will come from on-the-ground practice, it would be desirable that judicial members of the tribunal were familiar with the whole additional support needs environment. For example, part of their training could involve spending time in a school or project dedicated to additional support needs.

To ensure the principle of specialism is upheld CAS feel strongly that where a member is cross-ticketed between chambers, that member should have the same degree of specialism in both chambers. To ensure this, it would be preferable if the appointments process was individual to a chamber which would ensure that if a member is cross-ticketed, they have been appointed on their merits for an individual subject.

To further ensure specialisation CAS believes that part-time appointments should be allowed and encouraged. This could allow a member to continue working in the field in which they have established a specialist knowledge. Consideration could also be given to increasing the flexibility of tribunals to sit in various locations at times not necessarily restricted to office hours which could widen the pool of potential candidates.

(3) The rules relating to appeals.

The introduction of new measures allowing tribunals to review their own decisions could be a positive step in proportionate dispute resolution where decisions do not have to be escalated to be reviewed. This could certainly be to the benefit of users who do not experience a more daunting appeal situation but there are safeguards to the provision of justice which should be adhered to.

The most prominent of these is that the constitution of a tribunal (whether one member or more) should be entirely different to the original constitution. Accessibility for users should not suffer, in terms of location or procedure relating to review of decisions, and the degree of specialism of the members should remain consistent.

As with other Tribunal Rules which are not prescriptive, s38(3)(b) gives very wide powers to those writing the rules. While this does provide flexibility, this flexibility should not be unchecked. Tribunal rules such as this should be the subject of public consultation to ensure that rules do not bring unintended consequences – in this case relating to excluded decisions.

s43(1) highlights the route of appeal from the Upper Tribunal to the Court of Session, which is in line with appeals under the TCEA s13(12)(b) but in terms of the user experience in both situations, this represents a fundamental difference. Tribunals are designed to be user-friendly, accessible in process and venue and inquisitorial. If a case is appealed to the Court of Session the venue is set in Edinburgh and an advocate must be instructed. If an appeal or second appeal is raised by the State party (particularly in resolving clarity on a point of law) there is a risk that the individual will face real financial hardship or will not be capable of continuing in an action as a result of being swept into the legal process.
At each point in the process, but particularly in the leap between tribunal and Court of Session, there should be far more consideration given to the use of alternative dispute resolution. The Court of Session, Upper Tribunal and First Tier Tribunal should be forums of last resort but when they are necessary forums for dispute resolution, the accessibility of the user should be of paramount importance.

(4) The rules relating to appointments/membership.

CAS welcomes the introduction of a consistent system of appointment of tribunal members in Scotland. We acknowledge the duty placed on the Lord President at s30 to publish a document outlining the appointments process for judicial and non-judicial members and would expect this document to outline a process of appointment which is fair, open and transparent.

CAS also thinks that there should be opportunity for part-time appointments of judicial and non-judicial members to be made. This has the potential to further specialism through on-going practise in the area of specialism, could increase the pool of candidates and could greatly help to ensure the continuation of hearings in a wide series of geographical locations and venues across Scotland.

(5) The rule-making power granted to the Scottish Civil Justice Council.

At the outset of comments made in relation to the Scottish Civil Justice Council, CAS should declare an interest as a consumer representative of the SCJC. Any comments made reflect the independent views of CAS.

Process is fundamental to the user experience and it is vital that the Tribunal Rules devised are sensitive to the needs of users. Rules should be guided by principles of openness, fairness, impartiality and go further to ensure affordability, accessibility – both in location and in procedure, freedom from technicality, expedition and specialism. These principles should facilitate an accessible system with the needs of users at the core.

As discussed above, CAS would recommend that in guiding the development of Tribunal Rules, such principles are enshrined on the face of the Bill in a similar way to the principles expressly included on the face of the Tribunals Courts and Enforcement Act 2007, ss2(3) and 22(4).

In the delegation to the SCJC, CAS recognises the benefit in terms of consistency between civil and administrative justice which the remit creates. However, in this consistency there is a danger which should also be recognised in the need to ensure the unique and individual characteristics of tribunals is maintained and allowed to develop. The freedom which tribunals have been allowed until now has led to an ad hoc system, but it has also led to a system which has allowed the organic development of characteristics suited to the varying topics which tribunals govern.

We welcome the intention to increase the membership of the SCJC to accommodate the specialism needed to inform work in relation to tribunals. We would also recommend that consideration is also given to extending membership to a consumer member who specialises in tribunals.
As discussed above, CAS welcomes the provision in schedule 9 to keep the practice and procedure followed in proceedings under review but it is key to note that this provision does not replace the function of keeping the administrative justice system under review. The whole review function must be taken up by an independent body.

If this body is not to be the SCJC, consideration should be given to who this body should be, the scope of their function, and their interaction with the SCJC. Also under schedule 9, CAS welcomes the establishment of a Committee of the SCJC on Tribunals. We do note however that other Committees of the SCJC are left to the Council to establish and this Committee will be the only prescribed Committee.

An on-going monitoring function of the rules as well as how the tribunals system is functioning is essential. With a prescribed Tribunals Committee and a duty to review practice and procedure, perhaps the Bill should include express provision for the SCJC to become the monitoring body for administrative justice as well as civil justice.

Lauren Wood, Policy Officer
July 2013
Preliminary remarks

1. What follows is largely drawn from the consultation response made by Employment Judges in Scotland to the Scottish Government Consultation on proposals for the Tribunal System in Scotland. That response was a unanimous response from all the Employment Judges in Scotland.

2. Employment Tribunals (Scotland) fall into the category of Reserved Tribunals. Employment law remains a matter reserved to the UK Government and the administrative support for Employment Tribunals in Scotland is provided by Her Majesty’s Courts and Tribunal Service (HMCTS). Employment Judges in Scotland come under the judicial leadership of the Senior President of Tribunals but also, in connection with certain matters, the Lord President of the Court of Session. As the President and Vice President of a reserved tribunal we have seen the development of the tribunals system in England and Wales, following upon the Tribunals Courts and Enforcement Act 2007, at first hand. That experience informs this response.

3. It is relevant to note, however, that although we are closely linked into the tribunal system in England and Wales, Employment Tribunals (Scotland) are distinct from Employment Tribunals (England and Wales) in terms of their legal jurisdiction, and certain aspects of their procedure. Furthermore Employment Judges in Scotland are appointed by the Lord President and would take their lead from him in certain matters. It is submitted that the experience which has been gained in occupying this rather unusual judicial territory may also be helpful when considering some of the issues which will face the Tribunal system in Scotland as it evolves and develops. Furthermore, as the Scottish Government noted in its consultation document (for example, paragraphs 1.5 and 2.1), what is proposed is intended to allow for currently Reserved Tribunals sitting in Scotland to be absorbed into the Scottish system in due course. It is for these reasons that a response to this call for evidence has been submitted.

Focus of these submissions

4. These submissions focus principally on:
   • the membership types described in the Bill;
   • appointment processes and the protection of the specialist nature of Tribunals and
   • the equality/diversity impact of what is proposed
   • some technical issues relating to the powers of the tribunals.

Membership types including diversity related issues

5. Clause 12 of the Bill makes it clear that the First Tier Tribunal and the Upper Tribunal are to “consist of its ordinary, legal and judicial members”. Clause 13(1) sets out
that an ordinary or legal member of the Tribunal only has judicial status for the purpose of “exercising the decision-making function” of the Tribunal in any case before the Tribunal. Clause 13(2) makes it clear “for the avoidance of doubt”, that a “judicial member” (a term restricted only to courts based judges by this Bill) has “judicial status and capacity” in connection with decision-making “by reason of holding judicial office”. It follows from this that legal and ordinary members of a Tribunal do not hold “judicial office” for any other purpose than decision-making in connection with a case.

6. If one considers the terms of the Tribunals, Courts and Enforcement Act 2007 (TCE Act) it will be seen that the drafters there did not find it necessary to take such a decisive approach. In fact what has happened in England and Wales in recent years, at least partly because of the drafting of the 2007 Act, is an increased recognition that “Tribunal Judges” in the First Tier and Upper Tribunal (that being what the legally qualified members of the tribunal are called) are an important component of the “judicial family” and worthy of respect. (While non-legally qualified individuals who sit on tribunals are not called “judges” they are referred to as specialist or tribunal members, which, it is submitted, is preferable to the rather patronising idea of the “ordinary” member.) One of the great potential advantages of the Lord President becoming the judicial leader of the Courts judiciary and those who sit on Tribunals (who cannot in this Bill model be described as the judiciary), was the prospect of creating a “judicial family” but unfortunately the Bill as drafted makes that, it is submitted, virtually impossible to achieve. It creates a situation where one would have what could (and no doubt will by some) be described as the “real judiciary” (those who operate in the Courts), and what will no doubt be considered as the “something less than Judges” class.

7. There is little doubt that historically, for a variety of reasons Tribunals, those who sit on them and the work that they do, have not been given the respect that is deserved, despite the fact that some Tribunals are engaged in extremely complex, specialist work. This has been acknowledged repeatedly by higher courts up to and including the Supreme Court. The decisions made by tribunals have a huge impact on the more serious problems that “ordinary” people face in their lives (issues like whether they can stay in the country, whether they should be detained in a mental hospital, whether their job has been taken from them unfairly or they have been subjected to discrimination at work etc). This Bill presented an opportunity to begin to remedy this situation but it singularly fails to do so.

8. It is understood that one of the reasons for the membership types described above being used in the Bill relates to concerns raised by a small number of individuals who either use or support those who use one particular tribunal which will be included in the First Tier. The concern seems to be that the Tribunal will become too “court-like” if those who are legally qualified to sit on the Tribunal are called “Tribunal Judges”. While it is understood that there was a minority view in England and Wales to the same effect prior to the implementation of the TCE Act there is no evidence that the use of the term “Tribunal Judge” in England and Wales led to a change in the way in which the Tribunals go about their business. The key to maintaining the approach and ethos of a Tribunal lies not in whether those adjudicating are called “Judges”, but in the Tribunal Procedure Rules which apply, the training which is given to the Judges and the tone which is set through the President and any guidance s/he may give. No attention appears to have been given to the other side of the argument which is that by making it clear through use
of the term “Judge”, that a tribunal is a judicial body one sends out a signal that the
system recognises that the type of matters that Tribunals deal with are just as important
to those affected as the matters dealt with in the Civil Courts. It is legitimate to ask the
question, “Why would those having important decisions made about their lives want that
to be done by someone who is not a “proper” Judge, as they might see it?” In the
Employment Tribunal we have certainly found that the fact that cases are dealt with by
an “Employment Judge” has had positive effects. Parties seem more inclined to treat the
proceedings seriously, to realise the importance of complying with tribunal orders and to
understand that what is decided is going to be legally binding. They also seem to
appreciate that due attention is being paid to their concerns because a “judge” is hearing
their case. We run a judicial mediation scheme and the fact that the mediators are known
to be Employment “Judges”, when not acting as mediators, appears (from feedback
received from a variety of sources) to be a highly significant positive factor in relation to
the chance of the case being resolved by this mechanism.

9. The fact that legal and ordinary members do not have “judicial status”, other than
when they are exercising their decision-making function in relation to a particular case,
would mean that it would be very difficult to impose upon them the judicial conduct and
ethics standards which apply to the “judiciary”, which impact far beyond the “judicial
decision-making” process. If those sitting on Tribunals are to be denied general judicial
status, then it could not be seen as fair to impose upon them the standards of conduct
expected of the judiciary beyond their decision-making role.

10. It should also be noted that those who sit on Tribunals are generally more diverse
(particularly when one considers the issue of gender) than those in the Courts judiciary.
The denial of general judicial status to that group runs counter to the objective of trying to
improve access to the judiciary in Scotland from a diversity perspective.

11. In recent years in England and Wales (and for the Reserved Tribunals in
Scotland), there has been more interaction between Courts and Tribunals judiciary. The
status of Tribunal Judges has improved over time. This is because of the legislative
backdrop including the judicial title given to “Tribunal Judges”. Courts and Tribunals
judges increasingly undertake joint training in judge craft (e.g. dealing with vulnerable
witnesses, assessing credibility, decision writing etc) on an equal footing and what has
emerged is that both groups can learn much from the other. Certain court based judicial
roles are now being opened up to Tribunal Judges: it is no longer a one-way street of
Court Judges being considered to have an innate ability to transfer their skills into a
Tribunal but the reverse not being possible. The fact that there is increased recognition
of the expertise of Tribunal Judges, even at the highest level of the Court system, can be
seen by a remark made by Baroness Hale on a recent “Law in Action” programme on
Radio 4 when she said “Why should someone who is a good and experienced Judge in,
say, the Employment Tribunal, not be able to transfer their skills into a Court based
role?”. This is indicative of the general direction of travel in England and Wales. Lady
Hale’s remark was in the context of the need to improve judicial diversity. She recognised
that Tribunal Judges are more diverse (particularly in terms of their gender make-up)
than Court Judges, and that it is important to ensure that Tribunal Judges (as they would
be called in England and Wales and in the Reserved Tribunals) have an opportunity to
progress through the judicial system on merit. The Bill, as currently drafted, undermines
such an objective.
Appointment processes and preservation of specialist nature of tribunals

12. In responding to the Scottish Government’s consultation paper, Employment Judges stated that they considered that some might view the proposal that Senators and Sheriffs should automatically become members of the Upper Tribunal and the First Tier Tribunal as contrary to the objective of maintaining the specialist nature of the tribunals. In making this comment they are raising an issue of principle and mean no disrespect whatsoever to their judicial colleagues on the Court of Session or Shrieval Bench. While it may be the expectation that in practice only suitably qualified and experienced court judges will, in fact, sit in the Tribunal, the approach proposed does run the risk of creating the perception that the specialist nature of Tribunals is not in fact protected. Furthermore, the appointment of all Sheriffs to the Upper Tribunal creates the impression that Sheriffs are more senior in the judicial hierarchy than any of the Tribunal “judiciary”. That is not a message which the system, if it which wishes to ensure that tribunals are seen as a respected part of the judicial system, should be sending out.

There is no rationale set out in the Government’s consultation document for this particular proposal other than the desire to make sure there is sufficient judicial resource available for the tribunal. It is submitted that an alternative course would be for the legislation to give the Lord President the power to appoint court judges to the Upper Tribunal on the basis of relevant experience and knowledge of one or more of the areas of law coming within the jurisdiction of the Upper Tribunal. The same approach could be adopted in connection with appointment to the First Tier Tribunal. In essence, the issue which arises is why judicial office-holders falling into a named category should be automatically appointed to Tribunals on what appears to be a “just in case they are needed” basis without there being any need to discern whether those involved have the necessary knowledge and experience? Given the extent to which such an arrangement is likely to undermine the perception that the specialist nature of Tribunals is being preserved, one might expect that a very compelling case would be made as to why what is proposed is necessary.

13. Consideration also needs to be given to the diversity implications of the suggestion that members of the First Tier and Upper Tribunals should be appointed largely by dint of the fact that they are members of a small group who hold particular offices. If holders of the offices in question are not reflective of the diversity of the judicial population as a whole (including the current “Tribunals judiciary”), then there is a clear risk that one simply propagates any current gender or other imbalance in the wider judicial system in the new Tribunal structure.

14. Looking ahead, we have little doubt that if in the future it was to be suggested that Employment Tribunals (Scotland) should devolve and fit into the structure proposed by the Bill, Employment Judges would not wish to do so. There is a serious risk that some of them would resign and that others would seek to move to the Employment Tribunal in England and Wales (which they would be qualified to do). In essence there would be little to attract the best employment lawyers in Scotland (which is what we need to attract) to become something called a “legal member” of a tribunal who does not have full judicial status. It is suggested that users of the Employment Tribunal system would also be unhappy because the status of the Employment Tribunal in Scotland would be reduced,
compared to that of the Employment Tribunal in England and Wales. That would not be a desirable outcome.

Additional points on judicial diversity

15. While we recognise the importance of ensuring that the Scottish President of Tribunals is a person of sufficient standing and authority to ensure that the interests of the system are addressed and protected at the highest level it is an unavoidable conclusion that by restricting eligibility to Senators one automatically builds in a condition which is likely to have a disparate impact by (for example) gender and race, given the current characteristics of the pool from which a candidate will be selected. In their response to the consultation, Employment Judges in Scotland, having specialist expertise in discrimination law and good equality practice, considered it appropriate to at least flag this as an issue. (It is understood that other organisations/groups, well qualified to comment on such a matter, made the same point in their responses to the consultation.) It may be suggested that Tribunals “judiciary” all have the option of applying to become Senators if they wish to be considered for such a role but that, in fact, would not be so in the vast majority of cases, given the formal qualifications required for that role. Excellent tribunal “judges” who are solicitors rather than advocates or solicitor-advocates would not be qualified to apply and it is in the “barred” group that one would find a high proportion of women.

Miscellaneous points

16. Clause 42 gives the Upper Tribunal the power to make findings of fact. In the Employment Tribunal context the tribunal is the “master” of the facts and it is not open to the EAT to make new findings of fact. A number of negative unintended consequences may flow from giving the Upper Tribunal the power to make factual findings. An alternative course may be to allow an application for review (or reconsideration) to be made on the basis that the first tier tribunal failed to make essential findings of fact on the basis of evidence before it. That would give the First Tier tribunal the chance to remedy any defect and still leave open the option of a later appeal on a point of law.

17. It is noted that Clause 68(5) suggests that a Chamber President should be able to give directions to a Tribunal on “the application or interpretation of the law”. Such a provision undermines the concept of judicial independence. No-one should be able to direct a Tribunal on the application or interpretation of the law. That is not to say the Chamber President cannot seek to guide Tribunals “judiciary” through appropriate training but that is an entirely different proposition from issuing directions about how the law is to be applied or interpreted.

18. In the Employment Tribunal we have a “slip rule” which allows an Employment Judge of his or her own volition to correct an accidental slip without going through a formal review process. This can be a helpful, efficient and cost effective way of dealing with minor errors which require to be corrected.

19. In schedule 7 there appears to be no power to make open ended appointments. While there may be no salaried judiciary in the devolved tribunal system at the moment
that may well change. Outstanding individuals (whom one would wish to attract) will not necessarily be interested in a fixed term appointment.

20. With reference to Schedule 8, paragraph 15(1) it is submitted that only a full time judicial office holder should have authority to sit on a fitness assessment Tribunal in respect of a member of a Tribunal.

21. We have no power in the Employment Tribunal to appoint a curator in appropriate cases. We have found this to be a significant problem on occasion. While we are unclear of the position in devolved tribunals as they currently stand we suggest that consideration be given as to whether it might be helpful to specify that a tribunal has the power to appoint a curator.

Shona Simon  
President  
Employment Tribunals (Scotland)

Susan Walker  
Vice President

2 August 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Faculty of Advocates

The Faculty of Advocates is asked to assist the Scottish Parliament's Justice Committee and Finance Committee by providing views on aspects of the Tribunals (Scotland) Bill, as introduced on 8 May 2013. The Faculty reiterates its support in principle for the proposed reform. It confirms that it considers that the new structure would be an improvement on the existing lack of coherent structure, which is a consequence of the piecemeal establishment of various tribunals over decades. The Faculty also notes the current Scottish Government Consultation paper on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service. This proposal would also mean that it was sensible to develop a more coherent and unified Tribunal structure. The Faculty would however wish to draw attention to a number of matters which relate to the proposals in the Bill. This response is a combined response to the inquiries of the two committees, together with the current Scottish Government consultation.

The announcement by the UK Government in June 2013 that reserved Tribunals will not be devolved in the foreseeable future does have some serious implications for the Bill. We note that the currently "Listed Tribunals" will probably deal with fewer than 4500 cases per annum (taking figures from para 11 of the Consultation paper on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service as a guide). In particular, the very extensive jurisdictions of Social Security and Employment will remain outside the new structure for the foreseeable future\(^1\). Given the case load which it is likely would be dealt with under the proposed new system compared to the substantially greater volume of cases dealt with by the reserved Tribunals, the effect will be to produce a Rolls Royce structure for a relatively small number of cases. We appreciate, however, that it may be seen as desirable to create a structure capable of absorbing reserved tribunals and we have already commented on the desirability of this.

Within the new structure, the Faculty welcomes the preservation of the Lord President as judicial head, and new leader, of the Tribunal system in Scotland. This is the best guarantee of fairness and impartiality. It notes the supplementary provisions which enhance this.

The Faculty has already stated its reservations about the suggestion that the new structure must have as its President a Senator (High Court Judge), and it reiterates those reservations for the following reasons: (i) the cost of a Senator’s time may be regarded as disproportionate for what would currently be a tiny jurisdiction; (ii), few, if any, Senators have recent hands on experience of these Tribunals; and (iii) a requirement that the President must be a Senator may be regarded as narrowing the

\(^1\) There is a reference to the Pension Appeal Tribunal in the “Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service” - paras 11 and 12: although this is currently administered by the STS, it appears to the Faculty that it is correctly not included in the Listed Tribunals as it falls within reserved functions in the Scotland Act 1998, Schedule 5, F4.
pool of prospective candidates unnecessarily. It is for consideration whether the position should be the subject of an appointments procedure.

The Faculty does not take issue in principle with the proposals to recruit legal and lay members, which meet objectives of openness and fairness. However, the Committee's attention is drawn to practical difficulties which are already arising, and which will continue to arise, particularly while most judicial salaries and pensions remain reserved under the Scotland Act 1998. Parity with comparable judicial office holders will have to be considered. A pension scheme will need to be put in place for part time judicial office holders, following the decision of the Supreme Court of the United Kingdom in *O'Brien v Ministry of Justice* [2013] ICR 499. The Ministry of Justice has promised to put this in place; the Scottish Government has not as yet, although the decision in *O'Brien* is equally applicable in Scotland. Terms of Appointment will therefore need to be thought through with care, and we urge the Committee to ensure that specialist legal advice is taken on this. These comments apply to the “lay” judiciary, who will often include medical practitioners, as well as to legally qualified chairpersons. In short, while the relevant sections of the Bill do not attract any concern, some practical issues underpinning these appointment proposals are not being articulated, much less consulted on.

The appointment of judicial tribunal members to one tribunal, with the possibility of transferring them to work on another is not opposed in principle, but the Faculty notes that in practice this can prove difficult. Presidents of one Tribunal system, or their Court system equivalents, sometimes object to the transfer in of such people for various valid reasons. The Faculty suggests that there should be a clause in the Bill to preserve their right to control this, as it is in the public interest that specialist tribunals are staffed by specialist judges. This saves hearing time, and enables the unrepresented applicants to put forward their cases more effectively. Moreover, the recruitment of lay members is influenced by the nature of the jurisdiction, so (for example) people with experience of children with disabilities will be useful to the Additional Supports Needs Tribunal, and psychiatrists are essential for Mental Health Tribunals, but they would not necessarily be best used the other way round. It is important, in order to achieve the objective of fairness and impartiality, and also sensitivity to the needs of particular groups of tribunal user that there is judicial control over this issue. To take the example of the Mental Health Tribunal, tribunal members have developed expertise through experience and training in providing a procedure that meets the needs of those using the system, who may be ill and distressed but still willing and able to some extent to participate in hearings. There is a concern that transfer into a specialist tribunal of this type of members who do not have that expertise and experience (at least in the absence of substantial and jurisdiction-specific training) will be a step backward for tribunal users. The proposals to organise First Tier Tribunals into chambers, and the Upper Tribunal into divisions, are subject to the same caveat.

It should also be noted that there are very considerable cost implications to cross ticketing, as a great deal of training can be required. The Faculty is surprised by several of the conclusions reported to the Finance Committee which appear to underestimate costs on several fronts. See for example paras 31 (training); recruitment by the JAB, which we expect to be significantly more expensive than current Tribunal recruitment methods (para 15); and the alleged absence of cost
considerations for establishing the Upper Tribunal (para 36). A new computer system for processing appeals, which is compatible with the various totally separate systems in the Listed Tribunals, will surely have cost implications. However, this is really beyond the expertise of the Faculty, so we say no more.

The Faculty appreciates that there will be more Tribunals to add to the first List, both existing and new. For example, it had been suggested that there might be a new environmental tribunal in the Tribunals Bill to deal with the appeal rights in the Regulatory Reform (Scotland) Bill and other environmental legislation. Although the Bill does not contain any such provision, it is possible that future developments might see an environmental tribunal and a housing tribunal (as has also been widely mooted in the past, and recently in the Consultation on the Introduction of a New Housing Panel for Scotland, which the Faculty strongly supported). The Faculty is not clear what is meant by the reference to appointments which will continue to be made by the Secretary of State at para 15 of the FM. Does this refer to miniscule jurisdictions such as appeals against decisions of the Dentists' Vocational Training Board? If so, there is every reason to include those jurisdictions in the List, as they are vulnerable to challenge as not being Article 6 compliant.

The Faculty notes that the scheme of rule-making in the Tribunals is that Rules are to be made by a Tribunals Committee of the Scottish Civil Justice Council: schedule 9 paragraph 12. It agrees with that approach. It also notes, however, that until the establishment of that Committee Rules may be made by the Scottish Ministers. That is undesirable on constitutional grounds; Scottish Ministers should have the same rights as other parties to proceedings before the tribunals to comment on proposed rules, but no power to write them. This demonstrates the need to establish that Committee no later than the coming into force of the substantive provisions of the Bill.

Generally the Faculty would favour the writing of rules by ad hoc committees of tribunal judges. This would mean cost saving - see FM para 30. This applies to the rules relating to appeals and to the rules relating to First Tier business. There appears to be a long term objective of standardising the rules across the Tribunal jurisdictions, and the Faculty would caution that this is highly unlikely to work. Time scales for detained mental patients and tenants with problems with their landlords would be completely different, for example.

The proposed provisions for Review at section 38 are welcome, but they seem to be incomplete: this may be deliberate, as the grounds would be different according to the jurisdiction, so subsidiary legislation may be contemplated. The Faculty notes that an articulated basis for review is essential, as an open ended right to seek review would otherwise be used by most disappointed applicants/appellants. The chairman/judge concerned is assisted where defined grounds are stated, as he can say none have been invoked where that is applicable.

The broad scheme of appeals from the first-tier tribunal to the Upper Tribunal, and from the Upper Tribunal to the Court of Session, are satisfactory. The Faculty however notes with concern the terms of section 45 (4), which mirror the provisions relative to the UK Upper Tribunal in the Tribunals, Courts and Enforcement Act 2007 section 13, as recently amended by the Crime and Courts Act 2013 section 23 to apply to Scotland. This superficially-reasonable language has its genesis in problems
of repetitive appeals in the English courts which have little or no relevance to the Scottish system, and it has been interpreted with a startling lack of liberality by the English courts. In *SA v Home Secretary*, [2013] CSIH 62, the Inner House of the Court of Session held (following English authority) the test to be so ‘*stringent*’ that only ‘*rare and exceptional*’ cases could survive it: see paragraphs 36 to 44. The Faculty considers that this sets the test too high in matters which may be of critical importance to the citizen, and that section 45 as presently drafted is a missed opportunity to apply a test for appeals from tribunals to the Court of Session which would genuinely reflect Scottish needs and conditions, which could indeed be competently applied by this Bill to appeals from both Scottish and UK Upper Tribunals.

The Faculty notes that there are several very significant provisions in Part 7, including powers to charge fees (s70) and award expenses (s59). These powers are familiar in a court context, but are not normal for Tribunals; thus the extensive recent concern as to the introduction by the UK Government of fees in the Employment Tribunal. In some jurisdictions the charging of fees would be unthinkable, such as the Mental Health Tribunal. While it is said that there is no present intention of changing the status quo, these powers raise issues of principle and we would welcome the opportunity to comment on them. However, the invitation to comment does not mention these matters, so we assume that consultation on this aspect will take place later.

Faculty of Advocates
6 August 2013
Justices Committee

Tribunals (Scotland) Bill

Written submission from Glasgow City Council

1. Is the new structure is an improvement on the existing structure?

Glasgow City Council (“the Council”) is of the view that the new structure is an improvement as it brings tribunals into an independent, unified and coherent structure which sits within a clear governance framework.

2. Does the Bill guarantee openness, fairness and impartiality in tribunal procedures, and will it allow for sufficient specialisation?

The Council is of the view that the new structure provides for greater impartiality and better access to justice. The provision of specialist chambers with bespoke rules ensures that sufficient specialisation is retained.

The Council is of the view, for example, that the new Learning Chamber could be perceived by the public as more independent than the current Education Committees which are utilised in dealing with appeals for placing requests. However the council does have a commitment to provide best value and there is a concern that the tribunal fees (Section 70) will be an added expense that will have to be accounted for when resources are already depleted. Glasgow City Council has a large volume of placing request appeals in June each year and it is assumed that other authorities will be in a similar position. Would the tribunal chamber be in a position to deal with a large volume of appeals over a two week period?

The Bill suggests that the detail of the allocation of tribunal functions between chambers will be specified in regulations. It is presumed that those regulations will be the source of the rules in relation to separation and specialisation.

3. The rules relating to appeals.

The Council is of the view that the new appeals process, and in particular the introduction of the Upper Tribunal as an appellate body, provides the public with better access to justice.

The Council welcomes the clarification that an appeal must be on “arguable grounds” in addition to on a point of law.

4. The rules relating to appointments/membership.

The Council has no comments to make in relation to appointments/membership.

5. The rule-making power granted to the Scottish Civil Justice Council.

The Council has no comments to make in relation to the power granted to the Scottish Civil Justice Council.
6. **Any other aspects of the Bill.**

The Council would request further information on the Government’s proposals in relation to how the new system will be funded. For example, will local authorities be expected to provide any funding towards the tribunals?

Glasgow City Council
2 August 2013
Justice Committee
Tribunals (Scotland) Bill

Written submission from the Judicial Appointments Board for Scotland

Purpose

1. The Judicial Appointments Board for Scotland (the Board) is responding to the Justice Committee’s call for evidence on the Tribunals (Scotland) Bill.

Rules relating to appointments/membership

2. The Board wishes to restrict its views to Section 75 schedule 9 part 2, in the Bill, *Consequential Modifications* which seeks amendment to the Judiciary and Courts (Scotland) Act 2008 to bring the tribunal appointments within the Board’s remit.

3. The Board's fundamental purpose is to secure that the process of judicial appointment in Scotland is independent, transparent and fair. It expresses its statement of these aims in the following terms, reflecting its statutory duties:

   - To attract applicants of the highest caliber, recognising the need to encourage diversity in the range of those available for selection, and
   - To recommend applicants for appointment to judicial office on merit through processes that are fair, transparent and command respect.

4. The Board’s understanding is that all tribunal appointments will be viewed as judicial regardless of whether the appointees are legally qualified. The Board welcomes the opportunity to be involved in Tribunal appointments, and proposes to adopt an approach that will uphold the continued independence of the judiciary. In particular, it welcomes the proposal that the Bill will introduce a common system for appointments to the Scottish Tribunals which will ensure that members have security of tenure and independence from the executive.

5. The Board notes however that the draft Bill does not propose that it should become involved in any re-appointments to tribunals. While recognising the element of pragmatism in this, in that, for example it may ease the burden of transition to the new system, the Board comments that it may delay by several years the practical effect of the change in the appointment process that the Bill is aiming to achieve. The alternative would be to have the Board oversee the re-appointments process. Any perceived benefit to the independence and transparency of re-appointments would have to be set against the resource implications for the Board.

6. Given the importance of what it is seeking to achieve, the Board offers for consideration the proposition that the relevant statutory provisions should be spelled out on the face of the Bill rather than by a complex series of amendments to the 2008 Act.
7. The Board notes and welcomes the following features of the draft Bill in extending to tribunal appointments the provisions of the Judiciary and Courts (Scotland) 2008:

- in carrying out these functions the Board is not subject to the direction or control of any member of the Scottish Executive or any other person.
- the selection of individuals to be recommended for tribunal appointments will be based solely on merit and with regard to encouraging diversity in the range of individuals available for selection.

8. The Board has considered how best to discharge the new statutory responsibilities that the Bill will bring. At present, for the appointments within its remit, its approach is that Board Members are involved directly in the process of sifting, interviewing and making recommendations. The Board’s view is that this would not be sustainable given the caseload of Tribunal appointments, so that the work would have to be delegated to panels, which might include Board members or might have Board members as supervisors or assessors to quality assure the process.

9. In the Board’s view, delivering this approach will require the following:

- a requirement for an increase of two in the Board membership (one lay and one legal member) and additional administrative support to cover the additional workload.
- the option to have tribunal appointment panels supplemented where appropriate with individuals with relevant professional experience or other qualities.
- the option, therefore, to co-opt from a pool of individuals approved to undertake interviewing on behalf of JABS. The Board is currently in correspondence with Scottish Government officials on the need for a provision in the Bill to allow the Board to co-opt specialist or independent panel members. The Board understands that the Government tribunals policy team are considering this issue and the Board further understands that the Scottish Government may seek an amendment at stage 2 of the Bill to include such a provision.

Sir Muir Russell
Chairing Member
22 July 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Lands Tribunal for Scotland

Summary

This summary addresses the “key issues” referred to in the Call for Evidence. Our general response below takes a wider approach. We set out the reasons why we consider that LTS should be excluded from Part 1 of Schedule 1 and treated as a separate pillar of the new system. This material does not fit neatly under the six points specified as key issues.

Key issues

1. The tribunals in the list in Schedule 1 are all active and comparatively modern. Much work has gone into each to tailor the workings to the needs of their users. We think they work quite efficiently by that test. We are not persuaded that the approach of putting a number of tribunals into one and then seeking to discover how to preserve the characteristics of each is an efficient use of time and resources. But English experience shows that it can be done and as a great deal of time and effort has already been spent to try to deal with the many problems which arise, we no longer seek to suggest that it is inappropriate as a general approach. However, after much discussion we have concluded that it would make more sense to leave LTS as a separate pillar rather than try to squeeze it into the new system.

Much of the difficulty will lie in detail. It is proposed that most of the detail should be left to Scottish Ministers to deal with by way of Regulation. We do not think this satisfactory. For example, in relation to the LTS we are satisfied that if we are to go into a unified tribunal system it should be at Upper Tribunal level. This is said to be Scottish Ministers policy but the proposal is that they be free to change at any time. We think this is a matter of sufficient importance to require primary legislation. Effectively the LTS functions in the same way as a court in its procedure, its charging of fees and its rules for expenses. It is quite different from other tribunals.

2. The need for specialisation arises inevitably from the very different needs of users of the different tribunals. We think that the new system will inevitably tend to restrict that specialisation. Putting all tribunals into one and then seeking to find ways to make sure they remain separate in their functioning, is not an obvious way of improving specialisation. But we accept that with sufficient time and effort, administrators might be expected to learn enough about the needs of each to be able to put in place new systems which will overcome the restraints of the single tribunal approach. So the new system is not fatally flawed, simply an unnecessary attempt to demonstrate modernisation. We are quite satisfied from our much discussion with fellow judicial heads and others that the goals of openness, fairness and impartiality are well on their way to being achieved in each tribunal. Some tribunals may need change to make it absolutely clear that they have no connection with a “sponsoring department”. They can be expected to benefit from the common leadership of the Lord President. But, we have never heard of any criticism of the
LTS in any of these respects. We have welcomed the learning process which followed the shared administrative support of STS and the practice of regular meetings of tribunal heads.

3. The rules relating to appeals are of particular importance for LTS. Currently we have, in practice, appeals to the Inner House on points of law and appeals by stated case on valuation matters to the Lands Valuation Appeal Court (which in practical terms simply functions for our appeals in the same way as a Division of the Inner House.) We see no justification for change. The material with which we deal is appropriate for appeal to the Court of Session and the status of our legal members properly requires a court of three judges if our decisions are to be overturned. The current proposal to put LTS into the Upper Tribunal goes some way to meet the needs of LTS in relation to appeals but problems remain and, in any event, we think the citizens' rights of appeal need statutory protection. They should not be left to the Regulatory powers of Government.

4. Much of the work of the LTS requires highly qualified specialists. It would not be appropriate to appoint either Sheriffs, *ex officio*, or, say, surveyors simply because of their appointment to some other tribunal.

5. Making rules for specialist tribunals requires a specialist knowledge of the working requirements of the particular body. We think that any goal of establishing common rules is likely to prove a massive impediment to efficiency. It will take a lot of time for any person to acquire adequate knowledge of the needs of each tribunal. While we welcome the idea of guidance from a Council, we have no doubt that the aim should be to maximise the rule making capacity of the clerks and president of each tribunal. It might be added that all discussions of rules among judicial heads have tended to reveal the importance of the specific requirements of each tribunal. It is apparent that current heads are capable, thoughtful people with clear understanding of the workings of their own tribunals. We see no sound basis for the view that a Rules Council could provide a more efficient way of working.

6. The aim of common standards and say, standardised appeal systems should not have priority over an efficient tribunal system geared to nature of the very different issues in dispute. Fair and impartial decision making is required but, beyond that, treating standardisation as a goal is liable to distract resources from consideration of how each system can best deal with the needs of their own users.

We are aware that the Policy Memorandum talks of preservation of the “specialist ethos” of the Tribunals: eg at para [96]. Putting it in such abstract terms may obscure the reality which is that the specialist tribunals have been able to develop procedures tailored to the needs of their users. This is not a matter of “ethos” but of practicality. It may be added that we do not take the view that courts and tribunals are different creatures. There is nothing special or specialist about either which has to be preserved unless it serves the aim of meeting the needs of the public as users. Both should aim to be as flexible and informal as possible, recognising that formality is a valuable tool in any dispute resolution process but not to be insisted on for its own sake.
RESPONSE

General comment

1. The individual tribunals provide a service tailored to the needs of their particular users. Although we saw that some changes were needed we thought that the approach of putting all into one and then seeking to preserve the specific characteristics of each would be a difficult and time-consuming task. We did not see what it was intended to achieve. Had it not been adopted in England it is unlikely that it would ever have been viewed as an option here. However, much time was eventually spent on it and we came to see no point in trying to resist the change. In more recent discussions our efforts were, therefore, concentrated on the question of how the LTS could best be brought within the new scheme.

2. It became obvious that the LTS could not easily be fitted into the First-tier Tribunal. This was accepted by Ministers and it is now proposed that LTS be created as a separate division of the Upper Tribunal: Policy Memo [46]. This was the approach taken in England and we accept that it would make it easier to address the main problems - including the question of appeals. However, it is not a solution which fits the concept of the First-tier as a first instance tribunal and Upper Tribunal as an appellate body and in any event difficulties remain. When we came to make a final assessment for the purposes of these submissions we were driven to the conclusion that the preferable course would be to leave the LTS as a separate pillar under the new scheme rather than bring it into a single tribunal even at the Upper level. This was the approach adopted in England for the Employment Tribunals and it can, therefore, be seen to be consistent with the aim of creating a modern system. It would be consistent with any long-term policy of positioning tribunals so that they could come to be amalgamated with the courts if it was ever decided that this was the way forward. Indeed amalgamation of LTS with the courts as a “one-off” would be a simple process compared with trying to unite a multi-headed unified tribunal with the courts.

3. This paper goes on to describe briefly the work of the LTS and the reasons why it cannot easily be fitted into a single tribunal structure. It looks further at the justification for leaving LTS as a separate pillar. It then considers some of the main issues which arise in the context of the present proposal to make it part of the Upper Tribunal and finally looks at some points of detail which will require to be resolved, recognising that the Committee is at this stage concerned with policy but also that detail cannot be ignored.

The type of work we do

4. LTS functions in the same way as a court. It is not properly described as part of the Administrative Justice system. It deals with a comparatively small number of high input cases. It has four main areas of work. Disputes over assessment of rateable value for the purposes of commercial rating and disputes over compensation where land has been taken compulsorily for public purposes are areas which require specialist expertise in property valuation. Such expertise is also required in our jurisdiction relating to liability and compensation in claims arising out of mining subsidence or flooding although we do not have many such cases. We
think that the level of decision making required in all such cases is similar to that of decisions in the Court of Session. We follow standard court procedures with the pleading stages of application and answers; a period for adjustments; and requirements to lodge supporting material within certain specified period before the hearing. Hearings typically involve senior counsel and follow standard litigation procedures. The usual rule of expenses following success is applied. Currently we think we are the only tribunal in which awards of expenses are the routine. Some tribunals, such as the Employment Tribunals do have power to make an award of expenses to mark unreasonable conduct. In most tribunals, parties just pay their own expenses. We are unusual in charging fees although we note that Employment Tribunals now have power to do this.

5. Another major area of work concerns applications for variation or discharge of title conditions. These arise in a variety of circumstances and are of varying complexity. Most common are urban cases where a householder wish to build an extension and his titles give the neighbour a right to object – to protect a view or perhaps just to prevent loss of sunlight. A recent typical example in a rural setting was a case where the titles gave a householder right of access over a farm track. The farmer owner wished to change the route. In such cases, the Tribunal has to decide whether it is reasonable to change or vary the condition. This type of work requires an understanding of property matters and often also an ability to assimilate technical evidence – in our rural example, evidence of the durability of different road building techniques. It does not always require the same levels of judicial ability as are required in connection with rating or compensation although complicated and heavy cases can arise. (One involved the economics of Aberdeen Harbour when the proposal was to remove its apparent right to a mainline rail link.)

6. We also have jurisdiction to determine disputes over matters of title by way of appeal from decisions of the Keeper of the Registers in relation to registration of title. This area involves specialist legal ability in the law relating to rights in land. It is similar to the type of disputes over title issues which come before Sheriffs or judges in the Court of Session. The same can be said of our jurisdiction in relation to the right to buy legislation which originally applied only to tenants of public sector housing. (The scope of right to buy has grown but the number of disputed cases has dwindled almost to nil.)

7. The way we decide all disputes is very similar to litigation in court. Typically large bundles of written evidence will be produced on each side: plans, maps, photographs, planning materials, reports and the like. Expert witnesses will appear on each side and counsel are often instructed. A hearing may run for several days. We will usually have a site inspection. We may take several weeks to prepare a decision setting out our reasons.

Size

8. LTS is a small tribunal. We currently work with the equivalent of about two and a half members. We have one full time legal member, John Wright QC (who has been asked to give evidence to the Committee and who will provide a written summary of his evidence.) Technically the president, Lord McGhie may be viewed as a full-time legal member but he combines the role with that of chairman of the
Scottish Land Court – which works from the same floor at George House but is quite separate in its organisation and function. We have two part-time surveyors each presently committed to 40% equivalent. The Tribunal is supported by a team of three specialist clerks.

Further detailed information about the Tribunal may be found in Appendix 1.

Our concerns about the single tribunal concept in relation to LTS

9. The main policy aims of change appeared to be the establishing common leadership and providing reassurance for users that the tribunals were independent of those whose decisions were being challenged. Neither of these had been perceived as problems affecting the LTS. LTS operates, like a court, on a party against party basis and it has never been susceptible to suspicion that it is too close to Government. It is true that decisions on valuation for rating purposes or for compensation for compulsory purchase can usually be seen to involve either local authorities or the State as a party. But, in such matters, the Tribunal functions in the same way as a court. The connection of an arm of Government as a “sponsoring department” has never existed. Accordingly, in relation to the issues of ensuring separation of tribunals from Government which has been a problem for some tribunals, it is not thought that there is any need for change as far as LTS is concerned.

10. The administrative aim of reducing overlap, eliminating duplication, ensuring better deployment and sharing of available resources has been approached by accepting the common support offered by the STS. We are always seeking to identify specific matters where improvements can be made and closer contact with STS and other tribunals has been of some modest assistance in that respect. However, in our many discussions with civil servants and with the heads of the other tribunals it became apparent at every turn that there were good reasons for most of the different systems and procedures currently in place.

11. A goal of common standards and procedures has an abstract attraction. It might provide a tidy system on paper. But it must not blind us to the need to take a proportionate approach. The amount of money and time committed to resolution of a dispute should be proportionate to the nature of the matters in dispute. A system to allow the citizen relief from an unfair parking charge would not be expected to have the same standards and procedures as a system designed to determine liability to pay large sums of money or to determine whether major permanent changes were to be made to your home or environment. We think that to aim for common standards and procedures, including review and appeal, as a significant plank of policy risks creation of a serious impediment to identifying the most efficient way of serving the different needs of individual users. The start point ought to be identification of an efficient way of meeting the proper needs of the parties. That is best done through specialist tribunals with as much freedom as possible to adapt to these needs.

Our conclusion that it would be better to leave LTS as a separate pillar

12. Having given careful consideration to the whole issue again we conclude that even if unification of certain of the listed tribunals is the best way forward for them,
that is not the best way to deal with the LTS. We are satisfied that retaining essentially the present structure of LTS as a separate pillar within the new Tribunals structure provides a better outcome in terms of the main policy aims. The oft repeated aim of Government is that after the tribunals are unified they will be able to continue to function substantially as before. We accordingly hope that, even at this late stage, careful consideration will be given to the specific question of whether LTS should be squeezed into the unified Tribunal or left to function as a separate body. After full consideration of the detailed implications we see nothing but great expenditure of time and trouble from any attempt to standardise the procedures of LTS with procedures designed, say, for protection of patients with mental health difficulties and it is clear that even the rented housing bodies dealing with property and using surveyors have to deal with issues far removed from the work of LTS. The aim of bringing LTS under ultimate control of the Lord President could be achieved in the same way as the Employment Tribunals were brought under the authority of a Senior President in England: sec 3 of the Tribunals Courts and Enforcement Act 2007. Various other minor changes to the Bill would be needed.

13. It has been accepted by Ministers that significant difficulties would arise in making LTS a chamber of the First-tier Tribunal we need not now deal with that possibility. The solution of making the Lands Tribunal in England part of the Upper Tribunal was the one adopted in England. However, although there is a broad similarity between the jurisdictions of the LTS and the original English Lands Tribunal, the latter had a large appellate jurisdiction. Its new role under the label of “Lands Chamber” as part of the Upper Tribunal is consistent with the aim of creating that body as being predominantly an appellate structure. LTS has no true appellate functions at present. Although placing it in the Upper Tribunal can be seen to provide a pragmatic way of beginning to solve the main problems, it is not an elegant solution. Difficulties remain.

Matters to be resolved if LTS was to become a division of the Upper Tribunal

14. The main matters which would have been very difficult had LTS been squeezed into the First Tier, related to appeals and the qualifications (or status) of members. Having the LTS as a separate division of the Upper Tribunal does attempt to address these issues. However, questions do remain about appeals and it is appropriate to look at these in more detail before turning to other difficulties which would require attention if LTS was to be part of the Upper Tribunal.

Appeals

15. We recognise that part of the policy behind the new scheme was the perceived need for a common system of reviews and appeals: Policy Memo para 2. We think it important to recognise that different types of appeals are required in different contexts. A consistent policy requires that issues which are essentially the same should be dealt with in the same type of way: not that differences must be ignored. A right to appeal against a parking fine does not need such an elaborate system as the right to appeal against a commercial rating assessment. Right to appeal against compulsory detention in hospital requires a much speedier process than an appeal against a rating assessment. It would be a serious mistake to allow the desire to have an apparently “coherent” tribunals system on paper to over-ride the practical requirements of different jurisdictions. Restricted rights of appeal may
be quite appropriate in some contexts. Many tribunals are, in effect, appeal tribunals hearing appeals from considered decisions of officials. There is no self-evident need for a further appeal from such tribunals and if such a right of appeal is given it may make good sense to restrict it to a point of law and to require special permission for it to proceed. But decisions of LTS are first instance decisions after fully fought litigation. We have heard no discussion of policy pointing to a need for change in relation to the work of LTS. There is no evidence of any difficulties arising from the current provisions for appeals from LTS which would be addressed by the proposals in the Bill.

16. The proposals for appeals from the Upper Tribunal are set out at sec 43. They would limit the existing appeals by requiring the Tribunal or Court of Session to be satisfied that there were arguable grounds for appeal: sec 43 (2) (b) and (4). We recognise that the scope of appeal from our decisions is not a matter upon which our views have any special weight. However, appeals currently are not so restricted and we are not aware of any public demand for change. In practice, the sanction of expenses is sufficient to eliminate unarguable appeals and the requirement to seek leave would simply add another – albeit minor – layer of expense for parties.

17. In short, our own view is that the current rights of appeal to the Inner House and to the Lands Valuation Appeal Court (the LVAC, which is, in practical terms, much the same as the Inner House) should remain in place. We have no doubt that LTS appeals normally merit the attention of the Inner House. We have carried out an examination of the detail of all appeals over a ten year period. We have not identified any which were not appropriate for that Court.

18. One further point which must be kept in mind is that most cases in relation to valuation for rating are heard by Valuation Appeal Committees. They are constituted in a way which is quite different from other tribunals. (They will submit their own material explaining why it would be difficult for them to be fitted into the new First-tier.) Appeals from them are to the LVAC. It is important to stress that there is no appeal to LTS from decisions of the Committees - other than on the purely procedural issue of whether a case should be heard by LTS instead of a Committee. The Committees are unpaid bodies. They cope with a wide range of complex matters but the general scheme of valuation appeals is that LTS hears the more difficult cases. It would plainly be inappropriate if appeals from LTS were to become more restricted than appeals from the Committees. (It appears of course that the intention is that the Committees be brought into the First-tier and that their right of appeal to LVAC is to end. We think the present system works quite well. There is a great benefit in the right of appeal from Committees to LVAC in that it gives authoritative guidance quite quickly. It is a system which has stood the test of time.)

19. The scope of appeal on points of law is not limited to questions of interpretation of black-letter law. For example, if a Tribunal has taken into account irrelevant facts or failed to take account of relevant facts this will be an error in law. Similarly if a tribunal has made a finding for which there is no evidence, this will count as an error in law and if the decision appears to the Appeal Court to be perverse this too will be open to correction as involving an error in law. Appeal by way of stated case is not thought to offer any wider scope for appeal than an ordinary appeal on points of law.
20. The requirement for the Tribunal to be satisfied that the point of law is "arguable" does introduce another layer of time and expense. Some lawyer would have to draft an application. The other side would have to be given a chance to contend that the point was not arguable. The Tribunal would have to consider the matter. The Land Court has recent experience of requiring to determine similar issues when deciding whether to make a reference to the European Court on an issue of interpretation of European legislation. It is not an entirely straightforward task. It takes time. In the LTS frivolous appeals are currently restricted by the risk of liability in expenses. That is an effective sanction. No sensible person would want to go ahead with an appeal on a point which was not "arguable". We see no need for the additional layer of expense created for parties by a requirement to seek leave.

21. In any event, if such a requirement is to be introduced, it should only be done for a positive purpose and not simply in the interests of tidiness and uniformity. There seems little purpose in a test of "arguability". Such a test serves no purpose unless it is understood to mean something like "arguable with identifiable prospects of success". If that is intended that should be said.

**The separate issue of “Review”**

22. Some comment is required in relation to the proposal for Tribunals to review their decisions. By this is meant a power to a tribunal to look again at its own decision and correct it if it sees fit. We are not persuaded that this needed for decisions of an Upper Tribunal. In any event, we think it inappropriate for decisions of LTS. The existing powers have proved sufficient for our purposes.

23. Although appeals can be seen simply as a way to correct "mistakes" that it is not a helpful mind-set for understanding the nature of what is involved. None of the appeals arising in the ten year period examined turned on simple "mistakes". Appeals from the LTS tend to involve quite difficult questions with much to be said on both sides. The Tribunal will have taken a view after lengthy consideration and discussion of the problem. Almost always this involves mature thinking over a course of days, if not weeks. On appeal, the Court of Session may well take a different view. But to ask the Tribunal to "review" a decision taken after full consideration is to require it to engage in a potentially lengthy exercise.

24. We are not persuaded of the benefit of a wide right of review in the context of party and party litigation. LTS is like a court. In this context, there will inevitably be a winner and a loser. If there is a power of review someone will have a right to ask us to exercise it. A request for review by the loser will not only give rise to extra work for the Tribunal but extra expense for the winner who will wish to resist review. We presently have power under our Rules to correct "accidental or arithmetic errors", on giving notice of our intention to do so. But we treat this as relating only to obvious clerical error. We would not welcome any radical change. It may be added that we regard our present power as wide enough to allow correction of anything by agreement. Such a power – express or implied – to change by agreement of parties is a valuable power for any tribunal.
25. It is clear that even in this area, one size will not fit all. Where many tribunals are sitting daily in the same jurisdiction or where a tribunal is hearing several cases each day, there may well be occasions when one tribunal makes what can patently be seen to be a mistake or a decision out of step with the bulk of decisions in identical cases. A wide right of review may be very valuable in such contexts. It should not be imposed on LTS simply in pursuit of a goal of uniformity.

The issues of status or qualification of members

26. Our concerns under this head are broadly met by the proposal that LTS be part of the Upper Tribunal. We have some diffidence about expressing our views on this issue but, the work of the LTS is difficult. It requires fairly high levels of ability. The current president has the status of a judge of the Court of Session which arises from his concurrent appointment as Chairman of the Scottish Land Court. We are not aware of any formal connection between the two roles. They are joined as a matter of administrative convenience. But we are aware that when Lord Hope, who was very familiar with the work of the Tribunal, was Lord President he expressed the view that the intellectual requirements of the president were higher than those of the Land Court. The surveyor members of the Tribunal have been appointed on the basis of their established track records of dealing with the heaviest type of disputes. We recognise the importance of work being done by other tribunals and say nothing about the status appropriate to them. But, we have little doubt that in knowledgeable legal circles, the work of the LTS is seen as broadly equivalent to work in the Court of Session. This has importance in relation to appointment of members.

Main issues of policy

27. We understand that the Committee is concerned with the fundamental policy of the Bill and not with issues of detail. One difficulty at this stage is that much is entrusted to Ministers to deal with by way of Regulation. Under sec 27, Scottish Ministers appear to be given complete authority as to which tribunals should go where and when. We consider that the function of LTS is sufficiently important to be determined by primary legislation.

28. LTS should stand alone as a separate pillar. Accordingly reference to the LTS should be excluded from Schedule 1. The term the “Scottish Tribunals” will, in any event be misleading unless and until all tribunals operating in Scotland are brought into the new First-tier and Upper Tribunals. This might be a lengthy period: Policy Memo para [51]. A preferable term might be “United Scottish Tribunals”.

29. Express reference to the LTS would be required in sec 2 to bring the LTS under leadership of the Lord President in the same way as, for example, the Employment tribunal was dealt with under sec 3 of the English Act. Other changes might be required to apply appropriate parts of the Act to the separate pillar. For example material in sec 33 and Schedule 8 might well be applied to LTS members. Provision for training under sec 31 might be made. Application of such provisions to LTS on an ad hoc basis would not be expected to cause any administrative difficulty. We could arrange to go through the Bill to identify any relevant material if it was decided to keep LTS as a separate pillar of the new system.
30. If the Committee does not accept our submission and takes the view that it is appropriate to put LTS into an Upper Tribunal we consider that avoidance of the risk of being forced into the First-tier body, is a matter of sufficient importance to be dealt with by primary legislation and not simply left to Ministers. Such legislation should also make it clear that the existing appeal routes should remain without requirement of leave and provision should also be made for appeals from Upper Tribunal in rating cases to go to the LVAC.

Other potential problems if LTS was to go into Upper Tribunal

31. We have mentioned the issues of policy which arise in relation to appeals. We turn to some the matters of detail which would have to be addressed if the LTS was to become a separate division of Upper Tribunal. We make the point that these are administrative issues. We have not attempted to identify all of them. It is for Government to be satisfied that the Bill addresses all the problem areas.

32. The jurisdiction of LTS in relation to certain reserved matters is only a small part of our workload. But it may be that unless the relevant UK tax statutes are amended, some provision will have to be made for an LTS to continue in its present form in some way in order to meet the requirements of the statutes. We are not constitutional experts and do no more than raise this as a matter to be addressed. It is a problem which would, of course, be avoided if the LTS was left as a separate pillar.

33. Members of LTS are currently appointed by the Lord President under sec 1 of the Land Tribunals Act 1949. In the case of surveyor members this is after consultation with the chairman of the Scottish branch of RICS. They are salaried and pensioned posts. The terms and conditions of appointment are currently under control of the Senior Salaries Review Board. The Act appears to give power to Scottish Ministers to remove the current protections and leave the appointments to be on a short term basis subject to certain presumptions. We do not accept that the status of LTS members should be able to be changed in this way. We note that one policy aim of the Bill is to provide greater independence for tribunals: Policy Memorandum [3]. We are not aware of any perception that the LTS needs greater independence but the giving of these financial controls to Scottish Ministers could only tend to restrict independence.

34. Sch 2 (1(b) needs to be considered. The purpose is not clear. It may rest on an assumption that the president of LTS is appointed by virtue of being chairman of the Scottish Land Court. But as far as we are aware, the link is purely practical. (It is possible that the arrangements for a single salary have been set out in some formal protocol and Government records should be consulted.) We assume that the intention of the proposed provision would be met by saying “(b) any person who holds the post of Chairman of the Scottish Land Court”.

35. LTS usually follows the normal rules in awarding expenses on the same basis as courts, namely the successful party is found entitled to be paid expenses by the losing party. But in rating cases, the Tribunal follows the practice of the LVAC in only making awards of expenses in unusual cases. Under sec 103 of the Title Conditions (Scotland) Act there is express provision for expenses. This requires us
to follow the normal rule. But a Parliamentary Committee reviewing the operation of 
that Act has expressed concern about the operation of this section and has invited 
further comment from the Government. Care may be required to ensure that the 
provisions in the Bill about expenses - sec 59 - are consistent with these other 
regimes.

For completeness we add some general points applicable to all tribunals

36. Sec 17 (1)(2). Power to appoint retired judges etc. We suggest that this 
should include explicitly a retired chairman of the Scottish Land Court. Although the 
chairman has the status of a Court of Session judge in terms of Sec 1 of the Scottish 
Land Court act 1993, he is not in fact a judge of the Court of Session.

37. Sec 18. We have a concern that the use of the term “judicial member” may 
be misleading in giving the impression that the regular members – including legal 
member – are in some way less than “judicial”. It appears that essentially what is 
meant is much the same as “ex officio” although that term does not quite meet the 
needs of the situation, particularly in relation to retired judges. Some other term 
should be found.

38. Sec 35 appears to give Scottish Ministers the right to control the “composition” 
of Tribunals. Clarification would be appropriate of the relationship between this and 
the extent of the discretion of the President to decide who should sit.

Appendix 1

LTS at present

The judicial members of LTS are the President, Lord McGhie, who is also Chairman 
of the Scottish Land Court. The latter post currently occupies rather more of his time 
but he can be said to be equivalent to a 50% lawyer’s post. John Wright QC is a full 
time legal member although he currently also holds a position as a deputy or visiting 
Judge of the Upper Tribunal Administrative Appeals Chamber within the UK 
Tribunals Service. He fits in some work there from time to time. There are two part-
time surveyor members, who are experienced, senior and well respected chartered 
surveyors. They currently each sit on a pro rata basis of 40% of a full time member. 
The advantage of two is not only to give better range of advice but to give more 
scope to avoid potential clashes of interest. These are all salaried positions.

The administration is provided by a staff of three. Mr Tainsh, the clerk has a law 
degree. He requires a sound knowledge of conveyancing law for certain aspects of 
his work. Mr Ballantyne, assistant clerk, has long experience with the tribunal. His 
work requires some specialist knowledge of conveyancing matters. Mr Do Rego is 
concerned with purely clerical aspects.

The work of LTS members is primarily adjudication and case management of 
disputes. The jurisdiction relates to several different areas:-

(i) Valuation for Rating (Non-Domestic) – appeals which satisfy certain criteria 
generally related to complexity or difficulty may be referred to LTS rather than
determined by local Valuation Appeal Committees – issues may be technical legal issues about rateability or valuation.

(ii) Land Compensation – this may be compensation for compulsory purchase (or related planning blight issues), ‘injurious affection’ caused by the construction, or the use, of public works, or one of a number of other more particular types of compensation, e.g. for mining subsidence, effect of flood prevention works, compulsory utility 'wayleaves', etc: Land Compensation Acts 1963 and 1973.

(iii) Title Conditions – applications to discharge, vary, renew or preserve, or to determine certain questions as to validity/enforceability: Title Conditions (Scotland) Act 2003.

(iv) Land Registration – appeals against decisions of the Keeper of the Registers, often involving three parties, i.e. the two landowners with competing interests and the Keeper, and quite often involving difficult questions of law although the value of the subject matter may not be very high: formerly Land Registration (Scotland) Act 1979 set to change under the Land Registration Etc. (Scotland) Act 2012

(v) ‘Tenants’ Rights’ – disputes relating to the entitlement of secure tenants to buy their homes: Housing (Scotland) Act. Community rights to buy: Land Reform (Scotland) Act 2003

(vi) Disputed valuation issues under taxation statutes. Precise detail of this is unknown. Jurisdiction is often given to the LTS without consultation with us and this is a little used area. It should be noted that these are ‘reserved’ matters under UK legislation.

(vii) Miscellaneous, including ‘voluntary referrals’ (in effect arbitration by LTS usually involving issues of compensation but, in theory, unlimited: Land Tribunals Act 1949.

(viii) Under current law reform consultation proposals the LTS is to be given a jurisdiction in relation to proposals to close level crossings in rural areas and also a wide jurisdiction in relation to the Telecommunications Industry. This is likely to include power to award compensation for encroachment of equipment on private land but might also extend to power to determine when a landowner is obliged to allow providers to use the land.

The actual number of cases in any one of these categories is relatively low, with considerable variation from time to time.

The Tribunal also has some minor administrative functions the Title Conditions (Scotland) Act 2003. The judicial members are not involved in these matters.

The Tribunal usually sits with one legal and one surveyor member, and almost invariably carries out site inspections which play an important part in decision-making. Some cases require considerable case management, lengthy hearings and lengthy written judgments. Hearings normally take the same form as in civil court disputes, but the procedural rules are flexible enough to allow some variation. Some cases are disposed of, with the consent of all parties, on the basis of written submissions and a site visit. There are very few appeals: for figures see Table 1 of the Policy Memorandum.

Appeals

All appeals go to the Inner House or equivalent, namely the Lands Valuation Appeal Court.
The latter deals with rating appeals from the Tribunal and from Valuation Appeal Committees. In theory it can hear appeals from the latter sitting with only one member but in practice appeals from the Tribunal and from the Committees are always heard by a bench of three Senators. The Court in practical terms functions in the same way as the Inner House when hearing appeals.

Rating appeals proceed by way of stated case. This procedure is intended to allow short decisions to be issued in the first instance. If a dissatisfied party wishes to appeal on a point of law this is posed as a question for the LVAC and the Tribunal will require to set out the findings in fact it makes relative to these questions. This could mean that only a short stated case might needed if the point of law did not require much knowledge of the facts but in practice the Tribunal prepares all its valuation for rating cases as full decisions and simply converts the material into a slightly different layout if requested to prepare a stated case. The appeal is limited to the questions of law posed.

In other jurisdictions there is at present scope for confusion as to the proper method of appeal. Appeals are subject to the Rules of the Court of Session and the Tribunal cannot give an authoritative ruling. It appears that there is a choice between appeals by stated case and an ordinary appeal on a point of law: R 41.25. The enabling power appears to be sec 11 of the Tribunals and Enquiries Act 1992. Stated case procedure is never used in practice – except in appeals to LVAC.

Lands Tribunal for Scotland
2 August 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction
The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

A Society working group has considered the Scottish Parliament’s Justice Committee’s call for written evidence on the Tribunals (Scotland) Bill.

This paper sets out the general observations of the Society’s working group and comments on the bill, followed by the comments from the Society’s Mental Health and Disability Sub-committee, the Property Law Committee and the Charity Law Sub-committee which are focused on their respective tribunals as impacted by the bill.

General Comments

The Society believes that the Tribunals (Scotland) Bill (the bill), despite its technical nature, is a very significant piece of proposed legislation. It forms part of a complex set of measures which taken together, modernise the civil justice system of Scotland. To that extent the Society welcomes the bill.

This bill addresses issues in the structure and organisation of some tribunals. In creating the First and Upper Tier Tribunals it sets a template into which further reforms of devolved tribunals can be fitted. By doing that it will provide a coherent and more consistent structure within which an expert tribunals’ judiciary can discharge their responsibilities. That is undeniably a good thing so far as users of the administrative justice system are concerned.

Administrative Justice- putting the user at the centre

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 the rights of users are involved. By definition it also therefore includes complaints, review and ombudsmen systems affecting public authorities and public functions across government and public authorities as a whole. The vast majority of disputes which arise under this system are between the citizen and the state, and that factor on its own is sufficient to demand that great care must be taken in the structure and organisation of the system.

A problem for the administrative justice system, however, is that notwithstanding periodic review its scope and nature has never been properly looked at as a whole.
The system has developed in a haphazard fashion with the result that users whose concerns may span several different tribunals as well as complaints systems and ombudsmen are faced with an administrative maze. This separate development has however meant that individual tribunals have procedures and expertise well attuned to their individual remits. Securing a more coherent structure and approach so far as devolved tribunals are concerned will lead to benefits for the user, provided that the benefits developed through specialisation are not lost. In the future it will be necessary to consider the different structures and processes across the whole administrative justice system, including both reserved and devolved structures and processes, in order to create a comprehensive and comprehensible structure where the users’ interests are genuinely at the core.

The Scottish Government cannot for the reasons of legal competence address the wider issues referred to above, but the Society remains concerned that the bill addresses only a part of a sector of the wider administrative justice system.

The absence of any comprehensive plan for the Scottish Administrative Justice system as a whole means that the individual issues are looked at sequentially, and without the benefit of being able to see their place in the overall scheme. This bill along with the forthcoming Civil Courts Reform Bill are two important blocks in the development of the civil justice system. Such an approach may be unavoidable in the absence of any agreed overarching vision for the whole civil justice system, and also in the context of the shared responsibility within the administrative justice system which devolution necessarily implies.

The absence of an overall vision even for the devolved areas for civil justice is that the overall system becomes compartmentalised. It is inevitably more difficult to achieve necessary major changes in the absence of a strategy for the entire civil justice system. However, broader recognition of the inter-relationship of the different and overlapping sectors of a civil justice system would be a useful starting point for developing a coherent system, and the Society would hope that the bill might be a launchpad for further work which might evidence that recognition.

**Users’ Perspective**

Users are entitled to a system which is easily navigable and which meets their needs. However, the complexity of the system causes some problems. One example of this is the distinction between appeals and complaints. The circumstances in which an appeal is the relevant remedy where in other areas the remedy may be by way of a complaint, is not a matter on which there is a ready reckoner. Nor, the Society suggests, do policy makers, in general terms, have a developed approach differentiating in what circumstances the remedy, if there is to be one, is to be by way of complaint or appeal, and in the case of the latter whether to a court or to a tribunal.

Proceedings before tribunals tend to be less formal and more user friendly than courts. While there is, in some senses, the beginning of a convergence between courts and tribunals nevertheless in essence there is and will remain a difference

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between the two. Informality as opposed to formality and an investigative as opposed to an adversarial system are aspects of the tribunal approach which make it distinctive and preferable so far as users are concerned.

**Relationship with the Courts**

There is a debate at present as to whether tribunal justice is in effect being swamped by the courts. The bill does not directly address the relationship between courts and tribunals in Scotland, but it will be an important area in future. The Scottish Civil Justice Council (SCJC) will take on responsibilities in relation to tribunals under the bill, and that in itself is bound to present issues if the identity of tribunal justice is to be protected and developed.

As courts and tribunals become the responsibility of the Lord President and the SCJC, then issues may well arise which will touch on the distinctiveness of tribunals as opposed to courts. This is not simply an issue of seeking to preserve tribunals as they are, but ensuring that as they develop so their core characteristics, as discussed below, if they continue to be relevant, can be safeguarded. Having said that the Society appreciates that the courts themselves are moving to achieve changes in their own approach. But experience of, for example, small claims procedure (and the adult incapacity jurisdiction as operated in some courts) does not suggest that changing the culture of courts is an easy process. There is also some basis for believing that a process of judicialisation of tribunals is already in train in England and Wales where courts and tribunals administrations are linked in HM Courts and Tribunals Service (HMCTS). Linkage, as is proposed in the bill in particular through the conferring of powers on the SCJC could therefore present a challenge for the distinctive character of tribunals. If therefore retention of that distinctive character was, as indicated in the Scottish Government’s consultation, an objective of Scottish Government in this matter\(^2\), then it may be appropriate to consider how that distinctive character can be safeguarded.

**The distinctive character of tribunals**

As the Government is inviting Parliament to legislate on tribunals it is fair to ask what is meant by a tribunal, beyond simply referring for example to the listed tribunals. The Society believes that if there is to be coherent structure within a civil justice legislative framework, the bill should identify the characteristics which distinguish tribunals from courts.

The Society notes that the bill in part follows on from the Report of the Scottish Committee of the AJTC Tribunal Reform in Scotland; A Vision of the Future\(^3\), which at paragraph 4.1 defined a tribunal as:

\(^1\)A body which resolves disputes between citizen and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as

\(^2\)Tribunal Distinctiveness - Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland 9para 5.11 -5.12 (2012)

\(^3\)Sc Ctte AJTC - [http://ajtc.justice.gov.uk/docs/tribunal-reform-scotland.pdf](http://ajtc.justice.gov.uk/docs/tribunal-reform-scotland.pdf)
compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it."

Although there is a considerable amount of variation between courts, and likewise a considerable amount of variation between tribunals and although there is a degree of overlap between them in that some tribunals have characteristics associated with courts and some courts have characteristics associated with tribunals, the Society believes that the following factors distinguish most tribunals from most courts:

i. the specialist nature of the tribunal judges’ and tribunal members’ jurisdiction as compared with the more general jurisdiction of judges in the courts – tribunal judges and tribunal members are expected to be experts in the law and policy of the subject matter of the dispute;

ii. the relative informality of tribunal hearings as compared to court proceedings – tribunal procedures are simpler and more flexible than court procedures, evidence is in general terms not required to be taken on oath, the rules of evidence are less demanding, the parties often appear in person and, where they are represented, the representatives are often lay experts rather than lawyers;

iii. a less adversarial and more investigative approach or investigative than that encountered in the courts – tribunal judges and members frequently take a more active and interventionist role in the proceedings than judges in the courts.

iv. a more enabling approach than is typically encountered in the courts which is intended to facilitate the direct participation of the parties in the proceedings, especially when they are unrepresented; and

v. in many but no longer in all tribunals, the fact that parties do not have to pay to raise an action and that costs are not awarded against the losing party.

The Society also believes that a core factor distinguishing courts from tribunals is the position of the tribunal user, and the recognition of the user’s position by the tribunal. Leggatt emphasised the importance of remembering that:

"tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfill their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases. .... tribunals should do all they can to render themselves understandable, unthreatening, and useful to users ...." (paragraph 6)\(^4\).

It can be a difficult point to make to suggest that in effect the user’s position is a differentiating factor in the distinction between courts and tribunals. The Society does not suggest that the court user is less important to courts; we are aware for example of the Scottish Court Service Court User’s Charter. But the tribunal user differs from the civil court user. For the most part the latter are legally represented; court users tend to be lawyers, and individual court users, if parties as opposed to witnesses, will tend to deal with courts through their legal representatives. This means that the nature both of the conversation and the contact in general will be significantly different between court and tribunal users. Legal representatives are used to the experience but for the individual tribunal user, the contact with any particular tribunal

\(^4\) para 4.21 – Vision for the Future
may be a one-off experience where the user may well have no previous experience and only limited resources.

The Society believes that, in the context of the proposed merger of the Scottish Tribunals Service and the Scottish Courts Service, these characteristics are important and worth preserving and that they should be entrenched in the bill. In making this suggestion the Society is mindful of the objectives\(^5\) set out by Scottish Government in its consultation on Tribunal Reform. In particular at 1.7 of that consultation Scottish Government indicated that an objective was ensuring the ‘distinctiveness of different tribunals, including continuing specialisation’.

It is important to emphasise that, contrary to popular belief in some quarters, courts and tribunals are not to be differentiated on the basis that the remits of tribunals relate to matters of less importance. For example, the Mental Health Tribunal can, and frequently does, deal with fundamental issues of deprivation of liberty and non-consensual administration of medical treatment.

The Scottish Tribunals Service

The status of the Scottish Tribunals Service (STS) should be protected in the bill - The Society is concerned that the bill is silent on the status of the STS. The Society firmly believes that failure to accord similar status for tribunals administration to that accorded to courts administration risks from the outset fostering unfortunate misconceptions as to the general status and standing of administrative justice as a whole.

The Society has noted the consultation of the proposed merger of the Scottish Tribunal Service and the Scottish Court Service\(^6\). The Society recognises that complex restructuring as in the case of the Scottish Courts and Tribunals does have to be subdivided into manageable projects, but it is regrettable that the proposal was not in the original consultation on tribunal reform. The Society will respond separately to the consultation but its provisional position is that, overall, a merger at this stage, while providing the independent status argued for, presents real problems for the maintenance of the distinctive character referred to above, and the distinctive expertise of individual tribunals.

The Society notes that in its consultation prior to the bill the Scottish Government identified five main objectives to be secured\(^7\): The Society further notes that the Justice Committee has requested comment on the first three and the fifth of those

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\(^5\) 1.7 This proposal seeks to balance five key objectives:
- effectiveness in securing just and speedy outcomes;
- efficiency in the administration of justice;
- distinctiveness of different tribunals, including continuing specialisation;
- centrality of tribunal users; and
- potential for future developments of the wider system of Scottish justice.

\(^6\) Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service

Thursday, June 27, 2013 ISBN: 9781782566731

\(^7\) SECTION 5: 5.1 This proposal seeks to balance five key objectives as set out on page 5 in paragraph 1.7
- effectiveness in securing just and speedy outcomes;
- efficiency in the administration of justice;
- distinctiveness of different tribunals, including continuing specialisation;
- centrality of tribunal users; and
- potential for future developments of the wider system of Scottish justice
objectives as set out by Scottish Government. The Society believes, however, that the objective of recognition of the centrality of the user, which was a cornerstone of the Leggatt tribunal reform proposals\(^8\), should appear a dominant policy aim in the provisions of the bill.

In its consultation on civil courts reform the Scottish Government expressed the hope that the bill ‘will create a more user-focused and coherent system for devolved tribunals, providing a more efficient way of resolving citizen to state and party to party disputes.’ This thinking should be central to the bill. The Justice Committee should consider the bill in the light of the perspective of users of the tribunals system.

**A Single Tribunal with Chambers**

The bill represents a significant improvement on the existing fragmented and confusing structure of tribunals in Scotland. A single tribunal divided into Chambers will enable a more coherent and flexible approach to tribunal Justice in Scotland. Smaller tribunals should be able to modernise while, retaining and developing their own ethos and character. As Leggatt said

‘Combining the administration of different tribunals will provide the basis for a relationship between them. But that association cannot properly be called a Tribunals System until true coherence has been established by bringing within one organisation without discrimination all those tribunals which are concerned with disputes between citizen and state (in the guise of either central or local government) and those which are concerned with disputes between parties. Only so will tribunals acquire a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended.’\(^9\)

The new structure provides the first steps in achieving such a system, and the Society welcomes that, noting that the bill cannot address the position of the reserved tribunals.

The Society recognises the advantages of a single Scottish Tribunals structure, which will provide for a common system of leadership, appointment and consistency in practice and procedure, with the aspiration of judicial excellence. This will reduce fragmentation and may improve experiences for those tribunal users who are involved in multiple jurisdictions. The Society also recognises the benefits of creating a structure which will reduce duplication and ensure maximisation of finite resources.

**Guarantee of openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?**

The Society believes that provisions in the bill in relation to appointment, training etc. of members of tribunals will enhance the standing of the tribunals. Openness, fairness and impartiality in tribunal procedures are at the heart of tribunal business and function. The bill appears to reach the appropriate balance in seeking to

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\(^8\) Leggatt Report – ‘Tribunals for Users, One System, One Service’ – para 31 – ‘In a Tribunals System properly so-called there should be a new culture, starting with improved recognition of just how daunting the tribunal experience usually is for first-time users, as most are.’

preserve this through the appointment of the Lord President as the Head of Tribunals and the overarching responsibilities attached thereto.

The guarantee of independence in section 3 underlines the principles which Leggatt was trying to establish. A single system will enable leadership to be developed and thereby to ensure that specialism ethos and desirable distinctiveness can be ensured.10

However, the Society is concerned that seeking to achieve tribunals modernisation at the same time as securing convergence between courts and tribunals may result in those aspects – specialism, ethos and desirable distinctiveness - being swamped by the demands of the Courts system. It is noteworthy that the convergence process was not attempted in England and Wales until almost seven years after the start of the Tribunals modernisation process, following the Tribunal Courts and Enforcement Act 2007 (TCEA).

**Rules relating to Appeals**

The Society welcomes the provisions of the bill as they relate to appeals and in particular in relation to review.

**The rules relating to appointments/membership**

*Restrictions on appointment as President*

The Society considers it essential to the development of the tribunals judiciary in Scotland that appointment as President of Tribunals should be open to the tribunals judiciary at large and not restricted simply to judges of the Court of Session. Section 4(5) restricts appointment as President to Judges of the Court of Session on assignment by the Lord President and should therefore be amended to reflect this objective.

Chamber Presidents are to be appointed for their knowledge and expertise in the subject matters in their chamber which is an important protection for the preservation of the specialist subject nature of the separate tribunals. The Society is satisfied that there are sufficient protections in the bill to preserve the expert role of the Chamber President. For example, the President of Tribunals cannot assign himself or herself to the role of Chamber President.

*Judiciary eligible to sit*

The Society has some concerns about sections 16, 17 and 18 insofar as they would allow an automatic eligibility for the judiciary to sit as members of tribunals. The Society appreciates that members of the judiciary may only sit if authorised to do so by the President of Tribunals. However the Society believes that The President of Tribunals should consult with the President of the Chamber within which the judge is to sit before authorising the judge concerned – see section 20. It is unlikely that the President would act without so consulting but including a statutory requirement could

10 see eg Policy Memorandum para 14
bolster the proposition that the expertise of the membership of particular tribunals was being maintained.

*Differentiating between the status of Tribunal members and court judges*

The Society has some concerns about the status of tribunal members under the bill. Part 2 Chapter 1 of the bill provides that members of the tribunal on the one hand and court judges on the other are not to be seen in the same light; the latter may readily qualify for membership of the former, but not vice versa. The Society is of the view that certain tribunals in Scotland would be very uncomfortable if there was any move towards introduction of judicial titles as is the case in the reserved tribunals.

While the Society would welcome the retention of the less formal structure of ordinary and legal members of a Tribunal rather than the title of Judge, we recognise also that especially if the reserved tribunals are to be inserted into the new tribunal structure at some point, then something will have to be done to avoid developing a model which might in their view turn the clock back.

Developing and maintaining the informality which is part of the distinctive approach of tribunals can best be achieved by practical measures such as for example through the absence of court dress, the avoidance of court rooms with an elevated bench, avoiding adversarial styles and avoiding the use of judicial titles as a matter of practice. The Society recognises that establishing a tribunals membership which sits apart from the courts judiciary may well make convergence more difficult in the longer term. On a practical level it will perpetuate perceptions about a multi-tier judiciary in which the tribunals are of lesser status.

Ensuring the maintenance of the ethos of tribunals is a matter of judicial leadership rather than statutory prescription. An approach based on sections 4 to 6 of the TCEA might allow also for Chamber Presidents to determine whether members in any particular Chamber used judicial titles. The introduction of practices which distance the tribunal membership unnecessarily from those appearing before them is contrary to the Tribunals ethos.

*Involvement of Judicial Appointments Board*

The Society welcomes the fact that appointments of tribunals ordinary and legal members will be within the responsibility of the Judicial Appointments Board for Scotland.11

*The rule-making power granted to the Scottish Civil Justice Council*

The Society is concerned about the rule making power, because of the composition of the Scottish Civil Justice Council. Even though the bill makes express provision for the Tribunals Committee it does not deal with that in the same level of detail as applied to the arrangements for the Tribunal Procedures Committee under paragraph 21 of Sch 5 (Part 2) of TCEA.12 The Society is concerned that Tribunal Rules will be

11 Sch 9 para 11 amending section 10 of Judiciary and Courts (Scotland) Act 2008).
12 21(1)The Lord Chancellor must appoint—
   (a) three persons each of whom must be a person with experience of—
made with little or no user input; this would represent a retrograde step from the system which obtains in relation to the reserved jurisdictions. The Society recommends that the bill be amended to specify the composition of and arrangements for the Tribunals Committee, along the lines set out in Sch 5 of the TCEA.

Comments on particular Tribunals as impacted by the bill:

The Mental Health Tribunal for Scotland Comments of the Law Society of Scotland’s Mental Health and Disability Sub-committee (the committee):

The Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) established a new judicial body to be known as the Mental Health Tribunal for Scotland\(^{13}\) (the tribunal) replacing the Sheriff Court as the forum for deciding applications for the detention of patients and appeals against detention. This followed a recommendation of the Millan Committee in January 2001\(^{14}\) which had completed a review of the former Mental Health (Scotland) Act 1984.

The tribunal plays a vital role in ensuring that an individual’s rights to autonomy, liberty and freedom from inhuman or degrading treatment\(^{15}\) are protected. Moreover, as stated in Article 1 of the European Convention on Human Rights, and even more explicitly in the UN Convention on the Rights of Persons with Disabilities to which the UK is a signatory, Member States must actively protect these rights, which include adopting the necessary legislative and administrative measures.

The tribunal has the power to make or to prevent significant interventions in highly vulnerable people’s lives. The tribunal makes compulsory treatment orders, hears appeals by patients and their named persons and conducts statutory reviews of the patient’s order. The 2003 Act provides for the compulsory care and treatment of children (up to the age of 18 years) and adults. With such an extensive range of powers over vulnerable patients’ lives, it is necessary for the tribunal to retain its existing highly specialised competence.

The committee supports the Scottish Government’s commitment to the maintenance of a specialised Mental Health Tribunal. However, the committee is of the view that this level of specialism can only be preserved by placing the tribunal within a single chamber in the First-tier Tribunal and enshrining this in primary legislation.

The tribunal was established by an Act of Parliament and was therefore subject to the full scrutiny and procedures necessary for primary legislation. Any significant change, such as the bill now proposes, should be dealt with at that same level given the fundamental human rights involved. The committee is of the view that the

\(^{13}\)Section 21
\(^{14}\)New Directions - Report on the Review of the Mental Health (Scotland) Act 1984; Recommendation 9.10
\(^{15}\)Articles 3, 5 and 8, European Convention on Human Rights and corresponding rights in the UN Convention on the Rights of Persons with Disabilities
allocation of the Mental Health Tribunal to a chamber should be specified and preserved in primary legislation, rather than being left to subordinate legislation.

The Policy Memorandum to the bill specifies that the Scottish Government has made a commitment that “… initially mental health will be in a chamber on its own. At the moment there are no other tribunals covering a similar subject matter as mental health. It therefore makes sense to do this for now.”

There is an emphasis in the bill, and in the Policy Memorandum to the bill, on the need to ensure that the chamber structure is flexible, to allow future changes to be made. It is noted in the Policy Memorandum that chambers will evolve over time.

The Scottish Government’s consultation on proposals for the bill asked 6 specific questions but did not invite comment or offer sufficient specification on the proposed chamber structure in the First-tier Tribunal. Many respondents were in favour of the Mental Health Tribunal being in a chamber on its own. The Policy Memorandum to the bill states that “…this was generally based on some misunderstanding about what being in a chamber meant in terms of appointments and ticketing within and across chambers.”

The committee’s view is that the Mental Health Tribunal should be transferred into a single chamber and that provision should be made for this in primary legislation. The committee does not consider this view to be based on any of the points of misunderstanding noted by the Scottish Government in their analysis of consultation responses.

Subordinate legislation

The Delegated Powers Memorandum to the bill specifies the rationale for subordinate legislation, which includes the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation. The Memorandum specifies the Scottish Government’s intention to exercise the regulation-making power so that the functions of the Mental Health Tribunal are initially allocated to a separate and individual chamber.

The bill provides that Scottish Ministers can make regulations in a wide range of circumstances. Certain sections of the bill are subject to the affirmative procedure. This includes the chamber structure in the First-tier Tribunal. Regulations may make provision for and in connection with the organisation of the chambers, having regard to the different subject matters and any other relevant factors, and the allocation of the tribunal’s functions between the chambers. However, for as long as it appears to the Scottish Ministers that the acquisition of functions by the First-tier Tribunal for the time being is such that there is justification for not organising it into a number of chambers as required by section 19(1) of the bill, regulations need not be made or may provide for the Tribunal to have a single chamber only. Before making regulations in relation to the chambers, Scottish Ministers must obtain the Lord President’s approval and must consult such other persons as they consider

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16 Section(s) 10 - 11
17 Section 19(2)
18 Schedule 9, Part 1, paragraph 7(1)
appropriate\textsuperscript{19}. Before making regulations in relation to the composition of the tribunal, Scottish Ministers must consult the President of the Tribunals.\textsuperscript{20}

Scottish Ministers may, by affirmative procedure, modify the list of tribunals specified in the bill\textsuperscript{21} and provide for some or all of the functions of a listed tribunal to be transferred from it to the First-tier and/or to the Upper Tribunal. They may make provision for determining the composition of the First-tier Tribunal when convened to decide in any matter\textsuperscript{22} or may confer any additional powers on the First-tier Tribunal as are necessary or expedient for the proper exercise of their functions. Any additions to, or replacement or omissions of, any part of the text of the Act will be subject to the affirmative procedure.

All other regulations under any other provisions of the bill are subject to the negative procedure.

\textit{Structure of the First-tier Tribunal}

The Scottish Government’s commitment to placing the Mental Health Tribunal in a single chamber within the First-tier Tribunal is expressed as an “initial” proposal and is specified only in the two Memorandums attached to the bill. There is no explicit provision on the face of the bill to specify either the range of chambers (by subject) or that there will be a Mental Health Chamber, to which the Mental Health Tribunal will be transferred.

Chapter 2 (Internal Structure) of the bill provides for the structure of the First-tier Tribunal and specifies that this:

“...is to be organised into a number of chambers, having regard to:

(a) the different subject-matters falling within the Tribunal’s jurisdiction, and

(b) any other factors relevant in relation to the exercise of the Tribunal’s functions.\textsuperscript{23}”

“...Scottish Ministers may by regulations make provision for and in connection with

(a) the organisation of the Tribunal.....,

(b) the allocation of the Tribunal’s functions between the chambers.\textsuperscript{24}”

The bill lists eleven tribunals that it is proposed, be transferred into the Scottish Tribunals at such time as the Scottish Ministers consider appropriate\textsuperscript{25}. These tribunals are from a diverse range of jurisdictions and include Crofting, Housing, Parking, Police Appeals and the Mental Health Tribunal. Scottish Ministers may make regulations which provide for some or all of the functions of a listed tribunal to be transferred from it to the First-tier and/or to the Upper Tribunal.\textsuperscript{26} Where a listed tribunal has been transferred, regulations may also provide for the functions, or

\textsuperscript{19} Section 11(1)
\textsuperscript{20} Section 11(2)
\textsuperscript{21} Section 26(2)(a)
\textsuperscript{22} Section 35(1)
\textsuperscript{23} Section 19(1)
\textsuperscript{24} Section 19(2)
\textsuperscript{25} Schedule 1, Part 1
\textsuperscript{26} Section 27(2)
particular functions, to be re-distributed between the tribunals. The bill fails to specify how the transfers will occur, leaving this entirely for regulations.

The only way to transfer the tribunal into the proposed new structure is to retain it intact and to safeguard its integrity and the dedicated roles of all within it, which includes the tribunal’s administration. The Scottish Tribunals Service provides a focused and expert administrative service to the tribunal while involved in sensitive interactions with patients, and the provision of information to parties and stakeholders.  

Assignment of members

Ordinary or legal members will be assigned to at least one of the chambers and may be assigned to different chambers at different times. There are currently tribunal members who serve in more than one jurisdiction, who in the new structure may require to be assigned to different chambers. The bill adequately provides for the transfer in of existing members who hold more than one appointment in those of the listed tribunals.

The composition of the tribunal is specified in the 2003 Act and in regulations. The assignation of “ordinary” or legal members from another chamber will be limited by these provisions. This will ensure that only those members meeting the statutory requirements for a Mental Health Tribunal will be able to continue to sit.

Retention of expertise

The tribunal has an extensive range of powers under the 2003 Act, which include the power to detain child, adolescent and adult patients in hospital, to specify where such patients will require to reside in the community and to provide them with medical treatment for mental disorder without the consent, or against the will, of the patient. Medical treatment has a broad definition in the 2003 Act and includes the use of psychotropic medication, which has an altering effect on perception, emotion, or behaviour and can cause the patient to experience serious side effects, some of which may be life enduring.

With such an extensive range of powers over vulnerable child, adolescent and adult patients’ lives, the committee considers it fundamental that the Mental Health Tribunal retains its highly specialised competence to ensure the best decisions possible are made for the most vulnerable people in Scottish society. This specialism has been achieved through the statutory creation of a Mental Health Tribunal and must be maintained through the transfer of the tribunal’s functions to a chamber to be identified as a Mental Health Chamber specified in primary legislation.

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27 The Society is preparing a response to the Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service.
28 Schedule 2
29 Part 16 of the 2003 Act
30 Except where the Act specifies that the consent of the patient or the Mental Welfare Commission is required.
Section 19(2) of the bill confers a power on Scottish Ministers, by regulations, to make provision for the organisation of the First-tier Tribunal into chambers. These will be subject to the affirmative parliamentary procedure, which requires the approval of the Scottish Parliament to allow the provisions to come into force or to remain in force. The committee agrees that flexibility is needed in a range of the bill’s provisions and that subordinate legislation is the appropriate mechanism for these. However, it is suggested that such flexibility should not be extended to include the Mental Health Tribunal’s place within the chamber structure, which again it is further suggested, should be protected within primary legislation. This would ensure full parliamentary scrutiny of any change to the tribunal’s status.

**The Additional Support Needs Tribunal**

There are relatively few tribunal references and/or claims made to the Additional Support Needs Tribunal each year. Those which make their way to a tribunal hearing ordinarily deal with complex matters of law, and many involve children who have profound and complex disabilities, which include mental disorder. Parents or carers who raise references or make claims are mainly represented by lay representatives from the advocacy service established to provide representation and advice to tribunal users. The education authority is often represented by education officers or other lay education personnel.

Given the complexities of law and procedure which arise, the committee welcomes the bill’s provision for appeals to be heard by the Upper Tribunal, which has the opportunity to provide for a level of expertise should be more economical and quicker for the user.

The committee is of the view that the Additional Support Needs Tribunal should be transferred to a chamber whose subject matter is Education or Learning.

**The Lands Tribunal for Scotland**

Comments of the Law Society of Scotland’s Property Law Committee (the committee):

The Lands Tribunal for Scotland (LTS) currently works well. Much of its work has a judicial outcome in the sense of applying the law to resolve disputes, many of which have substantial importance and financial implications for the disputing parties and for the development of the law and its application. It displays a good balance of judicial rigour with (relatively) relaxed formality of procedure and hearings. Its members are high calibre and its reasoned judgements are of a standard comparable to the Court of Session. The LTS’s support staff are knowledgeable, helpful and prompt. The committee’s view is that the LTS in its current form and structure works well although the centralisation and potential for increased bureaucracy under the bill’s proposals should not be allowed to detract from the good service which users receive from the LTS.

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The Chamber model for the First Tier needs careful thought with a much clearer articulation in the bill of how this will work for the LTS. The LTS should be allocated to a chamber in the bill.

**Scottish Charities Appeals Panel** Comments of the Law Society of Scotland’s Charity Law Sub-committee (the committee):

Scottish Charities Appeals Panel – origins, ethos, legislative provision, practice

The Scottish Charities Appeals Panel (SCAP) has its origins in the recommendations of the Report of the Scottish Charity Law Review Commission (2001) (the McFadden Report), which envisaged enactment of a ‘power to establish a Scottish Charity Review Tribunal’.\(^{32}\) The tribunal would be ‘user-friendly’ and ‘would sit on an ad-hoc basis as and when appeals arose’.\(^{33}\) The reference to user-friendliness can be taken to include accessibility and informality, as well as the lower costs and swifter disposal times associated with a tribunal as opposed to a court. A tribunal has the further advantage over a court that specialist legal expertise within its membership can be supplemented by specialist non-legal knowledge and experience of the relevant sector, in the case of charities appeals the charities sector itself within the broader context of civil society at large.

The McFadden Report’s recommendations were given effect in the Charities and Trustee Investment (Scotland) Act 2005, which established SCAP and provided for appeals against specified decisions of the charities regulator, OSCR.\(^{34}\) SCAP’s procedures are governed by the Scottish Charity Appeals Panel Rules 2006,\(^{35}\) made by the Scottish Ministers under the 2005 Act. The McFadden Report did not envisage a high number of appeal cases – hence its recommendation of an ad-hoc rather than a standing tribunal – and this expectation has so far been fulfilled. A total of six appeals has been registered since the establishment of SCAP in 2006, of which only one so far has proceeded to a final decision; one was withdrawn and one dismissed by agreement, and three (all notified in 2013) remain outstanding.\(^{36}\)

**User-friendliness – informality**

The committee favours retention of the user-friendly character for charity appeals espoused by the McFadden Report. Although the business of SCAP is fundamentally adversarial, in that the point of the appeals process is to enable challenge in an independent forum of the specified decisions of OSCR,\(^{37}\) the tribunal format allows for flexibility of procedure and permits those challenging a decision to represent themselves or be represented by a non-lawyer. The more complex cases will always be likely to attract the involvement of counsel or specialist solicitors (and have in fact done so within the small sample of appeals to date), but it is important that small organisations, which account for the vast majority of Scottish charities,\(^{38}\) retain the possibility of challenging the decisions of the regulator without professional

\(^{32}\) McFadden Report, recommendation 18.
\(^{34}\) Charities and Trustee Investment (Scotland) Act 2005, ss 71, 75, 76, 77 and Schedule 2.
\(^{35}\) SSI 2006/571.
\(^{37}\) See 2005 Act, ss 71 and 77.
\(^{38}\) See OSCR, *Scottish Charities 2011 (2012).*
representation, if necessary with the support of a facilitative approach by the tribunal. Although the number of appeals to date is small, the fact that three of the six have been notified in the current year may presage an increase in appeals over coming years as the 2005 Act arrangements give rise to regulatory issues which cannot be resolved administratively.

The committee is of the view that ‘user-focus’ should be realisable within the framework in the bill. The Policy Memorandum foresees that existing procedural rules would be retained initially, but in the event of change the rule-making powers in Chapter 2 of the bill would have to be invoked in a way sensitive to the needs of particular types of business. This might involve different sets of rules for different types of business within a single chamber (in particular the proposed General Regulatory Chamber), and the committee is pleased to note that such an eventuality is allowed for in the bill\textsuperscript{39}.

**Specialist expertise**

The committee stresses the importance of having appropriate specialist expertise and experience available to the tribunal when charity appeals arise. By specialist expertise and experience the committee means here not only familiarity with charity law, but also experience and understanding of the practical world of charities and civil society. While on the face of it the decisions of OSCR which are subject to appeal are technical in character, they are inseparable from their practical context in the charities sector. Experience of the sector would be of particular value at first-tier level, where the factual background to the legal points in issue would be established. The McFadden Report’s recommendation of an ad-hoc tribunal recognised that charity appeals would be few, and that one way of summoning appropriate tribunal personnel would be to constitute each appeal panel afresh on a case by case basis. That approach is not consistent with creating a coherent overall framework for the devolved tribunals, but the committee is anxious that the principle of assembling relevant specialist skills and experience should be preserved.

The committee accepts as inevitable that in an integrated system charity cases will be heard at first-tier level by a catch-all chamber such as the General Regulatory Chamber proposed: this is what happens at first-tier level in the reformed tribunals system for England and Wales, although there charity cases are considered of sufficient importance to justify the designation of a Principal Judge for charities and seven non-legal members with experience of the charities and voluntary sectors.\textsuperscript{40} The committee accordingly welcomes the provision in the bill allowing for the deployment of specialist legal expertise in a First-Tier general chamber through the Deputy Chamber President system, as also for the appointment of ordinary members with appropriate ‘qualifications, experience and training’.\textsuperscript{41} In the case of ordinary members, however, the disparate types of business dealt with in a general chamber (the Policy Memorandum groups together ‘Charity’, ‘Parking’ and ‘Police’ in the proposed General Regulatory Chamber) might make it difficult to find ordinary members with experience spanning the full range of business. The committee suggests therefore that the bill as drafted should be amended to require appointment

\textsuperscript{39} Section 64.
\textsuperscript{40} See [http://www.justice.gov.uk/tribunals](http://www.justice.gov.uk/tribunals).
\textsuperscript{41} Schedule 3, paras 1, 2.
of appropriately qualified, experienced and trained ordinary members to be available for charity appeals, even if unlikely to be called upon for other general regulatory business.

Law Society of Scotland
9 August 2013
Justice Committee
Tribunals (Scotland) Bill
Written submission from the Lord President

Thank you for the opportunity to provide evidence to the Justice Committee on the implications of the Tribunals (Scotland) Bill. I have accepted your invitation to attend the meeting of the committee on 17 September. The committee may find it helpful if I set out, in advance, the proposals which I particularly support and those about which I have suggestions. I understand that several leading members of the tribunals’ judiciary in Scotland have been asked for their views. I have separately responded to you, in my capacity as chairman of the Scottish Civil Justice Council, and to the finance committee. In this letter, I confine my discussion to those issues which pertain to my proposed leadership of the tribunal judiciary in Scotland and to the principles underlying the Bill.

Judicial Independence
I welcome the proposed statutory commitment to ensuring the independence of the tribunals’ judiciary. The Bill is an important step toward that goal. While the Bill creates a system for my leadership of the tribunals’ judiciary, it does not provide for overall judicial governance of the tribunals such as has been established for the courts in Scotland (see: Judiciary and Courts (Scotland) Act 2008, Parts 1 and 4). I hope that you agree that further reform is needed if the independence of tribunals’ judiciary is to be guaranteed.

President of Scottish Tribunals
The creation of the new post of President of Scottish Tribunals is of particular significance. I welcome the clause which provides that the President of Scottish Tribunals should be a Senator of the College of Justice nominated by me. In light of the proposed powers of delegation and significant leadership and management responsibilities that the role will involve, this is a useful and helpful provision.

I have considered this important nomination carefully and now indicate to you that, should the Scottish Parliament enact this provision, I intend to nominate Lady Smith to be the first President of Scottish Tribunals. I am sure you will agree that she will bring considerable skill, knowledge and experience of tribunal work.

Membership: Judicial tenure
The Bill provides that tribunals’ judiciary posts will all be five year appointments (Schedule 7(2)). This is a suitable arrangement for most positions as the workload of tribunals may be hard to predict. However, some posts can immediately be identified which require full time commitment and there could be more in the future. It would be useful if the Bill provided for the possibility of permanent salaried posts. Where appropriate, it would give appropriate tenure and standing to such posts and, furthermore, would assist in ensuring suitable recruitment and retention. The ability to attract and retain persons of high calibre in key tribunal roles will be vital. If these posts cannot be permanent salaried posts, it may be difficult to attract good applicants.
Membership: Nomenclature
The Bill refers to lawyers who are appointed to membership of tribunals as ‘legal members’, not ‘judicial members’, the latter term being reserved for those of the courts’ judiciary who sit in tribunals. In my view, those lawyers should be referred to as ‘tribunal judges’. That is the approach taken in the Tribunals Courts and Enforcement Act 2007 (‘TCEA’). The provisions of this Bill are in many respects similar to the TCEA. The adoption of the term ‘tribunal judge’ would be entirely appropriate. It would also avoid confusion arising when, for instance, a judge of a reserved tribunal – known there as a tribunal judge – sits in a tribunal established under this Bill. The use of the nomenclature proposed by the Bill could lead to the unfortunate perception that the lawyer members of tribunals are of a lesser status than the courts’ judiciary.

Membership: Eligibility for appointment – judicial members
I am glad that the Bill gives scope for courts’ judiciary to sit in the First-tier Tribunal (“FT”), in the case of sheriffs and part-time sheriffs, and the Upper Tribunal (“UT”) in the case of sheriffs, judges of the Court of Session and the Chairman of the Scottish Land Court. It is useful that, as the Bill provides, although eligible such judges may sit only if authorised to do so by the President of Scottish Tribunals, not least because not all eligible judges will have had prior tribunal experience.

It is also useful that Section 17 of the Bill provides that retired judges of the Court of Session and judges of the upper tribunal appointed under the TCEA may be authorised by the President of Scottish Tribunals to sit in the UT. It would be sensible to amend the section to include retired sheriffs in this provision.

Judges in the first tier tribunal of the reserved tribunals appointed under the TCEA and in the employment tribunals will not be eligible to sit by reason of holding such office. In order to take advantage, where appropriate, of this wealth of tribunal experience in Scotland, I would suggest that it may be useful to extend eligibility to this group, with a similar provision in favour of the President of Scottish Tribunals regarding authorisation to sit.

Membership: Eligibility for appointment – legal members
I appreciate that care has been taken to avoid drafting the eligibility provisions too narrowly and that persons who are eminently worthy of and well fitted for appointment as the legally qualified members of tribunals may not have followed what might be regarded as a traditional career in the law.

Further, although the criteria for eligibility set out in Schedule 3, para 5(2) 3 to the Bill are not intended to prescribe the precise terms of any regulations that ensue and although that eligibility does not guarantee appointment, there are a few, perhaps unintended, consequences of the provisions that I wish to draw to your attention.

Para 5(1) of Schedule 3 provides that a person who is in practice and has practised for at least 5 years as a solicitor, barrister or advocate in Scotland, England, Wales or Northern Ireland would be eligible. This is in contrast to the eligibility requirements which apply to the courts’ judiciary in Scotland all of whom must be Scottish qualified and have been in practice as Scottish solicitors or members of the Scottish Bar. All the tribunals listed in Schedule 1 are devolved tribunals. Such tribunals all deal with
issues that arise under Scottish legislation and, at times, may have to consider whether the common law of Scotland is also relevant in a particular case. It may be that this provision to make eligible lawyers qualified only in other UK jurisdictions is in preparation for future additions to the tribunal structure, but I would suggest that this is an unnecessary and unhelpful extension at this time.

Conversely, until regulations are made under para 5(2) of Schedule 3, para 4(2) of the Schedule would exclude from eligibility a person who, though working as a judge in one or more of the reserved tribunals, is no longer in practice. This would be a loss to the tribunals’ judiciary, particularly since there is scope for these judges to bring not only relevant judicial but also jurisdictional experience to the new tribunal system.

I appreciate that the provisions of para 5(2) regarding the making of regulations to extend eligibility reflect those of the TCEA; but the extension of eligibility seems to be wider than is reasonably required to cover those lawyers who may merit appointment to tribunals but cannot, for legitimate reasons, satisfy the requirement that they should be in practice at the time at which they apply.

Membership: Fitness Assessment Tribunals
I have a concern regarding the proposed membership of tribunals established under the conduct and fitness for office provisions to determine whether or not a legally qualified member of a tribunal is fit to remain in office. I note that para 15(1) of Schedule 8 could lead to a situation in which no member of such a tribunal was a full time judge. That is not, in my view, appropriate. I would suggest that such an important determination should be made only by a panel which includes a person who is, or has been, a full time member of the judiciary.

Tribunal Structure: The Upper Tribunal
I consider that it is unnecessary and may be restrictive to programming for there to be ‘divisions’ within the UT. It may also be confusing to adopt the nomenclature of the Inner House of the Court of Session. I understand a similar feature is part of the system established by the TCEA, but I am not aware of any assessment which points to the need for the UT in this jurisdiction to be separated into distinct parts.

Tribunal Structure: Valuation Appeal Committees
As Chairman of the Lands Valuation Appeal Court I have a particular concern as to the position of the local Valuation Appeal Committees which are specified in Schedule 1 to the Bill. At present appeals from the decisions of Valuation Appeal Committees may be taken directly to the Lands Valuation Appeal Court, consisting of three judges of the Court of Session who have been specifically appointed to that court by me (see Valuation of Lands (Scotland) Amendment Act 1879 sec 7).

This appeal system works well, I am not aware of any dissatisfaction with its operation. While I recognise that the independence of the Valuation Appeal Committees requires to be dealt with I am firmly of the view that the Valuation Appeal Committees should be treated in the same way as the Lands Tribunal for Scotland (whose work also involves issues of valuation) and taken outwith the proposed tribunal structure, thus securing that those judges specifically appointed by me to hear these appeals will be the judges who do hear them.
Tribunal Structure: Lands Tribunal for Scotland
It is important that the new system preserves the present situation whereby any appeal from Lands Tribunal for Scotland (“LTS”) is taken direct to the Inner House of the Court of Session. Other proposals would be inappropriate because the President of LTS may be and for many years has been the person who holds the office of Chairman of the Land Court. This is an office which holds the same rank and status as a Court of Session judge.

The provision in the Bill to transfer LTS into the UT rather than the FT appears to recognise the importance of the route of appeal from LTS being direct to the Inner House of the Court of Session. However, this is not entirely suitable as the LTS is not an normally an appellate body. I propose another solution, namely the approach that was ultimately taken in relation to the Employment Tribunal and Employment Appeals Tribunal at the time when the TCEA was under discussion. This would involve bringing the judiciary in the LTS under my leadership, with the support of STS administration but positioning that jurisdiction in a separate pillar outwith the FT and UT. This would preserve the LTS’ close relationship to the Land Court and its ability to act as an arbiter under a reference of consent (Lands Tribunal (Scotland) Act 1949 sec 1(5)).

Tribunal Operation: Rules
I support the practical transitional provisions contained in Schedule 9 which allow for the making of tribunal rules by Scottish Ministers until such time as the provisions conferring responsibility on the Scottish Civil Justice Council and the Court of Session for the making these rules are brought into force. The provisions in the Bill allow those tribunals which are transferred in to the FT to be able, initially, to continue to operate on the basis of their existing rules. Effective and efficient rulemaking is vital to the success of the new tribunal structure. There will have to be a mechanism for effecting amendments of FT rules in place as soon as the FT is created. Further, there will be a need to create UT rules to be in force at the same time.

Tribunal Operation: Practice Directions
The provisions within the Bill for practice directions to be issued by the President of Scottish Tribunals, the Chamber presidents and the Vice President of the Upper Tribunal are helpful. However, the provision at 68(5)(a) empowering these persons to make practice directions for the purpose of ‘instruction or guidance on the application or interpretation of the law’ is inappropriate. The purpose of a practice direction is to give guidance as to matters of practice and procedure (subject always to rules of procedure) not as to matters of substantive law. That guidance is provided, when appropriate, by appellate courts and tribunals.

Tribunal Operation: Awarding expenses
The power to award expenses is appropriate in tribunals and I welcome these provisions. In the interests of justice, tribunals, a number of which are ‘party - party’ tribunals, ought not necessarily to be regarded as cost free zones. It is important that tribunals are given a wide measure of discretion, as the Bill seems to envisage. The assessment of what is a fair determination of an application for an award of expenses depends, in practice, on the facts and circumstances of the individual case.
Within the detail of these provisions, clause 59(2) provides that the awarding tribunal ‘may’ state by whom and to whom an award is to be paid. It is essential that the awarding tribunal should do so. It may be seen as implicit in the power to make such an award (59(1)). In my view clause 59 (2) should either be deleted as unnecessary or should be amended to specify that the tribunal must state who is to pay the award and to whom.

There is also a reference to ‘wasted expenses’ in the Bill. That is a concept familiar in the courts and tribunals in England and Wales and in some of the reserved tribunals, but it has no meaning in the courts in Scotland or in the devolved tribunals. If tribunals are to be empowered to make such awards, it would seem essential for the term to be defined within the Bill.

**Tribunal Operation: Powers of Review**

I welcome the provisions that will enable the tribunal that has already heard and is familiar with the case, to reconsider matters where it seems appropriate to do so. I suggest that it would be helpful to include a rule empowering the tribunal to correct accidental errors, slips or omissions without the need for there to be an application by either party.

I do not agree with the provision that would allow the FT to refer an application for review to the UT which would then have power to do anything that the FT could have done, including making new findings in fact. This is not the purpose of review. It would most unusual to confer a power of primary fact finding on an appellate tribunal. I am not aware of any circumstances which would point to its being of assistance here.

**Tribunal Operation: Permissions to appeal**

Finally, I support the provisions in the Bill for leave to appeal. In my view, the ‘sift’ provisions provide both the FT and the UT with an appropriate and important measure of control to ensure that only meritorious appeals should be heard.

I assure you that I make these comments on the Bill in a positive spirit. I entirely support the reform of the tribunal system on the lines that are proposed in the Bill.

Rt Hon Brian Gill  
Lord President  
31 July 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from Douglas J May QC and Allan J Gamble

1. We are salaried judges of the Upper Tribunal, Administrative Appeals Chamber, sitting in Scotland. Our Chamber is presided over by Mr Justice Charles. There are salaried judges in England and Wales and Northern Ireland as well as ourselves. We hold permanent Crown appointments. In both Scotland and England and Wales there are a number of fee paid judges who hold tenure on five year appointments. The Chamber hears appeals from the following First-tier Chambers namely Social Entitlement, Health Education and Social Care, General Regulatory, Armed Forces Pensions and also from the Pensions Appeal Tribunal in Scotland, which is devolved, but appeals are heard by our Chamber of the Upper Tribunal. In addition we hear appeals from the Traffic Commissioners. We have accepted the invitation for one of us to present oral evidence to the Committee. However, we are presenting this written evidence setting out the principal issues we would wish to bring to the attention of the Committee.

2. We consider that the proposed new system for devolved tribunals in Scotland to be an improvement on the existing arrangements. We are fortified in that view by our own experience of the implementation of the Tribunals, Courts and Enforcement Act 2007 which has brought consistency and coherence to administrative justice on both reserved jurisdictions and those relating exclusively to England and Wales such as the Health Education and Social Care jurisdictions. We do however note that the scope and extent of the devolved jurisdictions to be transferred in is more restrictive than originally contemplated. Thus at the present time the extent of the reform is quite limited and accordingly may be thought not to achieve the objectives of carrying out the reform.

We are further not satisfied that the Bill takes properly into account the distinctive nature of the Lands tribunal which does not fit in happily with the structure provided for in the Bill, both in relation to their jurisdiction and the current arrangements for the appointment and payment of their members. It is however for them to make their own case about that. We also note that this tribunal performs certain reserved functions and clearly there will have to be a resolution with the UK Government as to how these functions are to be dealt with.

3. In our view the Bill is correct when it makes provision for appeals to the Upper Tribunal on points of law only with permission. The advantage of such appeals is that it enables an expert Upper Tribunal to set out coherent bodies of law on the subject matter of the divisions that will be created and provides a readily available and accessible method of seeking redress on a point of law from decisions of First-tier Tribunals. Such appeals are both cheaper and quicker than taking proceedings in the Court of Session or the Sheriff Court. It also means that the Court of Session will only be used where there is an important point of principle or practice to be determined and will not be burdened with more simple points of law such as whether or not the facts and reasons stated by the First-tier Tribunal are adequate. The right of appeal is rightly restricted as an Upper Tribunal is not geared to hear evidence as
to fact and engage in a rehearing of all the issues in a particular case. That is both
time-consuming and as experience shows, through the work of the Administrative
Appeals Chamber in the reserved jurisdictions, unnecessary.

4. We would however point out that whilst we agree with paragraph 88 of the
Policy Memorandum it is to some extent unrealistic to imagine that the volume of
appeals in devolved tribunals to the Upper Tribunal will remain as low as is currently
the case where appeal goes to the courts. This is due to the fact that appeal to the
Upper Tribunal is, and will be, more accessible and cheaper. Experience in England
and Wales suggests that there will be more appeals to the Upper Tribunal than to the
Courts in the case of Mental Health. The mental health and special educational
needs jurisdictions which will be brought in to the new system by the Bill are covered
for England and Wales by the Health Education and Social Care Chamber of the
First-tier. The experience of the Administrative Appeals Chamber on appeals from
that Chamber has demonstrated that these cases are more time-consuming than
appeals from the other First-tier Chambers which provide the work of our Chamber.

5. It is noted that the proposed membership of the Upper Tribunal is not to
consist of salaried judges. Indeed it seems to be contemplated that principally the
membership will consist of Court of Session Judges and Sheriffs. The disadvantage
of that is that the specific expertise of tribunal judges will be missing, though an
increasing number of Court of Session Judges are gaining experience of the work of
the Upper Tribunal in the reserved jurisdictions by sitting in the Administrative
Appeals Chamber, the Immigration Chamber and the Tax Chambers of the Upper
Tribunal. We consider that clause 17(2)(b) of the Bill is useful in that it will provide,
subject to the consent of the Senior President of Tribunals, for the opportunity of
Upper Tribunal Judges such as ourselves to sit in the devolved jurisdictions and will
enable us to bring our expertise particularly in respect of areas which our colleagues
in England and Wales already hear appeals on the same subject matters there. We
will suggest that clause 17(8)(a) be slightly amended to cover Upper Tribunal Judges
as well as retired Court of Session Judges.

6. We do, however, have reservations about a number of the proposals
contained in the Bill. These are set out below.

(a) Rules

One the reasons why the 2007 Act has been so successful has been because of the
setting up of the Tribunal Procedure Committee which has drafted a generic set of
rules with the necessary adaptions to the needs of specific Chambers in both the
Upper Tier and the First-tier. Having a consistent set of rules from the outset gives
coherence to the whole system and is obviously beneficial both to the Judiciary and
those who use the tribunal because there is a consistency in relation to the way in
which appeals are to be conducted both before the First-tier and the Upper Tier. We
do recognise that the extent of the tribunals which are to be incorporated under this
Bill are much more limited in size and scope than those covered by the 2007 Act and
can understand why a separate Tribunals Procedure Committee could be thought to
be unnecessary. However, simply by allowing the existing rules of each tribunal to
operate under the new structure until such time as the Scottish Civil Justice Council
can make rules for the tribunals rather defeats the objectives of the Bill. In addition
there is no Upper Tribunal at present and rules will have to be made for the Upper Tribunal. That becomes a much more difficult exercise when the Upper Tribunal rules that are created will require to dovetail in with the various existing rules of the different tribunals which are transferred in. We do not endeavour to offer a solution to this but it is a problem which we consider the Justice Committee ought to be made aware of.

(b) Review of decisions of the Upper Tribunal

Clause 38 of the Bill allows the Upper Tribunal to review a decision made by it on any matter in a case before it. Clause 38(3) allows the tribunal rules to make provision for restricting the availability of a review. That is not something which should be left to tribunal rules. The important point of principle involved in respect of review of the Upper Tribunal is that as the appeal to the Upper Tribunal is an error of law only it would be wrong for another Upper Tribunal Judge to review a decision of the judge who made it because a different view of the law is taken by the reviewing judge. That subverts the whole purpose of an appeal on a point of law with a further right of appeal on permission to the Court of Session. Exclusion of such a review should be set out in the primary legislation as should the scope of any review of the Upper Tribunal of its decisions.

(c) Actions on Review

Clause 39[2][b] and [3] makes provision for a reference by the First-tier Tribunal to the Upper Tribunal for decision when carrying out a review of its decisions. That is a position which is effectively lifted from the 2007 Act. In practice this is rarely used and it is not an effective remedy, the Upper Tribunal as we have indicated not being geared to hearing cases at first instance.

Appeal to the Upper Tribunal against the decision is a better approach.

(d) Practice Directions

We are concerned by the provisions contained in clause 68(5) which makes provision for the President of Tribunals and the Vice-President of the Upper Tribunal to issue instructions for guidance on the application or interpretation of the law. Whether or not a First-tier Tribunal errs in law is a matter for the judicial determination of the Upper Tribunal having heard argument. It subverts the whole process of appeal on a point of law if a judge who is not engaged in hearing the case can give general directions as to what the law is or how it should be applied. The law should be determined by the Upper Tribunal Judge having regard to the relevant statutory provisions and judicial precedent not by instruction or guidance by another judge acting in a non-judicial capacity however senior.

(e) Judicial Reviews

Under the 2007 Act the Upper Tribunal is constituted a superior court of record. This has advantage both in relation to the conduct of judicial reviews and also from the point of view of enforcing Orders. We understand that there is some objection to constituting the Upper Tribunal in court in Scotland in respect of the devolved
jurisdictions but in our mind we cannot see the reason why. We do note that there is provision to give the Upper Tribunal powers to act as if a court both in relation to judicial review and enforcement of orders and that may be sufficient.

(f) Appointments

The Bill in respect of the security of tenure proposes a five year tenure. As it is not intended to appoint salaried judges, as we understand it, in either the Upper Tribunal or First-tier Tribunal this is broadly acceptable. However it would no proper basis for the appointment of salaried judges who in our view require a proper security of tenure such as that enjoyed by salaried judges under the 2007 Act and by Court of Session Judges and Sheriffs. It would be difficult to recruit suitable appointees on such a limited basis if salaried judges were to be introduced.

(g) Re-appointment

We are somewhat concerned about the proposal contained in schedule 7, paragraph 6 (b)(i) and (ii).

This provision introduces the concept of judicial redundancy and in respect of sub-clause (b)(ii) involves a process of selection as to which members will be reappointed and which will not. We can see the attraction from a financial point of view of being able to dispose of the services of judges where the business is insufficient. It is however important to appreciate that security of tenure and the expectation of reappointment, where the duties have been performed properly and the requirements of office have been adhered to, is an important ingredient in maintaining public confidence in the independence and impartiality of the judiciary. This involves the protection from removal and from not being reappointed on an arbitrary or selective basis.

7. One of our concerns about the Bill was that if the work of the reserved tribunals was devolved by the UK Government at some future date its provisions particularly in relation to appointments remuneration and tenure would not be suitable for the members of such tribunals sitting in Scotland having regard to the current arrangements for them. However this would appear no longer to be an issue as the Lord Chancellor has stated on 19 June 2013 that such devolution of the work of the reserved tribunals is not to take place, at least for a period of some years. We are strongly of the view that the best interests of users in Scotland is that the reserved tribunals should remain intact and there should be no devolution of their functions. The 2007 Act works well. As they are concerned with the application of British Statutes applying throughout the United Kingdom (with certain exceptions in relation to Northern Ireland) it is better to have the coherence that is created by a unified judicial structure than by splitting it.

Douglas J May QC, Upper Tribunal Judge (Administrative Appeals Chamber)
and Member of the Tribunal Procedure Committee
Allan J Gamble, Upper Tribunal Judge (Administrative Appeals Chamber)

27 June 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland ("the Tribunal") was established by section 21 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act") and became operational in October 2005. The Tribunal is responsible for making and reviewing decisions concerning the compulsory care, treatment and detention in hospital of people in Scotland with mental disorder.

Background

In March 2012, the Scottish Government published its consultation on the Scottish Government's Proposals for a New Tribunal System in Scotland. The Tribunal was concerned by a number of issues raised in the consultation document, in particular the statement that the Scottish Government’s proposal—

"...will create two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, with first-tier chambers into which existing tribunal jurisdictions can over time be transferred".

The Tribunal, which is an expert tribunal in the area of mental health, was concerned that after its creation by the 2003 Act with the specific intention of removing mental health cases from the jurisdiction of the “generic” public courts in Scotland and transferring them into an expert jurisdiction, the proposal appeared to envisage the return of the mental health jurisdiction to a “generic” First-tier Tribunal.

The Tribunal made a detailed response to the consultation on the Scottish Government's Proposals for a New Tribunal System in Scotland, and thereafter engaged with the Scottish Government to seek to have its concerns addressed.

The Tribunals (Scotland) Bill

The Tribunal has considered carefully the terms of the Tribunals (Scotland) Bill, its accompanying Explanatory Notes, the Policy Memorandum and the Delegated Powers Memorandum. In light of the Scottish Government’s engagement with the Tribunal after receipt of the Tribunal’s response to the consultation on the Scottish Government’s Proposals for a New Tribunal System in Scotland, and consideration of the Bill, Notes and Memoranda, the Tribunal welcomes and supports the Tribunals (Scotland) Bill.

The Tribunal warmly welcomes the fact that the Bill will designate the Lord President of the Court of Session as the Head of the Scottish Tribunals (section 2 of the Bill), thus bringing the Scottish Tribunals directly under the judicial leadership of the Lord President and so strengthening the perception of the independence of the Scottish Tribunals.
The Tribunal also warmly welcomes the statutory duty on various individuals, including the First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament, and all other persons with responsibility for matters relating to the members of the Scottish Tribunals or the administration of justice, to uphold the independence of the members of the Scottish Tribunals (section 3 of the Bill).

The Tribunal also warmly welcomes the establishment of the office to be known as President of the Scottish Tribunals, being a judge of the Court of Session assigned to that office by the Lord President (section 4). This appears to the Tribunal to be a valuable measure ensuring that the Scottish Tribunals are provided with direct leadership by a member of the senior judiciary.

The Tribunal welcomes the undertaking given at paragraph 43 of the Policy Memorandum that “The Scottish Government has made a commitment that initially mental health will be in a chamber on its own”. The Tribunal notes that paragraph 43 continues “At the moment there are no other tribunals covering a similar subject matter as mental health. It therefore makes sense to do this for now. The Scottish Government recognises the uniqueness of the Mental Health Tribunal for Scotland and is committed to ensuring that all of its distinctive and valued characteristics can be protected and maintained in the new structure”.

The Tribunal also welcomes the undertaking given at paragraph 44 of the Policy Memorandum that:

“The Scottish Government is committed to ensuring that safeguards in the new structure in relation to the Mental Health Tribunal for Scotland will:

- continue to keep the patient at the centre of everything it does;
- retain the eligibility criteria for non-legal members which ensures that new members have the knowledge, experience and expertise to hear mental health cases;
- retain the tailored and specific training provided to members of the Mental Health Tribunal for Scotland which recognises the patient-centred culture developed by this jurisdiction;
- have a Chamber President who recognises the patient-centric culture and ethos of the Mental Health Tribunal for Scotland and is committed to safeguarding this;
- keep the bespoke rules currently used by the Mental Health Tribunal for Scotland (subject to appropriate modification);
- use, so far as is possible, the same venues for hearings that have been particularly appreciated and uniquely adapted for patients;
- retain the membership of the Mental Health Tribunal for Scotland (including the President) at the time at which its functions are transferred, who have been specifically trained to understand the sensitivities surrounding these particular cases though the provisions in the Bill providing for the transfer-in of members;
- continue to adhere to the Millan Principles – which the Scottish Government believes are a key strength of this jurisdiction; and
- continue to receive a specialist and dedicated administrative support.

The Tribunal has three categories of members: legal, medical and general. In making its decision, the Tribunal sits as three-member tribunal panels comprising a
general member and medical member and convened by a legal member. Accordingly, the Tribunal welcomes the commitment given at paragraph 24 of the Policy Memorandum that “When sitting in tribunals all members, whether ordinary\(^1\) or legal, have the same status and capacity as the judiciary, as they are all making judicial decisions”.

**Key issues**

The Tribunal responds to the key issues identified in the call for evidence on the Tribunals (Scotland) Bill by the Scottish Parliament’s Justice Committee as follows:

(1) **Whether the new structure is an improvement on the existing structure?**

The Tribunal is an independent judicial body which makes decisions that directly impact on the liberty of certain individuals in Scotland. The Tribunal recognises that its important functions (important because they impact directly on the liberty of individuals in Scotland) can be discharged effectively within the context of a structure other than the existing structure.

The Tribunal is satisfied that it can continue to discharge its functions in the context of a differently configured institution. The Tribunal’s concerns are to ensure that its expertise (i.e. having the knowledge of general and medical members with the convenership of a legal member), its ethos (i.e. keeping the patient at the centre of all that it does while having appropriate regard to the views of others) and the substantive law (i.e. the provisions of the 2003 Act) are not compromised by the transfer of the Tribunal into a new structure.

In light of the undertakings given at paragraphs 43 and 44 of the Policy Memorandum, the Tribunal is satisfied that the new structure of the First-tier Tribunal, made up of various distinct chambers, will not compromise its expertise, ethos or the substantive mental health law. The Tribunal notes that the Scottish Government’s commitment is “…that initially mental health will be a chamber on its own” and “It therefore makes sense to do this for now”. The Tribunal’s only concern in respect of this matter is, should in future the Scottish Government seek to amalgamate the mental health jurisdiction with any other jurisdiction, that this should be done only after appropriate consultation.

Subject to the foregoing, the Tribunal recognises that there are potential benefits inherent in taking numerous disparate tribunal bodies and amalgamating them into one single institution, not least the benefit of having these disparate jurisdictions all brought under the judicial leadership of the Lord President and the President of the Scottish Tribunals.

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\(^1\) paragraph 20 of the Policy Memorandum states that “ordinary members” are “those not considered to be legally qualified”.
(2) Whether the Bill will guarantee openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?

Given the leadership provided by the Lord President as Head of the Scottish Tribunals, the establishment of the office of President of the Scottish Tribunals, and that the Mental Health Tribunal for Scotland will (“initially” at least) be a chamber on its own and that nothing in the Bill appears to the Tribunal to impact on its expertise, ethos or substantive law, and given the terms of section 3 (upholding independence) of the Bill, the Tribunal is satisfied that the Bill will guarantee openness, fairness and impartiality as currently exercised in the mental health jurisdiction. Further, given the clear commitment of the Scottish Government at paragraph 43 of the Policy Memorandum that:

“The Scottish Government recognises the uniqueness of the Mental Health Tribunal for Scotland and is committed to ensuring that all of its distinctive and valued characteristics can be protected and maintained in the new structure”

and the terms of the Bill itself, the Tribunal is satisfied that the Bill will not impact on the openness, fairness and impartiality as currently exercised in the mental health jurisdiction and will allow for specialisation.

(3) The rules relating to appeals

Section 41 of the Bill makes provision for appeals from the First-tier Tribunal. Such an appeal can be made by a party in the case on a point of law only with the permission of the First-tier Tribunal or of the Upper Tribunal. However by virtue of section 41(5)(b), section 41 does not apply in relation to an excluded decision.

Decisions of the Mental Health Tribunal for Scotland can be appealed to the sheriff principal or, in cases where the patient is subject to a compulsion order and restriction order, a hospital direction or a transfer for treatment direction, to the Inner House of the Court of Session.

The Tribunal understands that the Scottish Government’s intention is that appeals against decisions of the Tribunal which can currently be taken to the sheriff principal will be able to be taken to the Upper Tribunal in accordance with section 41 of the Bill. While the Tribunal’s view is that the route of appeal to sheriffs principal has worked well and that the Tribunal has received useful judgements and guidance from sheriffs principal, given the provisions in the Bill concerning the structure of the Upper Tribunal (at sections 22 to 25) and the provisions concerning membership of the Upper Tribunal (at sections 15 to 17), the Tribunal is content that appeals to the Upper Tribunal will continue the robust scrutiny of decisions of the Tribunal which are appealed against.

The Tribunal notes at paragraph 61 and footnote (9) of the Policy Memorandum that decisions of the Tribunal which are currently taken to the Inner House of the Court of Session will continue to be taken direct to the Inner House, and not to the Upper Tribunal. The Tribunal’s view is that the route of appeal to the Inner House of the Court of Session has worked well and that the Tribunal has received useful judgements and guidance from the Inner House.
(4) The rules relating to appointments/membership

The Tribunal notes that section 28 (transfer-in of members) provides that schedule 2 contains provision for the transfer of certain persons from the listed tribunals (including the Mental Health Tribunal for Scotland) into the Scottish Tribunals to hold (a) particular named positions or (b) ordinary\textsuperscript{2} or legal membership generally.

Paragraph 1(1) of schedule 2 to the Bill provides that the Scottish Ministers “may by regulations provide for some or all of the transferable persons to become the holders of any of the particular named or other membership positions within the Scottish Tribunals specified in paragraph 4(1) or (2)”. Paragraph 4(1) provides that in relation to the First-tier Tribunal, the particular positions are Chamber President in the Tribunal and Deputy Chamber President in the Tribunal, and the other positions are ordinary member of the Tribunal and legal member of the Tribunal.

It appears to the Tribunal that these provisions may allow the Scottish Ministers a discretion as to which of the current members of the Mental Health Tribunal for Scotland may be transferred into the First-tier Tribunal. However, the Tribunal notes the undertaking given by the Scottish Government at paragraph 51 of the Policy Memorandum that “The functions of listed tribunals along with their members and caseload will transfer-in separately to the new structure by regulations (which are subject to the affirmative procedure)”. Accordingly, the Tribunal’s understanding is that at the time of transfer-in of the Mental Health Tribunal for Scotland to the First-tier Tribunal, its President and all of its general, medical and legal members will be transferred in to the First-tier Tribunal.

The Tribunal notes that section 14 of the Bill provides that a person may be an ordinary or legal member of the First-tier Tribunal either by transfer-in under section 28 or by appointment under section 29(1). This response has addressed the transfer-in of members in the three foregoing paragraphs. With regard to appointment under section 29(1), the Tribunal notes that section 29(1) provides that in terms of schedule 3, the Scottish Ministers may make regulations setting out criteria for membership as an ordinary\textsuperscript{3} or legal member. See paragraph 1(2) and 6(1) of schedule 3. The Tribunal notes the undertaking given at paragraph 44 of the Policy Memorandum that the Scottish Government is committed to retaining the eligibility criteria for non-legal members, i.e. the Tribunal’s general and medical members, which are currently set out in the Mental Health Tribunal for Scotland (Appointment of General Members) Regulations 2004 (SSI 2004/375) and the Mental Health Tribunal For Scotland (Appointment of Medical Members) Regulations 2004\textsuperscript{4} (SSI 2004/374) respectively.

With regard to legal members, the eligibility criteria are currently set out in the Mental Health Tribunal for Scotland (Appointment of Legal Members) Regulations 2004 (SSI 2004/286). The Tribunal notes that paragraph 5(1) of schedule 3 to the Bill requires a legal member to be a solicitor, advocate or barrister who has practiced for

\textsuperscript{2} paragraph 20 of the Policy Memorandum states that “ordinary members” are “those not considered to be legally qualified”.

\textsuperscript{3} paragraph 20 of the Policy Memorandum states that “ordinary members” are “those not considered to be legally qualified”.

\textsuperscript{4} as amended by SSI 2005/359
a period of not less than 5 years, or if s/he falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 3. The Tribunal understands from paragraph 95 of the Explanatory Notes that the purpose of paragraph 5(2) of schedule 3 is to enable the Scottish Ministers to make provision for persons who have previously practised law for a period of not less than 5 years as a solicitor, advocate or barrister, but who have then gone on to engage in another law related activity such as legal teaching or researching.

The Tribunal would expect the Scottish Government to consult on any proposals it had to make regulations under paragraph 5(2) of schedule 3.

(5) The rule-making power granted to the Scottish Civil Justice Council

The Tribunal notes the terms of sections 62 to 67 of the Bill concerning the making of Tribunal rules. The Tribunal notes from paragraph 72 of the Policy Memorandum that “… as there is a clear distinction between courts and tribunals, the Bill provides for the SCJC to use the powers provided in the 2013 Act (section 13(1)) to constitute a ‘tribunals committee’ to deal with tribunal rules” and that the committee “would be composed of persons with tribunal experience in the area for which the rules were being made” and that the tribunals committee “would be chaired and panel members would be selected by the President of Tribunals”. The Tribunal agrees with the view of the Scottish Government expressed at paragraph 72 of the Policy Memorandum that this “would ensure that the distinctiveness and ethos of tribunals is protected in the new structure…”.

(6) Any other aspects of the Bill

The Tribunal has no comment to make on any other aspects of the Bill in this written response.

Mental Health Tribunal for Scotland
31 July 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Office of the Scottish Charity Regulator

1. Introduction

The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (‘the 2005 Act’) as a Non-Ministerial Department (NMD) forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,500 charities registered in Scotland.

The Committee issued a call for written evidence on the Bill in July 2013 and below is OSCR’s submission. In forming our view we have considered our overall vision, which is for charities you can trust and that provide public benefit, underpinned by the effective delivery of our regulatory role.

2. Written evidence

Appeals against the decisions of OSCR are dealt with in sections 75 to 78 of the Charities and Trustees Investment (Scotland) Act 2005 (‘the 2005 Act’). Section 75 provides that Scottish Ministers must constitute a new body the Scottish Charity Appeal Panel (‘SCAP’). The procedural rules of SCAP are detailed in The Scottish Charity Appeals Panel Rules 2006.

Appeals to SCAP are now on the increase. In 2012-13 three SCAP appeals commenced and, to date, in 2013-14 one appeal has so far commenced.

In these appeals three are being pursued by party litigants. The other is a complex Equality matter in which Counsel have been instructed for both the appellant and OSCR. To date no SCAP decision has been appealed to the Court of Session.

SCAP is intended to provide a simple way for charities and trustees to appeal against decisions made about them by OSCR.

In terms of the 2005 Act points of law, fact or administrative process may be appealed to SCAP. In terms of section 76 of the 2005 Act SCAP may confirm a decision appealed to it, quash the decision or remit the decision back to OSCR for reconsideration. A decision of SCAP may be appealed to the Court of Session by the person who appealed to SCAP or OSCR. In terms of the 2005 Act, an appeal to the Court of Session is not restricted to points of law only.

OSCR is supportive of the two tier tribunal system proposed in the Tribunals (Scotland) Bill. If the number of SCAP appeals continue to increase it would be of benefit if SCAP was transferred into a chamber, the appeal process standardised and the available pool of panel members increased. The ability of the First-tier tribunal to have members assigned from the court judiciary in very complex legal matters will be of benefit. OSCR is pleased that there will be the opportunity for
existing Panel members, with their knowledge and experience, to be transferred into the chamber where charity appeals will be dealt with.

On the basis of the nature of appeals to SCAP to date OSCR is of the view that going forward there may be very few appeals made against a decision of the First-tier tribunal. Even so, the availability, in the first instance, of an appeal to an Upper Tribunal on a point of law as opposed to directly to the Court of Session would be welcomed by OSCR. It would make the appeal process more accessible to charities and their trustees.

There would, of course, require to be an amendment to The Scottish Charity Appeals Panel Rules 2006 once the transfer in had taken place. When looking at the provisions of the 2005 Act OSCR does think it would be of benefit if the basis of appeal from SCAP/the First-tier was amended to limit this to points of law only. This would reflect the Tribunal(Scotland) Bill and avoid two potential routes for appeals being created (ie the exiting route direct to the Court of Session on issues of fact, and the new route on points of law as provided in the Tribunals (Scotland) Bill).

3. **Overall**

OSCR welcomes the opportunity to give a view on the development of this Bill, and hopes the Committee find it useful.

Office of the Scottish Charity Regulator
2 August 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the President of the Private Rented Housing Panel/ Homeowner Housing Panel

1. An improvement on the existing structure

The Tribunals listed in Schedule 1 of the Bill are currently served by Scottish Tribunals Service (STS) and feedback suggests that they all operate efficiently and effectively, although differently, as you would expect, given the different user groups, specialisms, procedural rules and subject matters in dispute. The benefit of the Bill is that it will provide a chamber structure which is flexible to allow the addition of other tribunals not listed and to create a coherent approach for the future.

However, whilst the intention is to preserve the approach of the existing tribunals who will continue to hear their relevant cases in their own distinctive manner, there is a danger that grouping tribunals into chambers may result in the distinctive features of individual tribunals being lost and an overriding principle to maintain these features written into regulations may be appropriate. This would give reassurance that the distinctive ethos of individual tribunals would be maintained particularly in the event of a merger between STS and Scottish Courts Service (SCS) and closer working links as a result with the courts.

2. Guarantees of openness, fairness and impartiality in tribunal procedures and whether there will be sufficient specialisation?

The Bill emphasises the judicial nature of the tribunals and provides important guarantees for the independence of the Scottish tribunal judiciary. This is particularly important where some tribunals have links to a "sponsoring department", which control the tribunal budget, and hence a risk exists that there may be indirect influence on the judicial working of the tribunal.

A chamber structure under the leadership of the Lord President will emphasise the judicial nature and impartiality of Scottish tribunals and separation of tribunals from the Executive.

The President of Scottish Tribunals, who is a senior member of the judiciary, to oversee the working of tribunals will provide important safeguards and ensure a consistency of approach. The ability of the President of Scottish Tribunals to delegate functions to Chamber Presidents is appropriate and essential to ensure the operational efficiency of each chamber, particularly given that each chamber and tribunal jurisdiction has different requirements and in some jurisdictions specific duties rest with the Chamber President. The President of Scottish Tribunals and Chamber Presidents could be charged with ensuring that the distinctive nature and specialism of the individual tribunals are maintained.

On a technical point, whilst Section 3 provides that Scottish Ministers are to uphold the independence of members of Scottish Tribunals, Schedule 2 Para 1 indicates
that the Scottish Ministers may by regulations provide for some or all of the transferable persons to become the holders of any of the particular named or other membership positions within the Scottish Tribunals. Schedule 2 Paragraph 1 would seem to contradict the undertaking in Section 3 since ultimately the Scottish Ministers seem to have discretion as to who within the existing tribunal judiciary is to become holders of particular named or other membership positions within Scottish Tribunals. Some reassurance is given in this regard in the policy memorandum to MHTS membership but this reassurance is not extended to other existing Scottish tribunal membership and holders of named positions (although my understanding is that this is the intention). It may be appropriate to extend that same assurance in the policy memorandum to other Schedule 1 listed tribunals.

3. Rules relating to Appeals

The Report of the Scottish Committee of the Administrative Justice and Tribunals Council on Tribunal Reform: a vision for the future (2011) examined reasons for a single appellate body and the Bill incorporates this approach which is to be recommended. It is appropriate that appeals are confined to points of law. It is also important that judges with specialist knowledge of the jurisdiction sit on appeal cases. The structure proposed will create an appeal route from chamber decisions to an Upper Tier Tribunal which will have special expertise in the chamber jurisdictions.

I welcome the proposal to allow tribunals to review their decisions.

4. Rules relating to appointments/ membership

The Provisions in the Bill for the appointment and training of members is welcomed and will help to improve the standing of tribunals and the assignment provisions will give flexibility in the event of workload pressures.

A differentiation in the Bill is made between the status of tribunal judiciary and the court judges. Whilst the introduction in some tribunal jurisdictions of judicial titles may prove unwelcome with some users, there may also be advantages in other jurisdictions to emphasise the judicial nature of the tribunal and its membership. It is also unfortunate if the members of the tribunal judiciary are perceived to have lesser value than court judges, or indeed for there to be distinctions between legal and ordinary members since all members perform a judicial role. There may be merit in allowing a degree of flexibility in approach with regard to the use of judicial titles with the President of Scottish Tribunals and the Chamber Presidents being able to make the decision after consultation with users. In time with the increased recognition of the place of tribunals in the judicial structure, the public perceptions of tribunal members fulfilling a judicial role will be more widely recognised and the use of a judicial title is less likely to be an issue.

5. The rule making powers granted to the Scottish Civil Justice Council

Making a uniform set of rules for all tribunals would be a challenge and may prove counter-productive to achieving an efficient procedure tailored to the needs of the different jurisdictions and its users. Procedural rule-making involves specialist knowledge of the working of the individual jurisdictions. The benefit of a body such
as Scottish Civil Justice Council would be to provide guidance and experience in this area of work but it is difficult to envisage a Rules Council implementing rule change without a major input from the Chamber Presidents.

6. Any other aspect of the Bill

- 6.1 On a technical point specific to the jurisdictions of which I am President, Schedule 1 of the Bill details the Listed Tribunals. This includes in relation to Housing and other Acts (a) a private rented housing committee and (b) a homeowner housing committee. Section 26 (4) states that a tribunal includes any body, officeholder or individual having decision making functions that are exercisable in the manner of a tribunal (but only in so far as such functions are so exercisable).

Section 23 of the Housing (Scotland) Act 2006 and Section 18 of the Property Factors (Scotland) Act 2011, give the President of prhp/hohp a decision making function in relation to individual cases, which decisions are subject to appeal in the courts. Schedule 1 of the Bill may need amendment to reflect this.

- No acknowledgement is made of the importance of maintaining the specialist tribunal administrations which are essential for the efficient working of the tribunals. Consideration should be given to assurances in this regard and possible inclusion of this in the policy memorandum.

Aileen Devanny
President
Private Rented Housing Panel/ Homeowner Housing Panel
2 August 2013
I welcome this opportunity to make a brief submission to the Justice Committee on the Tribunals (Scotland) Bill. In doing so, I will focus on the future of the Additional Support Needs Tribunal for Scotland (ASNTS) and the children’s hearings system.

The Additional Support Needs Tribunal for Scotland

Firstly, I note the provisions in the Bill that would implement the Scottish Government’s proposal to integrate the ASNTS into the new, unified two-tier tribunals system. In relation to those provisions, I would urge the Committee to press Ministers to show that the submissions made by users of the ASNTS and those who support them were taken into account, and their informed views taken seriously in the decision to pursue full integration in the new structure.

The issues involved in ASNTS cases relating to additional support needs and disability discrimination can be extremely sensitive and highly complex. By the time cases reach the ASNTS, it may feel like the end of the road for parents, and relations have often broken down between parent and education authority. Any loss of expertise and understanding of the often complex circumstances of children and young people with both additional support needs and disabilities and their families from the existing tribunal would be highly undesirable and detrimental to the children whose cases are being heard.

In particular, its capacity to elicit and take due account of the voices of the children and young people who use it must be protected and further improved. Along with others in the sector, I have argued for an end to the anomaly in the Education (Additional Support for Learning) (Scotland) Act 2004, whereby children under 16 have no access to the tribunal in their own right – in contrast to the general rule in civil proceedings which presumes capacity to instruct a solicitor to sue and defend in civil proceedings from the age of 12. If full integration of the ASNTS into the new tribunal structure proceeds, the new body should be set up so as to be both accessible and sensitive to the rights and needs of users and potential users with additional support needs.

Children’s Hearings

The Scottish Government’s Consultation on the Scottish Government’s Proposals for a New Tribunal System for Scotland (2012) proposed that Ministers take a power to

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1 Education (Additional Support for Learning) (Scotland) Act 2004, s. 18 (2)(a): Where the child is ‘not over school age’ (cf. s. 29 (2)), only the child’s parent(s) have the right to make a reference to the Tribunal.

2 Age of Legal Capacity (Scotland) Act 1991, s. 2 (4A) and (4B): Children under 12 may have capacity to instruct if in the assessment of the solicitor the child has a general understanding of what it means to do so.
transfer the functions of other tribunals into the new unified tribunals system in the future. Notably, children’s hearings were included in the list of tribunals to which this may apply\(^3\). No policy rationale was provided for the inclusion of children’s hearings in the document at that stage, and notably the children’s hearings system is not mentioned in the Policy Memorandum that accompanies the Bill. However, s. 26 (2) confers upon Ministers a broad power to transfer further tribunals into the unified tribunals structure by affirmative instrument\(^4\), and in my reading the children’s hearings system would meet the conditions in subsections (3) and (4), and is not excluded by subsection (5).

I do not consider the inclusion of children’s hearings under this category to be appropriate for a number of reasons, briefly discussed below.

The Children’s Hearings (Scotland) Act 2011 marks the most substantial programme of reform to this uniquely Scottish system for child protection and youth justice since at least the mid-1990s. The bulk of the Act’s key provisions came into force on 24 June 2013, and the system is transitioning to full operation under the 2011 Act. A new national body, Children’s Hearings Scotland, has been set up to improve consistency of standards and administration of the system. I am confident the Act’s operational provisions and the support provided to hearings and panel members will deliver real improvements for children and young people. It is important to allow those latest reforms to be implemented in full and the reformed system to settle in.

More fundamentally, I would submit that the children’s hearings system is different in nature from other tribunals, and its functions may not sit easily alongside those of others. It does not deal with ‘disputes’ in anything like the sense of those that come before employment tribunals or even the ASNTS, for example. The system’s founding principles, its remit and the nature of its proceedings occupy a special place in the Scottish legal system and the child welfare system. Those principles’ enduring relevance was powerfully illustrated by the unanimous passage of the 2011 Act through Parliament and the continuing cross-party support for its model.

These will be amongst the reasons for the notable fact that none of the various reviews of the tribunals system cited in the consultation document recommended bringing the children’s hearings system under the auspices of a unified tribunals infrastructure. Indeed, the Administrative Justice and Tribunals Council’s 2011 report *Tribunal Reform in Scotland: A Vision for the Future* noted that the children’s hearings system is the ‘one major exception’ to its proposal for a unified governance model for tribunals in Scotland, citing the system’s nature, its ‘size and sophistication’ and the recent substantial reforms among its reasons\(^5\).

Finally, neither the consultation document nor the Policy Memorandum to the Bill give any reasons why future additions to the new tribunals system should not be effected by means of primary legislation, with the full parliamentary scrutiny that that would entail.

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\(^3\) At para 4.63.

\(^4\) Section 73 (2)(b).

\(^5\) At para 4.4, p. 10.
It is my view, therefore, that Scotland’s unique care and justice system for children and young people should be explicitly excluded from the scope of the power in s. 26.

I trust the above comments are of assistance to the Committee.

Scotland’s Commissioner for Children and Young People
1 August 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Scottish Children's Reporter Administration

Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- whether concerns relate to their welfare or behaviour, the needs of children or young people in trouble should be met through a single holistic and integrated system

- a preventative approach, involving early identification and diagnosis of problems, is essential

- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout

- the child’s engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with other professionals such as social work, education, the police, the health service, the legal profession and the courts system.

SCRA’s vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people’s experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

Response

This response is restricted to the provisions in Part 3 of the Bill, which would grant Scottish Ministers the power, by secondary legislation, to incorporate other tribunals, including the Children's Hearings System, into the unified Scottish Tribunals System at some future date. We are deeply concerned that the Hearings System has not been excluded from the scope of this proposal. We believe this evidences a lack of understanding of the complexity and sophistication of the Children's Hearings System and what would be required in legislative terms to bring it within the new structure in a way that would not risk undermining its key strengths and principles.

We would like to make clear that making such an exception to the section 26 powers would not preclude the Hearings System being incorporated into the unified structure at some future point, if such a move could be shown to be of benefit to children and
families. It would simply recognise that secondary legislation is an inadequate vehicle to achieve such a significant change for Scotland’s largest tribunal.

It is important to recall that the Children’s Hearings (Scotland) Act 2011 has only recently come into force (on 24 June 2013). This legislation brings into being a number of structural reforms to the Hearings System, including the creation of a National Convenor (supported by an NDPB – Children’s Hearings Scotland) to take responsibility for recruitment, appointment, training, support and monitoring of Panel Members. We believe strongly that the 2011 Act and the structure it creates is the right vehicle for bringing forward the necessary reforms to the Hearings System and driving improvements in support, training, decision making and outcomes.

It is notable that the Children’s Hearings (Scotland) Act 2011 was the result of a wide-ranging and broad-based consultation before the legislation even reached the Parliament. It was then vastly improved by the extensive consideration it was given by Parliamentarians and stakeholders throughout its passage, and by the additional time for consultation, debate, discussion and detailed scrutiny which the primary legislative route guarantees. The whole process required almost three years to conclude and it is arguable that bringing the Hearings System within the scope of a unified tribunals structure would be an even more significant change, requiring just as much complex legislative provision and detailed consultation and discussion with stakeholders. Based on the experience of the 2011 Act, it is hard to see how it would be possible or desirable to use the far more limited and truncated processes and procedures involved with secondary legislation to achieve this. There would be huge impacts for children, families, panel members, reporters and other Hearings System partners. As such, we believe strongly that any proposal should be subject to the full scrutiny of the Scottish Parliament via the primary legislative process.

While we take some reassurance from the Scottish Government’s assertion that there is no intention at the current time to make use of this power in respect of the Hearings System, we are concerned that the simple existence of such a power will lead to further uncertainty and concern for panel members and other Hearings System partners at a time when everyone should be focusing on delivering improvements and bedding in the new structures provided by the Children’s Hearings (Scotland) Act 2011. Furthermore, the existence of such a power would risk substantially undermining the credibility of Children’s Hearings Scotland at a time when that body has only recently taken up its responsibilities.

SCRA continues to believe strongly that the unique strengths of individual tribunal systems should be fully considered on an individual basis before any decisions are made about integration into a broader tribunals structure. This would require extensive consultation with Hearings System partners and with service users. In particular, it would be necessary to show evidence that incorporation within a unified structure would deliver clear benefits for the children and families within the System. One of the main drivers for the 2011 Act, and for many changes to policy and practice within the system, has been to improve the ability of children and young people to participate in the process. This goes beyond the “in-hearing” issues and ensures that communications, letters, leaflets and face to face contact with children takes place with their interests and needs at its heart. We are concerned that this
focus would be lost in a centralised administrative structure that deals with a range of different tribunals.

As the Administrative Justice and Tribunals Council (AJTC) said in its report\(^1\), which originally proposed the creation of a unified Scottish Tribunals Service “…the size and sophistication of the system, together with the substantial reforms to their governance currently progressing through the legislative process, are such that it is difficult to see what the Children’s Hearing system, or its users, would gain through being fully incorporated into our recommended governance structure”.

We agree with that assessment and note that some of the most important ways in which the Hearings System differs from the rest of the Scottish tribunals include:

- The Children’s Hearings System provides a forum for making decisions about the need for state intervention in the life of a child, it is not a system of administrative justice or of dispute resolution
- Unlike some other tribunals, Children’s Hearings are the key locus for decision making in the system. They do not exist to review decisions already made by other bodies
- Children and young people do not approach the Hearings System themselves, they are referred first to the Reporter by frontline services (mainly the police and social work), then by the Reporter to the Hearing itself based on a determination of the need for compulsory measures of supervision
- The Children’s Hearings System is a holistic and end-to-end system involving a number of organisations and individuals working closely in partnership, with a clear focus on producing better outcomes for vulnerable children
- This enables an on-going consideration and review of a child’s needs and circumstances over a period of time rather than simply providing for a one-off decision
- Unlike other tribunal members, the 2,600 Children’s Panel Members are unpaid, leading to significant and necessary differences in the way they are recruited, trained and supported
- The sheer volume of the case load dealt with by the Hearings System sets it apart from many other tribunals – in 2011/12 there were 40,708 Children’s Hearings in Scotland, involving 18,836 children
- Due to their specialist nature, both SCRA and CHS are able to take a very clear focus on the best interests of children and on children’s rights. There is a risk that this focus could be diluted if the Hearings System were to be subsumed within a larger structure.

As previously noted, Panel Members are unpaid, setting them apart from other tribunal members. It is important to note that they have strongly resisted any suggestions in the past that they should be remunerated. It is hard to see how a unified Tribunals Service would be able to incorporate Children’s Panel Members into a centralised support structure without having to make special arrangements for recruitment, training and support, which would obviate to a large degree any efficiencies which might otherwise be gained.

\(^1\) Tribunal Reform in Scotland: A Vision for the Future
The structures put in place by the Children’s Hearings (Scotland) Act 2011 are specifically designed with the particular status of panel members in mind and therefore are likely to represent a much better option for providing the necessary supports and for driving a process of continuous improvement in the System. Those structures also reflect the particular need for panel members to be supported at a local level, by local authorities, a factor to which Ministers and parliamentarians gave great weight during the passage of the 2011 Act. There is no provision within the proposed unified system for this local and more specialised support structure to exist, or for local authorities to have a role. It is hard to see how a central administrative structure could provide anything other than a lesser standard of service to the volunteers upon whom the Hearings system depends.

In addition to the unique status and particular needs of panel members, there are also specialist roles within the Hearings System that simply do not exist in other tribunals. During the extensive debates over the draft Children’s Hearings Bill, there was considerable discussion around this issue. At the conclusion of that process, Ministers recognised the value of the holistic role of the Reporter and of SCRA’s highly experienced and specialist support staff. It was agreed that these roles were especially important given the dynamic and non-linear nature of the Hearings System, which makes it unlike any other tribunal. Again, it is hard to see how such necessary specialist roles could be duplicated within a homogenous administrative structure, certainly without incurring significant additional costs and thereby removing any justification for making such an attempt.

Furthermore, we understand that policy responsibility for the unified tribunals system would rest with the Scottish Government’s Justice Directorate. However, we believe that there are sound reasons why sponsorship of the Children’s Hearings System sits with the Health and Social Care Directorate and within the specific portfolio of the Minister for Children and Young People. It is of particular note that the vast majority of cases dealt with in the Hearings System relate not to juvenile justice but to welfare concerns. As such, the Hearings System is an integral part of Scotland’s child protection system.

Responsibility for GIRFEC, early years, child protection and youth justice also rests within the Health and Social Care Directorate and it would be entirely inappropriate for specific policy responsibility for the Hearings System to be vested elsewhere or to be removed from the portfolio of the Children’s Minister. This would risk a potentially damaging policy disconnect from other aspects of children’s services.

We recognise that there are efficiencies to be gained by reforming the tribunals sector, and are broadly supportive of the reform agenda and of the need for all public bodies to identify opportunities for savings and efficiencies. In fact, we note that significant efficiencies have already been realised within the Children’s Hearings System by SCRA and Children’s Hearings Scotland driving forward a shared services agenda and a shared focus on improving structures, decision making and outcomes for children. We consider that there is no bar to similar arrangements being made with the Scottish Tribunals Service where opportunities to make efficiencies can be identified. This provides an opportunity to make savings without requiring the disruptive structural reorganisation which would be required to incorporate the Hearings System into the new Tribunal Service.
Conclusion

We believe strongly that the Bill should be amended to specifically exclude the Children’s Hearings System from the scope of the section 26 powers. We make clear that this does not preclude the Hearings System being incorporated into the unified structure at some future point, it simply recognises that if such a move were to be proposed, it would require the time for consultation, debate, discussion and detailed parliamentary scrutiny which the primary legislative route guarantees. We urge the Scottish Government to take the opportunity to recognise this, and to provide clear and unambiguous reassurance that the lengthy process of review to which the Hearings system has been subject over the last eight years has now been concluded and that the reforms contained within the Children’s Hearings (Scotland) Act 2011 will be given time to take effect. Such reassurances would allow all partners to move forward together and remain appropriately focused on improving outcomes for children and young people.

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

Membership and committee structure

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

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

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

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

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

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

It is clear from the terms of the Bill, and in particular the Financial Memorandum, that it is the Scottish Ministers’ intention to retain the tribunal rule-making function until the SCJC is in a position to take over this function. The reason given in the Financial Memorandum for delaying these provisions is that the SCJC “will be concentrating on court business”. It may be helpful to the committee if we expand on this. The SCJC is unable to take forward this function in the short term as a consequence of the proposed introduction and subsequent implementation of the Court Reforms (Sc) Bill. As committee members will be aware, the Scottish Government consultation on the draft Court Reforms (Sc) Bill recently closed. This is an enabling Bill which, if passed, would leave the majority of the detail to be implemented through court rules. It is expected that the SCJC will be focusing on this rules drafting project for the next 3-4 years, and therefore the SCJC do not feel that it is resourced to take on a further project in respect of the tribunal rules simultaneously. For this reason, we agree with the proposed approach to delay commencement of the provisions to transfer the tribunal rule-drafting functions to the SCJC.

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

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

Roddy Flinn
Secretary to the Scottish Civil Justice Council
2 August 2013
Introduction

1. The Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) (‘the Committee’) welcomes the opportunity to respond to the call for written evidence regarding the Tribunals (Scotland) Bill (‘the Bill’). The AJTC is a statutory body created by the Tribunals Courts and Enforcement Act 2007 (‘the 2007 Act’), and its remit requires it to scrutinise and comment on legislation, existing and proposed, relating to all aspects of administrative justice in Scotland.

2. The UK Government has indicated its intention to abolish the AJTC and its Scottish Committee and currently envisages such abolition taking effect at or about 19 August 2013. In presenting this submission the Committee is conscious that it is unlikely to be able to respond to an invitation to offer oral evidence to the Justice Committee after that date. In the light of that circumstance this written submission exceeds the length ordinarily recommended by the Justice Committee.

General comment

3. The Committee is conscious that the Justice Committee has requested comment on specific issues and proposes to address each of those. In advance of commenting on the specific issues identified in this consultation the Committee offers the following general comments.

4. **In general terms the Committee welcomes the Bill.** In ‘Tribunal Reform in Scotland A Vision for the Future’ [2011] the Committee set out recommendations for the reform of the Tribunals system in Scotland in the light of the two reports of the Administrative Justice Steering Group which had been chaired by Lord Philips. The Committee is pleased to note that many of the Report’s recommendations are reflected in the Bill.

5. **The significance of the Bill** - The Tribunals (Scotland) Bill (the Bill) is an exceedingly important piece of legislation. We are conscious that the scope of the Bill is relatively narrow being only to establish the First-Tier Tribunal for Scotland and the Upper Tribunal for Scotland. The Bill therefore addresses the structure and organisation of devolved tribunals in Scotland. It does not, nor could it easily, directly address the structure and organisation of reserved tribunals in Scotland. Its significance stems in part from the fact that it represents the first step which if

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1 The Committee took the place of the Scottish Committee of the Council on Tribunals.
2 See para 13 Sch 7 to the 2007 Act; The Committee’s remit is
   • to keep the overall administrative justice system in Scotland under review;
   • to keep under review the constitution and working of those tribunals, under Scottish jurisdiction, which are designated as being under the AJTC’s oversight;
   • to keep under review the constitution and working of statutory inquiries relating to Scotland.
followed up on may at last begin to establish some coherence in the Scottish Administrative Justice system, and in so doing also on the Scottish Civil Justice system. We feel that it is appropriate to provide some background on that assertion, partly because the Scottish Committee will shortly disappear from the scene, and we will not be able to answer for it in oral evidence.

6. **The nature of administrative justice** - 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 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.

7. **The need for a joined up approach in the civil justice system** - Scottish Government has not so far offered a comprehensive plan for the Scottish Administrative Justice system as a whole, far less the civil justice system. It has preferred to look at issues sequentially, and this Bill along with the upcoming Civil Courts Reform Bill are two important blocks in the development of the civil justice system. It may be that such an approach is unavoidable in the absence of any agreed overarching vision for the civil justice system, and also in the context of the shared responsibility within the administrative justice system which devolution necessarily implies.

8. A consequence however of an absence of an overall vision is that the overall system becomes compartmentalized. It is likely to be more difficult to achieve necessary major changes in the absence of a strategy for the entire civil justice system. However, recognition of the inter-relationship of the different and overlapping sectors of a civil justice system is a useful starting point for developing a coherent system. Users want and are entitled to a system which is easily navigable and which meets their needs.

9. **Users’ understanding of the system** - Citizens do not in general terms have a developed appreciation of the relationships of the different parts of the Civil Justice system. One example of this is the distinction between appeals and complaints. The circumstances in which an appeal is the relevant remedy where in other areas the remedy may be by way of a complaint, is not a matter on which there is a ready reckoner. Nor, we suspect, do policy makers, in general terms, have a developed approach differentiating in what circumstances the remedy, if there is to be one, is to be by way of complaint or appeal, and in the case of the latter whether to a court or to a tribunal.

10. **Users perception of courts** – The Committee has not conducted research on the user response to courts as opposed to tribunals. However the AJTC conducted sufficient monitoring of tribunal users views to be able to form the provisional view that, in many cases, users prefer informality to formality and an investigative as opposed to an adversarial system. These are aspects of a tribunal approach which

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make it distinctive.

11. **Courts and tribunals** – One of the key areas of debate in modern times in the administrative justice area is whether tribunal justice is in effect being swamped by the courts. The Bill does not directly address the relationship between courts and tribunals in Scotland, but it will be an important area in future. The Scottish Civil Justice Council (SCJC) will take on responsibilities in relation to Tribunals under the Bill, and that in itself presents issues if the identity of tribunal justice is to be protected and developed.

12. As courts and tribunals become the responsibility of the Lord President and the SCJC then issues may well arise which will touch on the distinctiveness of tribunals as opposed to courts. This is not simply an issue of seeking to preserve tribunals as they are, but ensuring that as they develop so the core characteristics, if they continue to be relevant, can be safeguarded. Having said that it is appreciated that the courts themselves are moving to achieve changes in their own approach. But experience of, for example, small claims does not suggest that changing the culture of courts is an easy process. There is also some basis for believing that a process of judicialisation of tribunals is already in train in England and Wales where courts and tribunals administrations are linked in HM Courts and Tribunals Service (HMCTS). Linkage, as is proposed in the Bill in particular through the conferring of powers on the SCJC could therefore present a challenge for the distinctive characteristic of tribunals. If therefore retention of that distinctive characteristic was as indicated in the Scottish Government’s consultation an objective of Scottish Government in this matter, then it may be appropriate to consider how that distinctive character can be safeguarded.

13. **The distinctive character of tribunals** – In any event if Government is inviting Parliament to legislate on tribunals, as opposed to courts, then it is fair to ask whether the Bill might usefully contain some indication of what is meant by a tribunal, beyond simply referring for example to the listed tribunals. The Committee firmly believes that if there is to be coherent structure within a civil justice legislative framework, then at some point, whether in this Bill or elsewhere, some effort will be required to identify the characteristics which distinguish tribunals from courts.

14. In Para 4.1 of *Tribunal Reform in Scotland; A Vision of the Future*, the Committee defined a tribunal as:

   ‘A body which resolves disputes between citizen and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it.’

15. Although there is a considerable amount of variation between courts, and likewise a considerable amount of variation between tribunals, and although there is a degree of overlap between them in that some tribunals have characteristics associated with courts and some courts have characteristics associated with tribunals, the Committee believes that the following factors in large measure are

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what distinguish most tribunals from most courts:

i. **the specialist nature of the tribunal judges’ and tribunal members’ jurisdiction** as compared with the generalist experience of judges in the courts – tribunal judges and tribunal members are expected to be experts in the law and policy of the subject matter of the dispute;

ii. **the relative informality of tribunal hearings as compared to court proceedings** – tribunal procedures are simpler and more flexible than court procedures, parties are not required to take the oath, the rules of evidence are less demanding, the parties often appear in person and, where they are represented, the representatives tend to be lay experts rather than lawyers;

iii. **a less adversarial and more inquisitorial approach than that encountered in the courts** – tribunal judges and members frequently take a more active and interventionist role in the proceedings than judges in the courts and, instead of listening passively to the arguments advanced by the representatives of the parties, take the initiative in putting questions to the parties that elicit facts which they consider to be relevant to the case;

iv. **a more enabling approach than is typically encountered in the courts** which is intended to facilitate the direct participation of the parties in the proceedings, especially when they are unrepresented;

v. **in many but no longer in all tribunals, the fact that parties do not have to pay to raise an action and that costs are not awarded against the losing party**

The Scottish Committee of AJTC believes that, in the context of the proposed merger of the Scottish Tribunals Service and the Scottish Courts Service, these characteristics are important and worth preserving and that they should be given statutory protection in the Bill.

16. The Committee also believes that a core factor distinguishing courts from tribunals is the position of the tribunal user, and the recognition of the user’s position by the Tribunal. Leggatt emphasised the importance of remembering that “tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases. .... tribunals should do all they can to render themselves understandable, unthreatening, and useful to users ....” (para. 6)\(^5\).

17. It can be a difficult point to make to suggest that in effect the user’s position is a differentiating factor. The Committee does not suggest that the position of the court user is less important to courts; we are aware for example of the Scottish Court Service Court User’s Charter. But the tribunal user differs from the civil court user. For the most part the latter are legally represented; court users tend to be lawyers, and individual court users, if parties as opposed to witnesses, will tend to deal with courts through their legal representatives. This means that the nature both of the conversation and the contact in general will be significantly different between court and tribunal users. Legal representatives almost by definition are used to the experience and, through their professional bodies and the like, will be involved in shaping the processes and procedures of courts. For the individual tribunal user, the contact with a tribunal may be a one-off experience where the user may well have no previous experience and only limited resources.

\(^5\) para 4.21 – Vision for the Future
18. **The Committee believes therefore that consideration should be given to inclusion of some statement in the Bill touching on the distinctive characteristics of Tribunals which differentiate Tribunals from the ordinary courts, and which should be maintained.** In making this proposal the Committee is mindful of the objectives\(^6\) set out by Scottish Government in its consultation on Tribunal Reform. In particular at 1.7 of that consultation Scottish Government indicated that an objective was ensuring the ‘distinctiveness of different tribunals, including continuing specialisation’.

19. **The Committee believes that status of the Scottish Tribunals Service (STS) should be protected in the Bill** - The Committee is concerned that this Bill is silent on the status of the STS. In its report ‘Vision for the Future’ in 2011 the Committee had recommended that the STS should be a statutory body entirely independent of the Scottish Government and chaired by a Senior President of Scottish Tribunals\(^7\). The Committee firmly believes that failure to accord similar status for tribunals administration to that accorded to courts administration from the outset risks fostering unfortunate misconceptions as to the general status and standing of administrative justice as a whole.

20. The Committee has noted the proposal that STS and SCS should be merged. The Committee recognizes that complex restructuring as in the case of the Scottish Courts and Tribunals does have to be subdivided into manageable projects, but it is nonetheless regrettable that the proposal was not included in the original consultation on tribunal reform. The Committee will respond to the consultation by Scottish Government, but it should say at this stage that it believes that, overall, a merger at this stage, while providing the status argued for, presents real problems for the maintenance of the separate tribunal identity referred to above.

**Comments on the Bill**

21. **Objectives** - In its consultation prior to the Bill the Scottish Government identified five main objectives to be secured:
   a. Effectiveness in securing just and speedy outcomes;
   b. Efficiency in the administration of justice;
   c. Distinctiveness of different tribunals including continuing specialization;
   d. Centrality of tribunal users, and
   e. Potential for future developments of the wider system of Scottish justice.

22. The Scottish Committee notes that the Justice Committee has requested comment on the first three and the fifth of those objectives as set out by Scottish Government. It is disappointed that the objective of recognition of the centrality of the

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\(^6\) 1.7 This proposal seeks to balance five key objectives:
- effectiveness in securing just and speedy outcomes;
- efficiency in the administration of justice;
- distinctiveness of different tribunals, including continuing specialisation;
- centrality of tribunal users; and
- potential for future developments of the wider system of Scottish justice.

\(^7\) para 4.35 Vision for the Future
user, which was a cornerstone of the Leggatt tribunal reform proposals\(^8\) does not appear to be a dominant policy aim in the provisions of the Bill.

23. In its consultation on civil courts reform the Government expressed the hope that the Tribunals Bill ‘will create a more user-focused and coherent system for devolved tribunals, providing a more efficient way of resolving citizen to state and party to party disputes.’ The Committee regrets that the language of that consultation did not readily appear to refer elsewhere to a user focus. In the absence of that expression the philosophical basis for courts and tribunals may continue to diverge rather than converge, although at the same time a convergence between courts and tribunals in the Scottish Civil Justice Council, and under the judicial leadership of the Lord President could result in the erosion of the current user focus of tribunals. The Committee does not have the impression that the language of the Bill contributes to confidence that the user focus is indeed central to the thinking behind the Tribunals Bill. There are some isolated references to user perspective as for example [ref to policy memorandum] but the Committee believes that more needs to be done on the face of the Bill.

24. The Committee recommends, therefore, that the Justice Committee consider the Bill in the light of the perspective of users of the Tribunals system, and that if possible it might seek to reinforce the proposition that the user must be seen as central to the tribunal process and accordingly also in the consideration of the structural and other issues for which provision is made in the Bill.

25. An improvement on the existing structure? - The Committee considers that the provisions of the Bill represent a significant improvement on the existing structure of tribunals in Scotland. A single Tribunal divided into Chambers will enable a more coherent and flexible approach to Tribunal Justice in Scotland. Smaller Tribunals should be able to modernise while theoretically, and where appropriate, retaining and developing their own ethos and character. As Leggatt said

‘Combining the administration of different tribunals will provide the basis for a relationship between them. But that association cannot properly be called a Tribunals System until true coherence has been established by bringing within one organisation without discrimination all those tribunals which are concerned with disputes between citizen and state (in the guise of either central or local government) and those which are concerned with disputes between parties. Only so will tribunals acquire a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended.’ \(^9\)

The new structure provides the first steps in achieving such a system, and the Committee welcomes that.

26. Guarantee of openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation? – The Committee believes

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\(^8\) Leggatt Report – ‘Tribunals for Users, One System, One Service’ – para 31 – ‘In a Tribunals System properly so-called there should be a new culture, starting with improved recognition of just how daunting the tribunal experience usually is for first-time users, as most are.’

that provisions in the Bill in relation to appointment, training etc of members of Tribunals cannot but enhance the standing of the Tribunals. The guarantee of independence in s3 serves to underline the principles which Leggatt was trying to establish. A single system will enable leadership to be developed and thereby to ensure that specialism ethos and desirable distinctiveness can be ensured\textsuperscript{10}.

27. However, the Committee is concerned that seeking to achieve Tribunals modernization at the same time as securing convergence between courts and tribunals may result in those aspects – specialism, ethos and desirable distinctiveness - being swamped by the demands of the Courts system. It is noteworthy that the convergence process was not attempted in England and Wales until almost seven years after the start of the Tribunals modernisation process, following the TCE Act.

28. **Rules relating to Appeals** The Committee welcomes the provisions of the Bill as they relate to appeals and in particular in relation to review.

29. **The rules relating to appointments/membership –**
   a. *Restrictions on appointment as President* - The Committee had recommended\textsuperscript{11} that the post of President of Tribunals should be open and in particular should not be confined to judges of the Court of Session. The Committee had also noted in its responses to the consultation that it considered it essential to the development of the tribunals judiciary in Scotland that appointment to the office of President of Tribunals should be open to the tribunals judiciary at large and not restricted simply to judges of the Court of Session. The Committee is therefore disappointed both that s4(5) effectively restricts appointment as President to Judges of the Court of Session, and further that such appointment is by way of assignment rather than appointment through a process under the supervision of the Judicial Appointments Board for Scotland to the specific post of President.
   b. *Judiciary eligible to sit.* The Committee has some concerns about ss 16, 17 and 18 insofar as they may be seen as allowing an automatic eligibility for the judiciary to sit as members of tribunals. The Committee appreciates that members of the judiciary may only sit if authorized to do so by the President of Tribunals\textsuperscript{12}. However the Committee believes that there might usefully be some further refinement of that requirement on the face of the Bill. For example the President of Tribunals might be required to consult with the President of the Chamber within which the judge is to sit before authorizing the judge concerned – see s20. It is unlikely that the President would act without so consulting but including a statutory requirement could bolster the proposition that the expertise of the membership of particular tribunals was being maintained.
   c. *Differentiating between the status of Tribunal members and court judges* – The Committee has some concerns about the status of tribunal members under the Bill. It is fairly clear from Part 2 Chap 1 of the Bill that members of the Tribunal on the one hand and court judges on the other are not to be seen in the same light; the latter may readily qualify for membership of the

\textsuperscript{10} see eg Policy Memorandum para 14
\textsuperscript{11} Vision for the Future
\textsuperscript{12} In coming to this view the Committee has noted the terms of the Policy Memorandum, especially paragraph 21
former, but not *vice versa*. The Committee has consistently preferred that
the distinctiveness of tribunals be maintained – see 13 to 18 above. It
would for example deprecate practices such as wholesale adoption of an
adversarial style in Tribunals or sharing accommodation with criminal
courts, the latter being for example the practice in some areas in England
and Wales. We believe that certain tribunals in Scotland may have been
uncomfortable with the introduction of judicial titles within the reserved
tribunals. Equally however and in particular so far as the reserved tribunals
in Scotland are concerned, the convergence in status between tribunals
and court judiciary has been welcomed in some quarters. For the
avoidance of any doubt, the Committee’s preferred position is that the less
formal structure of ordinary and legal members of a Tribunal should be
adopted as it is in the Bill. But the Committee also recognises that the issue
may require to be finessed especially if the reserved tribunals are to be
inserted into the new Tribunal structure at some point, given our
understanding of the position of the reserved judiciary that the status of
judge which they currently enjoy should carry across into any new devolved
arrangements.

d. Developing and maintaining the informality which is part of the distinctive
approach of tribunals can, we think, best be achieved by practical
measures such as for example through the absence of court dress, the
avoidance of dais-type court rooms, avoiding adversarial styles and
avoiding the use of judicial titles as a matter of practice as well as other
similar measures. The Committee recognises that establishing a tribunals
membership which sits apart from the courts judiciary may well make
convergence more difficult in the longer term. Whilst, on a practical level it
may perpetuate perceptions about a multi-tier judiciary in which the
tribunals are of lesser value, we do not believe that this will be the
perception of the citizen user of tribunals.

e. The Committee does not believe that it is in the interests of users of
tribunals that the members of the tribunal may perceive that they in turn are
seen as of lesser status than judges. The Committee firmly believes
however that ensuring the maintenance of the ethos of tribunals is primarily
a matter of judicial leadership rather than statutory prescription. An
approach based on ss 4 to 6 of TCEA might allow also for Chamber
Presidents to determine whether members in any particular Chamber used
judicial titles, or, as many would prefer, including most users, something
less elevated and more accessible. What most users would wish to avoid
would be the introduction of practices which distance the tribunal
membership unnecessarily from those appearing before them. It would be
possible for tribunals to maintain informality including eg an absence of
judicial titles, even in such a structure.

f. Involvement of Judicial Appointments Board - The Committee welcomes
the fact that appointments of Tribunals ordinary and legal members will be
within the responsibility of the Judicial Appointments Board for Scotland –
see Sch 9 para 11 amending s10 of Judiciary and Courts (Scotland) Act
2008. This meets the points argued for in 4.13 of “Tribunal Reform – a
Vision for the Future”. It would have been preferable however had the
involvement of the Board been explicit on the face of the Bill rather than a
matter of inference from a textual amendment. The Committee accordingly
The rule-making power granted to the Scottish Civil Justice Council

30. The Committee is concerned about the rule making power. That concern derives mainly from the composition of the Scottish Civil Justice Council. Even though the Bill makes express provision for the Tribunals Committee it does not deal with that in the same level of detail as applied to the arrangements for the Tribunal Procedures Committee under paragraph 21 of Sch 5 (Part 2) of TCE Act\textsuperscript{13}. The Committee are concerned that Tribunal Rules will be made with little or no user input; this would represent a retrograde step from the system which obtains in relation to the reserved jurisdictions.

31. Accordingly the Committee recommends that provision be made in the Bill to specify the composition of and arrangements for the Tribunals Committee, along the lines set out in Sch 5 of the TCE Act.

Any other aspects of the Bill

32. The Committee welcomes the Bill in general terms but would draw attention to the General comments it makes at paragraphs 3 to 20 above

Scottish Committee, AJTC
July 2013

\textsuperscript{13}Lord Chancellor’s appointees

21(1)The Lord Chancellor must appoint—
(a) three persons each of whom must be a person with experience of—
(i) practice in tribunals, or
(ii) advising persons involved in tribunal proceedings, and
(b) one person nominated by the Administrative Justice and Tribunals Council.
Introduction

The Commission welcomes the opportunity to comment on the Tribunals (Scotland) Bill. The Commission welcomes the aims of the Bill to increase the independence of the tribunal system from the Scottish Government and to provide, overall, a more coherent and consistent system. Having considered the specific measures of this Bill, we would like to provide some general comments on the independence and impartiality of tribunals and access to justice. The Commission hopes these brief comments are useful and provide a framework for the approach to changes to the tribunal system, particularly as seen in the context of the ongoing process of changes to the justice system as a whole.

An independent and impartial tribunal

Both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) provide for the right to a fair trial by an independent and impartial tribunal established by law, in Articles 6 and 14 respectively. The Bill pursues a clear aim of ensuring the independence and impartiality of members of the tribunal system and, with this in mind, the Commission wishes to highlight the following essential elements of the requirement.

It is a pre-condition of the judiciary’s ability to uphold the rule of law that they should be independent and impartial from all outside pressures or influence, whether by the parties or by the executive or legislative branches of the state. The essential elements necessary to achieve this standard of independence are the process of appointment of judicial members, their terms of office and security of tenure, and guarantees of their independence from outside influences and pressure. It is also important that the judicial body presents an appearance of independence, in accordance with the maxim that justice must not only be done but must be seen to be done.

The United Nations Basic Principles on the Independence of the Judiciary highlight these key elements, outlining the importance of securing the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement.

In light of these requirements, the Commission wishes to highlight the importance of ensuring that the process of appointment and removal of judicial members of the tribunal is in accordance with these standards.

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1 See Le Compte, Van Leuven and De Meyere v Belgium (1981)4 EHRR 1.
Access to justice

The right to a fair trial encompasses a broad range of specific rights, which cumulatively amount to the standard of fairness. A key element of this right is ensuring that parties have access to justice, so that rights are “practical and effective”, rather than “theoretical and illusory”\(^3\). Access to justice refers to the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.

There are a variety of barriers in accessing the legal system such as complexity of the law; lengthy proceedings;\(^4\) restrictions to legal aid\(^5\); and the lack of implementation of effective remedy and reparation.\(^6\)

Access to justice depends on a properly designed and functioning system of justice. It is therefore important that the transfer of functions to the new tribunal system proposed by the Bill enhances rather than erodes this system.

The changes to the tribunal system present an opportunity, when viewed as part of the ongoing process of reform of the justice system currently underway in Scotland, to ensure the establishment of an accessible, relatively simple and inexpensive system for the individual. In order to enhance fair trial rights, the Commission wishes to highlight the need for the whole process of reform to be coherent in its approach to ensuring access to justice. An overarching view of the cumulative effect of the current reforms should be taken, to ensure that all measures in tandem amount to an enhancement of fair trial rights and access to justice. The Tribunals (Scotland) Bill can be seen as an opportunity to address any further obstacles to these rights, in the broader scheme of these changes.

The Scottish Human Rights Commission
August 2013

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\(^3\) Airey v Ireland ECHR (1979)


\(^6\) For example E and others v UK Application No 3321 8/96. This case pointed to gaps in the current framework for remedies of historic abuse in Scotland.
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Scottish Independent Advocacy Alliance

1. The Scottish Independent Advocacy Alliance (SIAA) is Scotland’s national membership body for advocacy organisations. The SIAA promotes, supports and defends independent advocacy in Scotland. It aims to ensure that independent advocacy is available to any person who needs it in Scotland. SIAA membership is drawn from advocacy organisations across Scotland.

2. Since the establishment of the Mental Health Tribunals for Scotland many people, who formerly had to attend the Sheriff Court for decisions on detention and treatment for mental disorder, now have their situation reviewed by a Mental Health Tribunal. The majority of SIAA member independent advocacy organisations have supported many individuals in Mental Health Tribunal settings and report on the consistently compassionate, caring and professional approach of Panel members. Many organisations report that this has made a substantial and positive change to the lives of individuals when facing loss of their liberty or compulsory treatment.

3. Member organisations supporting individuals in other Tribunal settings, e.g. Child Protection, have reported more mixed experiences.

4. The SIAA welcomes the Bill’s proposals which aim to provide consistency in practice and procedure. We believe that all Tribunals should aim to offer an approach similar to that of the MHTS in their work.

5. We believe that one contributory factor to this approach is the level of specialist knowledge and expertise within MHTS. We therefore feel it vital that the Tribunal is placed within a single Mental Health Chamber in the First-tier Tribunal with similar separation of Chambers across the different specialisms.

6. The MHTS plays a vital role in ensuring that an individual’s rights to liberty, freedom from inhuman or degrading treatment and autonomy are protected. This role could be compromised if the Tribunal’s current expertise and functions were to become diluted through the process of being placed in a multi jurisdiction chamber now - or in the future.

Shaben Begum MBE
Director
19 July 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Scottish Valuation Appeal Committees Forum

Introduction

Valuation Appeal Committees are composed of the members of 13 separate Valuation Appeal Panels each having jurisdiction in one or more local authority areas. The SVAC Forum is a voluntary umbrella group allowing the Panels to work together on matters such as member training and collective representation to the Scottish Government on relevant policy issues. The Policy Committee, composed of 4 (lay) Panel Chairmen and 3 (solicitor) Panel Secretaries, focuses and presents the collective representations of the sector.

We note the intention of the Tribunals (Scotland) Bill to introduce a framework providing for increased consistency and transparency in relation to the justice delivered by Tribunals. For our own sector, we welcome that intention but have reservations as to whether the framework proposed will necessarily achieve these objectives. The model is geared to the situation where a unified national Tribunal already exists, particularly where it is composed of paid professional members and where it has national jurisdiction. To translate Valuation Appeal Committees into such a regime it would first be necessary for the Scottish Government to undertake a comprehensive review of our constitution, functions and procedures (as prescribed by statute) to ensure that the resultant body would be viable and efficient. We highlight below some of the issues that need to be addressed; some will be relevant to other Tribunals while most are particular to our sector.

(N.B. In considering what follows, it is important to note that it is the functions of Valuation Appeal Committees that are listed for transfer to the First Tier Tribunal but they are composed of members appointed to Valuation Appeal Panels which have no other function.)

Appointment Criteria and Procedure

We note the intention, explained at paragraph 14 of the Financial Memorandum to introduce, in effect, a retirement age of 70 for all Tribunal members. This surprises us as a similar age limit previously applying to appointments to Valuation Appeal Panels was revoked in 2007 since it was perceived to be inconsistent with European Law. (Council Directive 2000/78/EC).

If such an age limit is applied then it would have serious implications at the time when the functions of Valuation Appeal Committees are transferred to the First Tier Tribunal. Since membership of Valuation Appeal Panels is unpaid, has a variable time commitment and requires some understanding of the local economy it is not surprising that a large proportion of members are appointed or become active only after their retirement from business or employment. Our core function dealing with rating valuation follows the cycle of rating revaluations which occur every 5 years (currently extended to 7 years by the Scottish Government). It is highly desirable
that, at least at the start of each cycle, there are members with experience gained in the previous cycle. At present, many of these people are approaching or over the age of 70.

In total, throughout Scotland, there are currently approximately 250 members of Valuation Appeal Panels. Of these an estimated 33% are already over the age of 70 and a further 27% will reach that age by 1 April 2017 (the date of the next revaluation). Only 40% will be under the age of 70 and have experience of the revaluation cycle that concludes this year. It follows that if this function of Valuation Appeal Committees is transferred to the First Tier Tribunal before 1 April 2017 there will be a serious shortage of experienced members during the 2017-20 appeal cycle. The problem is most acute in some of the areas with the highest caseloads to consider. Indeed, in some of these and other areas there would no longer be sufficient members to form a quorate Committee. If the membership numbers are to be maintained then it would be necessary, at or shortly after the date of transfer, to appoint about 150 new members spread across the country. An anticipated 20-25 appointments a year would be required on an ongoing basis thereafter.

Appointments to Valuation Appeal Panels are currently made by Sheriffs Principal but, from the date of transfer, would fall to be made by the Judicial Appointments Board for Scotland. We suggest that this surge in their responsibility would have resource implications for the Judicial Appointments Board which have not hitherto been acknowledged.

We also note that with progressive rises in the State Pension age and the normal retirement age of many occupational schemes, actual retirement ages are likely to rise in the years ahead. There will also be reducing numbers of people approaching these ages (the “baby boom” generation having passed). So, when coupled with an age limit for continuing as a tribunal member, there is likely to be a marked reduction in the pool of capable people who are in a position to consider undertaking unpaid tribunal work.

It also seems illogical that people should be considered capable of remaining in normal employment longer than previously but should not also be considered capable of performing judicial or tribunal duties longer, when they are as little as 3 years older than the future pension age of 67.

If recruitment cannot be achieved when required - and in many areas this already proves difficult - the obvious consequence is an increase in the workload of other members (who are all unpaid). This leads us to the conclusion that there would be a real risk that many of the present members eligible to transfer to the First Tier Tribunals might choose not to do so, because of the unbearable increase in time commitments, and the present model for service in this sector would become non-viable.

We note the requirement (Schedule 7, paragraph 13(6)) that a member of the First Tier Tribunal, on appointment or transfer in, will be required to subscribe to Oaths in the presence of the President of Tribunals or a Chamber President. We observe that this will be an onerous and expensive requirement for any geographically dispersed
Tribunal such as in our sector. We also do not see what this requirement, in reality, will achieve.

Present Constitution

Members of Valuation Appeal Panels must reside or be in business or employment in the Panel area (Local Government etc. (Scotland) Act 1994, section 29(4)). Committees drawn from the Panel may only sit in their own area. All members are appointed as lay persons and are unpaid. Panel Secretaries are mostly solicitors in practice in the area concerned.

This local structure is a key feature of the present system and has been endorsed by judicial comment in recent years. Sitting in the Lands Valuation Appeal Court in the case of Assessor for Lothian vs. H&M Hennes and Mauritz UK Ltd and others (2010 CSIH60), Lord Clarke said “It must never be forgotten that appeals to this court are appeals from committees who have been specially chosen for their expertise and knowledge of local circumstances.”

More recently, in his keynote address to the SVAC Forum Training Conference in April 2013, Lord Doherty said “Valuation Appeal Committees have been with us now for a very long time. That they have survived for such a long period in essentially the same form is, I think, testament to the fact that they serve the function they are intended to, and that on the whole they operate very effectively.”

From the information currently available it is difficult to see how this essentially local structure can be translated into the unified national structure proposed in the Bill. We submit, however, that great care should be taken not to let the perceived benefits of the present regime disappear.

Rating Valuation Appeals

One of our most significant functions relates to hearing rating valuation appeals. Appeals are initially lodged with the assessor against whose valuation the appeal is lodged. Some see this as biased and would prefer appeals to be lodged elsewhere. We submit, however, that the present regime is pragmatic since the only opportunity a ratepayer or their agent has to seek a review of a valuation is to lodge an appeal against it. That is why over 99% of appeals can be settled without being heard by a Committee; less than 1% have to be heard. Committees have no involvement in the 99%. There would be significant public cost in setting up a parallel system to process so many appeals that do not involve Committees when assessors need to keep track of them anyway in order to respond to them.

There is a key feature of the rating jurisdiction that would need to be reviewed before our functions can be transferred to the First Tier Tribunal. Either party to an appeal, or both together, can request that an appeal be transferred to the Lands Tribunal for Scotland if it appears to satisfy statutory criteria as to complexity which are set out at Regulation 5(1) of the Valuation Appeal Committee (Procedure in Appeals under the Valuation Acts)(Scotland) Regulations 1995. The procedure is clear so long as Committees and the Tribunal are separate bodies. It is not at present clear how these provisions can be adapted to the situation where the functions of both bodies
might be subsumed into the same Housing, Land and Property Chamber of the First Tier Tribunal. In that event the new tribunal would in effect be referring a case to itself. That suggests there would be a considerable attraction in having the Lands Tribunal for Scotland’s functions transferred to the Upper Tribunal as suggested at paragraph 46 of the Policy memorandum.

We perceive, however, that that could present difficulties for onward appeals in this jurisdiction since, at present, both Valuation Appeal Committees and the Lands Tribunal for Scotland hear appeals at first instance and appeals against the decisions of either tribunal are referred to the Lands Valuation Appeal Court, the decisions of which form a coherent body of law for all to follow. It is not clear how this coherence could be maintained in the future if some appeals are heard at first instance by the first tier (ex-VAC) with onward appeal to the Upper Tribunal (which might be constituted as a successor to LVAC or might be the successor to LTS) and other appeals are heard at first instance by the Upper Tribunal (ex-LTS). We therefore strongly recommend that the whole operation of the rating valuation appeal functions of all these bodies, and their interaction should be subjected to independent expert review before the rating valuation functions of Valuation Appeal Committees are transferred into the First Tier Tribunal. We suggest this review ought to involve each of the Lands Valuation Appeal Court, the Lands Tribunal for Scotland and the Scottish Valuation Appeal Committees Forum, as currently constituted.

**Council Tax Banding Appeals**

This is our second significant jurisdiction. Council Taxpayers have the opportunity to lodge, with the assessor, proposals for a change to the Valuation List. This provides an opportunity for these cases to be resolved by negotiation without maturing to become appeals. If they are not resolved in 6 months they automatically become appeals to the Valuation Appeal Committee. About 80% of these cases are settled and 20% heard by Committees.

**Council Tax Non-List (Finance) Appeals**

The third jurisdiction of Valuation Appeal Committees relates to appeals against the levying functions carried out by local authority finance departments. For these, there is an internal review procedure prescribed in the Local Government Finance Act 1992. If the Taxpayer is not satisfied after that, they may appeal the Council’s decision to the Valuation Appeal Committee by lodging an appeal with the Council, in the first instance, which must remit it to the Committee Secretary.

In summary, therefore, this sector has three separate jurisdictions with separate routes of appeal. They also have separate statutory procedures and different routes of onward appeal to the higher Courts, though these matters are not discussed here. There is no reason to suppose that an arrangement which will work for one jurisdiction will be suitable for the others.
Timing

We note that clause 27(2) would allow only some of a Tribunal’s functions to be transferred to the new structure at any one time. We believe this would allow separate consideration to be given, possibly at different times, to the rating and council tax functions currently exercised by Valuation Appeal Committees. We believe this could be beneficial for the reasons explained below.

As regards the rating jurisdiction, it would be operationally disruptive for all parties - not least appellants and assessors appearing in cases - for this function to be transferred during the period of 3 years 9 months following a revaluation which is allowed for the disposal of revaluation appeals. It would be operationally smoothest for any transfer to be following the conclusion of one cycle and before the next. Indeed the optimum date is probably the date of revaluation itself. We pointed out at the start of this evidence the risks of having a transfer by or on 1 April 2017. The next opportunity thereafter would be 1 April 2022.

As regards both Council Tax jurisdictions, we submit that any transfer should await a firm decision on the future of the Council Tax. If it is abolished then these jurisdictions could be wound up without being transferred. If, on the other hand, the Council Tax were retained and updated by having a revaluation it would be logical to transfer the function to the new regime before the revaluation takes place or, optimally, on the date of revaluation.

Conclusion

We hope the discussion above makes clear that Valuation Appeal Committees, which were structured locally as a deliberate policy intention, are different from most of the Bill’s Listed Tribunals, which have uniform national structures. Detailed consideration of these differences and of the activity in each of our 3 different jurisdictions will be required before our functions can be successfully transferred to the new First Tier Tribunal.

Scottish Valuation Appeal Committees Forum
July 2013
Justice Committee

Tribunals (Scotland) Bill

Written submission from the Traffic Commissioner for Scotland

I refer to the call for written evidence.

I have an interest in this Bill in that currently I appoint the Parking Adjudicators for Scotland (with consent of the Lord Advocate) and my Office through VOSA provides the administrative support through the medium of the Scottish Parking Appeals Service. I engaged in the many consultations which have led to the Bill and I can tell that many of the points I made in those consultations have been heeded.

I have two points to make in this final consultation. This bill serves to give any person aggrieved by the issue of a parking penalty (or bus lane penalty) a further right of appeal to a higher Tribunal and also to the Court of Session. At present the right of appeal is to a parking adjudicator with a provision for review by another parking adjudicator and that is it. If an appellant wishes further redress the only possible route would be judicial review.

I wonder if the Committee would wish to distinguish the right to challenge a parking ticket and the parking adjudication jurisdiction from the subject areas of the other tribunals which will be brought within the compass of the envisaged Act. Can I put it this way – “it is only a parking ticket” - it is not the loss of liberty, home, charitable status, right to special education. Does the Committee want to escalate a grievance about a parking ticket all the way through the Upper Tribunal and Court of Session? I only wish to pose the question but I do so for resources for the justice system are not infinite and must be proportionate. The answer is for the Committee and Parliament.

My second point is to stress the need for tribunals and the Upper Tribunal to remain as specialist tribunals. In my own role I am a specialist jurisdiction (road haulage, road passenger transport) and appeals are to the (GB) Upper Tribunal. A concern is the risk of dilution of expertise in the Upper Tribunal and wrong decisions. The virtues of a generic tribunal service are in shared services and training opportunities. Whether any given tribunal member can move freely between the different jurisdictions is a very different matter.

Joan N Aitken SSC
2 August 2013
Introduction

Voices of Experience Scotland (VOX) is the National Mental Health Service User Led charity funded by the Scottish Government and Comic Relief. We work in partnership with mental health and related services to ensure that service users get every opportunity to contribute positively to changes in the services that serve them and the wider society.

VOX supports individuals and service user led groups to ensure that their views are listened to. We have 345 Individual members, 12 Group Members and 8 Associate Group members (we have a fairly strict criteria for this grouping, must be service user led and must be following equal opportunities policies etc.) This means that we act for approximately 3500 people. Our work with Comic Relief is mainly founded on the equalities and human rights agenda and we have a role in promoting the community champion model.

General comments

Our member and group members represent user views and form the main part of the user and carer subgroup of the Mental Health Tribunal Sub Group, which is constituted to influence the working of the tribunal to take on user views.

Our members have worked with and continue to work with the Scottish Government Mental Health Division on the legislation, the subsequent creation of the MHTS and the McManus review and have continued to provide input into the running of the tribunal, selection of senior members and training of the majority of the membership through both formal and informal channels.

Many of the service users who act as general tribunal members are members of our organisation.

Two of our group member leads were members of the Millan Committee and the subsequent McManus review of the mental health care and treatment act.

We work in partnership with European and International Leadership initiatives and it is through these ties that we know that we in Scotland are widely praised for our legislation in this jurisdiction, as well as for the inclusive approach of the whole mental health community from health and social work/social care in demonstrating genuine and effective partnership with the people who use the services and their carers creating an equitable landscape.

Tribunal reform has therefore figured highly and been an agenda item for discussion at our general members meetings and as a separate agenda item at many of our larger group members own meetings.
As the Tribunal president has been a guest at many of these groups, there is a solid knowledge base of the current working of the tribunal. There is also an understanding of and ability to influence the current workings of MHTS. Potential change in that one to one relationship that the president has committed to creates a cause for concern.

That influence extends through the Mental Health Division, which has done its utmost to continue to follow the model first adopted by the Millan committee itself of inclusion as equal partners of the service users and the carers who support them.

Building on a number of earlier pieces of government guidance in this field, the earliest being the framework for Mental Health September 1997, the involvement aspects of that guidance then enshrined in our mental health legislation the right to access to not only individual advocacy, but collective advocacy, for everyone who has a mental health issue and not only those who are subject to compulsory powers.

The tribunal reform could potentially destabilise this situation which would very quickly impact on the standard of service provided to the population by the tribunal service itself and therefore the service they receive when under compulsion from whichever service provider supports them in their daily lives.

VOX believes that the reform agenda will inevitably impact on the MHTS and on the whole therefore welcome the sense that the MHTS is being considered currently, and recognised because of its unique nature, even though only shown in the memorandum of understanding, to need a separate structure.

Concerns that remain within the membership about the appointments process is the disparity between the other judicial appointments and the way MHTS was recruited to. Although the Mental Health Act ensures that the membership categories will remain unaltered, the ability to reach and then encourage applicants from within the mental health service user and carer population will be challenging, as there is no history of shared appointments, such has had existed within the health departments working and appointments for some time prior to seeking applicants for the MHTS.

(a) the creation of a new office – the President of the Scottish Tribunals – who will be a Senator of the College of Justice and who will have delegated responsibility for the tribunals’ efficient disposal of business;

This proposal would impact on MHTS only in as much as the powers delegated to the chamber presidents are done so, and through this office. Some of the chamber president’s decision-making powers about his membership could be eroded by these means, especially when the membership seeks to include service users. In this case, the president’s office and its staff have to be able to make reasonable adjustments to the role in the light of the fluctuating presentation often associated with mental health issues. For this reason all performance issues should be left in the hands of the chamber president.

(b) the organisation of the First-tier Tribunal into chambers and the Upper Tribunal into divisions;
In regard to the chamber structure, we feel it is vital that for all the reasons that we have mentioned to date that the MHTS is a separate chamber and that chamber structure should be enshrined in primary legislation.

To repeat some of the general introductory comments we are the envy of the international mental health community for the act and the tribunal that it helped to create and to risk endangering the ethos and culture of this long considered and well trained and supported structure both in membership and administrative terms must not be sacrificed for expediency.

(c) rules on appeals, including the right to appeal a decision of the Upper Tribunal to the Court of Session on a point of law and a new measure to allow tribunals to review their own decisions;

MHTS jurisdiction makes decisions on people’s liberties, agrees medications that are at best given to them without their agreement and at worst have damaging side effects and all that has to be decided in a framework of principled practice. It must be weighed against the person’s own mental health gains whilst addressing public safety. Appeals should only be heard through a route that ensures that they are heard by a higher level of decision makers in law.

While we find it encouraging that the second tier is proposed to include the tribunal president, it is our preference that all appeals, whether civil cases or restricted patients, should be heard in the court.

We are satisfied in our secondary position as long as we have a guaranteed separate tribunal chamber, because this would ensure the presence of a subject matter expert, through the presidency.

(d) a power for the Scottish Civil Justice Council to propose procedural rules for Scottish tribunals; and

Any proposal that takes the making of the rules further away from the direct influence of the members and the president is a retrograde step.

(e) Rules allowing certain members of the judiciary to act as members of the First-tier Tribunal and the Upper-tier Tribunal.

Many judges from other jurisdictions sit on the MHTS. We strongly feel these judges must be trained and supported in the same way as all other new members. It is essential in our view, to have the service user experience informing their practice, as well as protecting our other members by affording them the same level of insight and support to engage in the process.

In summary
VOX has to acknowledge that we have a unique and narrow perspective on the tribunal system and its workings within Scotland and our answers therefore in the main can only be used when considering MHTS.
Throughout consultation we have heard much of how other tribunals want to attain the same high standards as the tribunal in terms of bespoke training to a dedicated and informed membership and the provision of support of by an equally well trained and committed group of individuals as administrative staff.

I think we could potentially have a positive effect on the workings of other parts of the tribunal systems however this can be accomplished without the need to legislate to allow for it to happen at some indeterminate point in the future.

We also sympathise with the desire to make it easier to make changes to allow some of these changes to happen naturally for other jurisdictions by creating shared structures but this cannot be allowed to happen as this would potentially be to the detriment of the workings of the MHTS, and the service users it serves. Such changes deserve to be given a full consultation in their own right.

We wish to go into this changed tribunal system as a strong unified and distinct tribunal and that should be as difficult to undo as possible and therefore it deserves Scottish parliaments time to make changes to something which was the first main legislation of this Scottish Parliament and it is no less than its due, because of the significance of the decisions that this tribunal have to make, that it should be heard by full parliamentary process and consultation to undo it.

MHTS are sometimes the custodians of an individual’s whole life even within the rest of the justice system a person deprived of their liberty with few exceptions is reintroduced to society.

MHTS still have people in our care who through no fault of their own live and die in the system and these people as well as the young person who has one very frightening psychotic episode in their early teens or the person with early onset dementia deserve a system which has gone out of its way to make sure that the justice it provides is also ensuring a therapeutic outcome that for that individual is the best that they can aspire to.

The number of individuals that this legislation touches directly is one in four of the population of Scotland, and indirectly many more, hopefully never in terms of compulsory measures but in some of the rights that the Act gives people who use services, their families and communities.

This more than any other reason gives us a duty to ensure that the service provided to this population is the best version of decision making that Scotland can deliver.

Joyce Mouriki
Chairperson
August 2013
Introduction

1. Having been requested to give evidence to the Justice Committee, I consider an individual response, in addition to Lord McGhie’s response on behalf of the Lands Tribunal Scotland (LTS) (with which I generally agree) appropriate. I have experience in a variety of tribunals in various capacities. I have no personal agenda in this, being on the verge of retirement!

2. I share the reservations of others about the appropriateness of overarching unified tribunals, the central proposal of this Bill. I agreed with the expression of caution by the 2009 “Philip Report” at Paras 8.42-46. They reported that it seemed:-

“premature to conclude that the creation of a two-tier structure for devolved tribunals that mirrored the new structure for GB tribunals would be a desirable reform”

I find it difficult to see what has changed since then. I have particular difficulty in understanding what actual shape an upper tribunal in Scotland would take, given the really tiny number of appeals from devolved tribunals in most areas.

3. However, I was asked to give evidence particularly in relation to the Bill’s proposals as they affect LTS, of which I have been a legal member for around 10 years.

4. I regret that in my view, while LTS could benefit from some of the Bill’s provisions, there is no benefit, and probably some detriment, to LTS users in being included in the Bill’s central proposal of a unified tribunal scheme, for the reasons which I give below...

LTS at present

5. LTS is a very different type of body from the administrative tribunals to which these proposals basically relate. LTS is a specialist body dealing – generally more like an adversarial civil court than an inquisitorial administrative tribunal – with a relatively small number of disputes in some particular areas of law. These disputes mostly relate to property titles or land valuation and can be either very complex or very high value or both. If one had been starting again, one might have called it a court not a tribunal, although it benefits from the direct judicial involvement of highly respected surveyors, reflecting the specialist land valuation aspect of much of its work. As Table 1 of the Policy Memorandum shows, there are very few appeals against LTS decisions – apparently only one in a two year period.

6. The work of LTS, with its specialist legal and surveyor members (two of each), is primarily case management and adjudication of disputes in several different areas:-

(i) Title Conditions – applications to discharge, vary, renew or preserve title conditions, or determine certain questions as to validity/enforceability, etc. (these
jurisdictions were enlarged in various ways by the Title Conditions (Scotland) Act 2003.

(ii) Land Registration – appeals against decisions of the Keeper of the Registers, often involving three parties, i.e. the two landowners with competing interests and the Keeper, with difficult legal issues, although the value of the subject matter may not be very high (the nature of the different types of disputes which can arise under this jurisdiction is set to change under the Land Registration Etc (Scotland) Act 2012).

(iii) ‘Tenants’ Rights’ – some disputes around the current entitlement of secure tenants to buy their homes.

(iv) Valuation for Rating (Non-Domestic) – appeals which satisfy certain criteria generally related to complexity or difficulty may be determined by LTS rather than local Valuation Appeal Committees. Highly technical legal and/or valuation issues are involved.

(v) Land Compensation – this may be compensation for compulsory purchase (or related planning blight issues), ‘injurious affection’ caused by the construction, or the use, of public works, or one of a number of other more particular types of compensation, e.g. for mining subsidence, effect of flood prevention works, compulsory utility ‘wayleaves’, etc.

(vi) Miscellaneous, including ‘voluntary referrals’ (in effect, arbitration by LTS in areas within its expertise), community rights to buy, issues about ‘tenancies at will’, etc.

(vii) Disputes occasionally arise in ‘reserved’ areas, mainly in relation to taxation, e.g. base values of land/buildings for Capital Gains Tax purposes.

7. LTS also has a minor administrative function certifying some matters under certain procedures introduced by the Title Conditions (Scotland) Act 2003.

8. The actual number of cases in these various categories is relatively low, and varies from time to time, but considerable case management, lengthy hearings and lengthy written judgments are sometimes required.

Inclusion of LTS in a unified tribunals scheme: general

9. The main focus of any reform should be the requirement of users of LTS for fair and efficient specialist adjudication. In each area, a particular legislative decision has been taken to refer disputes to us and not to any general court or tribunal. Although I would welcome appropriate consideration of rationalisation and up-dating of our jurisdictions, which have developed gradually – it might be said piecemeal – over a period of time, I am not aware of any suggestion from anyone that our distinctive system of adjudication by specialist lawyers and surveyors would benefit from merger into a unified tribunal.

10. It is crucial to understand, in relation to LTS, that our case management is tailored to the needs of each of our particular jurisdictions. This is not simply a question of judicial decision-making, but is central to the work of our office clerks, two of the three of whom have particular qualifications and experience.

11. I am certainly very open to joining up our basic administration and administrative support with other tribunals or courts, as is already happening under the Scottish Tribunals Service (as suggested by the 2009 Philip report, at Paras 8.42-46). We can always work at improvement. Increased contact with courts and other tribunals is
welcome. Common overall leadership, and also more integrated arrangements in the fields of, for example, recruitment, training and monitoring, regulation of conduct, etc would be advantageous, whether LTS is seen as a court or as a tribunal. I also recognise the need for due economy and making the best use of resources.

12. However, the central proposal in this Bill for unified first tier and upper tribunals is altogether different. LTS would not fit well into either. The proposal in Para 46 of the Policy Memorandum to preserve our specialist qualities by creating us as a single division of the Upper Tribunal appears to recognise this, but it would not avoid the need to dis-apply, or make separate or different provision about, much of the Bill’s provisions. It might be suggested, on a superficial basis, that that could be done without too much difficulty, but I think that would be an optimistic view. It would make more logical and practical sense, and better serve the general purpose of improving tribunals for users, to keep us out of this scheme, perhaps as part of a separate ‘pillar’ of bodies dealing with land disputes, rather like the position of employment tribunals in relation to the UK Tribunal Service. This would help to concentrate on providing the best service for users of adjudication and dispute resolution services in the particular areas with which LTS is well equipped to deal.

13. In my view, the inclusion of LTS in such a scheme is, if anything, more likely to dilute, and therefore reduce the quality of, the specialist adjudication service which it presently offers than to improve it. I appreciate that there is no intention to take away the specialist ethos of individual tribunals such as LTS (Para 96 of the Policy Memorandum), but I am very much afraid that that is what would inevitably gradually happen. Any move in the direction of standardisation of case handling and procedure would tend to undermine the service which we aim to provide.

14. I would also suggest that a unified tribunal scheme, with a first tier and an upper tribunal, would appear tidier and more logical without LTS, which does not fit happily in either.

**Some particular issues/problems for LTS**

15. In this section, I highlight some particular matters of concern in relation to LTS (although some of these might have relevance for other tribunals also):

(i) Practice and procedure. I appreciate the usefulness of comparative consideration of the practice and rules of other courts and tribunals, but there is nothing to suggest that users of LTS require any similarity in procedure with, e.g., users of mental health or additional support needs tribunals. Further, there is no justification for a standardised starting point for LTS rules of practice with those of other divisions of the Upper Tribunal (if that is where LTS is to be put): specialised first instance rules would need to be devised in a basically appellate tribunal.

(ii) Tribunal members:
   - Names and types: it is unhelpful to describe only *ex officio* ‘visiting’ judges as ‘judicial members’, and the legal and surveyor members of LTS are of equal status
   - Qualifications
• Status and Tenure: basically, tenure is to be removed, albeit with protection – that does not apply to judges and sheriffs and may accordingly affect recruitment

(iii) Appeals to LTS – presumably, if we were a division of the Upper Tribunal, appeals from, e.g., valuation appeal committees and housing tribunals might be expected to be directed to us, but I am aware of no consideration whatever of the desirability of that. It would represent an enormous change in relation to rating valuation, distorting the established scheme for authoritative decision-making on matters of principle by the Lands Valuation Appeal Court. If we were in the first tier, there would be a problem with existing procedural appeals from VAC’s to LTS.

(iv) Appeals from LTS:-
• Difficulties if LTS in first tier
• Questions about nature of appeals – again, the very particular nature of appeals to LVAC would require consideration
• Apparently no necessity in LTS for any permission to appeal requirement, or at least for any such requirement standardised with other tribunals
• Unqualified delegated power under S 48(2) worrying
• Generally, so few appeals from LTS that inappropriate to interfere with existing position

(v) Review. The different nature of civil disputes before LTS makes anything more than the existing accidental/mathematical error ground of review entirely inappropriate.

(vi) Expenses. There appears to have been no consideration of any justification for standardising rules in LTS (whether in the first tier or the Upper Tribunal) with those of tribunals exercising very different jurisdictions. The Committee recently considered the issue of expenses under one particular LTS jurisdiction (in relation to title conditions – 8th Report, 2013 (Session 4)). What is significant is that the Committee was looking carefully at the particular context, not at any suggestion of standardisation. LTS has particular rules on expenses under two other jurisdictions – valuation for rating and compulsory purchase compensation.

(vii) “Allocation of cases” – Section 36(1) refers to allocation of cases to a particular division of the Upper Tribunal. This appears to imply some central clerking, by less specialist personnel not well qualified to answer users’ enquiries, or possibly duplication of clerking.

Conclusion

16. The above list provides only examples – more issues or problems will surely arise when the detail to be covered under delegated powers comes to be considered. Both at a general level – the inappropriateness of, and the lack of any apparent real need in the interests of users for, placing LTS either at first tier or at Upper Tribunal level – and on the basis of the extent of implementation issues and problems in relation to LTS, I think the conclusion should be clear: LTS can appropriately be involved in rationalisation and improvement of courts and tribunals,
but should not be included in the list of tribunals to be taken into a unified tribunal scheme.

**A technical problem**

17. So far as I can see, the Bill as drafted produces the undesirable result that tribunals either not yet brought into the scheme of unified tribunals, or not to be part of that scheme, will not be subject to provisions of the Bill which should surely apply to all Scottish tribunals, e.g in relation to common leadership, conduct, etc. I would add that such provisions might usefully also include some consolidation by statute of fundamental general rules, including as to overriding principles, and also encouragement of alternative dispute resolution, etc. This could be addressed by a clause applying such provisions to all the tribunals, either under reference to a list or under reference to a more general definition.

John Wright QC
2 August 2013
Summary in relation to LTS

1. LTS is does not have the character of an administrative tribunal. The policy aims in the field of administrative justice of providing an appellate tribunal (Upper Tribunal), and of securing independence from central and local government departments, do not apply to LTS.

2. LTS does not comfortably fit into the proposed unified tribunal structure. The proposals cause problems in relation to appeals, particularly in the important field of valuation for rating.

3. Inclusion of LTS in the unified tribunal structure would require a good deal of dis-application/separate/different provision. I also fear a gradual dilution of LTS’s specialism without any discernible benefit to LTS’s users.

4. Appropriate reforms, rationalisation, etc. of the administration of LTS can be achieved by building on the work already started by Scottish Tribunals Service without inclusion in unified tribunal structure.

5. Rather than as part of the consideration of administrative justice, any changes in relation to LTS’s various jurisdictions should be considered in the context of resolution of disputes about property law and land valuation issues in courts as well as LTS and other tribunals.

General

6. The lack of provision for ‘overriding objectives’, encouragement of alternative dispute resolution, etc. appears a missed opportunity.

7. It appears to be a technical problem in the Bill’s structure that tribunals, including LTS, receive the benefits of this Bill only if, and only when (in some cases apparently far in the future) they are brought into the unified tribunal structure.

John Wright QC
29 August 2013
Justice Committee
Tribunals (Scotland) Bill
Letter from the Scottish Government to the Convener

Composition Orders

At my appearance in front of the Committee on 17 September discussing the Tribunals Bill I offered to write to you with further information relating to how the use of court judiciary in the First-tier Tribunal will work in practice.

I am aware that several stakeholders have queried the provision in the Bill (Section 16(1)) that allows court judiciary (specifically sheriffs and part-time sheriffs) to act as members of the First-tier Tribunal. The Committee asked about this as there is a concern that the First-tier Tribunal will become more courtified as a result of this provision.

I explained as part of my evidence that there has to be the ability for court judiciary to sit in the First-tier Tribunal as the Mental Health Tribunal for Scotland has a legal requirement for this to happen at the moment. Schedule 2, paragraph 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 specifies that “there shall be a panel consisting of each person who for the time being holds the office of (a) sheriff principal; (b) sheriff; or (c) part-time sheriff, for the purpose of serving as sheriff convenors of the tribunal”. The provision at Section 16(1) of the Bill allows this to continue.

The Bill makes provision for the use of court judiciary to be restricted through the ability of Scottish Ministers by regulations to specify the composition of the First-tier Tribunal when convened to decide any matter in a case before it (Section 35(1)). These regulations will be subject to affirmative procedure.

The Bill specifies that there are three categories of members in the First-tier Tribunal: judicial; legal; and ordinary. Judicial refers to court judiciary and legal and ordinary members refer to tribunal judiciary.

The Composition Orders will specify that for certain mental health cases the composition of the tribunal will be made up of judicial, legal & ordinary members. For housing cases the composition of the tribunal will be legal & ordinary members etc. This will ensure that court judiciary will only be used in cases where there is a genuine requirement for them to do so.

The Chamber President of the relevant chamber will allocate the individuals from the categories specified in the Composition Order to hear the case.

I hope this reassures the Committee that the powers provided in the Bill are necessary and will be exercised appropriately.

Roseanna Cunningham
Minister for Community Safety and Legal Affairs
24 September 2013
18 October 2013

Dear Nigel,

41st Report, 2013 (Session 4) on the Tribunals (Scotland) Bill

I am writing to provide the Scottish Government’s response to the Delegated Powers and Law Reform Committee’s 41st Report 2013 (Session 4) on the Tribunals (Scotland) Bill. I would like to thank the Committee for its careful consideration of the delegated powers in the Bill.

Yours sincerely

Roseanna Cunningham
1. The Scottish Government has considered carefully the Delegated Powers and Law Reform Committee (“the Committee”) Report on the delegated powers provisions of the Tribunals (Scotland) Bill.

   *Section 48(2) – other appeal rights*

2. I have noted that the Committee considers that the power in section 48(2) could be used to create an inappropriate choice of appeal rights when a tribunal’s functions are transferred into the new structure. I have considered the Committee’s recommendation that an amendment be brought forward which restricts the purposes for which an exception may be made to the rule in section 48(1).

3. The Scottish Government does not intend to use the power in section 48(2) to create multiple routes of appeal for decisions made by the tribunals. However, given the Committee’s concerns, I propose lodging a suitable amendment at Stage 2 to clarify the intended use of this power.

   *Section 56(2) – venue for hearings*

4. I have noted that the Committee considers that the power in section 56(2) is inconsistent with the policy intention advanced in support of this power. I have considered the Committee’s recommendation that an amendment be brought forward which narrows the scope of the power to make provision as to the question where in Scotland tribunals are to be convened.

5. The Scottish Government is of the view that it is not necessary or desirable to limit this power. The existing tribunals which are intended to be transferred into the new tribunals system are convened in a variety of locations and a variety of types of locations. For example, Mental Health Tribunals have to take place in hospitals in some situations and other tribunals are convened in dedicated tribunals buildings or in suitable accommodation in the public estate or elsewhere.

6. Provision in Tribunals Rules concerning venue will have to address a number of matters, including the particular locations in which particular tribunals must or may sit, the types of venues in which types of tribunal may sit, and how disputes about the appropriate venue for a tribunal are to be resolved. Additionally, the power must be flexible enough to allow for the potential transfer-in of other tribunals (including new tribunals which might be established by future legislation) which might have new or unanticipated requirements about venue.

7. Accordingly, the Scottish Government is not proposing to lodge an amendment at Stage 2 to narrow the scope of the power in section 56(2).
Section 68 – practice directions

8. I have noted that the Committee considers that the power in section 68 enabling directions to be issued concerning tribunals’ practice and procedure should be supplemented with a requirement that such directions should be published.

9. The Scottish Government’s intention is that all such directions should be published, and we are now proposing to lodge an amendment at Stage 2 to make this an explicit requirement.
Dear Roseanna,

Thank you for your letter of 18 October, responding to the Delegated Powers and Law Reform Committee’s stage 1 report on the Tribunals (Scotland) Bill. The Committee considered the correspondence on 29 October and agreed to write to you to seek further clarification on Section 56(2) of the Bill which relates to the venue for tribunal hearings.

Your response to the Committee’s report, stating the intention that Tribunal Rules be capable of prescribing the particular location of a tribunal, differs from the earlier stated policy intention that the provision would allow Tribunal Rules to merely prescribe the types of venue in which tribunals could be held. The response does not explain why it is considered necessary or appropriate for that power to be exercised by Tribunal Rules and not subject to parliamentary procedure.

The Committee considers the location of Tribunal Hearings to be a significant matter, for all those attending, and for the disposal of business. Therefore, given your clarification of the Government’s policy intention that Tribunal Rules may determine particular venues for hearings rather than types of venues as was the Committee’s previous understanding, the Committee seeks further explanation on why the power in section 56(2), on the venue for hearings, is subject to Tribunal Rules and not subject to parliamentary procedure.
I would be very grateful of a response to the Committee by 21 November 2013.

Nigel Don MSP
Convener
Justice Committee

Tribunals (Scotland) Bill

Response from the Scottish Government to the Committee’s Stage 1 Report

I am writing to provide the Scottish Government’s response to the Justice Committee’s Stage 1 Report on the Tribunals Bill. I would like to thank the Committee for its careful consideration of the Bill, which is reflected in the comprehensive Stage 1 Report. I would also like to thank those who contributed by giving evidence.

I am pleased that the Committee supports the general principles of the Bill at this stage, and agree that the Bill brings forward a simplified restructuring of the tribunals system which will be more accessible to tribunal users.

I have added my comments in the attached Annexe, you will find them beneath each of the Committee’s recommendations. I hope the Committee finds this response helpful in its further consideration of the Bill.

Roseanna Cunningham
Minister for Community Safety and Legal Affairs
6 November 2013
ANNEXE

TRIBUNALS BILL

SCOTTISH GOVERNMENT RESPONSE TO THE JUSTICE COMMITTEE’S STAGE 1 REPORT

Response to the Bill

The Committee is sympathetic to the concerns raised (as set out in paragraphs 70 to 74). However, we note that the general view expressed is that the Bill’s provisions are welcome. Therefore, despite these concerns, we agree that subject to these being addressed the Bill is a welcome development in revising the administrative justice landscape. [Paras 65-75]

1. I welcome the Committee’s view that the Bill is an important step in revising the administrative justice landscape. I am pleased that the benefits of restructuring the tribunals system are recognised and that in general the majority of stakeholders are supportive. I note the concerns that have been raised by some stakeholders but feel that the provisions in the Bill strike the right balance overall. Care has been taken to accommodate the very diverse range of tribunals that will transfer into the new structure. Currently, tribunals operate in different ways with different standards. Some could be considered as ‘the gold standard’ and some ‘bronze’. The new structure, with clearly defined leadership and organisation, is designed to enable all tribunals, whatever their subject area, to operate to the same high standard.

Reserved Tribunals

The Committee notes the concerns regarding postponement of the inclusion of the reserved tribunals within the system. We concur with the position that, for this process to be most effective, reserved tribunals in Scotland should be included within the new structure. We note that this issue is not entirely in the hands of the Scottish Government but we urge it to work with the UK Government to ensure that early progress can be made on this matter. In doing so, we call on the Scottish Government to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals. [Paras 76-83]

2. I note the Committee’s concerns. Officials are in regular contact with their counterparts in the UK Government to ensure that dialogue is kept open on these matters. I believe the new structure is designed in a way that it will be able to accommodate reserved tribunals should the UK Government agree to devolve them in the future.

Judicial Leadership

The Committee welcomes the designation of the Lord President of the Court of Session as Head of the Scottish Tribunals. [Paras. 84-87]

3. I welcome the Committee’s comments.
President of the Scottish Tribunals

The Committee notes the intended appointment of Lady Smith to the role of President of the Tribunals. However, we are sympathetic to the concerns raised at the restriction of appointment to the post to a Senator of the College of Justice. While recognising the level of leadership that this appointment will bring, particularly in the early days of the Scottish Tribunals, we believe that consideration should be given, by amendment to the Bill at Stage 2, to extending the pool of eligible candidates. [Paras. 88-95]

4. I note the Committee’s comments. I am very pleased that the Lord President has assigned Lady Smith to the role of President of Scottish Tribunals. Lady Smith has wide experience in the tribunal field and I look forward to welcoming her to her new role. It may be helpful to the Committee if I explain further why this role should be filled by a Senator of the College of Justice.

5. The Bill places judicial leadership and responsibility for the efficient disposal of business on the Lord President. The Lord President will have overall responsibility for the Scottish Tribunals as he does for the Scottish Courts. The President of Scottish Tribunals, should come from the Lord President's hierarchy, in recognition that he cannot undertake these additional responsibilities alone, and to ensure the proper distinction and separation of tribunals from courts.

6. The position is not a stand-alone appointment – it is an assignment by the Lord President. The President of Scottish Tribunals has certain responsibilities delegated to them in the Bill and will be responsible for the day to day running of the Scottish Tribunals. The President of Scottish Tribunals has to be a senior person from within the Lord Presidents judicial compliment as they will have the responsibility for managing the Upper Tribunal which will be made up of Senators, Sheriffs Principal and Sheriffs as well as Chamber Presidents from the First-tier Tribunal.

Membership of tribunals

The Committee has reservations that adopting the term judge could over-judicialise this process. However, we note the status that using such language would afford and we accept the Lord President’s point that the nomenclature used would be for the individual tribunals. We therefore consider that there would be benefit in enabling individual tribunals to use this terminology while leaving it for them to decide whether to do so. We therefore recommend that provision is made in the Bill to give individual tribunals this flexibility. [Paras. 96-103]

7. I note the Committee’s comments and the Lord President’s view that legal members should be called tribunal judges so as not to imply they have lesser status than court judiciary. However, the Bill [at Section 13] provides for all tribunal members (legal or otherwise) to have judicial status and capacity. Therefore, there can be no question of any tribunal member being of lesser status than court judiciary.
8. The Bill is designed to create a new structure for devolved tribunals. I am not aware of any devolved tribunals who currently use the term ‘judge’. It is however, for individual tribunals to choose what they call themselves during introductions at a hearing. I do not feel it is necessary to specify that tribunal members are ‘judges’ on the face of the Bill. ‘Judges’, implies wigs and gowns and may be more intimidating and off-putting to tribunal users whose views must be considered in any changes that affect them. I am aware that the term ‘judge’ is not popular with the majority of tribunal stakeholders who fear a drift towards courtification and the implication of a more adversarial approach.

Judicialisation of tribunals

The Committee is strongly of the view that the particular nature and characteristics of the tribunals should be protected. We are therefore sympathetic to the concern that the provision for judicial members could potentially lead to the “judicialisation” of the process. However, we note that this provision would give tribunals access to the court judiciary which may also be of benefit. We welcome the safeguard that such appointments can only be made with the authority of the President of the Tribunals. Therefore on balance, we agree that this provision should be retained in the Bill with the proviso that the President’s discretion is applied in particular to ensure that the judicial members appointed have the necessary experience. We also recommend that consideration be given to the suggestion that the President of the Tribunals consults the President of the relevant Chamber before appointing a judicial member to a tribunal. We also ask the Scottish Government to give consideration to whether section 16 should be amended to remove the automatic entitlement for appointments of judicial members and whether additional safeguards are necessary to avoid the “judicialisation” of tribunals. [Paras. 104-113]

9. I concur with the Committee’s views about protecting the nature and characteristics of the individual tribunals concerned. I believe we have the necessary safeguards that meet that aim. As I explained in my letter to the Committee of 24 September we propose to use composition orders to specify which type of tribunal member is required for which type of case.

10. The Bill has to allow for court judiciary to sit in the First-tier Tribunal as the Mental Health Tribunal for Scotland has a legal requirement for this to happen. Schedule 2, paragraph 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 specifies that “there shall be a panel consisting of each person who for the time being holds the office of (a) sheriff principal; (b) sheriff; or (c) part-time sheriff, for the purpose of serving as sheriff convenors of the tribunal”. The provision at Section 16(1) of the Bill allows this to continue.

11. The Bill makes provision for the use of court judiciary to be restricted through the ability of Scottish Ministers by regulations to specify the composition of the First-tier Tribunal when convened to decide any matter in a case before it (Section 35(1)). These regulations will be subject to affirmative procedure.
12. The Bill specifies that there are three categories of members in the First-tier Tribunal: judicial; legal; and ordinary. Judicial refers to court judiciary and legal and ordinary members refer to tribunal judiciary.

13. The Composition Orders will specify, for example, that for certain mental health cases the composition of the tribunal will be made up of judicial, legal & ordinary members. For housing cases the composition of the tribunal will be legal & ordinary members etc. This will ensure that court judiciary will only be used in cases where there is a genuine requirement for them to do so.

Judicial tenure and salaried posts

While the Committee is sympathetic to the need to be able to justify the costs of the Bill’s provisions, we also note the concerns raised by witnesses regarding the appointment of full-time salaried judges. The Minister for Community Safety and Legal Affairs has acknowledged that it is not clear what the circumstances will be in the future. We therefore believe that the Bill should allow for such posts to be created should the need arise. In doing so, we note the provision in section 71(4)(a) of the Bill which enables the Scottish Ministers to make arrangements as to the payment of remuneration or expenses of members of staff of the Tribunals. While this may address this point in the short-term (at least on the assumption that the term “members of staff” covers members of the Tribunals), it does not make provision for such payments to be made on a permanent basis and we therefore recommend that amendment is made to the Bill to enable this to happen in relation to both members of the Scottish Tribunals and members of staff. [Paras. 114-118]

14. I note the Committee’s comments. It may assist the Committee if I explain the detail of these provisions more fully.

15. Section 71(4)(a) deals with the administrative staff supporting the tribunals only. Schedule 7, paragraphs 2 to 7 deal with the terms of office which apply to tribunal members. This allows for members to be appointed and re-appointed on a rolling five year basis. This provides security of tenure as re-appointments are automatic, except in specific circumstances such as, the member has indicated that they do not wish to be re-appointed. Schedule 7, paragraph 14, provides for the Scottish Ministers to determine the terms and conditions on which a member of the Scottish Tribunals holds office, including provisions for sums to be payable by way of remuneration, allowances and expenses. Whilst these provisions could allow for salaried posts they do not allow for these posts to be permanent.

16. Due to the current volume of business in devolved tribunals it is my view that permanent posts are not required at this time. However, having read carefully the Committee’s position and having listened to the views of stakeholders, I intend to make an amendment to the Bill at Stage 2, to allow for the possibility of permanent salaried positions in the future.

Eligibility of non-Scottish lawyers

The Committee notes this concern (as set out in paragraphs 120 and 121) and calls on the Scottish Government to review the appropriateness of this
provision and give consideration to tightening up the language to ensure that, in the short-term, only those qualified in Scots law can conduct business in devolved tribunals. [Paras. 119-122]

17. I note the Committee’s concerns and those of the Lord President in his written evidence and I am happy to consider these provisions further.

Structure of the Upper Tribunal

The Committee notes that this is not a widespread concern (as set out in paragraphs 124) but recognises the point that the volume of business through the Upper Tribunal will be small. While noting the need to avoid unnecessary restrictions, we consider that there may be merit in retaining the division structure within the Upper Tribunal for the longer term, particularly if there are future proposals to incorporate the reserved tribunals within the structure. [Paras. 123-125]

18. I welcome the Committee’s comments.

Definition of a tribunal

The Committee sees merit in the suggestion of including a provision in the Bill setting out what a tribunal is. We are very concerned to protect the character and nature of tribunals and so consider that including this in the Bill would be a step towards achieving that. We therefore call on the Scottish Government to bring forward an amendment, for example in the same terms as section 2(3) and 22(4) of the Tribunals, Courts and Enforcement Act 2007, to set this out on the face of the Bill. [Paras. 126-133]

19. I note the Committee’s concerns. I consider there are difficulties in defining exactly what constitutes a tribunal as they come in many different forms, deal with many different subjects and are varied in their nature, specialisms and individual ethos. The Bill is flexible to allow further tribunals to be added in the future. It would be difficult at this time to define how future tribunals might look and I would not wish to narrow the field by providing an exact definition which could exclude them from becoming part of the new structure.

20. However, I do agree that every effort should be made to protect the character and nature of tribunals. I am therefore, willing to consider setting out in the Bill defined principles for tribunals along the lines of those included in the Tribunals, Courts and Enforcement Act 2007.

Specialism

The Committee welcomes the provisions in section 30 that aim to ensure that specialism within tribunals is protected under the new structure. We therefore recommend that careful consideration be given to the provisions within this section to ensure that such protection is ensured.

In terms of cross-ticketing, the Committee welcomes the reassurance given by the Minister for Community Safety and Legal Affairs that the system currently in place works effectively and that it is not the expectation that tribunals would be assigned members without the necessary specialism. We also note the
Lord President’s comments that cross-ticketing allows for career development. Although we welcome these reassurances, we consider that close regard must be paid to whether this works well in practice. We therefore recommend that this is monitored during the early years of the new system being established to ensure that it is working effectively. [Paras. 134-146]

21. I note the Committee’s and the Lord President’s comments. I am confident that by providing for the Lord President to have responsibility for the making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals (Section 7), that the provisions in relation to Section 30 will be used appropriately.

Tribunal independence

The Committee welcomes the commitment to ensuring tribunal independence. In particular, we welcome the new structure as a way of ensuring this and the statutory provision placing a duty on key individuals to ensure that independence of tribunals is upheld. We would ask the Scottish Government to give consideration to bring forward an amendment to include provision for judicial governance similar to that contained within the Judiciary and Courts (Scotland) Act 2008. [Paras. 147-155]

22. I welcome the Committee’s support for ensuring tribunal independence in the new structure. The Scottish Government recently consulted on the feasibility of merging the Scottish Court Service with the Scottish Tribunals Service. The Scottish Government are currently analysing the responses to this consultation. We would intend that should provisions be brought forward they would be in another Bill to allow full parliamentary scrutiny to take place.

Procedural rules

The Committee notes the concerns of witnesses regarding the interim arrangements for producing rules. However, we welcome the Minister for Community Safety and Legal Affairs’s reassurance that this is a continuation of the existing arrangements, in particular, that expert input would be made to the drafting of rules of the individual tribunals.

We have more serious concerns regarding the production of rules for the Upper Tribunal and the delay in the Scottish Civil Justice Council being in a position to take on this role. We therefore urge the Scottish Government to examine whether there is scope to expedite this transfer of responsibilities, for example, by considering whether the resourcing of the Scottish Civil Justice Council could be reviewed to enable it to undertake this work. [Paras. 156-167]

23. I note the Committee’s concerns about the production of rules for the Upper Tribunal. I would like to reassure the Committee that in the production of any rules in the interim period where the Scottish Ministers would continue to make rules for tribunals that, as is currently the practice, expert help would be enlisted in the drafting of those rules, including the rules for the Upper Tribunal.
Practice directions

The Committee notes the concerns raised by witnesses with regard to the provision set out in section 68(5)(a) regarding the issuing of practice directions and welcomes the Minister for Community Safety and Legal Affair’s commitment to bring forward an amendment at Stage 2 to address these concerns. [Paras. 168-175]

24. I note the Committee’s comments. I would reiterate my commitment to remove the provisions at Section 68(5)(a) from the Bill at Stage 2.

Appeals and review

Section 38 - The Committee notes the concerns raised regarding section 38, however, on balance we agree that such a provision needs to be cast in a general way in order not to restrict the options available to the reviewing body. We therefore do not have any concerns regarding the drafting of this provision. However, we suggest that it be kept under review to ensure that it is applied appropriately. [Paras. 176-182]

25. I welcome the Committee’s support and note their comments.

Section 39 - Again, the Committee notes the concerns raised regarding section 39. However, on balance, we recognise the benefits to be made from the Upper Tribunal being able to provide a general view and therefore, note that the provisions need to be drafted in a general way to enable this to happen. We therefore have no concerns regarding the drafting of this section. [Paras. 183-188]

26. I welcome the Committee’s support and note their comments.

Section 45 - The Committee notes the concerns raised regarding section 45, in particular, whether such a restriction is necessary in Scotland. We agree that further consideration needs to be given to the wording of the test applied and whether this is too restrictive. At a minimum we propose that this be reviewed in the short-term to ensure that the provision works effectively. We therefore call on the Scottish Government to give further consideration to this provision. [Paras. 189-195]

27. I note the Committee’s concerns and the comments from the Faculty of Advocates about this provision. It may be helpful if I outline how I see this provision working. The new tribunal structure is designed, in the main, to keep tribunal business within the tribunals system. By keeping the appeals process out of courts the user benefits from a speedier, less costly, resolution to their petition and a less formal and intimidating process.

28. The new process should ensure finality of decision-making for the user. The tribunal user will already have had a decision from the First-tier and an appeal to the Upper Tribunal. I believe the process should not be limitless.
Expenses and fees

The Committee has some concerns regarding the provision to charge expenses and fees. We recognise the need to include this provision in the Bill to allow tribunals with the existing power to charge fees to continue to do so. However, we consider the wording of the provision to be drafted very generally and does not set out the circumstances where it would be appropriate for fees to be charged. We therefore recommend that, where there is a proposal for a tribunal to be given the power to charge expenses and fees where it did not previously, consultation should be carried out with users and stakeholders of the tribunal concerned. [Paras. 196-205]

29. I note your concerns regarding this provision. I can assure the Committee that it is not the Scottish Government’s intention to use this provision to introduce any new fees or expenses in tribunals. Any proposal to charge fees or expenses, for example, in a new tribunal, would be subject to consultation and the views of users and stakeholders would be taken into consideration. Any such proposal would also be subject to parliamentary scrutiny. The Bill makes provision that any new fees must be determined by the Scottish Ministers by SSI. I will consider what further provision could be given to strengthen the position.

Lands Tribunal for Scotland

The Committee notes the case put forward by the Lands Tribunal for Scotland that it should not be transferred into the new system. We therefore urge the Scottish Government to review its position in this regard. [Paras. 206-213]

30. I note the Committee’s comments but I am not persuaded that it is necessary to leave the Lands Tribunal outwith the new tribunal structure.

31. Having a separate pillar outwith the structure is contrary to what the Bill is trying to achieve. The Bill seeks to provide coherence to the current disparate tribunals landscape. The structure will be flexible enough to cater for the many different tribunals and their varying specialisms. Having tribunals sitting outside the structure goes against the whole principle of the Bill.

32. All tribunals are unique. Every tribunal that will come into the new structure is different and will have its own specialist subject supported by its specialist members and staff. However all of these complexities can be catered for within the proposed new structure.

33. In the Lands Tribunal’s written evidence (T13) they say at paragraph 1, “...if we are to go into a unified tribunal system it should be at Upper Tribunal level.” My officials met many times with the Lands Tribunal members in developing the provisions in the Bill to ensure that the unique nature of the tribunal was taken into account when determining their position in the new structure and they were left assured that by positioning Lands in the Upper Tribunal the needs of users and members would be met. Given that assurance I am not considering changing the position stated in the Policy Memorandum that Lands would transfer into the Upper Tribunal.
Mental Health Tribunal for Scotland

The Committee welcomes the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the First-tier Tribunal. We consider that taking such a step will ensure that the unique nature of the tribunal will be preserved within the new structure. However, we are sympathetic to the Mental Health Tribunal’s concerns that this commitment appears to be made of a temporary nature and so we recommend that the Scottish Government bring forward an amendment to preserve the distinctiveness of the Mental Health Tribunal for Scotland. [Paras. 214-220]

34. I note the Committee’s concerns and would stress our commitment to preserving the character and distinctiveness of the Mental Health Tribunal. That is a commitment we have stated on many occasions and I hold firm on that.

35. The Bill allows similar subject matters to be housed together in chambers. It would be against the intentions of the Bill to have single chambers for every jurisdiction. Having multiple numbers of chambers would defeat the purpose of creating a simpler structure, it would increase costs with the need to appoint more Chamber Presidents; and it would be difficult to manage effectively. To be clear, a multi-jurisdictional chamber does not mean that tribunals will be amalgamated. They will still operate in their own unique way and have their dedicated specialist members and staff. They would however, share a Chamber President who would be responsible for the business within his/her chamber.

36. There was a commitment made in the policy memorandum to have a single chamber initially for mental health and I would reiterate that commitment. The Bill allows for chamber structure to be changed only after consultation with the Lord President and relevant stakeholders; and that any regulations are made by affirmative resolution which will allow proper Parliamentary scrutiny.

37. The Chamber structure has to be flexible. The Bill allows changes to be made as the Scottish Tribunals acquire more functions, or additional functions are conferred upon them, without the need for further primary legislation. Having chamber structure on the face of the Bill removes this flexibility. It is sensible not to ‘tie our hands’ in case other jurisdictions come along in the future that could be housed alongside mental health because they are of a similar nature.

Children’s Hearings System

The Committee recognises the complexity and importance of the Children’s Hearing system in Scotland and notes that it has very recently been reformed. We also note that the power given to the Scottish Ministers under section 26(2)(b) require regulations to be laid before the Parliament which will be subject to the affirmative procedure. It would be for the Scottish Ministers at the time to undertake the required consultation and background work before laying any regulations before the Parliament. We consider this to provide
sufficient Parliamentary protection which would prevent Children’s Hearings being transferred into the Scottish Tribunals inappropriately. [Paras. 221-224]

38. I welcome the Committee’s support for these provisions.

**Delegated powers**

The Committee is sympathetic to the concerns caused by the lack of detail on the face of Bill. However, we also understand the need for the flexibility afforded by the use of delegated powers given the complexities of the legislation involved. We will therefore pay very close attention to the secondary legislation which will be brought forward under the Bill. [Paras. 225-229]

39. I note the Committee’s comments.

**Delegated Powers and Law Reform Committee**

The Committee endorses the conclusions drawn by the Delegated Powers and Law Reform Committee on its Stage 1 report on the delegated powers in the Bill and calls on the Scottish Government to give particular consideration to the recommendations in respect of the powers in sections 48(2) and 56(2). [Paras. 230-233]

40. I note the Committee’s comments. I responded to the Delegated Powers and Law Reform Committee’s report on 18 October.

**General Principles**

The Committee supports the general principles of the Bill. We consider that the Bill brings forward a much-needed restructuring of the tribunals system. In particular we believe that the provisions will simplify the existing process and will make the tribunals more accessible to users. [Paras. 236-237]

41. I welcome the Committee’s support for the general principles of the Bill, and note the comments on certain provisions.
Tribunals (Scotland) Bill: The Minister for Community Safety and Legal Affairs (Roseanna Cunningham) moved S4M-08145—That the Parliament agrees to the general principles of the Tribunals (Scotland) Bill.

After debate, the motion was agreed to (DT).
Tribunals (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): The next item of business is a debate on motion S4M-08145, in the name of Roseanna Cunningham, on the Tribunals (Scotland) Bill.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I am delighted to open this stage 1 debate on the Tribunals (Scotland) Bill. I thank the Justice Committee for its scrutiny of the bill at stage 1 and for the preparation of its comprehensive stage 1 report. I also record my thanks to the various groups and individuals who provided evidence to the committee during stage 1, as well as to those who have engaged directly with the Government during the development of the bill and the parliamentary process to date. As members know, the introduction of a bill is usually preceded by a considerable amount of work, probably for a good couple of years prior to it, and the folk who are engaged in the discussion then have to carry that through during the bill process.

The bill aims to create a simplified and flexible framework that will bring coherence to the current disparate tribunals landscape. It brings improvements to the structure, management and organisation of devolved tribunals while maintaining the specialism and ethos of each individual tribunal. The bill creates a simple two-tier structure; introduces common practices and procedures; and brings judicial leadership, under the Lord President. The bill includes proposals to bring tribunal appointments into the remit of the Judicial Appointments Board for Scotland, which will ensure independence from Government and provide consistency in tribunal appointments. That will ensure that all tribunal users benefit from the same high standard of judicial decision making, regardless of the subject matter.

The bill creates the office of president of the Scottish tribunals, to support the Lord President with his new duties, to champion tribunals in the wider civil justice system and to ensure the proper distinction and separation of tribunals from courts. There will also be a new upper tribunal for Scotland, which will benefit the tribunal user by, in most cases, removing appeals from courts. The bill creates a structure that will enable a far better service to be provided to users. As it deals with structure and organisation, much of the detail will necessarily be fleshed out in secondary legislation.

The proposals in the bill have not been developed in isolation. In addition to the formal consultation exercise, we have engaged extensively with stakeholders and the judiciary. It is important to note that the bill does not sit in isolation and is an integral part of our making justice work programme, which is the most significant set of reforms to our justice system for more than a century. The programme brings together a wide range of reforms to the structure and processes of the courts, access to justice and tribunals and administrative justice. It has been developed and is being delivered with partners across the justice system. It is probably fair to say that the bill is at the least controversial end of that broader programme of work.

I turn to the detail of the Justice Committee’s report. I warmly welcome the committee’s support for the general principles of the bill and the recommendation to the Parliament that those principles be agreed to. I will address a few of the issues that are raised in the report, and I will be interested in hearing members’ views during the debate.

I note the committee’s view that consideration should be given to extending the pool of eligible candidates for assignment to the office of president of the Scottish tribunals. It is important to acknowledge that the leadership of the new tribunals structure will be invested in the Lord President, who will have responsibility for the efficient disposal of business and overall responsibility for the Scottish tribunals, as he does for the Scottish courts. The position of president of the Scottish tribunals is not an appointment; it is an assignment by the Lord President to assist him in delivering those new responsibilities. The president of the Scottish tribunals has certain functions delegated to them in the bill and will be responsible for the day-to-day running of the Scottish tribunals. That includes the upper tribunal, which will be made up of senators, sheriffs principal and sheriffs as well as chamber presidents from the first-tier tribunal.

For those reasons, it is entirely appropriate that the president of the Scottish tribunals should be assigned from among the senators of the College of Justice. I welcome the Lord President’s announcement that he intends to assign Lady Smith to the office. Lady Smith will bring a wealth of knowledge to the position.

John Finnie (Highlands and Islands) (Ind): The minister says that there will be an assignment, rather than an appointment. There is public expectation that the post and person specifications will be clearly laid out, as happens with other public appointments. Does the minister see merit in that?

Roseanna Cunningham: We want to ensure that the Lord President’s role is paramount. Members need to keep that in mind. I do not want to get into the business of defining matters all the way down the line, in the way that the member might be suggesting. If that is not what the
member meant, he will no doubt come back to the issue.

That rather leads me to the debate about whether the term “judge” should be specified in the bill. I note that some people have suggested that legal members on tribunals should be called tribunal judges, so as not to imply that they have a lesser status than court judiciary. However, all members of tribunals, whether they be legal or ordinary, are taking judicial decisions and should therefore have the same status. The bill achieves that aim by giving all members judicial status and capacity.

The bill is designed to create a new structure for devolved tribunals. I am not aware of any devolved tribunal that currently uses the term “judge”. We must not forget that users are at the centre of what we are creating. I am aware that the term “judge” is not popular with the majority of tribunal stakeholders, who fear a drift towards courtification—which may or may not be a word, but people understand what it means—and a more adversarial approach to tribunal hearings. However, it is for individual tribunals to determine what they call themselves during hearings informally. That therefore does not need to be explicit in the bill. However, I look forward to hearing members’ views on the issue during the debate.

There has been interest throughout the development of the bill, from consultation to the committee evidence sessions, that the particular nature and characteristics of the individual tribunals should be protected in the new structure. If anything, that has probably been the prevailing sentiment expressed to us all in one way or another. I fully agree with that view and I am confident that we have ensured that there is the right balance in the bill. The bill has to be flexible enough to allow the new structure to accommodate the different tribunals. By providing adequate safeguards, we ensure that each tribunal’s specialism and ethos is protected.

The committee has recommended that an amendment is made to the bill at stage 2 to allow for permanent members of the tribunals. Although there is no need for permanent members now, I accept that it might be a requirement in the future. I therefore intend to make an amendment to allow for permanent tribunal members should the need arise. I hear the convener of the Justice Committee sighing—I suspect that I may already have dealt a blow to part of her speech.

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I shall say this very slowly: I am amending parts of my speech.

Roseanna Cunningham: I thought that that might be the case.

Members need to keep it in mind that each tribunal was created by an act of Parliament. They are all required to operate differently depending on the matter that they are addressing. That will still be the case in the new structure. For instance, the Lands Tribunal for Scotland charges fees, so the bill contains provisions to allow that to continue.

Concern has been expressed about provision being made in the bill for court judiciary—sheriffs—to be able to act as members of the first-tier tribunal. However, there is a requirement in the Mental Health (Care and Treatment) (Scotland) Act 2003 for the Mental Health Tribunal for Scotland to have a sheriff convener to sit in its forensic cases. We therefore have to allow recognition of that position in the bill to ensure that sheriffs can act as members of the first-tier tribunal for that purpose.

The bill allows Scottish ministers to make composition orders specifying which category of member hears what cases in matters that fall to the first-tier tribunal to determine. The judicial members—sheriffs—of the first-tier tribunal will appear on composition orders only for cases where the founding legislation requires them to sit. That will ensure that they cannot hear any other type of case in the first-tier tribunal.

It is possible that, in the future, a new jurisdiction will be created that will require a judicial member to be part of the panel that hears the case. That would be enacted in the set-up legislation, and would be the result of a policy decision that was taken in the context of a particular policy area; it would not be my decision or come from the justice department. The bill as drafted allows for that flexibility, with safeguards in place to ensure that judicial members of the first-tier tribunal are authorised to hear cases only where there is a genuine requirement for them to do so.

The committee suggested that there would be merit in setting out the characteristics of a tribunal in the bill. As I indicated to the committee in my evidence, I would be happy to consider that, and I am open to hearing members’ views this afternoon on how that might be constructed and what they might like it to include.

There have been representations by stakeholders to request that the Lands Tribunal for Scotland and the Mental Health Tribunal for Scotland should be treated differently in the bill, by placing the former as a separate pillar outwith the structure and giving the latter its own chamber enshrined in legislation. I fully appreciate the complexity and unique nature of both those tribunals; I will say more about them individually in
a moment. The key word to describe what the bill proposes is “flexibility”. The structure is designed to allow it to develop and grow, and respond to the needs of the individual tribunals that are transferring into it. The structure protects and maintains the unique individual needs of tribunals as well as providing the benefits that I mentioned earlier.

It is true that the Lands Tribunal for Scotland deals with complex matters of law, and that it operates extremely well. However, that is true of many other tribunals that will transfer into the new structure. Nothing that is proposed in the bill will affect how the tribunals operate in accordance with their founding legislation. I have taken account of the complexities of the Lands Tribunal by stating in the policy memorandum that its functions and members will transfer into the upper tribunal, with its appeals going to the inner house of the Court of Session, as they do now. It has been acknowledged that being in the upper tribunal would work for the Lands Tribunal; being in a separate pillar would not provide anything that is not achieved by the Lands Tribunal’s position in the new structure.

The Mental Health Tribunal is the only tribunal that is currently listed to come into the new structure that makes decisions on people’s liberty. The tribunal focuses on the needs of the patient, putting them at the centre of everything, and ensures that their voice is heard by those who make decisions about their care and treatment. I fully agree with those who advocate strongly for the retention of the specialism and ethos of that tribunal. However, I do not believe that anything that we are proposing would be detrimental to those values. The bill provides many safeguards, but most importantly it does nothing to change the fact that the tribunal will continue to adhere to the Millan principles, which the Scottish Government believes are at the centre of everything that the tribunal does.

I have made the commitment that the Mental Health Tribunal will be in a chamber of its own in the first instance. The bill is clear that only similar subjects can be located together in chambers, and there is currently no jurisdiction of a similar nature that could be located with the Mental Health Tribunal. There may never be such a jurisdiction, but the bill as drafted is flexible enough to allow for that to happen if one should come along. Any changes to chamber structure will be made only following consultation and by affirmative order by this Parliament.

I will clarify, in case there is any misunderstanding, that the location of two or more jurisdictions in the same chamber in no way amalgamates them. Each jurisdiction will continue to have its own founding legislation, specialist members, procedural rules and specialist support staff; all that the jurisdictions will share is a chamber president.

The committee commented on other issues that might be of interest to members in the chamber. I look forward to the debate and will seek to address in my closing remarks any matters that arise.

The bill represents a long-overdue reform of the tribunal landscape in Scotland, which I sincerely believe will be to the advantage of all tribunals and their users. I welcome the wide support for the bill to date, and I look forward to a constructive debate today on the creation of a cohesive tribunal structure for devolved tribunals in Scotland.

I move,

That the Parliament agrees to the general principles of the Tribunals (Scotland) Bill.

The Presiding Officer: Thank you, minister. If “courtilization” is not a word, it should be. I call Christine Grahame to speak on behalf of the Justice Committee—you have 10 minutes.

14:44

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): Heavens.

It says in my notes, “Welcome the opportunity to speak in the debate”. I think that that might be going a bit too far. I speak on behalf of the Justice Committee, which was the lead committee in considering the bill. Like the minister, I thank all those who gave written submissions and oral evidence to the committee.

I will get in a wee moan first. The difficulty is that the minister gets to speak first, which completely undermines all the issues that we raised in our report. I wish that it was the other way round, but I have no power. As the minister says, the purpose of the bill is to create a system to improve the independence of tribunals and facilitate improvements in the quality of service to tribunal users. It is a worthy but somewhat dry and technical bill, so I have dressed to distract.

Given that I am, yet again, allocated vast deserts of time—10 minutes—when there is not much to say except repeat, and repeat and repeat, I have huge sympathy for those who follow. I would call this a tumbleweed debate, but there was a worse one in 2000 on the reform of district courts. Look it up. Nothing could have been drier than that.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP) rose—

Christine Grahame: I am sure that Mr Stevenson will tell me about an even greater tumbleweed debate.
Stewart Stevenson: I wonder whether the member remembers the Court of Session Act 1693—[Laughter]. It specifically says that “no person presume to speake after the Lords begin to advise”.

Perhaps that may be guidance as to the order in which we should be speaking in this place, since I am sure that the convener of our committee stands above us all.

Christine Grahame: I liked the last bit, but the idea that I was around in 1693 is a bit wounding.

By way of introduction, I will take members on a brief journey through the mixed landscape of tribunals. For the purposes of the debate, and indeed the legislation, those tribunals will be in the devolved areas, which of course is only 2 per cent of the total. They include the Additional Support Needs Tribunal, which considers references made by parents and young people against decisions by local authorities regarding additional support for learning needs. In certain circumstances, it will hear placement requests. I know that things have improved since then, but some years ago I attended one of those tribunals with a constituent, only to find the council armed to the gunwales with solicitors, and parents having only me on their team—and a silenced me, at that. It was not very balanced and was quite intimidating.

There is the Mental Health Tribunal for Scotland, which, as the minister said, considers issues of compulsory detention under the Mental Health (Care and Treatment) (Scotland) Act 2003—taking away individuals’ rights.

There is the private rented housing panel, which sets about resolving issues between landlords and tenants, and the home owner housing panel, which aims to protect home owners by providing minimum standards for property factors and, broadly, land managers.

I know that members are familiar with all these tribunals, but many people do not know about them until they have to use them. They have a problem, they go on the internet and they find out that the tribunals exist. It is all pretty nitty-gritty, basic and practical stuff, which quite often involves the citizen and the state, in the form of the local authority or indeed any other organisation. At the other end, as the minister said, is the Lands Tribunal for Scotland, which is really more like a court in its processes and culture.

As I have said, the tribunals are very disparate; many of them have evolved over time. That is a good reason for the bill to draw them into some structure or order, while maintaining the range of processes and the culture of the informal of some and the very formal—perhaps of the Lands Tribunal—while building in accessibility and maintaining a firm line between tribunals and courts. That is important.

The committee supports the general principles of the bill. However, we highlight a number of areas, which the minister has already sabotaged, that could be improved to ensure that a balance is achieved between streamlining the current system without losing individual expertise within the existing tribunal. Reserved tribunals are not included in the new structure. The United Kingdom Government has put on hold plans to devolve reserved tribunals for the time being. I repeat—my first but not last repeat—that devolved tribunals account for only around 2 per cent of Scottish tribunals. Witnesses, including the Faculty of Advocates and Citizens Advice Scotland, recommended that those reserved tribunals also be included to ensure the effectiveness of the system and make the process clearer for the user.

On judicial leadership, we welcome the designation of the Lord President as head of the Scottish tribunals and agree that that would bring strong judicial leadership across the system. However, as I said, we had concerns about the appointment to the post of president of tribunals, which will happen through what I think is called the signing. I am not sure whether another term was used.

Roseanna Cunningham: It is assignment.

Christine Grahame: Thank you.

The president will be responsible for the efficient disposal of tribunal business. Currently, only a senator of the College of Justice can be assigned, but some witnesses felt that that was overly restrictive. I add that that does not in any way reflect on the proposed assignment of Lady Smith, Queen’s counsel.

We welcomed the bill’s objective to secure a greater degree of tribunal independence, which will be brought about by the new structure. That is particularly the case for valuation appeals committees and education appeals committees, to which I have referred.

Some witnesses raised questions about the nomenclature that is used to describe legal members of tribunals. I think that we made a bit of a fuss about that, but I just threw that bit in to see whether members were awake. The Lord President argued that legal members should be referred to as judges to afford them the same status as court judiciary. On the other hand, the Law Society of Scotland and Employment Tribunals (Scotland) argued in evidence that that would make tribunals too court-like. What was the word that we agreed on? I have forgotten. Was it “courtified”?

The Presiding Officer: Courtification.
Christine Grahame: I will need to develop adjectives and adverbs now.

We concluded that how legal members of tribunals are referred to was a matter for individual tribunals to determine and therefore recommended that provision be made in the bill to give tribunals that flexibility. The bill also allows judicial members to act as members of the first-tier and upper tribunals, if authorised to do so. If members do not know what we are talking about with regard to upper and first-tier tribunals, they will need to look at the briefings on them, or somebody else in the chamber will explain—I am looking round at colleagues. [Laughter.] However, I am not too hopeful, given that sound.

We were concerned that allowing judicial members to act as members of the first-tier and upper tribunals would lead to over-judicialisation—I think that is a word—of the tribunals and make them more formal. We were also concerned that the court judiciary might not have sufficient specialised knowledge and experience of tribunal work to carry out the proposed role. We were concerned, too, about the possible impact on the diversity of appointments to tribunals and that perhaps the current gender and other imbalances within the judiciary would be replicated. I think that Margaret Mitchell might develop that issue. I have a feeling that I have pressed a button there.

The committee concluded that the nature and characteristics of tribunals should be protected, but we recognised the benefits of the provision on membership of first-tier and upper tribunals. We therefore concluded that the provision could be applied effectively using the president of tribunals’ discretion, with possible consultation with the relevant chamber president. As I said, I will leave it to others to explain about chambers.

The definition of a tribunal is a tricky one. Because there is an issue about protecting the particular characteristics and nature of tribunals, a number of witnesses suggested that the definition of a tribunal should be included in the bill. I will give members an example, as I have 10 minutes for my speech. The Scottish Committee of the Administrative Justice and Tribunals Council has a definition of a tribunal:

“A body which resolves disputes between citizens and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it.”

That is one proposed definition. I know that the minister’s response to the committee, which I have taken the trouble to read, referred to section 2(3) of the Tribunals, Courts and Enforcement Act 2007. Other members might wish to develop that point.

The bill’s challenge is to strike a balance between establishing a unified tribunal structure and retaining the unique features of tribunals of different kinds. It is also important to have the perception that that is being done. Some of our witnesses were concerned that the perception might be that all the tribunals were the same.

On practice directions—I am getting through my speech—we welcome the minister’s commitment to lodge an amendment to review the provision in section 68(5)(a) that enables the issuing of practice directions for the purpose of “the application or interpretation of the law”.

We did not like that bit. If I remember correctly, the Lord President did not like it either, so I am in a good team in supporting that amendment.

Are members still with me? They are all awake, which is quite a big plus.

The committee supports the bill. We welcome its objectives of bringing about a greater degree of tribunal independence as well as ensuring the greater accessibility of tribunals to users. We identified issues that to some extent the minister has addressed. I am sure that other members of the committee are itching to pick up on some of the aspects of the bill that I have not had time to cover. I look forward to hearing other contributions in the debate and to the inventiveness of colleagues in trying to say something additional in the next two hours.

The Presiding Officer: Thank you, Ms Grahame. It might be helpful to members if I advise that we have a little time in hand. If members take interventions, the Presiding Officers will certainly allow them the additional time.

14:55

Elaine Murray (Dumfriesshire) (Lab): The Scottish Parliament has, over the years, debated many bills that have attracted significant media and public attention. Bills have given the entitlement to permanent housing to the unintentionally homeless, banned smoking in public places and foxhunting and, more recently, addressed climate change and reformed Scotland’s police and fire and rescue services. However, I do not think that the Tribunals (Scotland) Bill is one of those that will get everyone talking. As members have already said, it is relatively uncontentious in its general principles, although there are concerns about aspects of the detail, which I will come on to.

Despite the lack of major areas of discord, I found the committee’s three evidence-gathering
sessions surprisingly interesting, although I cannot promise that either of my speeches—unfortunately, there will be more than one today—will be interesting to the same extent. However, I certainly thank the witnesses for their contributions.

In many respects, the bill mirrors the provisions in the UK Tribunals, Courts and Enforcement Act 2007, which applies to tribunals in England, and was introduced for the same reasons: tribunals have evolved through separate pieces of founding legislation; there is no coherent system of review and appeal; and there is a variety of processes for appointments and opportunities for training. The bill therefore aims to bring coherence to the devolved tribunals in Scotland, and to provide opportunities to benefit from shared good practice and expertise.

However, because the UK Government is not minded to transfer into the Scottish tribunals reserved tribunals such as employment tribunals, immigration tribunals or the social entitlement chamber, the bill will apply to only a small percentage of tribunals in Scotland, as Christine Grahame said. One of the witnesses said that it was 2 per cent and another said that it was 3 per cent, so I think that is somewhere between 2 and 3 per cent. The vast majority of tribunals will remain within the reserved tribunals system.

Jonathan Mitchell of the Faculty of Advocates advised us that the proposed system will apply to around 4,000 cases annually in Scotland, while 60,000 will go through the social entitlement chamber, 20,000 will go to employment tribunals in Scotland, and 10,000 will go to immigration and asylum tribunals. At the moment, therefore, we are dealing with a small number of cases.

One of the issues that was brought to the committee’s attention was the fact that, as the bill will apply not only to existing devolved tribunals but—if and when they transfer—to reserved tribunals and to any new tribunals that we might decide to set up in future, it should, as has been said already, contain some form of definition of the character of a tribunal. Lauren Wood of Citizens Advice Scotland suggested that the bill could incorporate

“principles to help to guide tribunals, as there are in the Tribunals, Courts and Enforcement Act 2007.”—[Official Report, Justice Committee, 3 September 2013; c 3125.]

That might be a starting point for us to consider at stage 2 how the bill might be amended.

Jon Shaw of the Child Poverty Action Group felt that, despite similar provisions being contained in the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013,

“Placing a principle in the bill ... would be a real improvement.”—[Official Report, Justice Committee, 3 September 2013; c 3216.]

Richard Henderson of the Law Society for Scotland advised that, when making reforms in different areas, such as civil courts and tribunals, we will have to ask ourselves about the linkage between them, and asking that question then prompts the question, “What is a tribunal?”

The argument for having principles that define the nature of a tribunal in the bill does not contradict the fact that the existing devolved tribunals have distinctive characteristics that the new system must preserve.

Stewart Stevenson: I wonder whether it would be helpful to look at the way that the Scottish Parliament information centre has described what a tribunal is. It seems to me that it captures it very well. It says very simply:

“most tribunals deal with disputes between individuals and the state”.

We should not, therefore, downplay the importance of tribunals because they are, ultimately, a quasi-judicial way for individuals to make sure that their rights are protected and that the state does not become too dominant. That is probably as good a definition as I have seen.

Elaine Murray: I thank the member for his intervention. That was along the lines of some of the suggestions that were made to the committee, and I think that we will be keen to pursue some of those later. Although we all think that we know what a tribunal is, that is not good enough when we are dealing with matters of law.

Witnesses who spoke to the committee were also anxious that tribunals’ specialisms should not be lost and that individual tribunals should be placed in the appropriate tier, pillar or chamber to ensure that expertise and character are maintained.

The policy memorandum that accompanies the bill states:

“The Scottish Government has made a commitment that initially mental health will be in a chamber on its own”,

which the minister referred to, because at the moment no tribunals cover a similar subject. The Mental Health Tribunal for Scotland itself is satisfied that the new structure will not compromise its expertise or ethos, or substantive mental health law. However, some witnesses felt that “initially” was an insufficient guarantee.

Adrian Ward of the Law Society pointed out that

“five years ago, a significant change in the status of the Mental Welfare Commission for Scotland almost slipped through in the context of the Public Services Reform (Scotland) Bill.”—[Official Report, Justice Committee, 10 September 2013; c 3166.]
The Law Society argues that the bill itself should state that the Mental Health Tribunal should be in a chamber of its own. Any change to that arrangement would therefore have to be made by Parliament, a stance that met with the agreement of Alan Gamble, who has been a convener of the Mental Health Tribunal.

I wonder—I have only just thought about this—whether there could be some form of compromise that would allow a change in status to be introduced through statutory instrument. That would mean that there would be parliamentary change, although amendment of the primary legislation would not be required. Perhaps we can look at something along those lines at stage 2.

The positioning of the Lands Tribunal for Scotland is also a matter of argument. As we have heard, the bill places the Lands Tribunal in the upper tier, which is analogous to the position of the Lands Tribunal for England and Wales under the UK Tribunals, Courts and Enforcement Act 2007. However, the Lands Tribunal for England and Wales is substantially an appeals body that deals in a large part with valuation appeals and therefore sits comfortably within the upper tier. The Lands Tribunal for Scotland describes itself on its website as

“in effect an independent civil court”

that deals with disputes involving land or property.

Lord Gill told the committee:

“The Lands Tribunal for Scotland is a court of law in all but name”,

which

“has no appellate functions of any kind”,

and that appeals from it go to the Court of Session. He stated that

“The Lands Tribunal is not broken”—

I do not think that anybody was saying that it is broken; rather, there was discussion of the structure of the tribunals system itself—

“and does not require fixing.”

He believed that it should be left

“as a separate pillar of its own.”—[Official Report, Justice Committee, 17 September 2013; c 3195-6.]

The minister indicated that she was not supportive of that suggestion, for understandable reasons. It would appear contrary to the purpose of the legislation to bring devolved tribunals together within a coherent structure and then start to make exceptions and stick different tribunals outside that structure.

There might be a more fundamental question regarding whether the Lands Tribunal is, despite its name, actually a tribunal, which is where a definition in the bill could be of assistance. Despite its name, and despite its being one of our oldest tribunals, if it is, as Lord Gill advised, in “all but name” a civil court, perhaps it should be part of the civil courts structure rather than the tribunals structure. In that case, it could be argued that leaving it as a separate pillar until its status is resolved is a sensible temporary solution. That is something else that we may wish to return to at stage 2.

The bill also contains provision for tribunals to award expenses and charge fees. As members will know, that has been a contentious feature of employment tribunals, which recently introduced significant fees of £160, or up to £250 to lodge an appeal and, if the case goes ahead, a further £230 or £950. Those charges were subject to judicial review in the High Court last month as a result of a challenge from Unison.

The minister advised the committee that the provisions of section 70 were necessary because some tribunals already charge fees, and the Scottish Government’s solicitor, Michael Gilmartin, further advised the committee that any proposal to charge fees where they had not been charged previously would be required to come to Parliament for approval. My understanding is that that would be under the negative procedure, and it might be worth considering whether any proposals to introduce fees should be by affirmative rather than negative instrument, in order increase the level of scrutiny.

Section 59 will give tribunals the power to award expenses. Lord Gill believed that use of those powers would not be a regular event as expenses are not generally a feature of tribunal decisions, and that the power would be used only in exceptional cases. Section 59(3)(c) makes a curious reference to “wasted expenses”, which Lord Gill pointed out was not defined. I was relieved to hear the minister state:

“I am not quite sure what is meant by wasted expenses.”—[Official Report, Justice Committee, 17 September 2013; c 3214.]

I had no idea what the expression meant, either. I wonder whether, if it is used, we need to define it. The Government’s solicitor did not seem to be terribly sure about that either, although he said that a definition could be set out in procedural rules.

Section 68(5), which the convener of the Justice Committee has already mentioned, caused considerable consternation among witnesses, as it gives the president of the Scottish tribunals the power to issue directions, including instruction or guidance, on the application or interpretation of the law. The witnesses in question felt that it was quite inappropriate for the interpretation of the law to be made by a senior judge acting
administratively rather than judicially. Fortunately, that turned out to be a drafting error that the minister intends to correct at stage 2.

Members might refer to a number of other issues that arose in our evidence taking, including the proposal for the sift of appeals to go to the upper tribunal and whether it was necessary to set the bar so high. The provision appears to have been based on the English and Welsh legislation, which was designed to exclude a flood of vexatious requests for review. Another issue was whether the first-tier tribunal should be able to refer a case to the upper tribunal not just on a point of law but on the whole case—facts and law.

Finally, the minister felt that salaried posts were unnecessary for the operation of the devolved tribunals but some witnesses argued that it would be helpful to put such provision into the bill in readiness for the transfer of reserved tribunals, which will generate a far greater workload and may necessitate the creation of full-time salaried positions. The committee agreed that the bill should allow for that possibility, should the need arise in future.

I am pleased to say that I have spoken for nearly 11 minutes and therefore say in conclusion that I am looking forward to the debate and our stage 2 discussions.

15:06

Margaret Mitchell (Central Scotland) (Con): As tribunals form an important part of our civil justice system, I welcome the opportunity to speak in this stage 1 debate on the general principles of the Tribunals (Scotland) Bill.

Christine Grahame has already cited the Scottish committee of the Administrative Justice and Tribunals Council’s definition of a tribunal but I wonder, Presiding Officer, whether you would like to hear it, given that you were not in the chamber earlier.

The Deputy Presiding Officer (John Scott): I would be delighted.

Margaret Mitchell: According to that committee, a tribunal is

“A body which resolves disputes between citizens and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it.”

Tribunals in Scotland deal with 80,000 cases annually. Without them, individuals would either lose an avenue for redress or be forced to take their grievances into a court system that is already overstretched and—I am sad to say—likely to become more so with the court closures that are planned.

In some instances, a tribunal is a forum for citizens to challenge decisions made by public bodies on their entitlement to benefits and services. Because of that, it is imperative that they are independent from Government and the public organisations whose decisions they regulate. In other cases, they are a forum for the resolution of private disputes—as we see, for example, in the Lands Tribunal for Scotland’s work—or issues arising from employment. In essence, tribunals offer a less formal and less costly dispute resolution mechanism as an alternative to the courts. However, as the Justice Committee heard from a wide range of witnesses, the current complicated tribunal system, which has developed in an ad hoc way over the past decades, needs to be reformed, and the committee’s stage 1 report confirms that users and experts generally welcome the bill as a step towards revising the administrative justice landscape.

The bill creates a first-tier tribunal for first-instance decisions; an upper tribunal to deal primarily with appeals; and a standard system of appointment, training and appeals. However, although all of that is generally to be welcomed, there are, as the stage 1 report notes, certain areas of concern that will need to be addressed as the bill progresses, including the balancing act that the Government will have to perform between establishing a simplified uniform system and recognising that tribunals deal with very specialised areas of the law.

That challenge was reflected in the evidence that the Justice Committee received from the Lands Tribunal, which is a vocal critic of the bill and the creation of a uniform system. In its written submission, it noted that

“to aim for common standards and procedures, including review and appeal, as a significant plank of policy risks creation of a serious impediment to identifying the most efficient way of serving the different needs of individual users”.

Consequently, the Lands Tribunal has argued that, instead of occupying a division in the upper tribunal as the Scottish Government has proposed, it should be placed in a separate pillar. Indeed, that position has been supported by the Lord President.

The difficulty with the Lands Tribunal for Scotland not being included in the new structure is the precedent that that would set for the approach to other tribunals that are equally specialist, which would result in a complex arrangement under the new system, representing not a lot of change. The challenge for the Scottish Government is to establish some standardisation without compromising the interests of users of the tribunal.
system. I note that the minister has recognised that with the requirement for flexibility.

The stage 1 report also highlights the legitimate concern that has been raised about judicialisation or so-called courtification. In other words, there is a need to ensure that the characteristics of tribunals, as distinct from those of courts, are protected. That concern springs from, among other things, the provision that sheriffs, sheriff principals and part-time sheriffs will be eligible to act as judicial members of the first-tier tribunal by virtue of their judicial office alone. Although the Lord President is supportive of that proposal, an influx of judges and former judges risks turning tribunals from informal and generally non-adversarial environments into courts in all but name. The Justice Committee’s stage 1 report therefore recommends that the Government seriously consider amending the bill to remove automatic entitlement in the appointment of judicial members. A further concern is that, because judicial members may be appointed to the first-tier and upper tribunals, the current gender inequality that is present in the wider judicial system may be replicated in the new tribunal structure.

The bill makes provision for the newly established Scottish Civil Justice Council to propose procedural rules for the Scottish tribunals through a specialised tribunals committee. However, without additional resources, it will be years before the SCJC, which must first rewrite a mountain of civil court rules, will be able even to consider tribunal rules. The Government has proposed that, in the interim, Scottish ministers should make rules for Scottish tribunals, but that interim rule-making arrangement poses serious constitutional issues, as it would result in Scottish ministers writing the rules of administrative justice and significantly drafting the rules surrounding the newly created upper tribunal. Although that may already happen on a limited basis, it remains, as the Faculty of Advocates pointed out to the committee, “undesirable on constitutional grounds”. As Jonathan Mitchell QC said:

“Scottish Ministers should have the same rights as other parties to proceedings before the tribunals to comment on proposed rules, but no power to write them.”

Scottish ministers can be challenged in tribunals, and it is simply not appropriate for them to be involved in setting the rules. An alternative must be found in either the creation of a new, independent interim body or the additional resources that the SCJC would require in order to carry out that role.

All those issues will require to be addressed in the future. In the meantime, I confirm that the Scottish Conservatives will support the general principles of the bill.

The Deputy Presiding Officer: We move to the open debate. There is a modest amount of time in hand for interventions.

15:14

Colin Keir (Edinburgh Western) (SNP): I am not terribly sure that I am delighted to be speaking here today, but it is my last hurrah as a member of the Justice Committee. There is an element of déjà vu about the debate. After the previous debate on the subject, my late colleague David McLetchie said to me on the way out of the chamber, “Colin, with all your wittering on about the citizens advice bureaux you’ve given me an extra two minutes for my summing up.” However, he still did not manage to fill his allocation of time, such was the agreement among members on the subject. I miss David and his humour—many of us do.

However, this debate is somewhat different. A number of eminent people gave the Justice Committee evidence, verbally or in writing, on the bill. The issues raised were quite fascinating, so I agree with Elaine Murray that aspects of the bill are interesting.

The tribunals are designed to provide an easier and less expensive method of justice for society, and we hope that that will carry on. Their set-up is such that, in some cases, it is not necessary to employ legal counsel, although we all know that tribunal cases can also become extremely complicated, so a lawyer is required in most.

As we can see from the concerns that were raised in witness statements to the committee, the possible judicialisation of management and procedure of tribunals is worrying, because it would mean that tribunals would be out of step in terms of accessibility. It has been suggested that tribunals might be subjected to what I think has been called “courtification”—according to my notes, the word was used by Christine Grahame, so it obviously cannot be wrong.

In broad terms, I agree with the committee in feeling strongly that individual aspects of the various tribunals—for example, the Additional Support Needs Tribunal and the Mental Health Tribunal—should not be lost within the new system. Under the bill, the Mental Health Tribunal will become an individual chamber within the first-tier tribunal and the Lands Tribunal for Scotland will also transfer. As several speakers have pointed out, Lands Tribunal cases can be incredibly complicated, so perhaps we need to consider whether it is not so much a tribunal as a court. I know that the complexities were described by the minister. Fears about loss of identity and loss of methods of working that have been gained over many years should be allayed.
Another concern that is highlighted in the report relates to the children’s hearings system, which has just undergone a period of reform. We should keep that in mind if further reforms are required, and we should try to avoid children’s hearings being included in the tribunals system. A power to make such a modification is given to ministers in section 26(2)(b), which requires that regulations that are subject to affirmative procedure be laid before Parliament. I have a lot of notes on that, but Margaret Mitchell has already kindly raised all those concerns, so I shall not mention them again.

Christine Grahame: Mention them again.

Colin Keir: No—I refuse to mention them again. Ms Grahame should just sit there. She has had her shot.

Anyway, use of affirmative procedure will provide some parliamentary protection.

The two-tier structure is quite interesting, given that over the months we constantly complained about people going into their silos and using all their own terminology. However, everyone seems to be in agreement regarding the two-tier structure and how it will work; it seems to be the right way. Again, previous speeches have explained the matter better than I could; members will not hear my description of it, as I hope to run out of time fairly shortly.

Much has been made about the suggestion by the Lord President that he would name Lady Smith as president of the tribunals. I welcome the clarification that has been provided by the minister that that is not an appointment but an assignment. That is important because that was, as far as I am aware, the first time we have heard that description. When the Lord President gave evidence, I accepted that Lady Smith is more than qualified for the post—I certainly would not argue against her credentials or suitability—but it seems to be a little strange to see a name being presented for the position before the legislation to establish the post is in place.

On the people who sit on tribunals, there were a number of comments, including on whether the term “judge” should be used to refer to the person who presides over the tribunal. In one respect, it may be useful to keep a clear distinction between a court and a tribunal—I understand that point and I think that it is quite important. Certainly, as a matter of symbolism, it is perhaps a better idea to lose the title “judge”. I will avoid using the quotations that three or four other members have used.

That leaves me to say only that, as Elaine Murray mentioned, the legislation deals with a relatively small amount of work, but at least—if I can be a little bit parochial—should we vote yes next year, we will have plenty of scope to bring the other tribunals into the system.

15:20

John Pentland (Motherwell and Wishaw) (Lab): Sometimes it takes weeks to hear repetition in the chamber, but when it does we tend to think, “Oh, no! Not that again.” However, we are less than an hour into this debate and members should believe me when I say that they will hear much the same from me as they did from others, so I ask them to enjoy themselves and try to keep awake.

There is, so far, broad consensus on the bill, its principles and most of its proposed measures. That consensus not only applies in the Parliament; it applies among many who submitted their views and gave evidence. There were criticisms, but those had a sympathetic reception from the committee, which is keen to see them addressed as the bill progresses.

The advantages of reform of tribunals were acknowledged—those include greater economies of scale and sharing of good practice and resources—but there was also a strong desire to retain the special support and knowledge that are embodied in the current arrangements. Basically, we do not want to throw out the baby with the bath water. We want to keep the lay involvement, the less adversarial approach and the simpler and relatively informal user-centred nature of existing tribunals. I hope that those principles will be made explicit in the bill, with the fundamental characteristics of tribunals set out in it.

It was also felt to be important that the bill be drafted in such a way that reserved tribunals could be brought into the structure at a later date.

The Law Society of Scotland welcomes the bill, but has expressed concern about judicialisation of tribunals eroding their character. I agree that there is a danger that judicial members who would be appointed under the legislation would not understand the informality or the centrality of the user in the tribunal process. The committee has asked the Scottish Government to consider what additional safeguards can be included to avoid that. In particular, there must be a direction in the bill that the president’s discretion on appointments should be used to ensure that judicial members have the necessary expertise and understanding of the tribunal and its context.

Although many submissions suggested ways to improve the bill to protect the characters of the tribunals, some people were not convinced that that is possible. The Lands Tribunal for Scotland questioned the efficiency of the approach, and whether it would be able to adapt—without creating significant problems—to the one-size-fits-all structure. It put its case strongly, and the
committee was persuaded to urge the Scottish Government to think again about its inclusion. The valuation appeals committee was also concerned about the impact of imposing age limits, which would see over half of its membership lost.

The Mental Health Tribunal also has unique characteristics, and there is support for its being retained in a chamber of its own. However, the worry is that that would be a temporary measure by the Scottish Government, so there must be long-term commitment to that arrangement for that tribunal.

The other big area in which reassurances are sought is the children’s hearing system. It has already been subjected to reform, which adds to the need for care when we are considering further change. It is important that regulations in respect of the children’s hearings system be laid under the affirmative procedure in order to ensure that there is adequate consultation and parliamentary consideration of proposals.

There are also various concerns about costs. Although we recognise that there is the potential to save money through elimination of duplication and adoption of common administrative and other resources, there will be costs involved in the transition. Long-term savings are one thing, but we should not risk being unsuccessful by trying to make the transition on the cheap.

Fees and charges are also important, as recent controversy over fees for the reserved employment tribunals has highlighted. Some devolved tribunals also have charges and fees. Therefore, provision for them has been included in the bill, but it is important to ensure that that does not open the door to new charges being imposed where none previously existed, and that it does not become a platform for significant increases in existing charges. The committee proposes that any such charges be subject to consultation of users and stakeholders.

Another issue that needs to be addressed is the enforceability of tribunals’ awards. More than 50 per cent of awards are not paid, or are not paid in full. As part of our discussions, we should consider how to address that.

Although I was not a member of the Justice Committee at the time, I spoke in the debate on the matter last year. I said that I was in favour of reducing overlap and eliminating duplication as long as the overlap and duplication are genuine and their elimination does not involve putting square pegs into round holes. We have had the consultation and the committee has considered the bill. My view is that such a reduction is the intention of the bill, but work remains to be done to ensure that it achieves that in practice.

I am content to support the bill at stage 1, but with my fellow committee members, I will look for significant improvements to be introduced at stage 2.

15:26

Roderick Campbell (North East Fife) (SNP): I welcome the opportunity to speak in the debate and I declare my interest as a member of the Faculty of Advocates.

As members are aware, the UK Government has announced that reserved tribunals will not be devolved to the Scottish Parliament, for the foreseeable future. That is disappointing in that it makes it a little more difficult to achieve the bill’s aims of streamlining the tribunals system in Scotland and making it more efficient. However, that is where we are.

Notwithstanding that, we need to ensure that the legislation will be fit to accommodate reserved tribunals in due course, but as Jonathan Mitchell of the Faculty of Advocates pointed out, without reserved tribunals, we are dealing with about only 2 per cent to 3 per cent of cases that come before tribunals in Scotland—much less if the Lands Tribunal for Scotland or, indeed, the Mental Health Tribunal for Scotland were to be excluded.

Much of the bill is technical and to some people—possibly even the convener, who I see has now left—it may appear to be dull, indeed. I accept that repetition may be the order of the day, but there are also a few matters that merit comment.

First, given the volume of mental health work and the fact that 332 of the existing 460 tribunal members who are covered by the bill sit on mental health tribunals, it seems to be sensible that the Mental Health Tribunal for Scotland should form a chamber of its own. Indeed, the proposals in relation to mental health were well received, with the exception of the possibility that the unique position of the tribunal as a separate chamber might be temporary. I note the Scottish Government’s response on that issue, but I am not sure that it will fully allay those fears. Further engagement with the sector on the issue might be helpful.

The second issue is whether the president of the tribunals should be a senator of the College of Justice, a judge or someone without such experience. I was not quite as enthusiastic as other members of the committee about opening up the field to others with relevant experience. If we are to move towards an integrated tribunals and courts system, it is inevitable that a judge—whether appointed or assigned—would be in an advantageous position.
The next issue is the absence of a definition of “tribunal” in the bill. Citizens Advice Scotland and others have called for incorporation in the bill of a definition and a statement of overriding objectives, such as that in the Tribunals, Courts and Enforcement Act 2007. I note the minister’s comments on that, but I hope that her consideration of the overriding principles will give rise to an amendment at stage 2.

I also welcome the statutory provisions that will place a duty on key individuals, including MSPs, to ensure the independence of tribunals.

Stewart Stevenson: Will Roderick Campbell give way?

Roderick Campbell: I am not sure that I have time, to be honest, but I will give way if the intervention is brief.

Stewart Stevenson: Roderick Campbell quite rightly identifies the duty not to prejudice the independence of tribunals that will be placed on members of this Parliament. Does he regret the fact that paragraph 1(d) of schedule 5 to the Scotland Act 1998 means that we do not have the power to enforce a similar duty on members of the UK Parliament who represent Scottish constituencies, who will continue to be able, should they so wish—I do not suggest that they would—to seek to influence tribunals?

The Deputy Presiding Officer: You may have a little extra time.

Roderick Campbell: Thank you, Presiding Officer.

As always, Stewart Stevenson makes a very good point.

On procedural rules, particularly for the upper tribunal, the evidence said that the new Scottish Civil Justice Council could not deal with that in the short term. As Margaret Mitchell said, the Faculty of Advocates expressed concerns of a constitutional nature that Scottish ministers should not be making rules. Even though, as the minister said, Scottish ministers currently nominally write tribunal rules after consulting relevant parties, I believe that that is a practice that should be ended sooner rather than later, and I would welcome further assurances from the Scottish Government on that.

On accessibility, as Iain Nisbet of Govan Law Centre said, tribunals are more accessible than court. They are generally also much cheaper, so our aim must be to preserve that accessibility.

I turn to the Lands Tribunal for Scotland, the provisions on which remain one of the most controversial aspects of the bill.

Stewart Stevenson: Will Roderick Campbell take an intervention?

Roderick Campbell: No—I need to make some progress.

As Elaine Murray mentioned, Lord Gill said in evidence that

“The Lands Tribunal for Scotland is a court of law in all but name.”—[Official Report, Justice Committee, 17 September 2013; c 3195.]

I agree. John Wright of the Lands Tribunal for Scotland made the point that it does not really fit in with the unified tribunal system that is proposed. He advised that in England and Wales, in contrast to the position in Scotland, the Lands Tribunal there is substantially an appeals body and therefore seems to have a natural position in an upper tribunal system.

John Wright also outlined the variety of expenses orders that currently prevail in the Lands Tribunal for Scotland. There are different expenses rules for compulsory purchase, rating and applications concerning title conditions. Those orders do not fit easily into a tribunals system in which expenses orders are a rarity. The prevailing ethos, at least in relation to title conditions matters that come before the Lands Tribunal for Scotland, is still that the winner gets his expenses. As an aside, in our review of title conditions, the committee expressed concerns about the implications of expenses orders, particularly as they impact on lowly home owners who are up against wealthy developers. The truth is that, particularly in respect of expenses, the Lands Tribunal for Scotland resembles a court.

As I have mentioned, the Lord President took the view, in evidence, that expenses orders in tribunal cases should be used sparingly and only in extreme cases. That does not fit in with the Lands Tribunal for Scotland. He argued for the Lands Tribunal for Scotland to be in a separate pillar with a separate administration. Although I accept the minister’s reservations about that and agree that if we were to make an exception for the Lands Tribunal, coherence might be lost, and that, devoid of the Lands Tribunal, the remaining tribunals might look somewhat sparse—I also note the minister’s comments on the appeals provision—I think that the characteristics of the Lands Tribunal are very different from those of other tribunals. It has had the power to award expenses since it started in 1949. Therefore, I believe that continued dialogue between the Scottish Government, the Lands Tribunal and others, even at this late stage, might be appropriate.

On the provision of permanent or salaried posts, at the present time I agree with the minister that that is difficult to justify, but I am pleased that the bill will provide for that possibility in the future.
I turn to the new interim committee that is to replace the Scottish Committee of the Administrative Justice and Tribunals Council, which was not mentioned in our report. The interim committee is to be welcomed, but I am not sure what the long-term solution is. CAS and others are concerned about the issue. They propose that some body should have the function of overseeing administrative justice, as the SCJC has in relation to civil justice. That idea merits consideration, and I will be pleased to hear from the minister on it.

Jonathan Mitchell of the Faculty of Advocates described the bill as “fundamentally a good bill” that is “going the right way.” I agree.

15:34

Alison McInnes (North East Scotland) (LD):
Despite having a few concerns that we believe need to be addressed at stage 2, the Liberal Democrats support the bill in principle.

As others have said, the tribunals system can and should be reformed to ensure that it is fit for purpose. Historically, it has developed in a piecemeal manner. As a result, too often it seems disjointed and perplexing to legal professionals and lay people alike. The reforms will also secure the independence of tribunals—that is overdue.

Having a tribunal consider a case can be a defining, stressful and even traumatic time in someone’s life. Clear and consistent rules and procedures will help users—who often have no experience of the civil justice system and find it daunting—to overcome any anxiety and to access proper redress.

I will take the opportunity to highlight some of our reservations. They are key issues that we need to examine further at stage 2, to ensure that the tribunals system is sensitive, just and transparent.

At the end of the bill process, we want tribunals to be better placed to make decisions and reach the right conclusions. The intentions are good, but we must be alert to unintended consequences. We must be sure that the system provides greater depth of expertise—not a dilution of that—among tribunal members. That is why we must not allow the specialist knowledge and intrinsic character of tribunals to be eroded to the extent that they are indistinguishable from courts, which other members have touched on. The tribunals must continue to offer a comparatively faster resolution, at lower cost and in a less intimidating environment—be it a hospital or a community centre.

The focus on service users’ needs, the comparatively informal and inquisitorial approach to cases and the fact that lay experts sit alongside legal professionals all contribute to ensuring that tribunals have a distinctive role and a unique integrity. Concern has been expressed that the bill could compromise those qualities. The committee therefore suggested that the principles that underpin the tribunals system—the things that define it and set it apart from the courts—should be enshrined in the bill. I know that the minister is instinctively cautious, but I welcome the fact that she is willing to consider that further.

As other members have said, concern has been expressed about what has been described as the potential judicialisation of tribunals. The proposed merger of the tribunals system with the Scottish Court Service could lead to more judicial practices being rolled out in the tribunals system, if it is simply absorbed. Tribunal members might be referred to as judges, which we know would make many of them uncomfortable.

The Law Society is concerned that the value of the ability of first-tier tribunals to access the judiciary when making decisions will be undermined if judicial members do not have the necessary expertise. We need sufficient safeguards, such as the need for presidential discretion to be respected and for the relevant chamber president to be consulted when judicial appointments are made. In its report, the committee asked the Government to consider that, so I hope that the minister will reflect on it further.

Since the consultation on tribunals reform was launched, concerns have repeatedly been expressed about the Mental Health Tribunal’s future. That subject attracted by far the most comments during the 12-week consultation period. That tribunal is very different from the other devolved tribunals that are set to be transferred from 2015. It has immense power over the lives of some of the most vulnerable people in our society; it has the power to detain patients in hospital and to decide where they will reside. It can rule to give people treatment for mental illness against their will. As the minister said, it can also deprive people of their liberty.

The extremely sensitive matters that the Mental Health Tribunal considers mean that it must retain its existing highly specialised expertise and experience. However, the bill provides that it could—conceivably—become part of a multijurisdictional chamber in the future. I listened carefully to the minister’s speech and found some reassurance in it, but should we be satisfied with that tribunal being transferred into a chamber of its own in the first instance? The Scottish Government seeks to establish an overarching framework, but sufficient protections need to be in place for the Mental Health Tribunal. It is therefore right to consider further whether the tribunal should be guaranteed its own chamber through
primary legislation. An amendment to its status would then require a further act of Parliament, which would allow for proper scrutiny and consideration. However, the proposal at the moment is to use regulations.

Vulnerable people, people on low incomes and hard-working families typically cannot afford to incur costs in accessing justice, so we must guard against that becoming the norm rather than the exception in the tribunal system. I welcome the minister’s commitment to considering whether the position can be strengthened at stage 2 in order to ensure that financial barriers to justice are not erected in the future.

We will listen closely to what the Government has to say on those issues as the bill progresses through Parliament. I am confident that we can work on them constructively. I hope that that approach will result in the bill striking the proper balance between the need to make the system more consistent and transparent and the needs of service users—those often vulnerable people whose needs must remain our focus.

15:39

Nigel Don (Angus North and Mearns) (SNP): I would like to start by taking a step back in history, although not, I fear, as far as my good friend Mr Stevenson has stepped back and probably will step back again. I want to take us back to the report by Sir Oliver Franks in 1957, which was the result of the Crichel Down affair, as some may remember. It said:

“Since the war”—

that was the second world war, of course—

the British electorate has chosen Governments which accepted general responsibilities for the provision of extended social services and for the broad management of the economy. It has consequently become desirable to consider afresh the procedures by which the rights of individual citizens can be harmonised with wider public interests.”

At the bottom of that page, it says:

“But over most of the field of public administration no formal procedure is provided for objecting or deciding on objections. For example, when foreign currency or a scarce commodity such as petrol or coal is rationed or allocated”—

those are signs of the times—

“there is no other body to which an individual applicant can appeal if the responsible administrative authority decides to allow him less than he has requested. Of course the aggrieved individual can always complain to the appropriate administrative authority, to his Member of Parliament, to a representative organisation or to the press. But there is no formal procedure on which he can insist.”

We can note that, within the lifetimes of most of us, I suspect, the world has moved on and that, by and large, formal procedure exists. As the minister has previously pointed out, each part of that procedure has been set up by its own act of Parliament, and, of course, came with its own set of rules, caveats and ideas at the time.

In his next chapter, Sir Oliver Franks made it quite clear that the aims of tribunals are pretty clear, and I would like to dwell on that point. First, he pointed out that Parliament must have required good administration. That is what they are there for. Secondly, he noted that they must embody “Openness, fairness and impartiality”.

As someone who was not on the committee, I want to step back and look at tribunals from the point of view of the individual who will appeal to them. What that individual wants is pretty simple: a tribunal that works. He or she wants to be treated with respect, and they definitely do not want to be overwhelmed by the other parties. I have to concur with Christine Grahame’s earlier comments about education appeals, with which I had to deal in my time as a councillor. There seemed to be complete inequality between the two sides, with the council being seriously overrepresented.

The individual wants to be heard, of course, but they need to be listened to, and they want the issues to be considered.

The individual wants all that to happen pretty soon—that is important. The individual also wants the correct law to be applied, and the decision to be issued swiftly and actioned accordingly.

All of that is pretty much straightforward stuff, and I do not expect it to be remotely contentious. If we remember that that is what the tribunal should deliver, we will also note that the individual is, by and large, not concerned about titles. He or she really does not mind whether the person is a judge in description or whether that judge wants to be called a judge. That is of no concern. Indeed, the whole process is of no concern, provided that it is fair. The individual most certainly wants to avoid costs, delays, uncertainty and error. That, of course, is precisely what the system is supposed to provide.

What do tribunal members want? What do those who take part in the process and bring expertise to bear want? They want a process that can provide them with all the evidence, so they want it to be properly organised. They want the relevant parties to be there, so they certainly want the process to appear to be a legal one that people turn up for—people should not just decide whether or not they will bother to turn up. Tribal members want somewhere appropriate to meet, of course, and they would like the occasional cup of coffee. Some will need to do site visits. Those who are seriously engaged in land issues may need to go and look at the ditch that is being complained about. They also want—this is important—a proper exposition
of the law. That is why they want a legally qualified representative, at the very least.

I suggest that they also want an opportunity to deliver their judgment quickly. They want good leadership for the whole process, which is why I concur with those who feel that having the Lord President ultimately in charge is an extremely good thing—judicial oversight seems right. Of course, they want an organisation, and it is with that organisation that the bill is really involved. Plainly, each tribunal can operate separately—they have done so—but in so doing they miss economies of scale and cross-fertilisation, and they all have their own way of doing things, which can sometimes be unhelpful.

Our experience is that sensible rules of life are not complicated. I cannot help but feel that anybody who has ever convened a meeting in the Parliament knows perfectly well that we have a set of rules of procedure but, actually, if we just get on with it in the normal sensible way that human beings do and respect the chair, everything will more or less work. I note Margaret Mitchell’s concerns about rules, but I seriously suggest that we can get overly taxed by rules. I think that we have far too many and that we believe that everything needs to be written down. The basic rules of administrative law, which I am afraid come in Latin—the nemo judex rule and the audi alteram partem rule—are simple descriptions of what we have to do to do things fairly. I feel that a substantial rulebook on how a tribunal will work needs to be justified, and probably is not.

Some feel that the newly set up Scottish Civil Justice Council should produce the rules for tribunals. Perhaps it should, but I wonder whether the council should produce the same set of rules for tribunals and all our courts, because I have a sneaking feeling that most of the rules are precisely the same regardless of where someone is in the system.

15:47

Graeme Pearson (South Scotland) (Lab): I hope that it is not unkind to note that the number of people in the public gallery has dwindled somewhat as the afternoon has gone on. I would like to think that that is because of people’s travel commitments rather than the nature of our business this afternoon. There is no doubt that tribunals are a somewhat unattractive subject matter for many people in public life and for the general public. However, I was fortunate enough to hear evidence on the bill in the Justice Committee earlier in the year, when I was a member, and it is evident to me that the tribunals that oversee matters on behalf of the public across Scotland provide a service that individual citizens value greatly and from which they expect a great deal.

We have heard that about 80,000 cases are conducted by various tribunals in Scotland each year in pursuit of justice. The sheer volume of cases is indicative of the challenges that individual citizens face as they approach tribunals for adjudication. There is a David and Goliath aspect to the experience in a tribunal, as an individual member of the public tries to understand their rights and how matters have been decided on, and as the tribunal tries to explain, on their behalf, whether the person has certain rights or the reasons why they cannot access them. To that extent, it is welcome that the Scottish Government is, through the bill, attempting to clarify the process in tribunals across the country and to bring some order to the way in which they conduct their business.

As a young student, I conducted a course in constitutional and administrative law as part of my degree course at the University of Glasgow. In those years, I was in danger of being overcome by the sheer volume of information and the complex nature of tribunals. It is sobering to realise that now, as a grey-headed member of the Parliament, I am still in danger of being overwhelmed by the complexity and sheer volume of information.

The appointment of the Lord President to oversee the implementation of the new bill is to be welcomed. He will provide leadership and vision in taking forward the future for tribunals across this country and will represent the interests of tribunals to Scottish ministers and the Parliament.

Stewart Stevenson: The member will recall from his studies the Courts Act 1672, which shows quite clearly that this is not a new problem. This is more or less the whole act. It states:

“That it be left and recommended to the Judges of that Court to regulat the inferior officers therof and order every other thing concerning the said Court.”

Therefore, a few attempts have been made in the past. It is interesting that, even after hundreds of years, we are still dealing with the same subject.

Graeme Pearson: Very much so.

Some of the debate in the Justice Committee indicated that there were those within the tribunal environment who believed that, through experience and time, they had come to understand what was good for us all. I think that each of us in the chamber realises that, as much as we do not need too many rules, it is important that we write some rules down that we can all acknowledge as delivering a clear outcome.

The Lord President’s second responsibility is “securing the efficient disposal of business”.

That it be left and recommended to the Judges of that Court to regulat the inferior officers therof and order every other thing concerning the said Court.”
With over 80,000 cases going through tribunals, it is evident that the efficient disposal of business is important not only for the financial wellbeing of the Government in supporting tribunals but for the individual clients who are trying to get their cases through the tribunal process.

In the context of the requirement to secure the efficient disposal of business, I hope that fees will not become an attractive new way to generate the finance that is required to support tribunals. As Ms McInnes said, many people who access tribunals have virtually no money. Indeed, a person might approach a tribunal precisely because they are in dire circumstances. In such circumstances, to charge a fee would be to deny people justice. I am heartened that there is an indication that the Government understands that, and I hope that that will be reflected in the bill that we pass.

I want to mention three more issues. First, the definition of “tribunal” is worth reviewing, to see whether it can be clarified. Secondly, in relation to schedule 7, which sets out how members will be appointed, concern was expressed in the Justice Committee that the disbarring of members who have reached the age of 70 from continuing in their appointment might well create a vacuum in tribunal membership and in the experience that is necessary in that regard. The issue has not been mentioned today and perhaps it has been addressed since I left the committee. I hope that the Government takes account of those concerns.

I am conscious of time, so I will end my speech there.

15:54

Sandra White (Glasgow Kelvin) (SNP): Last night I spoke in the second debate this week on women’s issues and suggested that the debate’s title should be taken from the popular song, “Sisters are doin’ it for themselves”. I am afraid that I cannot come up with a catchy title for this debate. Perhaps someone else will do so.

I thank the minister and members for their comprehensive speeches, which I think have covered most of the areas. Nevertheless, I will do my best to give some background information on the reasons for reform and the bill’s key aims.

The Tribunals (Scotland) Bill was introduced on 8 May to create the framework for a new structure and organisation for the devolved tribunals in Scotland. Once an act of the Scottish Parliament, it will provide for the establishment of a first-tier tribunal and an upper tribunal for Scotland.

The policy memorandum explains that devolved tribunals “have been established in an ad hoc fashion, with no common leadership, appointments, practice and procedure or reviews and appeals”.

It notes that such a complex and fragmented system can lead to a “narrowness of outlook” and variation in standards and performance.

The bill creates a structure that will reduce overlap, eliminate duplication, ensure better deployment and allow for available resources to be shared more widely, as a number of members have mentioned. It is intended to create a system that will improve the independence—and the perception of independence—of the devolved tribunals.

The policy memorandum overview states that the bill

"will create a simple two-tier structure—a First-tier Tribunal for first instance decisions (into which most tribunal jurisdictions will be transferred) and an Upper Tribunal (where the primary function will be to dispose of appeals from the First-tier)—under the leadership of the Lord President of the Court of Session."

All the members who have spoken so far in the debate have welcomed that decision, as has the committee. The bill follows the Philip report and the Scottish Committee of the Administrative Justice and Tribunals Council’s 2011 report.

I turn to some of the issues that the committee raised. We considered the judicial system and the idea of judges being salaried, which has been highlighted by Elaine Murray, Rod Campbell and a number of other members. The committee said that we should look at that issue, and its report states:

“The Bill makes no provision for the appointment of full-time salaried judges in any of the tribunals envisaged by the Bill. A number of concerns were therefore raised regarding this perceived gap in the legislation.”

The report goes on to note that the minister’s reply “was not entirely in favour of this suggestion, noting that ‘it would be difficult to justify the need for full-time permanent judiciary’ as ‘you would be paying salaries to people who would not necessarily be’ there all the time.

During the bill process in committee, I noted the knock-on effect for the financial memorandum of that particular recommendation. Perhaps the minister can go into more detail on that issue, because we need to know what effect the committee’s recommendation for salaried judges for tribunals would have in monetary terms and for the financial memorandum for the bill as a whole.

The committee recommended that the Government should resolve the delay in “the production of rules for the Upper Tribunal” as a matter of urgency, and a number of members have raised that point today. The committee also
The policy memorandum says:

"such as placing users at the core of tribunals. The practice and procedure of tribunals is accessible, suggests various principles to ensure that the on the face of the bill. Citizens Advice Scotland and others that the purpose of tribunals should be access. If people are going to access tribunals, they must be accessible and I concur with CAS on that.

As has been said, a lot of people go to tribunals but do not necessarily go to court. A lot has been said on that—Nigel Don mentioned that it is part of the legal system and that people who sit on the tribunals perceive them to be part of the judicial system. With regard to the recommendations on people being called judges or judiciary, I think that, as the bill goes through further stages, it will become easier for ordinary members of the public to understand the tribunals system. We are trying to set up a system with no duplication and to give ordinary members of the public who go to tribunals a better understanding and enable them to find out what they are all about so that they get a better service.

16:00

John Finnie (Highlands and Islands) (Ind):

The Justice Committee described the bill as

"a welcome development in revising the administrative justice landscape."

We have certainly heard about the varied tribunals that are covered in that landscape, the 80,000-odd cases that they deal with and the fact that that is a small percentage of the overall number of cases—between 2 and 3 per cent—because the rest are covered by reserved tribunals.

I am grateful to the witnesses for the evidence that they gave to and the organisations that provided briefings. The briefing from Citizens Advice Scotland says that tribunals are the facet of the justice system that people are most likely to access. If people are going to access tribunals, they must be accessible and I concur with CAS and others that the purpose of tribunals should be on the face of the bill. Citizens Advice Scotland suggests various principles to ensure that the practice and procedure of tribunals is accessible, such as placing users at the core of tribunals. The policy memorandum says:

"The Bill has no differential impact upon island or rural communities."

That will be the case, but I hope that technology can be embraced, in conjunction with the courts and public services, to ensure accessibility.

CAS says that tribunals should be fair, expeditious and just. That will require adequate resourcing. Like many members, I do not favour the resourcing coming by way of fees, which would affect people's access. CAS also suggests that a safeguard must be provided to ensure that the spirit of tribunals and the distinctive nature of individual tribunals will be maintained. Many speakers have covered that point. We know that there is a unique range of not only subjects but manners in which those subjects are dealt with. CAS says that the bill should provide a framework of defining principles to frame the development of new tribunals. We have heard from the minister that there is a feeling that the framework is adequately loose—if I can use that term—to absorb future tribunals.

The principles that CAS suggests would help to mitigate the lack of detail about procedure on the face of the bill by guaranteeing a minimum standard to which all Scottish tribunals should operate. Its suggestions are not at all unreasonable and I hope that they can be considered.

Much has been made of the special case that the Lands Tribunal for Scotland believes that it is. That is certainly not my view. It said that it does "not really fit in with the scheme."—[Official Report, Justice Committee, 3 September 2013; c 3112.]

In a written response, the minister told the committee that all the tribunals are unique; I would not place one above any of the others. The Mental Health Tribunal for Scotland has been referred to—it can deprive someone of their liberty. There are also challenges associated with the additional support needs tribunal. All the tribunals are important and should be treated similarly.

The committee's view on the postponement of the inclusion of reserved tribunals is that it would welcome the inclusion of the other tribunals, although our report acknowledged that this is something that "is not entirely in the hands of the Scottish Government".

I do not think that it is in the hands of the Scottish Government at all. The report went on to urge the Scottish Government "to work with the UK Government to ensure ... early progress"—we have heard that those discussions are on-going—
“and to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals”,

not that we identified any.

I welcome the significant role that tribunals play in civic Scotland and the oversight provided by the Lord President. My early intervention on the minister about the appointment of the tribunals president is not about an individual—far from it. The Scottish Government’s response to the committee’s report says:

“The position is not a stand-alone appointment—it is an assignment by the Lord President. ... The President of Scottish Tribunals has to be a senior person from within the Lord Presidents judicial complement as they will have the responsibility for managing the Upper Tribunal which will be made up of Senators, Sheriffs Principal and Sheriffs as well as Chamber Presidents”.

There is a debate about appointment versus assignment. How does someone become assigned? Roderick Campbell talked about opening up the field, but how do we do that if we do not know the field’s boundaries? I do not think it is unreasonable to ask for a job description which, in many respects, is given in the Government’s response to the committee. Public appointments should have a post and person specification. It is not about personalities but about public confidence and about judicial and senior circles in Scotland not being seen as some sort of exclusive club. The committee commended the idea of extending the pool of eligible candidates.

I welcome the minister’s response on the use of the term “judge”. We want the tribunals to act independently and make their own decisions, but implying wigs and gowns might be intimidating and off-putting to tribunal users. I think that that is the case. The tribunal should be a forum for the lay person, but that certainly is not my experience of employment tribunals. I go along with a lot of what Elaine Murray said about the changes that have taken place there, and I would add to that that the issues of increased qualifying periods of one to two years, the fees, reduction in compensation and judges sitting alone. If we come to inherit the employment tribunal, we would be going to what has certainly become a different beast in recent years. I think that there would be an opportunity for the Scottish Parliament to reinstate some of the fairness and opportunity with control of employment law.

The issue of specialisms has been mentioned. There is another human resource term that should apply, which is succession planning. The explanatory notes to the bill state that

“the Mental Health Tribunal for Scotland ... currently has 332 members ... the Scottish Charity Appeals Tribunals ... has 19.”

Further on, table 3 refers to:

“Projection of number of members approaching 70, and number of resignations”.

I certainly do not favour age discrimination. I think that people should hold a job on the basis of competence. One of the ways to deal with the issue is not to invest specialism in individuals but to ensure that knowledge is widely spread by having succession planning systems.

I will conclude by again mentioning Citizens Advice Scotland, which said something that I think we can all go along with: the needs of the user must be placed at the centre of the process. I am certainly very happy to support the bill at stage 1.

16:07

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Before I contribute to this fascinating debate, I cannot help but think that on this occasion, as on past occasions in the chamber, we would surely by now have been treated to some mirth and devilment from our former colleague David McLetchie, who was also mentioned by my colleague Colin Keir. I am certain that David would have enjoyed the proposition that tribunals were a place where justice could be determined without the necessity for lawyers to make an appearance. Similarly, I think that we would have listened in reverential silence to the wit and wisdom of our own Brian Adam, an experienced voice in the Parliament, guiding us through a process such as this with a steady hand and some gentle reasoning. They were two great members of the Scottish Parliament, who are sadly missed.

While reviewing the papers for the debate, I thought that a good place to start might be to ask a fairly simple but fundamental question: what exactly is a tribunal? I know about tribunals from past experience, of course, but I naively expected that a bill on tribunals making its way through the Parliament might define what tribunals were, or would be. Were we about to legislate on something that we were not going to define? Nothing is ever quite that simple, of course. The evidence at committee about the distinct nature of tribunals appeared to suggest that attempts to define what they were could lead to a loss of uniqueness. Thankfully, however, the committee did not buy that argument and has asked the Scottish Government to set out a definition on the face of the bill. In its response, the Scottish Government appears to be happy to define the principles for tribunals along the lines of those included in the Tribunals, Courts and Enforcement Act 2007.

There might have been some misunderstanding about the bill’s proposals and the purpose of introducing the bill. As I understand it, creating a unified tribunal structure offers us the best of both
It will be a system in which the public can expect consistent processes and procedures, with consistency and quality of expertise being available, while at the same time it will ensure that the specialisms of some tribunals, such as the mental health tribunal and the additional support needs tribunal, remain in place.

Yes, of course, there must be a careful balance, but the committee seems to be confident that that can be achieved. From what I have read, the current tribunal system is mainly ad hoc with little common ground in leadership, appointments, procedures, reviews and appeals, and the bill aims to address those concerns. By doing so, it should ultimately deliver a better system for the public.

I will pick out a few important elements from the bill that merit further mention. On the independence of tribunals, it should be welcomed that the bill proposes a statutory obligation to ensure that tribunal hearings are heard by people who have no links to the body that they might be challenging. That seems an obvious requirement, but it has not always been guaranteed. For example, there have been occasions on which appeals on educational placing requests have been heard by people who were appointed by the education authority. The guarantee in the bill will surely provide greater comfort to appellants.

The provision relating to appeals and reviews generated differing views on the committee. For me, the provision was less than clear, and still needs a bit of work. I note that first-tier and upper tribunals may review their own decisions and that appeals may be lodged from one level to the next one up and on to the Court of Session. However, Jonathan Mitchell QC warned against making the grounds for appeal overly restrictive because a person who wins a first-tier appeal might have it overturned by the upper tier and find themselves unable to challenge that decision at the Court of Session because of restrictions that have been imposed. I hope that we end up with an appeal and review process that does not diminish the appellant’s right to challenge perceived injustice simply because of the imposition of strict rules. From what I can see, the committee took the reasonable step of asking that this aspect of the bill be kept under review.

The submission from the Lands Tribunal for Scotland made the case that it should be excluded from the provisions of the bill because it has been operating quite successfully as a court for many years. However, I note the minister’s comments that that would probably defeat the overall aims of the bill and create an anomaly at the outset. The Lands Tribunal, which is highly regarded, would sit comfortably within any new system that had improved systems and processes at its core. The Scottish Government’s response reflects that, and the Government intends to transfer the Lands Tribunal to the upper tier.

Because of the expert nature of its considerations, the Mental Health Tribunal for Scotland made a strong case to be retained within its own chamber. My understanding from the Scottish Government’s response is that that will, indeed, be the case.

On children’s hearings, there was some concern from the children’s reporter and Scotland’s Commissioner for Children and Young People about a possible transfer to the tribunals, particularly since the system has only recently been reformed. However, it has to be said that the SCCYP and children’s reporter were not opposed in principle. The bill appears to contain sufficient safeguards that require the Scottish ministers to undertake the necessary consultation in advance of laying any further regulations before Parliament.

Scotland’s tribunal system offers our people access to justice in an informal setting while safeguarding the rights of ordinary people who feel that they have suffered an injustice. It is right for the Scottish Government to modernise the system, make it simpler, more consistent, and easier to access. It is also right for us to carefully establish the ground rules for reviews and appeals, but always with the rights of the public in mind so that justice is served first and always. The new system will need time to settle in and, in due course, it will clearly be in a position to absorb those tribunals that are currently reserved by the UK. With that, Presiding Officer, I am happy to support the Government’s motion.

16:14

Lewis Macdonald (North East Scotland) (Lab): As Christine Grahame nearly said, it is a pleasure to take part in a debate on stage 1 of a justice bill on a Thursday afternoon.

Willie Coffey and Colin Keir mentioned much-missed members of the Parliament who are no longer with us and, of course, when the late great Donald Dewar advocated devolution at Westminster, he always listed as one of the causes for that change the fact that there was simply not the time or the opportunity to update Scots law and the Scottish legal process in the way that we would all have wanted. That is something that we are addressing now.

Finding parliamentary time to debate such matters is no longer a challenge. The real challenge is not, as some members have suggested, to fill in the time that we have found. It is to get the process of reform right when have the time to do it.
As has been said, tribunals deal with more cases in Scotland each year than the criminal and civil courts put together. The most striking thing about the Justice Committee’s stage 1 report is its view that the bill still has some way to go to get it right.

It is agreed that tribunals will be more accessible and better understood if they operate in a common framework and the bill’s general principles command broad support. Of course, the Conservative-led Westminster Government might argue that it is enacting the same general principles in its reform of UK-wide tribunals, but some of its reforms do not command broad support.

Employment tribunals appear to be under attack for political reasons. In Scotland and across the UK, working people are less likely to seek redress against unfair treatment at work because of the introduction of fees. The statistics, albeit that they are only for the first few months, suggest that already there is a fall in the number of cases brought, in particular those brought by individual employees rather than those brought by several workers or their trade unions on their behalf.

That matters for two reasons that are relevant to the bill. First, the introduction of fees in employment tribunals is arguably a matter of procedure rather than statute, and procedures in Scotland, even for UK tribunals, are defined in terms of the law of Scotland. There might therefore be implications for devolved areas. I would be interested to hear the minister’s view on whether more might have been done to debate the issue here before we all gave legislative consent to the relevant Westminster legislation.

Secondly, the bill creates a mechanism to allow the Scottish ministers to introduce fees and charges for use of tribunals in devolved areas, including tribunals where—as John Pentland said—no such fees apply at present. That provision has rightly caused concern to members of the Justice Committee.

As the Faculty of Advocates commented, imposing fees on users of, for example, the Mental Health Tribunal would be “unthinkable”, yet it would be possible under the bill as it stands. The intention to require an affirmative resolution before fees could be introduced is welcome, but the committee is right to call for wider consultation to be required before any such resolution is passed. It is hard to see why an existing power for some tribunals to charge fees should require provision for other tribunals to be given the same powers, unless it is in pursuit of uniformity for its own sake. The parallel reforms of UK tribunals have brought in fees in a way that tilts the balance of the tribunal system against users and the bill must be proofed against that outcome.

The fact that there is a parallel process is itself a cause for concern. One of the distinctive features of the Scottish justice system is that there are areas where justice is done without too much reliance on courtrooms, lawyers and formal proceedings. Children’s hearings are the best example of that, but many other tribunals work because they retain a user-friendly informality that we should work hard to protect.

The committee raises a number of concerns about the risks of turning tribunals into something more like a formal court of law. The merging of the UK Tribunals Service with Her Majesty’s Courts surely runs the risk of the judicialisation of those tribunals, and I am sure that the Scottish ministers will think long and hard about how to maintain the distinctiveness of Scottish tribunals, if indeed they follow the UK Government’s model of administrative rationalisation, as proposed in their consultation earlier this year.

Children’s hearings are also an area on which the Justice Committee sounds a note of caution. In the last parliamentary session, ministers came perilously close to damaging what was most Scottish and most valuable about the Scottish approach to young offenders: children’s hearings that are centred on the child, rather than youth courts focused on proving guilt. Happily ministers came back from that particular brink, but there has to be a real concern about ministers pushing children’s hearings into a tribunals service straitjacket, which could put their distinctive character at risk again.

Likewise, as a number of members said, the distinctive character of the Mental Health Tribunal for Scotland needs to be protected. The decision to treat it as a stand-alone chamber is welcomed, but the commitment to protect its distinctive role needs to be given greater certainty in the medium to longer term.

At the opposite end of the spectrum is the Lands Tribunal for Scotland. As Elaine Murray reminded us, the Lord President described it as “a court of law in all but name”—[Official Report, Justice Committee, 17 September 2013; c 3195.]

and said that it was “not broken” and did not need fixing. The Lands Tribunal itself is against being pulled into the new system and, indeed, it appears that no one is particularly keen to do so, except ministers. We should not allow that to happen, simply because its standing alone as a separate pillar prevents everything from being the same. Clearly everything should not be the same. A common framework should by all means be created where appropriate but the urge to make all our tribunals fit precisely into a single template should surely be resisted. The important question is how things work in practice and I hope that
ministers will listen to the concerns that have been raised and, as has been said, amend the bill to make it fit for purpose.

16:20

Gordon MacDonald (Edinburgh Pentlands) (SNP): As one of the last speakers in the open debate—and especially as someone who has not had the benefit of having listened to the evidence gathered by the committee—I apologise in advance for any repetition that members might be about to hear. In light of that, I suggest another answer to Sandra White’s search for a song title: the Average White Band’s “Let’s Go Round Again”.

It is important that we highlight why the bill is necessary. The bill’s policy memorandum notes that devolved tribunals have “been established in an ad hoc fashion, with no common … leadership, appointments, practice and procedure or reviews and appeals”.

Such a complex and fragmented system can lead to a “narrowness of outlook” and “variation of standards and performances”, and the bill creates a structure that “will reduce overlap, eliminate duplication, ensure better deployment and allow for the wider sharing of available resources.”

It is intended to create a system that improves the independence—and the perception of independence—of the devolved tribunals.

The overview in the policy memorandum makes it clear that the bill will create a simple two-tier structure: a first-tier tribunal for first instance decisions and an upper tribunal where the primary function will be to dispose of appeals from the first tier. In its 2011 report, “Tribunal Reform in Scotland: A Vision for the Future”, the Scottish committee of the Administrative Justice and Tribunals Council defines a tribunal as:

“A body which resolves disputes between citizen and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as compared to the model of adjudication applied by the courts and is independent of both the executive and the legislature and of the parties appearing before it.”

I know that Christine Grahame and Margaret Mitchell have already cited that definition, but I think that it bears repeating.

The 18 devolved tribunals all have different powers and processes, and they deal with a range of different subject matters from compulsory treatment orders under the Mental Health (Care and Treatment) (Scotland) Act 2003 to adjudicating on disputed parking tickets. The proposed changes in the bill apply only to those tribunals, and not the two dozen that operate on a Great Britain basis and which cover a whole range of subjects from criminal injuries to social security and child support appeals.

The bill’s aim is to change the current tribunal system to make it less complicated, more independent and more user-friendly, and it will create a new structure for devolved tribunals, a new leadership structure under the Lord President, a new office of president of Scottish tribunals, a new process for appointing tribunal judiciary and a new process for making tribunal rules. As for the user, the bill will give them access to a more coherent tribunal structure, will take appeals out of the court system, will put in place a common procedure for appointments, complaints and disciplinary processes and, more important, will despite the changes give access to the same specialist members, venues and staff.

The bill has been generally welcomed as an improvement on the existing system. According to witnesses, the benefits of the new system include providing the “opportunity for generic training”, “dealing with questions about the conduct of tribunal judges” and “sharing the expertise that has been gained from the tribunals.”—[Official Report, Justice Committee, 3 September 2013; c 3116-7.]

The bill will also “give coherence to what already exists.”—[Official Report, Justice Committee, 10 September 2013; c 3160.]

Citizens Advice Scotland—which, having represented 5,500 clients in civil court and tribunal cases in 2011-12, has a wealth of experience in supporting and representing clients—believes “that the proposed structure is an improvement on the existing” system, and Govan Law Centre noted that an existing benefit of tribunals is that they are more accessible than going to court. It concluded that “the primary benefit” of the new structure “from a user’s point of view is that those advantages will be extended to the first tier of appeals.”—[Official Report, Justice Committee, 3 September 2013; c 3129.]

The Scottish Independent Advocacy Alliance, whose members have supported many individuals in mental health tribunals, welcomes the bill’s proposals, which, it said,
“aim to provide consistency in practice and procedure.”

If we are to provide consistency in practice and procedure, we must examine the position of all tribunals that operate in Scotland. The Justice Committee’s recommendations recognise that, and its second recommendation states:

“We concur with the position that, for this process to be most effective, reserved tribunals in Scotland should be included within the new structure. We note that this issue is not entirely in the hands of the Scottish Government but we urge it to work with the UK Government to ensure that early progress can be made on this matter. In doing so, we call on the Scottish Government to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals.”

In ensuring that all tribunals that operate in Scotland abide by the same standards, we must consider accessibility. In assessing the position south of the border, Sir Andrew Leggatt stated:

“It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them.”

The policy memorandum states that an intention of the bill is to facilitate improvements in the quality of services that are offered to users of tribunals. That need was also identified by several witnesses. The Additional Support Needs Tribunal for Scotland noted that

“our concern must be the tribunal user, to whom the primary benefit must apply and who must be at the heart of the system.” — [Official Report, Justice Committee, 3 September 2013, c 3116.]

The bill is the right way forward in bringing tribunals into the 21st century and providing the accessible, straightforward, independent and user-friendly service that we want for our country.

16:26

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Some of us had forgotten that political debates are over not when everything has been said but when everyone has said it, the most recent of whom was Gordon MacDonald. However, I hope to avoid that particular trap.

It is worth going way back to where tribunals came from—the tribuni plebis. Following a battle in 494 BC, the legionaries refused to go out and fight for Rome. To buy them off, the plebs were given the right to elect plebeian tribunes, who were made sacrosanct while they held office. The tribune was the principal and guarantor of the civil liberties of the Roman citizens against arbitrary state power. That is a pretty good basis for what tribunals are.

Willie Coffey talked about the rights of the public. Let us zoom forward a couple of thousand years to the College of Justice Act 1532, which reads:

“...and privy Councillors and the nomination of the Lords of the Session”.

Fortunately, we have moved on from that.

Christine Grahame: Will the member take an intervention?

Stewart Stevenson: I want to try to fill my six minutes.

Christine Grahame: It is to challenge your history.

Stewart Stevenson: Briefly, then.

Christine Grahame: I may blunder, but I was not aware that the divine right of kings pertained to the Scottish kings. I thought that it was an English concept and that Scottish kings were appointed by leave of the Scottish people following the declaration of Arbroath. Lewis Macdonald is nodding, so I have an ally.

Stewart Stevenson: I simply remind the member that the Crown Appointments Act 1661 was the sixth act of 1661 by the estates of the Scots Parliament, so things were probably not quite as clear-cut as she suggests. That approach was certainly tried, but whether it succeeded is a debate for another day.

The briefing from the Scottish Parliament information centre draws our attention to concerns about whether tribunals’ lack of independence from Government—whether perceived or otherwise—is in contravention of article 6 of the European convention on human rights. The bill that we are considering today, and which we will continue to consider in times to come, will be an opportunity to provide a pretty rigid statement that our tribunals are independent.

I will turn to the provisions in the bill. I have already made reference, on the back of Rod
Campbell’s comments, to the duties that the bill will place on members of the Scottish Parliament to uphold the independence of the members of Scottish tribunals. That is quite an interesting issue, because the bill does not directly prescribe what would happen if a member, or members collectively, of the Scottish Parliament failed to uphold that independence. I suspect that the matter may be covered by the “Code of Conduct for Members of the Scottish Parliament”, paragraph 3.1.3 of which requires that “Members should uphold the law.”

However, I suspect that there may be some ambiguity there, which the committee and the Parliament may want to look at.

Of course, we have not entirely failed to look at the issue of tribunals before. Willie Coffey referred to David McLetchie, who in March 2004 led a debate on the Fraser inquiry. One issue that that inquiry faced was that it was unable to have access to powers that would have been available to a Westminster inquiry held under the Tribunals of Inquiry (Evidence) Act 1921. Under that act, a tribunal can be given the power to command witnesses to appear before it and to produce the necessary evidence. We have therefore been here before, but we have perhaps overlooked the fact that there are some significant potential effects from our not having all the powers that we might seek.

When, as a minister, I took the Long Leases (Scotland) Act 2012 through Parliament, I had to refer to tribunals in the stage 1 debate because tribunals play an important part in judging the value of land, which is a central issue in such matters.

As the time when I should wind up is approaching, I will say just a little about the Mental Health Tribunal. As a tribunal, the Mental Health Tribunal is special and different in the distinct sense that it is about deciding on the deprivation of liberty of a citizen. That is quite an unusual function for a tribunal, albeit that it is in the interests of the citizen that the decision is taken. I certainly want to ensure that we protect the rights of the citizen.

For me, this is an interesting speech because it is the 500th speech that I have made here—

Christine Grahame: It feels like it, too.

Stewart Stevenson: And 500 is a special round number. However, it may feel like more than 500, if that is what the convener of the committee is saying.

Let me close by quoting from the College of Justice Act 1532, which says that the Scots Parliament intends

“to Institute ane college of cunning and wise men”.

That might be the kind of people that we want involved in our tribunals—

Roseanna Cunningham: Although the majority on the front bench today are women.

Stewart Stevenson: The 1532 act goes on to require

“thir persoune to be sworne to minister Justice equally to all persoune in sic causis as sall happen tocum before thaim”.

Let us extend that to women, in this modern age, as the minister has urged me to do.

The Deputy Presiding Officer (Elaine Smith): That brings us to the closing speeches. Annabel Goldie, you have seven minutes.

16:34

Annabel Goldie (West Scotland) (Con): I welcome the opportunity to speak in the stage 1 debate on the Tribunals (Scotland) Bill. I am not a member of the Justice Committee, so I must say that undreamt-of vistas, without limit of horizon, have opened up for me this afternoon. Who would have imagined that reform of tribunals could reveal such glittering facets as “judicialisation” and “courtification”?

One feature of this debate that has distressed— nay, alarmed—me is that, while the rest of us have been sustained throughout the afternoon with the presence of colleagues, the minister has been on her own for lengthy chunks of the debate. Quite honestly, in the 21st century and a debate of this nature, that is not humane, and I think that the Scottish Government should address the matter without delay. I accept that the topic of reform of our tribunal system might not set the pulses racing but, as members have acknowledged, it is an important topic and reform is overdue.

The tribunal system as we know it grew up on an ad hoc basis during the 20th century as Governments acquired more and more power over citizens’ daily lives. An important landmark was the 1957 Franks report to which Nigel Don referred. That followed the Crichel Down affair in which land acquired during the second world war was not returned to the previous owner but was instead handed over to the Ministry of Agriculture and leased out—so land grab is nothing new.

Following that scandal, the Franks report moved tribunals from an executive and administrative model towards a judicial footing, based on the three principles of openness, fairness and impartiality. That was an important change. That judicial footing can be observed without either judge overload or—to use that extraordinary word—courtification. That sounds to me more like
a mandatory term for wooing, so I hope that the minister will let me know how she gets on with that.

In Scotland there is a clear division between tribunals that deal with devolved matters, and are therefore under the responsibility of the Scottish Government, and those that are reserved. However, users of a tribunal are unlikely to be concerned about or aware of—or, for that matter, care about—whether a tribunal is devolved or reserved. We must come up with a system that is as efficient and fair as it can be and which, above all, meets the needs of the users. Indeed, the minister specifically referred to that.

I welcome the Scottish Government’s commitment to continue working with the UK Government in coming up with a satisfactory solution for the reserved tribunals, which are more numerous and deal with far more cases than the devolved tribunals.

Ah—the minister has found a friend. I am much comforted by the appearance of Kenny MacAskill in the chamber.

The system’s complexity has been commented on. Indeed, the 2008 Philip report specifically referred to that complexity and fragmentation. It also expressed concern that the system did not “meet the key principles of independence and coherence.” I think that we all acknowledge that that complexity is not in the best interests of the users of tribunals; nor does the duplication of resource, in whatever form that occurs, represent value for money.

Although the Scottish Government has taken some limited steps to simplify the system—most notably by bringing some of the devolved tribunals under the administration of the Scottish tribunals service—progress has been slow. I observe that the UK equivalent to this bill was passed six years ago. As Roderick Campbell observed, the legislation represents movement, but it will still apply to only a tiny 2 per cent of tribunal cases north of the border.

There is a risk that we may create different systems for tribunals in Scotland, compounding the complexity that surrounds them, which would be unfortunate. Currently, only some tribunals are supported by the Scottish tribunals service, and the bill will establish a separate structure for some devolved tribunals, while leaving untouched other devolved tribunals and all the reserved tribunals.

I will now comment on a few points that were raised on the committee’s stage 1 report. As mentioned by Margaret Mitchell, the Lands Tribunal for Scotland has expressed concern. A number of members have commented on that, and I expect that the minister will comment on the matter, too. That raises the wider point that the challenge for the Scottish Government is to come up with a system that preserves the specialist qualities required by the Lands Tribunal without complicating a structure that is meant to simplify things.

I also reiterate the points made about the importance of protecting our tribunals’ unique and distinct approach to civil justice. There is no doubt that the informality and less adversarial nature of our tribunals, compared with the courts, is a strength. However, there is a legitimate concern that, with the Lord President in charge, a senior judge appointed as president of the tribunals and the expansion of judicial members, care must be taken to avoid judge overload.

I hear alarm bells ringing with the proposal that, until the newly created Scottish Civil Justice Council is in a position to take over, ministers will make procedural rules. Ministers, who are of course sometimes subject to tribunal proceedings, should not be making the rules, no matter how much independent or expert advice they take. Instead, the rules should be made on an interim basis, either by the new Scottish Civil Justice Council with additional resource or by another interim body.

Other speakers have commented on independence. It is critical to tribunals, and the bill could do more to promote that—an idea that the Lord President shared with the Justice Committee. Indeed, I understand that he suggested the inclusion in the bill of a similar provision to that in the Judiciary and Courts (Scotland) Act 2008. Perhaps the Scottish Government will consider that.

The new structure, with the position of president of the tribunals appointed by the Lord President, is interesting. I have noticed a restriction: the bill limits the pool of candidates to senators of the College of Justice. I have no quarrel with the senators of the College of Justice, but that pool is deep rather than wide and it needs to be broadened out. The system would benefit from a wider scope of qualified and experienced personnel.

The Justice Committee’s stage 1 report notes that much of the detail of the new structure is not contained in the bill. One or two speakers have referred to that, and I am slightly concerned about it. It hampers scrutiny and, although I accept that the proposed legislation seeks to provide a framework for the new structure and needs to be flexible, the amount of detail that will be left to delegated legislation is disquieting. I hope that the Government will take on board some of the comments that the Delegated Powers and Law Reform Committee made.
The Justice Committee will closely scrutinise the forthcoming secondary legislation, but it already has an enormous workload and I think that it would have preferred that the Parliament be given more specific information about the detail of the proposed new structure. Perhaps the minister could address that.

I believe that the Government is considering merging the Scottish tribunals service with the Scottish Court Service, but has it considered related matters, such as the sheer number of tribunals and the concerns that have been expressed about the independence of some of them?

16:41

Elaine Murray: I thank members for their valiant efforts to keep the debate going. I had fears that there would be a huge amount of time left for the closing speakers and that we would have to fill it all up, so I am grateful to all members for their efforts to ensure that that did not happen.

At one point, I saw Mr Q licking his paws with a rather resigned air, which may have reflected the feelings of members in the chamber. However, we had some points of excitement.

Stewart Stevenson implying that the convener could remember the Courts Act 1672, I think it was, was uncharacteristically ungentlemanly. At least he did not suggest that any of us could remember 494 BC. When he began to use the term “plebs”, I began to be a little worried on his behalf.

Nigel Don may also have caused a little bit of offence by suggesting that members of the Parliament could remember the Oliver Franks report of 1957. That may be true of some, but I am sure that some of my colleagues would be rather offended by that.

A number of members referred to the principles of tribunals. That was an issue to which speakers kept coming back. The minister wanted to hear what members were saying about that, and there have been a number of good suggestions. We also have the suggestions from Citizens Advice Scotland, which reflect the provisions in the UK legislation.

All Justice Committee members have reflected on the importance of protecting the character and nature of tribunals because far more people experience administrative justice through a tribunal than will enter into the civil or criminal courts system. As we know, the majority of people attending tribunals do so within the reserved system but, as most of us want all those tribunals to come over into the Scottish system, it is important that Scottish legislation is drafted in such a way as to bring them in. I say to Colin Keir that it does not require a yes vote next year to make that happen.

I think that the minister agreed with the committee—I know that she was keen to consider the matter—but nobody is suggesting that a tight definition of tribunals be incorporated into the bill. As we have heard, tribunals have been formed according to the needs and circumstances. They perform different functions, but they have characteristics that need to be preserved, such as user-friendliness and others that members have mentioned. We need to maintain that character and nature. That would be covered by a definition of principles rather than a rigorous definition. I was pleased to hear that the minister is interested in hearing more about that.

I would like to reflect on a couple of issues that were raised with us in briefings prior to the stage 1 debate, but which were not raised with us in evidence—I do not know why that was—as they are interesting issues to consider.

This week, CAS flagged up to committee members an additional concern about the independent review of tribunals. The AJTC, which had the remit of keeping under review the administrative justice system, has been abolished. The bill makes provision for the Scottish Civil Justice Council to review practice and procedure and to prepare draft civil and tribunal procedural rules through amendment to the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. That act charges the SCJC with keeping the civil justice system under review and with providing advice and recommendations to the Lord President on matters that relate to the civil justice system, but there is no requirement on any body to do the same for the administrative justice system. The SCJC can review process and procedures, but it cannot review the administrative justice system as a whole; nor can it make representations or provide advice on administrative justice matters to the Lord President.

CAS recommended that, at stage 2, consideration should be given to allowing the SCJC to have functions in relation to the administrative justice system that are equivalent to those that it already has in relation to civil justice. I do not know whether the minister has seen CAS’s suggestion, but I would be interested to hear her views on it.

For some time, environmental organisations such as Friends of the Earth Scotland, Scottish Environment LINK and RSPB Scotland have argued that Scotland does not comply with the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to
Justice in Environmental Matters, which is also known as the Aarhus convention. As members might know, it has three pillars: the right of access to environmental information that is held by public authorities; the right to participate in environmental decision making; and the right to review procedures and to challenge decisions that are made by public authorities. Currently, decisions can go to judicial review on a point of law, but there is no right to a review of the merits of the case.

Stage 1 of the Tribunals (Scotland) Bill is certainly not the occasion to argue about whether Scotland is in compliance with the Aarhus convention or whether it could end up in a European Union court, as RSPB is saying, but an environmental tribunal could be a mechanism for addressing the issues that are raised by the convention. Indeed, the Minister for Environment and Climate Change suggested that that could be so in evidence to the Rural Affairs, Climate Change and Environment Committee on 5 June this year. He stated that he intended to set up the appropriate tribunal in regulations once the Scottish Government knew the landscape of the new tribunals system for Scotland.

Environmental organisations such as Friends of the Earth suggest that, as the Government already intends to set up an independent tribunal to hear appeals on environmental monetary penalties that arise as a result of the Regulatory Reform (Scotland) Bill, there could be an opportunity to consider the creation of a wider environmental tribunal. Therefore, in the not-too-distant future, we might see the Tribunals (Scotland) Bill being used to create a new tribunal, rather than just being used to transfer existing tribunals.

A number of members have made reference to what the committee described as the “judicialisation” of tribunals, which was also referred to as “courtification”. In using that term, we were not quite sure whether we had invented a new word. We were concerned that any judicial members who are appointed to a tribunal might not have the necessary experience to fully understand the differences between a tribunal and a court. That is yet another argument for having a clearer definition in the bill of what a tribunal is.

I note that, in the minister’s written response to our report, she stated her intention to use composition orders to specify which type of tribunal member will be required for which type of case. I look forward to receiving more detail on how such orders may be scrutinised.

Several members raised concerns about fees, including John Pentland, Sandra White, Graeme Pearson and Lewis Macdonald. Lewis Macdonald and John Finnie spoke about issues to do with employment tribunals, and John Finnie expressed the wish that we might be able to take those into a Scottish system and address some of the issues relating to the charging of fees.

I am sure that there is no intention to allow the problems that have arisen in UK employment tribunals to arise here, but the issue could be addressed by transferring some of those tribunals to the Scottish system. That would give us more control over issues such as the charging of fees, which already appears to be causing problems for people who wish to go to employment tribunals. That is very much to be regretted, and the bill may provide us with opportunities to address some of those issues.

16:50

Roseanna Cunningham: I thank all the members in the chamber for a stimulating debate on an important reform. I particularly thank Justice Committee members for their constructive contributions.

I will make a tiny point. When I talked about composition orders, some members might have thought that they heard me say “compensation orders”. I make it clear for the record that I was talking about composition, not compensation, orders.

We have missed something in the debate. One or two members have referred to it; it is the presence of David McLetchie. However, I feel that his spirit is with us. I can envisage him sitting with a cigar and watching our proceedings now, saying heartfelt thanks that he is no longer required to contribute. It is only right that I remind Parliament that, when we previously debated the tribunals system, so impressed was Graeme Pearson that he put it on the record that he felt that David McLetchie possessed the attribute of glamour. It is important to reiterate that.

It is clear from the debate that members across the chamber agree that tribunals reform is long overdue, and that they desire to create a tribunals structure that is fit for the devolved landscape. I will respond to as many members’ comments as I can.

Elaine Murray, Colin Keir, Rod Campbell and a fair few others spoke of our proposals for the Lands Tribunal for Scotland; a number of members made the point that it should more properly be regarded as a court, rather than as a tribunal. It might be true that it is the tribunal that looks most like a court—I do not think that anybody would depart from that—but it is not a court; it is a tribunal. It is a tribunal in legislation and it has a key attribute of a tribunal—it has lay members on its panels. Its being a court would pretty much rule that out. It cannot be a court, because of the lay members; it is a tribunal in
legislation, and the lay members reinforce the idea that it is a tribunal. We need to remind ourselves of that when we talk about it.

We desire to transfer the Lands Tribunal for Scotland into the new system, and we have made a proposal on where it would fit. The Government believes that it needs to remain in the system with the other tribunals.

Each tribunal is different. Despite some of the concerns and fears that people have expressed, nothing in the bill will change how the tribunals operate in any way, shape or form, and there is no desire to do that. As new tribunals are discussed and perhaps legislated for, they will each have their own particular ways of working, which the proposed structure will simply absorb. That is as it should be.

On a slightly related point, I confirm to Elaine Murray that the chamber structures will be set out in an affirmative Scottish statutory instrument, so we will come back to that.

Margaret Mitchell reminded us that 80,000 people use tribunals every year. That is a lot of people, who are generally overlooked when we talk about the number of people who go through the court system. The reality is that tribunals probably see far more people than courts do.

I gently point out to Stewart Stevenson that there is nothing at all “quasi” about the judicial decisions that tribunals make. He should not use the term; tribunals make judicial decisions.

In a sense, John Pentland recognised the balancing act that the bill represents. Most committee members have understood that we are trying to strike a balance, with a better structure and a more efficient way of managing the whole framework while keeping the individual nature of tribunals clear cut.

Colin Keir referred to the children’s hearings system. I agree with all his comments, which were, of course, exactly why children’s hearings are not listed in the schedule to the bill. Perhaps there has been some padding out of speeches by raising things that will not actually happen. The danger is that that could create concern in other people’s minds, and I do not want that to happen. Children’s hearings are not included in the bill for a very good reason.

Building a structure that is flexible enough to cater for the many different tribunals in Scotland is challenging, but I think that we have achieved the right balance in the bill, which will create a simple and clear structure that will make it easier for users to navigate their way through the tribunals system. I reiterate my commitment to ensuring that the unique characteristics of all the tribunals that are transferring into the new structure will be protected. [Interruption.]

The Deputy Presiding Officer: Order, please.

Roseanna Cunningham: I know how important that is to those who are involved in tribunals.

It is in everyone’s interests that the aspects of the current system that are valued are maintained and strengthened in the new structure. Those include the expertise, flexibility, sensitivity, specialism and ethos of individual tribunals. Nothing that the Government is doing is about interfering with any of that. I hope that the safeguards in the bill that I have already spoken about have gone some way towards reassuring members that those characteristics can and will be protected.

The different leadership roles of judicial office-holders in the new structure—for example, of the Lord President, the president of Scottish tribunals and chamber presidents—will provide an important mechanism to safeguard the particular and distinctive operations of individual jurisdictions against any unintended drift towards more generalised arrangements or dilution of specialisms.

The committee’s convener and other members, including John Finnie, have spoken about the position of the president of Scottish tribunals. I have made a point about saying that the role will not be an appointment. Appointments are a particular category of what a Government does. As I said, it will not be an appointment; the position is within the Lord President’s hierarchy, because it will have delegated powers from the Lord President. It is not a judicial appointment or an appointment in the general sense of the word. If the role is to have delegated powers, they need to flow directly from the Lord President.

We expect the judicial leadership to work together across jurisdictions to bring coherence to the system where that will benefit through delivery of a high-quality service to tribunal users. The new leadership structure will also provide opportunities for tribunal members to share best practice and learn from one another’s knowledge and experience.

Members have mentioned the number of tribunals that are not being transferred into the new system. I accept that the creating and transferring into the new structure of tribunals will not happen overnight. Obviously, there is a landscape of reserved tribunals out there that must also be considered in the future. That is not currently our decision, but we are trying to create a framework that will be flexible enough to allow such transfer in, if and when that is required.
The bill is a technical one that provides a framework for the creation of a cohesive system for tribunals as a whole. The process is designed to be manageable, because it will take time to bring in each of the individual tribunals. I remind members that there are other policy areas in which creation of tribunals is being discussed. I think that Elaine Murray mentioned one or two, but they are not the only ones. There is the potential for an increase in the number of tribunals in the landscape.

It will take time to bring the tribunals in, partly because of the complexity of the tribunals involved and the attention to detail that will be required to ensure that the system works effectively. We have therefore ensured that there will be a high level of parliamentary scrutiny for the majority of the secondary legislation that will derive from the bill. [Interruption.]

The Deputy Presiding Officer: Order, please. There are too many conversations.

Roseanna Cunningham: We want to get this right first time, with no disruption to the service that is provided to the user. I am confident that we can do that.

Before I finish, I draw members’ attention to “Just News”, which is the administrative justice newsletter that can found on the Scottish Government’s website. Its information is of use particularly to committee members who may not know about it. I advise members to have a look at it.

Tribunals reform is long overdue; many expert reports have told us that over a long time. Members have debated the issue twice previously, and there was cross-party support on both occasions. Tribunals reform is quite simply the right thing now for the people of Scotland. It is the right thing for Parliament to do.
Decision Time

17:00

The Deputy Presiding Officer (Elaine Smith):
There are three questions to be put as a result of today’s business. The first question is, that motion S4M-08145, in the name of Roseanna Cunningham, on the Tribunals (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament agrees to the general principles of the Tribunals (Scotland) Bill.
14 November 2013

Dear Nigel,

**Tribunals (Scotland) Bill**

Thank you for your letter of 31 October 2013 seeking further clarification on section 56(2) of the Tribunals Bill, which relates to the rule-making power concerning the venue for tribunal hearings. I am happy to provide further detail about the intended scope of this power and the reasons for the level of scrutiny chosen.

*The scope of the rule-making power*

Section 56 provides that tribunals may be convened at any place in Scotland, subject to any provision made by Tribunal Rules. During the period when Rules are to be made by Scottish Ministers, it is not our intention to limit any more than is considered necessary the broad generality of section 56(1) with Rules made under section 56(2). It is important to note that if no Rules about venue are made under section 56(2) with respect to any particular jurisdiction of the Scottish Tribunals then the general rule in section 56(1), that tribunals may be convened anywhere in Scotland, will continue to apply. The Scottish Ministers have no plans to alter the sitting or venue arrangements for any tribunals intended to transfer-in to the new Scottish Tribunals.

Section 56(2) is an enabling provision. Decisions about where tribunals can and should sit will continue to be made for each jurisdiction, considering the particular needs of the users of each. The rule-making power therefore needs to be wide enough to accommodate tribunals that have very specific requirements about venue (for instance, that forensic Mental Health Tribunals continue to be held in hospitals) as well as tribunals that have a very flexible approach to venue (for example, some land-related jurisdictions which often conduct site visits as part of hearings). As well as exceptionally providing for tribunals to be held in specific locations, it also needs to allow rules to provide for other matters, such as the type of venue that may be used for particular jurisdictions, or how questions or disputes about venue may be resolved.
Additionally section 56 has to allow for novel or unanticipated requirements about venue which might arise in connection with tribunals which might transfer-in in to the Scottish Tribunals in future or which might be established by future legislation. Section 56 will also, necessarily, be subject to any particular or specific provision which might be made in primary legislation concerned with tribunals venues for any individual jurisdictions.

I am therefore satisfied that the provision made by section 56(2) of the Bill is proportionate and appropriate.

The level of scrutiny of Tribunals Rules

Section 62 provides that, ultimately, Tribunal Rules shall be made by the Court of Session by act of sederunt, after draft rules have been prepared by the Scottish Civil Justice Council (“SCJC”). Schedule 9 of the Bill makes changes to the SCJC’s composition and remit for this purpose. The SCJC will be required to establish a Tribunals Committee, chaired by the President of Tribunals or a member of the Scottish Tribunals, to prepare these draft rules. This committee will be required to have among its members people with knowledge of how the Scottish Tribunals exercise their functions. These Tribunals Rules will be subject to the same level of scrutiny as other acts of sederunt prepared by the SCJC and made by the Court of Session.

The SCJC has indicated, however, that because of the expected demands on its resources over the next few years, it will not be able to take on the additional responsibility for Tribunals Rules before 2017. The Bill therefore makes transitional provision. Paragraph 4 of schedule 9 to the Bill provides that in the interim period before the SCJC takes on responsibility for Tribunals Rules, these Rules will be made by the Scottish Ministers, as is currently the case for the tribunals listed in Schedule 1. During this interim period, in recognition of the position of the Scottish Ministers, two additional requirements are imposed on the rule-making process. Under paragraph 4(3), before making Tribunals Rules, the Scottish Ministers must consult with the President of Tribunals and such other persons as they consider appropriate. Under paragraph 5(2), the regulations containing Tribunals Rules are subject to negative procedure.

I am therefore satisfied that appropriate arrangements for expert input, consultation and scrutiny are in place both during the interim period when Rules are to be made by Scottish Ministers and once that function is taken over by the SCJC. I am satisfied that these arrangements provide for a suitable level of governance and oversight when Rules regulating the sensitive matter of Tribunals venues are being made.

I hope this response is helpful to the Committee.

Yours sincerely,

Roseanna Cunningham
Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Section 1 to 26  
Section 27 and 28  
Section 29  
Sections 30 to 32  
Section 33  
Section 34 to 75  
Section 76  
Section 77 and 78  
Schedule 1  
Schedule 2  
Schedules 3 to 6  
Schedule 7  
Schedule 8  
Schedule 9  
Schedule 10  
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 1

Elaine Murray

1* Before section 1, insert—

<Definition of Tribunal

(1) For the purposes of this Act, a tribunal is a body established under an enactment to adjudicate on a matter concerning administrative justice between—

(a) a person and the state, or

(b) different persons,

and is independent of both the executive and legislature and of the parties appearing before it.

(2) In subsection (1), “administrative justice” means the determination of an issue arising from a statutory right or obligation which is within the jurisdiction of a tribunal.>

Section 1

Roseanna Cunningham

6 In section 1, page 1, line 18, at end insert <or another Act>

Roseanna Cunningham

7 In section 1, page 1, line 20, at end insert <or another Act>
Section 2

Elaine Murray

8 In section 2, page 2, line 2, at end insert—

<( )> The Lord President must, in carrying out the functions of that office, adhere to the following principles for the Scottish Tribunals—

(a) the need for the Scottish Tribunals to be accessible,

(b) the need for proceedings before the Scottish Tribunals—

(i) to be fair, and

(ii) to be handled quickly and efficiently,

(c) the need for members of the Scottish Tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and

(d) the need to consider and develop innovative methods of resolving disputes that are of a type that may be brought before the Scottish Tribunals.>

Section 10

Roseanna Cunningham

9 In section 10, page 4, line 7, leave out <or 37(1)> and insert <, 37(1) or (Voting for decisions)(1)>.

Section 11

Roseanna Cunningham

10 In section 11, page 4, line 18, leave out <or 37(1)> and insert <, 37(1) or (Voting for decisions)(1)>

After section 11

Roseanna Cunningham

11 After section 11, insert—

<Guiding principle

Principle to be observed

(1) In exercising their regulation-making functions under this Act, the Scottish Ministers must have regard to the principle below.

(2) In exercising their leadership functions under this Act, the Lord President and the President of Tribunals must have regard to the principle below.

(3) The principle is the need for proceedings before the Scottish Tribunals—

(a) to be accessible and fair, and

(b) to be handled quickly and effectively.>
Section 13

Roseanna Cunningham
12 In section 13, page 5, line 4, leave out <mentioned in subsection (3)> and insert <for which this section makes provision>

Roseanna Cunningham
13 In section 13, page 5, line 7, leave out <mentioned in subsection (3)> and insert <for which this section makes provision>

Roseanna Cunningham
14 In section 13, page 5, line 9, leave out <mentioned in subsection (3)> and insert <for which this section makes provision>

Roseanna Cunningham
15 In section 13, page 5, line 11, leave out subsection (3) and insert—
   <(3) This section makes provision—
      (a) in the case of an ordinary, legal or judicial member of the Scottish Tribunals, for the purpose of holding the position of and acting as such a member,
      (b) in the case of an extra judge of the Upper Tribunal, for the purpose of holding that position and acting as mentioned in section 17(5).>.

Section 16

Margaret Mitchell
92 In section 16, page 6, line 20, leave out <authorised> and insert <appointed>

Roseanna Cunningham
16 In section 16, page 6, line 21, leave out <Apart from the Lord President and the President of Tribunals.>

Margaret Mitchell
93 In section 16, page 6, line 23, leave out <authorised> and insert <appointed>

Roseanna Cunningham
17 In section 16, page 6, line 23, at end insert <(but see next instead for the Lord President and the President of Tribunals)>

Margaret Mitchell
94 In section 16, page 6, line 27, leave out subsection (6) and insert—
   <(6) Before making an appointment under subsection (3)(a) or (b) or (4) the President of the Tribunals must—>
(a) be satisfied that the person concerned is suitably qualified,
(b) have the approval of the Lord President (including as to the person to be appointed),
(c) have the agreement of the person concerned,
(d) in the case of a sheriff (apart from a sheriff principal), also have the concurrence of the relevant sheriff principal.

Margaret Mitchell
95 In section 16, page 6, line 34, leave out <authorisation for the purpose of> and insert <appointment under>

Roseanna Cunningham
18 In section 16, page 6, line 36, leave out <relevant by virtue of> and insert <referred to in>

Section 17

Roseanna Cunningham
19 In section 17, page 7, line 6, leave out <retired judge of the Court of Session> and insert <former—
   (i) judge of the Court of Session (including temporary judge),
   (ii) Chairman of the Scottish Land Court, or
   (iii) sheriff (except part-time sheriff)>

Roseanna Cunningham
20 In section 17, page 7, line 7, leave out from first <the> to end of line 8 and insert <a court or tribunal in a country or territory outwith Scotland (whether or not another part of the United Kingdom).>

Roseanna Cunningham
21 In section 17, page 7, line 12, leave out subsection (4)

Roseanna Cunningham
22 In section 17, page 7, line 18, leave out from <, agreement> to <(4)> in line 19 and insert <and agreement as is referred to in subsection (3)>

Roseanna Cunningham
23 In section 17, page 7, line 20, leave out <, agreement and consent> and insert <and agreement>

Roseanna Cunningham
24* In section 17, page 7, line 24, at end insert—
   <( ) An authorisation under subsection (1) may not be issued if the person concerned—>
(a) is aged 75 years or over, or  
(b) has been removed from judicial office because of unfitness by reason of inability, neglect of duty or misbehaviour (or is for the time being suspended from such office in connection with an investigation into the question of such unfitness).>

Roseanna Cunningham

25 In section 17, page 7, line 24, at end insert—

<( ) In the case of a person mentioned in subsection (2)(b)—

(a) subsections (1) and (6) are subject to such further arrangements as the Scottish Ministers may make with a governmental or other body in the person’s country or territory for the purposes of those subsections,

(b) if the person has not previously taken the required oaths, the person must take them in the presence of the President of Tribunals before acting as mentioned in subsection (5).>

Roseanna Cunningham

26 In section 17, page 7, line 26, leave out from <mentioned> to <counts> in line 28 and insert <of the required oaths counts (so far as necessary)>  

Roseanna Cunningham

27 In section 17, page 7, line 33, at end insert—

<( ) In this section, “the required oaths” means the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868.>

Roseanna Cunningham

28 In section 17, page 7, line 34, leave out subsection (9)

Section 18

Margaret Mitchell

96 In section 18, page 7, line 37, leave out <authorised for the purpose of> and insert <appointed under>

Margaret Mitchell

97 In section 18, page 8, line 1, leave out <authorised for the purpose of> and insert <appointed under>

Section 19

Elaine Murray

2 In section 19, page 8, line 12, at end insert—

<( ) The First-tier Tribunal must include a single chamber to adjudicate exclusively on the subject-matter of mental health.>
Elaine Murray

In section 19, page 8, line 16, at end insert—

<(  ) Regulations under subsection (2) must provide for a single chamber to adjudicate exclusively on the subject-matter of mental health.>

Section 26

Roseanna Cunningham

In section 26, page 11, line 10, leave out <(iv)> and insert—

<(  )>

Schedule 1

Roseanna Cunningham

In schedule 1, page 32, line 21, leave out <section 72(2) and 73(3)(a)> and insert <sections 72(2) and 73(3)>

After section 28

Roseanna Cunningham

After section 28, insert—

<Conferral of functions by another Act>

Accommodation of functions

(1) Subsections (2) and (3) apply where any functions are conferred on either or both of the Scottish Tribunals by or under an Act other than this Act.

(2) The Scottish Ministers may by regulations modify this Act so that this Act specifies the relevant provisions of the other Act (whether in existing or new provisions of this Act).

(3) The Scottish Ministers may by regulations modify this Act or the other Act so as to make the functions exercisable in accordance with or subject to (as far as not already so exercisable)—

(a) the whole of this Act, or

(b) particular provisions of this Act.

Redistribution of functions

(1) Where any functions are conferred on either or both of the Scottish Tribunals by or under an Act other than this Act, the Scottish Ministers may by regulations—

(a) provide for the functions, or particular functions, to be redistributed between the Tribunals by—

(i) transferring them from either of the Tribunals to the other,
(ii) taking them away from one of the Tribunals (but not the other), or
(iii) causing them to be exercisable by both of the Tribunals (instead of one only),

(b) if they are so redistributed by causing them to be exercisable by both of the Tribunals, also make provision of the sort allowed by subsection (2).

(2) This subsection allows provision enabling the question as to which of the Tribunals is to exercise particular functions in a specific case or in specified circumstances to be determined, including as against any prescribed criteria—

(a) in accordance with Tribunal Rules, or
(b) by the President of Tribunals (whether or not by reference to Tribunal Rules).

(3) Regulations under subsection (1) may include provision for the purposes of or in connection with, or for giving full effect to, a redistribution of any functions to which the regulations apply.

(4) Provision included in such regulations by virtue of subsection (3) may modify any enactment relating to the functions being redistributed by the regulations.

(5) Subsection (1) is subject to any express provision in the other Act prohibiting or limiting the making of regulations under that subsection.

Schedule 3

Roseanna Cunningham

33 In schedule 3, page 34, line 28, leave out from <, or> to end of line 29

Schedule 5

Roseanna Cunningham

34 In schedule 5, page 38, line 31, leave out from <, or> to end of line 32

Section 32

Roseanna Cunningham

35 In section 32, page 13, line 27, leave out <office> and insert <their positions>

Roseanna Cunningham

36 In section 32, page 13, line 27, at end insert—

<(2) The Scottish Ministers may by regulations make provision enabling a relevant appointment or transfer to be made or have effect in such terms as to cause a person to hold permanently the type of membership or (as the case may be) particular position in question.

(3) The Scottish Ministers must consult the President of Tribunals before—

(a) making regulations under subsection (2), or
(b) exercising in relation to a relevant appointment or transfer the discretion allowed
by such regulations.

(4) The operation of paragraphs 2 to 7A of schedule 7 is subject to provision made by
regulations under subsection (2).

(5) For the purposes of subsection (2)—

(a) a relevant appointment is appointment or reappointment by the Scottish
Ministers—

(i) of a person as an ordinary or legal member of the Scottish Tribunals,
(ii) of a legal member of the First-tier Tribunal as a Chamber President or
Deputy Chamber President in the Tribunal, or
(iii) of a legal member of the Upper Tribunal as a Vice-President of the
Tribunal,

(b) a relevant transfer is transfer-in to the Scottish Tribunals—

(i) of a person as an ordinary or legal member of the Tribunals by virtue of
section 28(b), or
(ii) of a person to a particular position within the Tribunals by virtue of section
28(a).>

Schedule 7

Roseanna Cunningham

37 In schedule 7, page 43, line 23, at end insert—

<Extension in senior post

7A(1) Sub-paragraphs (2) and (3) apply where—

(a) a legal member of the First-tier Tribunal becomes by appointment a Chamber
President or Deputy Chamber President in the Tribunal, or

(b) a legal member of the Upper Tribunal becomes by appointment a Vice-President
of the Tribunal.

(2) Despite paragraphs 2 and 3, the period for which the legal member holds that position
does not end until the expiry of 5 years beginning with the date of the appointment
mentioned in the relevant limb of sub-paragraph (1).

(3) In all other respects also, the appointment mentioned in the relevant limb of sub-
paragraph (1) supersedes the earlier appointment or (as the case may be) transfer-in as a
legal member.>

Roseanna Cunningham

38 In schedule 7, page 43, line 25, leave out <to which the member was appointed or transferred-in>
and insert <of member of the Tribunals>

Roseanna Cunningham

39 In schedule 7, page 43, line 32, leave out <4> and insert <7A>
40 In schedule 7, page 43, line 37, leave out paragraph 10

41 In schedule 7, page 44, line 6, leave out <appointment or transfer-in, and from holding a position, as a> and insert <holding, or continuing to hold, the position of>

42 In schedule 7, page 44, line 15, leave out paragraph 12

43 In schedule 7, page 45, line 7, at end insert—

<Pensions etc.

(1) The Scottish Ministers may make arrangements as to—

(a) the payment of pensions, allowances and gratuities to or in respect of the members, or former members, of the Scottish Tribunals,

(b) contributions or other payments towards provision for such pensions, allowances and gratuities.

(2) Under sub-paragraph (1), such arrangements may (in particular)—

(a) include provision relating to payment of compensation for loss of office,

(b) make different provision for different types of member, different positions or other different purposes.>

44 In schedule 7, page 45, line 9, leave out from <in> to <the> in line 11 and insert <elsewhere in this Act or under it, the Scottish Ministers may determine the terms and conditions on which the members of the Scottish Tribunals hold their positions.

(2) Under sub-paragraph (1), a>

45 In schedule 7, page 45, line 14, leave out <categories of member> and insert <types of member, different positions>

Schedule 8

46 In schedule 8, page 48, leave out lines 25 to 28 and insert <is, or has been—

<(i) a judge of the Court of Session (except a temporary judge), or
(ii) a sheriff (except a part-time sheriff),>
Roseanna Cunningham

47 In schedule 8, page 48, leave out lines 30 to 33 and insert—

<( ) where the member under investigation is an ordinary member, another
ordinary member, or

( ) where the member under investigation is a legal member, another legal
member, and>

Roseanna Cunningham

48 In schedule 8, page 50, line 21, at end insert <of member of the Scottish Tribunals>

Section 34

Roseanna Cunningham

49 In section 34, page 14, line 6, leave out <a member or> and insert <one, or two or more, of the>

Section 36

Roseanna Cunningham

50 In section 36, page 14, line 38, leave out <a member or> and insert <one, or two or more, of the>

Roseanna Cunningham

51 In section 36, page 15, line 9, leave out <37> and insert <37(1)>

After section 37

Roseanna Cunningham

52 After section 37, insert—

<Decisions by two or more members>

Voting for decisions

(1) The Scottish Ministers may by regulations make provision for the purposes of sections
34(1) and 36(1) in so far as a matter in a case before the First-tier Tribunal or the Upper
Tribunal is to be decided by two or more members of the Tribunal, including—

(a) for a decision to be made unanimously or by majority,

(b) where a decision is to be made by majority, for the chairing member to have a
casting vote in the event of a tie.

(2) Subsection (1) applies in relation to the Upper Tribunal as if an extra judge who is
authorised to act as mentioned in section 17(5) were a member of the Tribunal (with
section (Chairing members)(1) so applying accordingly).>

Roseanna Cunningham

53 After section 37, insert—
Chairing members
(1) Tribunal Rules may make provision for determining the question as to who is to be the chairing member where a matter in a case before the First-tier Tribunal or the Upper Tribunal is to be decided by two or more members of the Tribunal.
(2) Rules making provision as described in subsection (1) may (in particular)—
   (a) allow the President of Tribunals to determine the question,
   (b) specify criteria as against which the question is to be determined (including by reference to type of member or particular expertise).

Section 45
Roseanna Cunningham
54 In section 45, page 19, line 21, leave out <issue> and insert <point>

Section 48
Roseanna Cunningham
55 In section 45, page 19, line 22, leave out <another> and insert <some other>

Section 56
Roseanna Cunningham
57 In section 56, page 22, line 14, after <any> insert <time and>
Roseanna Cunningham
58 In section 56, page 22, line 16, after <of> insert <when and>
Roseanna Cunningham
59 In section 56, page 22, line 17, at end insert <(and such Rules may allow the President of Tribunals to determine the question)>

Section 57
Roseanna Cunningham
60 In section 57, page 22, line 26, after <the> insert <citation,>
Section 59

Roseanna Cunningham

61 In section 59, page 23, line 16, leave out <may> and insert <is to>

Roseanna Cunningham

62 In section 59, page 23, line 19, leave out <such> and insert <awardable>

Roseanna Cunningham

63 In section 59, page 23, leave out lines 24 to 26

Roseanna Cunningham

64 In section 59, page 23, line 29, at end insert—

<(3A) Tribunal Rules may make provision—
   (a) for disallowing any wasted expenses,
   (b) for requiring a person who has given rise to such expenses to meet them.>

Roseanna Cunningham

65 In section 59, page 23, line 30, after <(3)> insert <or (3A)>

Roseanna Cunningham

66 In section 59, page 23, line 31, leave out <that subsection> and insert <this section>

After section 61

Roseanna Cunningham

67 After section 61, insert—

<Offences in relation to proceedings>

(1) The Scottish Ministers may by regulations make provision, in relation to proceedings before the First-tier Tribunal or the Upper Tribunal—
   (a) for offences and penalties—
      (i) for making a false statement in an application in a case,
      (ii) for failure by a person to attend, or give evidence in, such proceedings when required to do so in accordance with Tribunal Rules,
      (iii) for alteration, concealment or destruction by a person of, or failure by a person to produce, something that is required to be produced in such proceedings in accordance with Tribunal Rules,
   (b) about the circumstances in which a person need not give evidence or produce something (for example, where a person could not be compelled to give evidence or produce something in proceedings in a case before the sheriff or in the Court of Session).
(2) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

Section 62

Elaine Murray

68 In section 62, page 24, line 33, at end insert—

<(  ) In making Tribunal Rules, the Court of Session must have regard to the need for—
(a) tribunals to be accessible,
(b) the rules to be clear and easy to understand,
(c) proceedings before the tribunal to be—
   (i) fair,
   (ii) handled quickly and efficiently,
(d) members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters.>

Section 63

Roseanna Cunningham

69 In section 63, page 25, line 1, at end insert—

<(A1) Tribunal Rules may confer functions on the persons mentioned in subsection (4) or the other members of the Scottish Tribunals.>

Roseanna Cunningham

70 In section 63, page 25, line 2, after first <the> insert <persons mentioned in subsection (4) or the other>

Roseanna Cunningham

71 In section 63, page 25, line 11, at end insert—

<(  ) Neither Tribunal Rules nor directions under section 68 may make provision altering the operation of section 34(1) or 36(1).>

Roseanna Cunningham

72 In section 63, page 25, line 11, at end insert—

<(4) For the purpose of subsections (A1) and (1), the persons are—
(a) the Lord President,
(b) the President of Tribunals,
(c) in the First-tier Tribunal—
   (i) a Chamber President,
   (ii) a Deputy Chamber President,
(d) a Vice-President of the Upper Tribunal.

Section 64

Roseanna Cunningham

73 In section 64, page 25, line 26, after <27(5)> insert <, (Chairing members)(1)>

Section 65

Roseanna Cunningham

74 In section 65, page 26, line 2, at end insert—

<( ) enable two or more applications to be conjoined in certain circumstances,>

Section 66

Roseanna Cunningham

75 In section 66, page 26, line 23, at end insert—

<( ) enable two or more sets of proceedings to be taken concurrently at a hearing in certain circumstances,>

Section 67

Roseanna Cunningham

76 In section 67, page 27, line 5, leave out from <(in) to end of line 6 and insert <, including as to—

(a) the manner in which such decisions are to be made,
(b) the incorporation in such decisions of findings in fact,
(c) the recording, issuing, and publication of such decisions.>

Section 68

Roseanna Cunningham

77 In section 68, page 27, line 21, leave out subsection (5)

Roseanna Cunningham

78 In section 68, page 27, line 24, leave out subsection (6)

Section 69

Roseanna Cunningham

79 In section 69, page 27, line 28, at end insert—
The President of Tribunals must arrange for directions under section 68(1), (2) or (3) to be published in such manner as the President of Tribunals considers appropriate.

Roseanna Cunningham

80 In section 69, page 27, line 28, at end insert—

<(< ) Directions under section 68(1), (2) or (3) may—
(a) vary or revoke earlier such directions,
(b) make different provision for different purposes (in the same respects as Tribunal Rules).>

Roseanna Cunningham

81 In section 69, page 27, line 29, leave out subsection (1)

Section 70

Roseanna Cunningham

82 In section 70, page 28, line 13, at end insert—

<(< ) to such extent as they consider appropriate, persons having an interest in the operation and business of the Scottish Tribunals.>

Section 73

Roseanna Cunningham

83 In section 73, page 29, line 23 leave out <or 37(1)> and insert <, 37 (1) or (Voting for decisions)(1)>

Roseanna Cunningham

84 In section 73, page 29, line 24, leave out <or 61(1)> and insert <, 61(1) or (Offences in relation to proceedings)(1)>

Schedule 9

Margaret Mitchell

98* In schedule 9, page 51, line 10, at end insert—

<(< ) Rules having effect as mentioned in sub-paragraph (2) (by virtue of regulations made under that sub-paragraph)—
(a) are to be regarded as if made as Tribunal Rules under Chapter 2 of Part 7,
(b) have effect accordingly (and may therefore be revoked, amended or remade by Tribunal Rules under Chapter 2 of Part 7).>

Margaret Mitchell

99 In schedule 9, page 51, line 25, leave out paragraphs 4 to 6
Roseanna Cunningham

85 In schedule 9, page 51, line 27, after <62(3)> insert <and (4)>

Elaine Murray

4 In schedule 9, page 52, line 16, at beginning insert <Subject to sub-paragraph (1A).>

Elaine Murray

5 In schedule 9, page 52, line 21, at end insert—

<(1A) Regulations under section 27(2) may not provide for the transfer-in of the functions of the Mental Health Tribunal for Scotland to the First-tier Tribunal until provision has been made for a single chamber to adjudicate exclusively on the subject-matter of mental health.>

Roseanna Cunningham

86 In schedule 9, page 53, line 6, at end insert—

<Making appointments

(1) Until all of the functions of a listed tribunal have been transferred to the Scottish Tribunals by regulations under section 27(2)—

(a) paragraph 3(1)(d) of schedule 1 to the 2008 Act has effect in relation to that tribunal as if the reference in that paragraph to a person holding the position of Chamber President or of Vice-President within the Scottish Tribunals includes the President of, or the holder of an equivalent office in, any listed tribunal,

(b) paragraph 16A(2) and (3) of schedule 1 to the 2008 Act has effect in relation to that tribunal as if the references in that paragraph to a member of the Scottish Tribunals includes a member of any listed tribunal.

(2) In this paragraph—

“the 2008 Act” means the Judiciary and Courts (Scotland) Act 2008 (see paragraph 11(4)(b) and (5)),

“listed tribunal” is to be construed in accordance with Part 3 (see section 26(1)).>

Roseanna Cunningham

87 In schedule 9, page 53, line 35, leave out <following paragraph (f)> and insert <preceding paragraph (g)>

Roseanna Cunningham

88 In schedule 9, page 53, line 36, leave out <after paragraph (f)> and insert <before paragraph (g)>

Elaine Murray

89 In schedule 9, page 55, line 15, at end insert—

<( ) after paragraph (a) there is inserted—

“(aa) to keep matters relating to the administrative justice system within the jurisdiction of the Scottish Tribunals under review,”,>
Elaine Murray
90 In schedule 9, page 55, line 22, at end insert—

<( ) after paragraph (d) there is inserted—

“(da) to provide advice and make recommendations to the Lord President on
the development of, and changes to, matters relating to the administrative
justice system within the jurisdiction of the Scottish Tribunals.”.>

Elaine Murray
91 In schedule 9, page 55, line 22, at end insert—

<( ) after paragraph (e) there is inserted—

“(ea) to provide such advice on any matter relating to the administrative
justice system within the jurisdiction of the Scottish Tribunals as may be
requested by the Lord President.”.>
Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Definition of Tribunals
1, 29, 30

Functions conferred by other Acts
6, 7, 31, 32

General principles
8, 11, 68

Decision-making in the Tribunals
9, 10, 49, 50, 51, 52, 53, 73, 74, 75, 76, 83

Capacity of Tribunal members
12, 13, 14, 15

Use of the judiciary
92, 16, 93, 17, 94, 95, 18, 96, 97

Judges from outwith Scotland
19, 20, 21, 22, 23, 24, 25, 26, 27, 28

Mental Health Chamber
2, 3, 4, 5

Appointments, terms and conditions of Tribunal members
33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 86, 87, 88

Fitness and removal of Tribunal members
46, 47, 48
Appeal process
54, 55, 56

Tribunal rules
57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 69, 70, 71, 72, 85

Notes on amendments in this group
Amendment 85 is pre-empted by amendment 99 in group “Rule-making: transitional arrangements”

Procedural offences
67, 84

Practice directions
77, 78, 79, 80, 81

Consultation on fees
82

Rule-making: transitional arrangements
98, 99

Notes on amendments in this group
Amendment 99 pre-empts amendment 85 in group “Tribunal Rules”

Role of the Scottish Civil Justice Council
89, 90, 91
Present:

Christian Allard
John Finnie
Alison McInnes
Elaine Murray (Deputy Convener)
Sandra White

Roderick Campbell
Christine Grahame (Convener)
Margaret Mitchell
Graeme Pearson (Committee Substitute)

Apologies were received from John Pentland.

**Tribunals (Scotland) Bill:** The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87 and 88.

The following amendments were disagreed to (by division)—

1 (For 4, Against 5, Abstentions 0)
2 (For 4, Against 5, Abstentions 0)
98 (For 1, Against 8, Abstentions 0)
99 (For 1, Against 8, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 8, 92 and 89.

The following amendments were not moved: 93, 94, 95, 96, 97, 3, 68, 4, 5, 90 and 91.

The following provisions were agreed to without amendment: sections 2, 3, 4, 5, 6, 7, 8, 9, 12, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 28, schedule 2, section 29, schedules 4 and 6, sections 30, 31, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 49, 50, 51, 52, 53, 54, 55, 58, 60, 61, 62, 71, 72, 74, 75 and 76, schedule 10, sections 77 and 78 and the Long Title.

The following provisions were agreed to as amended: sections 1, 10, 11, 13, 16, 17 and 26, schedules 1, 3 and 5, section 32, schedules 7 and 8, sections 34, 36, 45, 48, 56, 57, 59, 63, 64, 65, 66, 67, 68, 69, 70 and 73 and schedule 9.

The Committee completed Stage 2 consideration of the Bill.
The Convener: The next item is stage 2 proceedings on the Tribunals (Scotland) Bill. I think that we can probably get all the way through it today—I am advised that it does not appear to be that controversial. It will be good to get this one out of the in-tray, before we move on to consider our draft stage 1 report on the Criminal Justice (Scotland) Bill.

The Minister for Community Safety and Legal Affairs is staying with us for this item. I welcome her officials to the meeting, but I remind members that the minister’s officials are here in a strictly supportive capacity and cannot speak during proceedings or be questioned by members. Any questions will be directed to the minister. She is on her tod.

Members should have a copy of the bill, the marshalled list and the groupings for today’s consideration.

Before section 1

The Convener: Amendment 1, in the name of Elaine Murray, is grouped with amendments 29 and 30.

Elaine Murray (Dumfriesshire) (Lab): In several recommendations in its stage 1 report, this committee reiterated its view that the particular nature and characteristics of tribunals should be preserved and that courtification should be avoided.

Recommendation 10 of our report suggests that there should be a provision in the bill that sets out what a tribunal is. Amendment 1 gives a clear and unambiguous definition of the term “tribunal” as a body that adjudicates on matters of administrative justice. According to the Law Society of Scotland, there is no such definition in Scottish legislation, and including a definition in the bill will avoid possible current and future uncertainty in light of the proposals to merge the tribunals service and the Scottish Court Service.

The Tribunals, Courts and Enforcement Act 2007 contains such a definition. In conjunction with amendments 8 and 68—I thought that my amendments would have been grouped together but they have not been—amendment 1 would promote parity with United Kingdom legislation and ensure a consistent experience for users of all tribunals in Scotland, whether their governance is reserved or devolved.

The amendments would also provide a framework for defining the principles for any new tribunals that could be created in Scotland in
future, and they would guarantee a standard to which all tribunals should operate.

I note from the purpose and effect notes that she very helpfully circulated last night that the minister feels that there are difficulties with defining exactly what a tribunal is and that amendment 1 might not be flexible enough to allow further tribunals to be added in future. I am a little puzzled by that because the definition of the function of a tribunal in the amendment is only “to adjudicate on a matter concerning administrative justice between—

(a) a person and the state, or
(b) different persons”.

The amendment goes on to say that a tribunal “is independent of both the executive and legislature”.

It also contains a definition of administrative justice. I am not sure why that would prevent any further new tribunals from being added in future.

I move amendment 1.

The Convener: I am sure that the minister will clarify that point, as I now call her to speak to amendment 29 and the other amendments in the group.

Roseanna Cunningham: In its stage 1 report, the committee called for the characteristics of tribunals to be protected in the bill and sought an amendment setting out general principles similar to those that are included in the Tribunals, Courts and Enforcement Act 2007.

The proposals to define what a tribunal is and to include a statement of tribunals’ principles became, in my view, a bit confused during discussions on the bill. They are separate ideas, and the distinctive characteristics of tribunals are best protected by including a duty to consider principles rather than by including a difficult and limiting definition of what a tribunal is.

I see great value in including a statement of principle on the face of the bill, as committee members will see when we come to consider amendment 11 in group 3. However, I am not convinced of the merits of attempting a definition of what a tribunal is or does in the way proposed in amendment 1.

The tribunal system is very complicated. Tribunals come in many different forms and deal with many different subjects, and they are varied in their nature, specialisms and individual ethos. Including in the bill a defined statement on what a tribunal is could have the effect of narrowing the field and making things difficult when considering the type of tribunal that would be suitable for inclusion in the new structure. The bill reflects that point at section 26, which already explains—as far as is possible or appropriate—what is meant by “tribunal”.

The difficulty of attempting to include the type of definition that Elaine Murray proposes is clear from the text of her amendment 1, in which tribunals are defined in terms of “administrative justice” and administrative justice is defined in relation to the work of tribunals. That is really a circular argument.

In addition, the first-tier tribunal and the upper tribunal as created by the bill are defined primarily with reference to the functions that are conferred on them by and under the bill. In a sense, they are self-defining, and no more needs to be said for it to be understandable what sort of bodies they are and what they do.

Furthermore, the description of a tribunal in section 26, along with the detailed specification of particular tribunals in schedule 1, is sufficient for the bill’s purposes. The bill is not lacking detail in the definition of a tribunal, and I do not understand what actual gap in meaning and effect Elaine Murray is trying to fill with her amendment.

I do not consider that anything would be gained by including the definition that Elaine Murray suggests. Indeed, there would be risks to the future workability of the new tribunals system. The important protection of the essential elements in the new tribunals structure would be better achieved by having members accept my amendment 11 when we reach it.

Amendments 29 and 30 are minor drafting adjustments. Amendment 29 tidies up the numbering in the list at the end of section 26, and amendment 30 corrects the cross-reference in schedule 1 to an act relating to parking adjudicators.

I therefore invite Elaine Murray to withdraw amendment 1.

The Convener: Before Elaine Murray responds, does any other member wish to come in?

Margaret Mitchell (Central Scotland) (Con): Notwithstanding what the minister has just said, I believe that the definition of “tribunal” would be a welcome addition to the bill and would help to clarify a tribunal’s characteristics. I do not see that it would interfere with the minister’s proposed amendment 11, which I also consider to be a welcome addition.

Roseanna Cunningham: I remind members that, when we put definitions in the bill, we are by definition unintentionally—or intentionally—excluding the possibility that we might in future want to include things outside that definition. That is why we do not often find such precise definitions in legislation.
Elaine Murray: I am interested in what the minister says, but I am still not certain about what sort of tribunal would fall outwith the definition. I cannot imagine any tribunal that would not be covered by it. I press amendment 1.

The Convener: I am blocked up and cannot hear anything, so members will need to shout. The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 1 disagreed to.

The Convener: I warn members that my deputy convener and I are struggling through shared head colds—it is a coalition of the cold—so they will have to shout.

Section 1—Establishment of the Tribunals

Roseanna Cunningham: The amendments in this group make provisions in relation to functions being conferred directly on the Scottish tribunals by another act.

When a new tribunal jurisdiction is created, it might directly confer functions on the first-tier tribunal, rather than create a new tribunal and then transfer its functions into the Scottish tribunals structure under section 27. Therefore, the bill needs to provide the same power to make the necessary legislative changes and do the required updating, as are available when jurisdictions are transferred in.

Amendment 32 allows the Scottish ministers to redistribute functions among the tribunals once they have been directly conferred. Again, that is in line with existing powers in section 27. The amendment gives flexibility when decisions are being taken about new tribunal jurisdictions that might be considered in future, and it takes away the need for new jurisdictions to be created in their own right before they can be transferred into the Scottish tribunals.

Amendments 6 and 7 pave the way for that approach.

I move amendment 6.

Amendment 6 agreed to.

Amendment 7 moved—[Roseanna Cunningham]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Head of the Tribunals

The Convener: Amendment 8, in the name of Elaine Murray, is grouped with amendments 11 and 68.

Elaine Murray: Amendment 8 seeks to place a duty on the Lord President in carrying out his or her functions to adhere to the principles for Scottish tribunals: the need for them to be accessible; the need for proceedings to be fair and handled quickly and efficiently; and the need for tribunal members to be experts in the subjects on which they decide. The expert status of tribunal members is fundamental to achieving those principles, as it would enable them to identify and focus on the key issues to be resolved.

Obviously, there are some overlaps between amendments 8 and 11, although amendment 8 is a little bit wider. It includes the need for members of tribunals to be experts in the subject matter of the cases on which they decide and the need for the Lord President to develop innovative methods of dispute resolution. However, I do not know whether those two amendments would stand together as they are, so I might withdraw amendment 8 in the passage of amendment 11.
and see whether we can add to amendment 11 at stage 3.

Amendment 68 would place a duty on the Court of Session in making tribunal rules to have regard to the need for those rules to be accessible, for proceedings to be fair and handled quickly and efficiently and for members of the tribunal to be experts in the subject matter on which they decide. The distinctive nature and character of tribunals must be taken into account and protected by the author of procedural rules. Those rules must ensure that users can use the system as easily as possible and that they remain at the heart of the system.

I notice that amendment 11, which covers much of the same ground, does not include reference to the Court of Session. I would be interested to hear from the minister why the Court of Session is not included.

I move amendment 8.

Roseanna Cunningham: Amendment 8, in the name of Elaine Murray, would place a duty on the Lord President to adhere to certain principles. I have reflected on what the committee and stakeholders said at stage 1 about the inclusion of a guiding principle in the bill. Government amendment 11 sets out the guiding principle that will ensure that the user is placed at the centre of any proceedings before the tribunals under the bill. That principle is that tribunals’ proceedings should be accessible to the user, fair to the parties and handled quickly and effectively.

Amendment 11 ensures that the Scottish ministers, the Lord President and the president of the tribunals must have regard to the principle when undertaking their respective high-level roles. I believe that the amendment addresses the concerns of stakeholders and the committee, which were expressed at stage 1, by ensuring that the distinctive character of tribunals is respected by those who have responsibility for them. Members of the Scottish tribunals will be appointed on the basis of jurisdictionally specific criteria. There is no question but that they will be experts in the subject matter of, or the law to be applied in, cases in which they decide matters. There is no extra benefit in placing a specific duty on the Lord President to ensure that.

On that subject, I refer Elaine Murray to sections 34 to 37, which provide for the selection of tribunal members on a case-by-case basis. In addition, section 30 is designed to ensure that tribunal members are assigned in a way that ensures that the best use is made of particular expertise in relevant areas of the law. Those sections, taken with the appointment criteria in schedules 3 and 5, will ensure that the right people are in the right place within the new tribunal system.

Tribunal rules will be made by the Court of Session but will be drafted by the Scottish Civil Justice Council. The SCJC is already required to have regard to principles such as that

"the civil justice system should be fair, accessible and efficient,"

and that

"rules relating to practice and procedures should be as clear and easy to understand as possible".


The bill will amend the 2013 act to require the SCJC to form a committee, whose members will include the president of the tribunals and members with knowledge of how the tribunals exercise their functions, to draft tribunal procedure rules. It is not clear how amendment 68 would sit with the duties that the bill will impose on the SCJC and the principles that the SCJC must already observe. The result would be confusing, and I consider that my amendment should be preferred.

In my view, amendment 11 strikes the correct balance between overarching principles and the day-to-day operation of the tribunals. I therefore ask Elaine Murray to withdraw amendment 8 and not to move amendment 68.

Roderick Campbell (North East Fife) (SNP): I have just a small point to make. The Tribunals, Courts and Enforcement Act 2007, which is a UK act, states:

"The Lord Chancellor is under a duty to ensure that there is an efficient and effective system".

The language in amendments 8 and 11 alternates, as one uses the word “efficiently” and one uses the word “effectively”. That is just a small point.

I have heard what the minister says and I largely agree with it. I have particular concerns about paragraph (d) in amendment 8 because it uses slightly woolly language. What is “develop innovative methods” supposed to mean? I am a big fan of dispute resolution and other ways of settling disputes, but I am not sure that having that wording in the bill is the way forward.

The Convener: I agree about the language of “innovative methods”, but I would have liked some comment about mediation prior to tribunals. I agree with the minister’s position on paragraph (c) in amendment 8—it is taken as read that that does not need to be in the bill. However, I have some sympathy for paragraph (d), which might be expressed in more acceptable language, as there is an issue about encouraging people to resolve matters before they go head to head.

Roseanna Cunningham: There is a bigger issue, across more than one piece of legislation,
about the need for mediation and I am not sure that introducing it as a paragraph in an amendment in this way would achieve what we are looking for across, I suspect, a wide area of Government.

Elaine Murray: I will not press amendment 8. Apart from anything else, there would be duplication and a certain amount of conflict if the two amendments were agreed to. I will deal with amendment 68 when we come to it.

Amendment 8, by agreement, withdrawn.

Section 2 agreed to.

Sections 3 to 9 agreed to.

Section 10—Authority under regulations

The Convener: Amendment 9, in the name of the minister, is grouped with amendments 10, 49, 50 to 53, 73 to 76 and 83.

Roseanna Cunningham: These amendments provide more clarity and flexibility around decision making in the Scottish tribunals.

Amendment 52 sets out the arrangements for voting on decisions when they are made by two or more members. The Scottish ministers will be able to make provision in regulations for individual tribunals. For example, regulations might provide for the chairing member of the tribunal to have the decisive vote in the event of a tie. Amendment 53 makes provision allowing tribunal rules to determine who the chairing member of a particular tribunal should be.

The amendments simply provide another tool for jurisdictions to use if they require it, although some jurisdictions will never require it. That is not a decision for us now. The amendments are enabling ones that will help the Scottish ministers and the particular tribunal jurisdictions to create the decision-making framework that they need. That all fits with sections 34 to 37, as they anticipate tribunals sitting constituted by single members or two or more members as needs require.

Amendments 74 and 75 allow tribunal rules to make provision for multiple cases to be conjoined or heard at the same time, if that is appropriate. Those amendments, too, are enabling, for the sake of efficiency in the system. Amendment 76 expands on the type of provision that tribunal rules can make in respect of the decisions of tribunals. It provides more detail and more clarity for the sake of the completeness of the story.

Amendments 9, 10, 49, 50, 51, 73 and 83 make minor adjustments and changes that are necessary to implement the other amendments.

I move amendment 9.

Amendment 9 agreed to.

Section 10, as amended, agreed to.

Section 11—Consultation on regulations

Amendment 10 moved—[Roseanna Cunningham]—and agreed to.

Section 11, as amended, agreed to.

After section 11

Amendment 11 moved—[Roseanna Cunningham]—and agreed to.

Section 12 agreed to.

Section 13—Capacity of members

The Convener: Amendment 12, in the name of the minister, is grouped with amendments 13 to 15.

Roseanna Cunningham: The amendments make changes to section 13, to make it absolutely clear that all tribunal members have judicial status and capacity by virtue of holding their positions as members. Amendment 15 replaces the current provision, which restricts their judicial capacity and status to the exercise of their decision-making functions. The result is that the capacity of members is broadened to cover all aspects of their tribunal work. Amendments 12 to 14 make minor adjustments.

In preparing the amendments, I have taken account of representations made to me by interested stakeholders.

I move amendment 12.

Amendment 12 agreed to.

Amendments 13 to 15 moved—[Roseanna Cunningham]—and agreed to.

Section 13, as amended, agreed to.

Sections 14 and 15 agreed to.

Section 16—Sheriffs and judges

The Convener: Amendment 92, in the name of Margaret Mitchell, is grouped with amendments 16, 93, 17, 94, 95, 18, 96 and 97.

Margaret Mitchell: Amendments 92 to 97 all cover the appointment of judicial members. These are merely probing amendments so that we can hear the minister’s views on the following points.

During stage 1, a number of witnesses raised concern about what was referred to as the judicialisation of tribunals. Tribunals are, by nature, generally less formal and less adversarial than courts and are, in the main, forums in which justice can be determined without the need for lawyers and judges.
Section 16 allows all sheriffs and part-time sheriffs, judges and temporary judges to be appointed as judicial members of tribunals. Although the appointment of judicial members is appropriate to allow tribunals to have access to important expertise, a number of witnesses expressed concern that the provision is drafted too widely.

10:00

Section 16 in particular states that all members of the judiciary are automatically eligible to act as judicial members purely by virtue of holding judicial office. Given the committee’s view that the particular nature and characteristics of tribunals must be protected, I ask the minister to comment on the committee’s recommendation in its stage 1 report that the Government consider whether section 16 should be amended to remove the automatic entitlement of members of the judiciary to be appointed as judicial members.

The amendments in my name seek to address that concern by making it clear that, although sheriffs and judges are eligible to become judicial members, they must be actively appointed by the president of the tribunals after consultation with the Lord President. Amendments 92 and 93 seek to remove the word “authorised” in section 16.

More significantly, amendment 94 seeks to provide for appointment by the president of the tribunals only when he or she is satisfied that a sheriff or judge is “suitably qualified” and he or she would also be required to identify a placement or position and the need for a judicial member on a particular tribunal. The term “suitably qualified” is taken from section 2 of the Lands Tribunal Act 1949 as amended. I would be grateful if the minister could clarify the instances in which judicial members would be appointed and respond to the suggestion that the automatic entitlement for appointments in section 16 be removed. In addition, I ask the minister to indicate whether the Government has considered any other safeguards to avoid the judicialisation of tribunals.

Do I move my amendment now, convener?

The Convener: You can probe away all you like, but you have to move amendment 92.

Margaret Mitchell: I move amendment 92.

The Convener: Excellent. I call the minister to speak to amendment 16 and the other amendments in the group.

Roseanna Cunningham: Margaret Mitchell’s amendments seek to change the language that is used in sections 16 and 18 so that, instead of referring to the authorisation of judges to act as judicial members of the first-tier or upper tribunal, they refer to the appointment of judges to do so. Moreover, the amendments seek to impose an additional duty on the president of the tribunals to be satisfied that the judge concerned is “suitably qualified” to act as such.

I agree that at first blush these amendments seem reasonably anodyne and unobjectionable. However, they are fairly problematic and do not sit comfortably with other provisions in the bill. On the change of the term “authorised” to “appointed”, in the judicial and tribunal context an appointment to a position normally refers to the process of appointment following an exercise by the Judicial Appointments Board for Scotland. The judges to whom sections 16 and 18 apply will already have been appointed as judges and will already be eligible to be judicial members of the Scottish tribunals under section 16(1) of the bill.

The term “appointment” is used for a specific process in the bill, such as that set out in sections 21 or 25 and, in my view, the term “authorisation”, which is already used in section 17, better describes what will actually happen under these sections. Section 16 works perfectly well as it stands and there is no need to change its approach. Calling this process an “appointment” at best is confusing and at worst dangerously casts doubt on the effect of the surrounding provisions and the nature of the process.

Secondly, the requirement that the president of the tribunals be satisfied that each judge is “suitably qualified” to act as such is misconceived and fails to take into account the bill’s other protections, which ensure that only appropriate and qualified members sit in each jurisdiction operating in each chamber of the tribunal. These sections relate to the authorisation of already appointed judges to act as judicial members of a tribunal, not as legal or ordinary members. Judicial members will sit in tribunals only where the composition order for that jurisdiction requires such a member to sit. For example, certain types of mental health tribunal are always chaired by a sheriff.

Under section 30, the Lord President must publish an assignment policy that will control how members, including judicial members of the tribunal, are assigned to sit in cases in each tribunal jurisdiction.

To take the first-tier tribunal as an example by reference to schedule 4, judicial members are assigned to a particular chamber by the president of the tribunals, with the consent of the relevant chamber president. Once assigned, they are selected to sit in individual cases by that chamber president under section 34. In addition, assignment by virtue of section 30 is designed to ensure that tribunal members are assigned in a way that ensures that best use is made of particular expertise in relevant areas of the law.
On all of this, the equivalent is true under the corresponding provisions for the upper tribunal. This detailed and considered scheme represents, in my view, a much more focused and rigorous way of ensuring that tribunals have as their members only those people who are most qualified to sit in any particular case.

In addition, I point out something obvious: namely, that sheriffs and judges are eminently qualified to exercise their judicial functions anywhere, whether in our courts or in our tribunals. It is not clear how Margaret Mitchell’s amendments would interact with this scheme and I consider that they are not necessary or desirable.

Amendments 16 and 17 in this group make minor adjustments to the wording of section 16 for the sake of readability but involve no change in meaning or effect.

I invite Margaret Mitchell to withdraw amendment 92.

Margaret Mitchell: Those comments were helpful and will be good to reflect on in detail for stage 3. I will not be moving amendment 92.

The Convener: You have moved amendment 92. You are asking to withdraw it.

Margaret Mitchell: I ask permission to withdraw amendment 92.

The Convener: That is what we are doing; it is not that I am cleverer than you.

Amendment 92, by agreement, withdrawn.

Amendment 16 moved—[Roseanna Cunningham]—and agreed to.

Amendment 93 not moved.

Amendment 17 moved—[Roseanna Cunningham]—and agreed to.

Amendments 94 and 95 not moved.

Amendment 18 moved—[Roseanna Cunningham]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Authorisation of others

The Convener: Amendment 19 is grouped with amendments 20 to 28.

Roseanna Cunningham: Amendment 19 will add the chairman of the Scottish Land Court, judges and sheriffs—excluding part-time sheriffs—to the list of formal office holders who can be authorised to sit in the upper tribunal. That is in order to provide consistency with the list of judges who are ordinarily eligible to sit in the upper tribunal. Their inclusion will allow further flexibility in the disposal of business in the upper tribunal, should it be required, and is consistent with the eligibility of former judicial office holders to sit within the court system.

Amendment 24 will ensure that former office holders cannot be authorised to sit if they have reached the age of 75, or if they were removed from office, or are currently subject to fitness for office proceedings.

Amendments 20 to 23 and amendment 25 will allow Scottish ministers to authorise non-Scottish judges to sit in the upper tribunal and to make arrangements with other administrations, as necessary. Amendment 25 will also require those judges to take the judicial oath if they have not done so previously. The amendments will make the provision for use of non-Scottish judges more flexible. They will also allow for use of court or tribunal judiciary from any territory outwith Scotland to sit in the upper tribunal, with the appropriate authorisations. Amendments 26 to 28 will make minor changes that are necessary to implement the other amendments.

I move amendment 19.

Amendment 19 agreed to.

Amendments 20 to 28 moved—[Roseanna Cunningham]—and agreed to.

Section 17, as amended, agreed to.

Section 18—Judicial membership

Amendments 96 and 97 not moved.

Section 18 agreed to.

Section 19—Chambers in the Tribunal

The Convener: Amendment 2, in the name of Elaine Murray, is grouped with amendments 3 to 5.

Elaine Murray: In its stage 1 report, the committee welcomed the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the first-tier tribunal, but was sympathetic to the Mental Health Tribunal for Scotland’s concerns that that commitment appears, from the policy memorandum, to be temporary. The committee recommended that amendments be lodged that would preserve the distinctiveness of the chamber.

The Mental Health Tribunal for Scotland was created under the Mental Health (Care and Treatment) (Scotland) Act 2003, with the intentions of removing jurisdiction from the generic courts in Scotland and of ensuring expertise. The MHTS has significant powers that other tribunals do not possess, including the power to deprive someone of their liberty, to impose treatment on a person and to impose conditions on how or where they may live.
The bill’s current provisions will not sufficiently protect and preserve the level of specialisation of the MHTS. The amendments in the group would do so by setting out, in amendments 2 and 3, that the MHTS must be placed within a single chamber, and by stating, in amendments 4 and 5, that it may not be transferred into the first-tier tribunal until provision has been made for a single chamber to adjudicate exclusively on mental health.

I notice that, in the notes that the minister has provided, there is an objection to the amendments on the basis that they would not allow other tribunals to be transferred into the same chamber as the Mental Health Tribunal, but that is the amendments’ very purpose. The idea is that the MHTS should remain in a chamber on its own; if we start transferring other tribunals in, we will dilute that commitment.

I move amendment 2.

The Convener: I have to say that I am sympathetic to Elaine Murray’s amendments, but let us hear what the minister has to say.

Graeme Pearson (South Scotland) (Lab): I support the amendments in the group. People who are engaged in that area of tribunal work gave strong evidence to the committee to the effect that the relationships, culture and special knowledge that are exercised in the Mental Health Tribunal are so distinctive that the tribunal deserves a section of its own, and that it is important to maintain the boundaries of that section, for fear that in future years—whether by design or by accident—the way business is conducted is changed to such an extent that it would leave people who approach the tribunal at a disadvantage, for all the reasons that Elaine Murray explained. I hope that the minister will be sympathetic to the concerns that were expressed in the evidence.

Roseanna Cunningham: Elaine Murray’s amendments seek to ensure that the bill will provide for a single chamber exclusively for the Mental Health Tribunal. As I explained in my response to the committee following stage 1, nothing—not one thing—that we are doing in the bill will affect the work of the Mental Health Tribunal for Scotland, the specialism of its members or the way in which the important decisions of that tribunal are made. There still seems to be a fundamental confusion in people’s minds between the concept of a tribunal and a chamber.

Most significantly, the Mental Health Tribunal will still be governed by the Mental Health (Care and Treatment) Scotland Act 2003—the legislation that set up the Mental Health Tribunal and governs how it works—and it will still adhere to the Millan principles. The intention is that it will be transferred into the new tribunals structure intact, with its jurisdiction unchanged.

As the committee is aware, I have made a commitment to the Mental Health Tribunal’s being in a chamber of its own in the first instance. The bill is clear that only similar subject matters can be located together in a chamber. I refer Elaine Murray to section 19, which will require that to be paramount when deciding how to organise the first-tier tribunal into chambers. That requirement is inescapable.

10:15

We should not entirely discount the possibility that a new tribunal jurisdiction could be created that would most naturally sit alongside mental health work in a chamber, and would benefit from shared chamber leadership. Even if that were to happen, section 19 will still ensure that collocation of something with mental health will be possible only if it is done in accordance with the requirement in section 19.

In any event, any creation of, or change to, the chamber structure can happen only following agreement to an affirmative order by Parliament and—where appropriate—consultation of stakeholders. Two or more jurisdictions being located in the same chamber will in no way amalgamate them or dilute their specialisms. The only thing that they will share is a chamber president. Members will continue to be appointed by subject-matter-specific criteria, and will be appointed following the recommendation of the Judicial Appointments Board for Scotland.

At section 30 there is a duty on the Lord President to publish an assignment policy, as I indicated in the debate on a previous group of amendments. Section 30(3) specifies that the policy must make use

“of the knowledge and experience of the members of the Scottish Tribunals”.

Section 35 will allow ministers by regulation to determine composition orders that show what types of members can hear what cases. The composition order can specify what relevant criteria must be met by the ordinary member. We must also not forget that it is the chamber president who will pick the individuals to hear cases in their chamber.

The bill has many safeguards that will ensure that the only people who will be able to hear cases in the mental health jurisdiction will be people who have the skill, experience and knowledge to do so. We have engaged with stakeholders on the issue, and the presidents of the Mental Health Tribunal for Scotland and the Mental Welfare Commission are content with the safeguards in the bill. They
are also content with the commitment that I made that the Mental Health Tribunal for Scotland will be in a chamber of its own in the first instance.

Elaine Murray’s amendments 2 to 5 do not offer any additional protection to the mental health jurisdiction that is not already adequately addressed by the safeguards in the bill. They would, however, restrict flexibility and the ability of a new tribunal structure to deal with new jurisdictions or approaches. I therefore ask Elaine Murray to seek to withdraw amendment 2.

Elaine Murray: I am still slightly confused by the argument about new tribunals. I would have thought that any new tribunal would be created by primary legislation; therefore, if stakeholders considered a shared tribunal to be necessary, surely there would be the opportunity to amend this legislation at that point.

The Convener: I will let the minister respond to that.

Roseanna Cunningham: It would be tempting to speculate where and in what area of wider mental health new tribunals might be set up. I do not think that that would be helpful, but we have to encompass the possibility that such new tribunals will be set up. If it does happen, it would be nonsensical not to allow for such a tribunal to be in the same chamber. Do not forget: if you were to assign the chamber to only the Mental Health Tribunal, you would create a problem if another mental health related tribunal were to be set up, for whatever reason.

Elaine Murray: My point is that any other tribunal will be set up through primary legislation and that if it became necessary to change this bill, surely it could be done through that subsequent bill.

The Convener: You are both still disagreeing, but you have aired your debate enough. I take it that you are pressing amendment 2.

Elaine Murray: Yes.

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.
Amendment 2 disagreed to.
Amendment 3 not moved.
Section 19 agreed to.
Sections 20 to 25 agreed to.

Section 26—Listed tribunals
Amendment 29 moved—[Roseanna Cunningham]—and agreed to.
Section 26, as amended, agreed to.

Schedule 1—Listed tribunals
Amendment 30 moved—[Roseanna Cunningham]—and agreed to.
Schedule 1, as amended, agreed to.
Sections 27 and 28 agreed to.
Schedule 2 agreed to.

After section 28
Amendments 31 and 32 moved—[Roseanna Cunningham]—and agreed to.
Section 29 agreed to.

Schedule 3—Appointment to First-tier Tribunal

The Convener: Amendment 33, in the name of the minister, is grouped with amendments 34 to 45 and 86 to 88.

Roseanna Cunningham: Amendments 33 and 34 will amend schedules 3 and 5 as they relate to the appointment of lawyers as legal members of the new tribunals. I have reflected on the recommendation in the committee’s stage 1 report that only people who are qualified in Scots law conduct business in devolved tribunals. The amendments will therefore remove the automatic right for a solicitor or barrister from England, Wales or Northern Ireland to be appointed as an elected member of the Scottish tribunals.

The Convener: Amendment 36 addresses the concerns that were expressed at stage 1 by the committee and the Lord President that the bill should allow the possibility of permanent appointment to the Scottish tribunals. That will be achieved by allowing Scottish ministers, by regulations, to affect the operation of schedule 7, which contains the provisions that will automatically reappoint tribunal members to five-year terms of appointment.
Scottish ministers, after consulting the president of the tribunals, may make regulations in respect of a particular appointment or position in the Scottish tribunals. For instance, the power could be used to provide that the position of chamber president of a particular chamber of the first-tier tribunal, or of vice-president of a particular division of the upper tribunal, could become a permanent appointment. That will future proof the bill and provide a more flexible scheme of appointments for jurisdictions that might transfer in, in the future.

Amendment 37 confirms the provision that where a legal member obtains a new position—for example, being appointed as a chamber president—their five-year appointment term will begin from the day on which they take up that new office. That will ensure that they will have a full five-year term in their most recently appointed office.

Amendment 86 is a transitional provision that will increase the pool of people who will be eligible to sit on the Judicial Appointments Board for Scotland and take part in recruitment exercises. That is to allow for when there is only one tribunal, or a small number of tribunals, in the new structure. As the bill is currently drafted, when the first tribunal is transferred in to the new structure, only the president of that tribunal would be eligible to sit on the Judicial Appointments Board. Amendment 86 will allow people who hold leadership positions in the tribunals that are listed in schedule 1 of the bill also to participate in the work of the Judicial Appointments Board prior to their tribunal being transferred in.

Amendments 35, 38 to 45, 87 and 88 will make the necessary adjustments, rewordings and rearrangements to implement the substantive changes, or have other minor drafting purposes.

I move amendment 33.

Roderick Campbell: I thank the minister for taking note of the committee’s and the Lord President’s comments on the need to provide flexibility for permanent appointments.

The Convener: You just future proofed your career by thanking the Lord President, Roddy.

Margaret Mitchell: I take it that the original reason for including English barristers as legal members of the tribunals was to ensure that wider expertise would be available. By taking on board the committee’s recommendation that only people who are qualified in Scots law should be eligible, thereby removing English barristers, will we be removing the possibility of using the expertise of such barristers, who may also be qualified in Scots law?

Roseanna Cunningham: If the person is qualified in Scots law, they will be qualified in terms of the bill. Such people will have to be members of the Faculty of Advocates or the Law Society of Scotland. I am aware that there are people who are qualified in both jurisdictions; it is not common, but it does happen. I might be right in saying that a member of the committee is qualified in both jurisdictions.

Roderick Campbell: No—only historically.

Roseanna Cunningham: I am sorry; I thought that you were qualified in both jurisdictions.

Roderick Campbell: I was once upon a time, minister, but I am authorised to practise only in Scotland at present.

Roseanna Cunningham: Some people qualify in both jurisdictions, or in more than one jurisdiction—the provision applies to jurisdictions other than the English jurisdiction.

The Convener: That was quite a sweet little exchange in a rather dull process.

Elaine Murray: I know that the UK Government is not keen on this at the moment, but in the event of the reserved tribunals transferring across into our jurisdiction, would there be a problem with excluding barristers?

Roseanna Cunningham: That is why I have put it on the record that if there is a need to reintroduce provisions in the future, we will do so. However, the bill is directed only at the devolved tribunals.

Christine Grahame: Do you wish to wind up, or have you answered all the questions?

Roseanna Cunningham: I think that we have done that.

Amendment 33 agreed to.

Schedule 3, as amended, agreed to.

Schedule 4 agreed to.

Schedule 5—Appointment to Upper Tribunal

Amendment 34 moved—[Roseanna Cunningham]—and agreed to.

Schedule 5, as amended, agreed to.

Schedule 6 agreed to.

Sections 30 and 31 agreed to.

Section 32—Conditions of membership etc

Amendments 35 and 36 moved—[Roseanna Cunningham]—and agreed to.

Section 32, as amended, agreed to.
Schedule 7—Conditions of membership etc
Amendments 37 to 45 moved—[Roseanna Cunningham]—and agreed to.
Schedule 7, as amended, agreed to.
Section 33 agreed to.

Schedule 8—Conduct and fitness etc
The Convener: Amendment 46, in the name of the minister, is grouped with amendments 47 and 48.

Roseanna Cunningham: I will be brief. The Lord President raised concerns in his stage 1 written evidence about the possibility that a fitness assessment tribunal could be convened without a full-time judge. By removing the provision for part-time sheriffs, excluding temporary judges and making other changes, amendment 46 ensures that there will always be a full-time judicial member in the composition of a fitness assessment tribunal.

I move amendment 46.
Amendment 46 agreed to.
Amendments 47 and 48 moved—[Roseanna Cunningham]—and agreed to.
Schedule 8, as amended, agreed to.

Section 34—Decisions in the Tribunal
Amendment 49 moved—[Roseanna Cunningham]—and agreed to.
Section 34, as amended, agreed to.
Section 35 agreed to.

Section 36—Decisions in the Tribunal
Amendments 50 and 51 moved—[Roseanna Cunningham]—and agreed to.
Section 36, as amended, agreed to.
Section 37 agreed to.

After section 37
Amendments 52 and 53 moved—[Roseanna Cunningham]—and agreed to.
Sections 38 to 44 agreed to.

Section 45—Procedure on second appeal
10:30
The Convener: Amendment 54, in the name of the minister, is grouped with amendments 55 and 56.

Roseanna Cunningham: Amendments 54 and 55 are minor drafting adjustments. They align the language of the second appeals test exactly with other statutory examples of the test.

Amendment 56 deals with switching off appeal rights. The Delegated Powers and Law Reform Committee felt that section 48(2) allowed a choice of appeal routes, so we lodged amendment 56 to ensure that no choice of appeal routes can or would be created.

I move amendment 54.
Amendment 54 agreed to.

Amendment 55 moved—[Roseanna Cunningham]—and agreed to.
Section 45, as amended, agreed to.
Sections 46 and 47 agreed to.

Section 48—Other appeal rights
Amendment 56 moved—[Roseanna Cunningham]—and agreed to.
Section 48, as amended, agreed to.
Sections 49 to 55 agreed to.

The Convener: I sense that we are running out of steam. That was a very limp “agreed”. Try to be enthusiastic.

Section 56—Venue for hearings
The Convener: Amendment 57, in the name of the minister, is grouped with amendments 58 to 66, 69 to 72 and 85. Amendment 85 is pre-empted by amendment 99, which is in the group entitled “Rule-making: transitional arrangements”.

Roseanna Cunningham: Amendments 57 to 59 clarify that hearings can be held at any time and at any place in Scotland. They allow tribunal rules to determine when and where hearings take place; they also allow the determination of when and where hearings take place to be made by the president of the tribunals, under tribunal rules. The amendments better explain the role and function of tribunal rules and of the president of the tribunals as regards the issue.

Amendments 60 to 66 and 85 make minor adjustments, rearrangements and changes for the sake of overall sense and effect. For instance, amendments 63 to 66 rearrange the provisions on wasted expenses for improved readability.

Amendments 69 to 72 make some adjustments to section 63 concerning the way in which tribunal rules may deal with the functions of members of the Scottish tribunals. The amendments clarify that rules may also confer functions on, and deal with the functions of, the particular postholders that are listed in amendment 72. Amendment 71 clarifies
that that does not refer to the function of actually deciding any matter in a case before the first-tier or upper tribunal. Rather, it refers to the procedural or administrative functions of tribunal members and those in leadership posts.

I move amendment 57.

Elaine Murray: In the stage 1 debate, we touched on the issue of wasted expenses, but none of us was terribly sure what wasted expenses are—including yourself, I think. There seems to be no definition of wasted expenses. Will that be addressed at stage 3?

Roseanna Cunningham: I see one of my officials scribbling furiously. We may get some clarity shortly.

The Convener: I think that somebody will say that it means a pair of shoes that I should not have bought.

Roseanna Cunningham: I have received my note—this is transparent government; I hope that you are impressed.

Wasted expenses are awarded to express judicial disapproval of unnecessary steps in litigation.

I guess that it is one of those legal terms that do not mean, legally, what they might mean in ordinary English.

The Convener: Not shoes, then.

Roseanna Cunningham: There are a few similar expressions. Basically, it concerns judicial disapproval. It sounds almost like a punishment expense. I see my officials nodding, so that is what it is. I hope that that helps people to understand it better.

The Convener: Our resident advocate is about to speak.

Roderick Campbell: It is a purely English concept at the present time.

The Convener: Well, there we are.

Roderick Campbell: Section 59(4) provides that rules may prescribe a meaning for wasted expenses. The minister may wish to take that on board and define the term at some stage.

The Convener: You should be sitting over there with the officials. I am so sorry—I am offending the officials; I am getting looks from them.

We have exhausted the discussion on what wasted expenses are, but we have not wasted time talking about the topic.

Amendment 57 agreed to.

Amendments 58 and 59 moved—[Roseanna Cunningham] and agreed to.

Section 56, as amended, agreed to.

Section 57—Conduct of cases

Amendment 60 moved—[Roseanna Cunningham] and agreed to.

Section 57, as amended, agreed to.

Section 58 agreed to.

Section 59—Award of expenses

Amendments 61 to 66 moved—[Roseanna Cunningham] and agreed to.

Section 59, as amended, agreed to.

Sections 60 and 61 agreed to.

After section 61

The Convener: Amendment 67, in the name of the minister, is grouped with amendment 84.

Roseanna Cunningham: Amendment 67 allows offences to be created in connection with tribunal proceedings, such as those of making false statements and concealing or destroying evidence. Where tribunal jurisdictions require such a provision, the Scottish ministers will be able to make it under the proposed new section. That is consistent with the equivalent provisions governing the Mental Health Tribunal for Scotland. The amendment also allows regulations to be made that specify the circumstances in which a person cannot be compelled to give or produce evidence.

Amendment 84 is consequential on amendment 67.

I move amendment 67. Amendment 67 agreed to.

Section 62—Tribunal Rules

Amendment 68 not moved—[Elaine Murray]. Section 62 agreed to.

Section 63—Exercise of functions

Amendment 69 to 72 moved—[Roseanna Cunningham] and agreed to.

Section 63, as amended, agreed to.

Section 64—Extent of rule-making

Amendment 73 moved—[Roseanna Cunningham] and agreed to.

Section 64, as amended, agreed to.

Section 65—Proceedings and steps

Amendment 74 moved—Roseanna Cunningham and agreed to.
Section 65, as amended, agreed to.

Section 66—Hearings in cases
Amendment 75 moved—[Roseanna Cunningham]—and agreed to.
Section 66, as amended, agreed to.

Section 67—Evidence and decisions
Amendment 76 moved—[Roseanna Cunningham]—and agreed to.
Section 67, as amended, agreed to.

Section 68—Practice directions
The Convener: Amendment 77, in the name of the minister, is grouped with amendments 78 to 81.

Roseanna Cunningham: We were persuaded by the arguments made by stakeholders and in the evidence at stage 1 that practice directions should not issue guidance on the interpretation of the law. Amendment 77 removes that provision.

The Delegated Powers and Law Reform Committee recommended that there should be a statutory requirement for directions to be published. Amendment 79 requires the president of the tribunals to arrange for the publication of directions.

Amendments 78 to 81 rearrange the provisions of sections 68 and 69 as a consequence of those changes, in light of other amendment and for other minor purposes.

I move amendment 77.

Roderick Campbell: I thank the minister for listening to the considerable concerns about section 68(5), and I welcome its proposed removal.

Amendment 77 agreed to.

Amendment 78 moved—[Roseanna Cunningham]—and agreed to.
Section 68, as amended, agreed to.

Section 69—Reconciling differences
Amendments 79 to 81 moved—[Roseanna Cunningham]—and agreed to.
Section 69, as amended, agreed to.

Section 70—Tribunal fees
The Convener: Amendment 82, in the name of the minister, is in a group on its own.

Roseanna Cunningham: The committee recommended at stage 1 that there should be a requirement for consultation if there were any plans to introduce fees for tribunals where there were no fees previously. Members will remember that we discussed fees and noted that one tribunal had already been set up with fees being charged as part of the structure.

Amendment 82 places a duty on Scottish ministers to consult stakeholders with an interest in tribunals before making any regulations with regard to the introduction of fees. As I stated in my response to the committee’s stage 1 report, the Scottish Government does not intend to use the provisions in section 70 to introduce new fees for tribunals.

I move amendment 82.

Elaine Murray: I welcome the amendment, given that there were concerns in particular about the scale of fees in some of the reserved tribunals, such as the employment tribunals. It is good to see a guarantee that consultation will take place if there are any such plans.

The Convener: We did our work at stage 1, and got a response.

Amendment 82 agreed to.
Section 70, as amended, agreed to.
Sections 71 and 72 agreed to.

Section 73—Regulation-making
Amendments 83 and 84 moved—[Roseanna Cunningham]—and agreed to.
Section 73, as amended, agreed to.
Sections 74 and 75 agreed to.

Schedule 9—Transitional and consequential
The Convener: Amendment 98, in the name of Margaret Mitchell, is grouped with amendment 99. If amendment 99 is agreed to, I cannot call amendment 85, which was previously debated in the group on tribunal rules, because of pre-emption.

Margaret Mitchell: Amendments 98 and 99 relate to the issue of tribunal independence. The bill currently allows Scottish ministers to draft procedural rules by virtue of paragraph 4 of schedule 9. The Scottish Government intends that that will be an interim arrangement until the newly created Scottish Civil Justice Council has the capacity to take over the responsibility for those rules.

The council will certainly have a very heavy workload in drafting new civil court procedural rules, and I understand and agree with the Government’s intention to ensure that the rules are drafted as soon as possible. I also appreciate
that someone has to draft the rules for the newly created upper tribunal.

In response to the committee’s stage 1 report, the ministers made the point that the Government currently has a limited role in writing some tribunal rules and that, under the new tribunal landscape, it will draft rules only following consultation. However, the committee heard at stage 1 that that arrangement was undesirable on constitutional grounds. The Faculty of Advocates argued that the Scottish ministers should have the same rights as other parties to proceedings before tribunals to comment on proposed rules, but that they should not have the power to write them. That is a very serious matter. In fact, decisions that are taken by the Scottish ministers and Scottish Government agencies can themselves be subject to tribunal consideration. That means that, as the interim power provision stands, the Scottish Government is effectively acting as linesman in a match in which it is participating.

10:45

The interim rule-making power gives ministers more power than they currently enjoy. That is because the rules have to be written for the upper tribunal, which will deal with cases that are more serious and therefore more politically sensitive. Furthermore, the rule-making power does not specify a time limit, meaning that the Scottish ministers could retain the power indefinitely. I do not consider that to be a satisfactory situation, because giving the power to ministers, even as an interim measure, breaches the important principle of separation of powers.

Additionally, there are potential problems for the future if an agreed party who has lost a tribunal hearing against the Government later learns that the rules were drafted by the Scottish ministers. I understand why the bill takes the approach that it does, given the fact that the Scottish Civil Justice Council has a huge task ahead of it, but the Government could and should ensure that the Scottish Civil Justice Council is appropriately resourced to take on the role from the start. A new committee of the Scottish Civil Justice Council will be created at some point down the line, so it should be created now.

Amendment 98 therefore seeks to replace the relevant provisions in paragraphs 4 and 5 of schedule 9 to ensure that rules that are currently in place are to be regarded as if they are new tribunal rules until and if those rules are amended.

I move amendment 98.

Roderick Campbell: I heard what Margaret Mitchell said and I have a great deal of sympathy with it. In constitutional terms, it is clearly not ideal at all, and a number of stakeholders gave evidence to that effect. On the other hand, the practicality is that we also heard evidence that there is no way that the Scottish Civil Justice Council could embark upon this venture at the moment.

Would it be possible for the minister to reflect before stage 3 on whether there ought to be some provision that any rules made by the Government in the short term, even after consultation, would be subject to a prompt review by the Scottish Civil Justice Council at some point so that it would not necessarily be allowed to carry on ad infinitum without being subject to a proper and full review?

Roseanna Cunningham: We always listen to suggestions, so we will take that on board and have a think about it. I need to restate that the transitional provision is what happens currently and it has been the case for all previous Governments and ministers, not just this Government. We are discussing the way that things have been done throughout the tribunal experience. As a result of the conversations that we have had about this legislation, we might now come to the view that that state of affairs should come to an end. That is what we have done, in effect. All that the bill does is ensure that the transition towards that end point is as seamless as it can be. It does not confer any new powers on ministers, regardless of who is in Government. It simply continues the existing powers that ministers have always been able to exercise, and it foresees that there will be an end point to that situation.

In his written evidence at stage 1, the Lord President supported the transitional arrangements for the making of tribunal rules by the Scottish ministers. Discussions with his judicial office indicated that the Lord President would like to concentrate on the significant task of rewriting the court rules before taking on the work of tribunals. The transitional arrangements are merely a continuation of the current practice. I would not wish to place an additional burden on the Lord President and the Scottish Civil Justice Council before they felt able to take on the new task. Neither the removal of the transitional period by amendment 99, nor the consequential change to the nature of rules during the transitional period by amendment 98 are therefore desirable.

I am satisfied that the detailed scheme in schedule 9 for transitional rule making is the best way forward. The transitional phase, during which rules are made by the Scottish ministers, has additional protection built in. Rules are subject to negative parliamentary procedure and a consultation requirement is imposed on the Scottish ministers.

I believe that that is a sufficient safeguard to ensure that any rules that the Scottish ministers make are suitable for application in the tribunals.
system. I remind members that ministers make rules now and have done so for many decades. That procedure will continue, and in making rules, ministers will always take expert advice. This area of the bill is really about timing and not resources. We have committed to providing the resources when required by the Scottish Civil Justice Council and the Lord President. I therefore ask Margaret Mitchell to withdraw amendment 98.

Margaret Mitchell: I thank the minister for her comments, but I do not find them convincing. The fact that something has been done in a certain way in the past does not necessarily mean that it should continue to be done in that way. We are looking at a new set of circumstances, and the powers are greater because they relate to the upper tribunal, which has the potential to deal with serious and politically sensitive cases.

I do not believe that the minister addressed the problem that could arise if the Scottish Government wins a tribunal case to which it is subject and the person who loses it then discovers that it was the ministers who set the rules.

I fully understand that the new committee of the Scottish Civil Justice Council that will be created will have its hands full with civil procedural rules, and I understand that the Lord President will want to get on with that work. However, that does not prevent the council from being adequately resourced to allow it to deal with the interim rules in the meantime.

For all those reasons, I press amendment 98.

The Convener: The question is, that amendment 98 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Mitchell, Margaret (Central Scotland) (Con)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 98 disagreed to.

Amendment 85 moved—[Roseanna Cunningham]—and agreed to.

Amendments 4 and 5 not moved.

Amendments 86 to 88 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 89, in the name of Elaine Murray, is grouped with amendments 90 and 91.

Elaine Murray: Citizens Advice Scotland, which, as we all know, specialises in taking people through the tribunals process, advises that, in Scotland, there has been a clear and statutory link between the oversight of tribunals and the making of procedural rules since 1957, but that that is broken by the bill. CAS has major concerns about the current arrangements and the gap between oversight and the making of rules. It points out that the functions of the Scottish Civil Justice Council are imbalanced with regard to the treatment of administrative and civil justice. The SCJC has much wider policy and oversight functions for civil justice and the scope of what it can achieve for tribunals is much narrower.

As the committee is aware, an interim committee on administrative justice and tribunals is to be established as an independent advisory committee for ministers, and ministers will exercise the function of making procedural rules. At some stage, that function will pass to the SCJC, but without the duties of oversight and development being defined. My amendments 89 to 91 seek to remedy that by giving the SCJC the same statutory functions for administrative justice as it holds for civil justice. Amendment 89 requires the SCJC
“to keep matters relating to the administrative justice system within the jurisdiction of the Scottish Tribunals under review”.

Amendment 90 inserts a duty

“to provide advice and make recommendations to the Lord President on the development of, and changes to” such matters. Amendment 91 requires the SCJC to provide advice on any such matter “as may be requested by the Lord President.”

I move amendment 89.

Roderick Campbell: I heard what Elaine Murray said. Obviously, I raised the issue in the stage 1 debate, and I have read the Citizens Advice Scotland briefing. I have considerable sympathy with what has been proposed, because it seems to me that a gap will emerge, but there is an interim committee and things rather depend on what happens after it. At this stage, it seems to me that, if we were to agree to Elaine Murray’s amendment, we would reduce the flexibility to think about how the tribunals system would be best overseen in the future.

I would be very pleased to hear the minister’s views on the matter.

The Convener: I endorse what Roddy Campbell said. I am very sympathetic to the position of CAS, which is really the link between the perceived informality of the tribunals system and tribunals. It provides an important service there. Therefore, I, too, am interested in the minister’s response.

Roseanna Cunningham: I think that I need to remind members that administrative justice is wider than tribunals and that it covers all redress mechanisms for citizens to challenge or complain about decisions that public bodies have made. It is not confined to what happens in tribunals. Obviously, it includes the courts and tribunals.

It is more appropriate that those who will have an overview are not part of the system that they scrutinise. I have set up a non-statutory committee to keep the administrative justice and tribunal landscape under review, and that committee’s work is already well under way. It is developing its work plan, and I understand that it will hold a stakeholder event in April and publish its progress online.

Elaine Murray’s suggested addition to the bill would replicate work that is already under way, which is wider than on tribunals alone. The bill ensures that the Scottish Civil Justice Council must establish a particular committee for the purpose of making tribunal rules. That committee will be chaired by the president of the tribunals, who, when selecting members of the committee, will have to consider the need to choose members who have knowledge of how the Scottish tribunals exercise their functions. I believe that that safeguard will ensure that tribunal rules are made with the appropriate expertise and with the user in mind. Therefore, I ask Elaine Murray to withdraw amendment 89.

Elaine Murray: Would it be possible to get more detail prior to stage 3 on the process that is under way? I am content not to press the amendments pending seeing a bit more detail on that process.

Roseanna Cunningham: The existence of the interim committee is in no doubt, and I can ensure that something straightforward is put to members that explains what is currently happening and what the immediate future holds. However, I am not sure when stage 3 will be and therefore where the interim committee’s work will be at by the time that we discuss it at stage 3.

Elaine Murray: I am content not to press the amendments. I hope that we can get more detail.

Amendment 89, by agreement, withdrawn.

Amendments 90 and 91 not moved.

Schedule 9, as amended, agreed to.

Section 76, schedule 10 and sections 77 and 78 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the committee, the minister and her officials very much. We move into private session.
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An Act of the Scottish Parliament to establish the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland; and for connected purposes.
(2) In that capacity, the Lord President has the functions exercisable by him or her by virtue of this Act.

3 **Upholding independence**

(1) The following persons must uphold the independence of the members of the Scottish Tribunals—

(a) the First Minister,
(b) the Lord Advocate,
(c) the Scottish Ministers,
(d) members of the Scottish Parliament,
(e) all other persons with responsibility for matters relating to—

(i) the members of the Scottish Tribunals, or
(ii) the administration of justice,

where that responsibility is to be discharged only in or as regards Scotland.

(2) In particular, the First Minister, the Lord Advocate and the Scottish Ministers—

(a) must not seek to influence particular decisions of the members of the Scottish Tribunals through any special access to the members, and
(b) must have regard to the need for the members to have the support necessary to enable them to carry out their functions.

**President of the Tribunals**

4 **Assignment to office**

(1) There is established the office to be known as that of President of the Scottish Tribunals.
(2) It is for the Lord President to assign a person to that office.
(3) An assignment of a person to that office continues for as long as the Lord President considers appropriate.
(4) The Lord President may nominate a Vice-President of the Upper Tribunal to act temporarily in that office—

(a) if a person assigned to that office is for the time being unable to act in it, or
(b) pending an assignment of a person to that office.
(5) A person assigned to that office under subsection (2) or nominated to act in it under subsection (4) must be a judge of the Court of Session (but may not be a temporary judge).

5 **Functions of office**

(1) Under the headship of the Lord President, the President of Tribunals is the senior member of the Scottish Tribunals.
(2) The President of Tribunals has the functions exercisable by him or her by virtue of this Act.
(3) In this Act, a reference to the President of Tribunals is to the President of the Scottish Tribunals (and a reference to the office of President of Tribunals is to be read accordingly).

CHAPTER 2

OVERARCHING RESPONSIBILITIES

Head of the Tribunals

6 Representation of interests

The Lord President is responsible for—

(a) representing the views of the membership of the Scottish Tribunals to—

(i) the Scottish Ministers, and

(ii) the Scottish Parliament,

(b) laying before the Scottish Parliament written representations on matters that appear to the Lord President to be of importance in relation to the Scottish Tribunals (including as to the administration of justice).

7 Business arrangements

(1) The Lord President is responsible for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals.

(2) The Lord President is responsible for ensuring that appropriate arrangements are made and maintained as to the welfare of the members of the Scottish Tribunals.

8 Delegation of functions

(1) The Lord President may delegate to the President of Tribunals the exercise of any of the functions mentioned in subsection (2).

(2) That is, the functions exercisable by the Lord President by virtue of—

(a) section 7(1) or (2),

(b) section 30(1) or (2), or

(c) section 31(1) or (2).

9 Directions on functions

(1) The Lord President may give directions to the President of Tribunals as to the exercise of the functions exercisable by the President of Tribunals by virtue of this Act.

(2) Directions under subsection (1) may—

(a) vary or revoke earlier such directions,

(b) relate to particular functions or functions generally.
Regulations by Ministers

10 Authority under regulations

(1) Regulations under section 19(2) or 22(2) may—
   (a) delegate to the Lord President authority to make arrangements of the kind to which that section relates,
   (b) include provision relying on the effect of Tribunal Rules.

(2) Regulations under section 35(1), 37(1) or 37A(1) may—
   (a) delegate to the President of Tribunals authority to determine the things to which that section relates,
   (b) include provision relying on the effect of Tribunal Rules.

(3) Delegation of authority under subsection (1) or (2) is subject to such provision about the exercise or sub-delegation of the authority as may be made in the regulations referred to in that subsection.

11 Consultation on regulations

(1) Before making regulations under section 19(2) or 22(2), the Scottish Ministers must—
   (a) obtain the Lord President’s approval,
   (b) consult such other persons as they consider appropriate.

(2) Before making regulations under section 35(1), 37(1) or 37A(1), the Scottish Ministers must consult the President of Tribunals.

11A Principle to be observed

(1) In exercising their regulation-making functions under this Act, the Scottish Ministers must have regard to the principle below.

(2) In exercising their leadership functions under this Act, the Lord President and the President of Tribunals must have regard to the principle below.

(3) The principle is the need for proceedings before the Scottish Tribunals—
   (a) to be accessible and fair, and
   (b) to be handled quickly and effectively.
PART 2
ORGANISATIONAL ARRANGEMENTS

CHAPTER 1
MEMBERSHIP TYPES

Overview and main types

12 Overview of membership

(1) Each of the First-tier Tribunal and the Upper Tribunal is to consist of its ordinary, legal and judicial members.

(2) Any type of member of the First-tier Tribunal or the Upper Tribunal is not, merely by reason of having that type of membership of the Tribunal, precluded from having any type of membership of the other Tribunal.

(3) In this Act, the references to the members of the Scottish Tribunals are to—

(a) the ordinary and legal members of either or both of the Tribunals by virtue of sections 14 and 15, and

(b) the judicial members of either or both of the Tribunals by virtue of section 16 (as read with section 18).

13 Capacity of members

(1) Membership of the Scottish Tribunals as an ordinary or legal member of the Tribunals has the effect of granting such a member judicial status and capacity for the purpose for which this section makes provision.

(2) For avoidance of doubt—

(a) a judicial member of the Scottish Tribunals has judicial status and capacity for the purpose for which this section makes provision by reason of holding judicial office,

(b) an extra judge derives judicial status and capacity in relation to the Upper Tribunal for the purpose for which this section makes provision from authorisation to act as mentioned in section 17(5).

(3) This section makes provision—

(a) in the case of an ordinary, legal or judicial member of the Scottish Tribunals, for the purpose of holding the position of and acting as such a member,

(b) in the case of an extra judge of the Upper Tribunal, for the purpose of holding that position and acting as mentioned in section 17(5).

14 First-tier members

(1) A person is an ordinary member of the First-tier Tribunal if the person is that type of member of the First-tier Tribunal through—

(a) transfer-in as such by virtue of section 28(b), or

(b) appointment as such by virtue of section 29(1).

(2) A person is a legal member of the First-tier Tribunal if the person is—
(a) that type of member of the First-tier Tribunal through—
   (i) transfer-in as such by virtue of section 28(b), or
   (ii) appointment as such by virtue of section 29(1), or
(b) however holding the position, a Chamber President or Deputy Chamber President in the First-tier Tribunal.

(3) Despite subsection (2)(b), a person assigned as a Temporary Chamber President in the First-tier Tribunal, if a judicial member of the Tribunal, remains such a member of the Tribunal.

15 Upper members

(1) A person is an ordinary member of the Upper Tribunal if the person is that type of member of the Upper Tribunal through—
   (a) transfer-in as such by virtue of section 28(b), or
   (b) appointment as such by virtue of section 29(3).

(2) A person is a legal member of the Upper Tribunal if the person is—
   (a) that type of member of the Upper Tribunal through—
      (i) transfer-in as such by virtue of section 28(b), or
      (ii) appointment as such by virtue of section 29(3),
   (b) however holding the position, a Chamber President in the First-tier Tribunal except a Temporary Chamber President, or
   (c) however holding the position, a Vice-President of the Upper Tribunal.

(3) Despite subsection (2)(c)—
   (a) a person assigned as a Vice-President of the Upper Tribunal under section 24(1) or (2) remains a judicial member of the Tribunal,
   (b) a person assigned as a Temporary Vice-President of the Upper Tribunal, if a judicial member of the Tribunal, remains such a member of the Tribunal.

Judiciary eligible to sit

16 Sheriffs and judges

(1) By reason of holding judicial office, a person is eligible to act as a member of the First-tier Tribunal if the person is a sheriff (including a part-time sheriff).

(2) By reason of holding judicial office, a person is eligible to act as a member of the Upper Tribunal if the person is—
   (a) apart from the Lord President and the President of Tribunals, a judge of the Court of Session (including a temporary judge),
   (b) the Chairman of the Scottish Land Court, or
   (c) a sheriff (except a part-time sheriff).

(3) A sheriff may act as a member of—
   (a) the First-tier Tribunal, or
(b) the Upper Tribunal,

only if authorised to do so by the President of Tribunals.

(4) A judge of the Court of Session or the Chairman of the Scottish Land Court may act as a member of the Upper Tribunal only if authorised to do so by the President of Tribunals (but see next instead for the Lord President and the President of Tribunals).

(5) By reason of holding office within the Scottish Tribunals, each of the Lord President and the President of Tribunals is a member of the Upper Tribunal and needs no further authorisation to act as such.

(6) An authorisation for the purpose of subsection (3)(a) or (b) or (4)—

(a) requires—

(i) the Lord President’s approval (including as to the person to be authorised), and

(ii) the agreement of the person concerned,

(b) in the case of a sheriff (apart from a sheriff principal), also requires the concurrence of the relevant sheriff principal.

(7) An authorisation for the purpose of subsection (3)(a) or (b) or (4) remains in effect until such time as the President of Tribunals may determine (with the same approval, agreement and concurrence as is referred to in subsection (6)).

17 Authorisation of others

(1) If requested to do so by the President of Tribunals, the Scottish Ministers may issue a temporary authorisation for a person falling within subsection (2) to assist in the disposal of the business of the Upper Tribunal.

(2) A person falls within this subsection if the person is—

(a) a former—

(i) judge of the Court of Session (including temporary judge),

(ii) Chairman of the Scottish Land Court, or

(iii) sheriff (except part-time sheriff), or

(b) a judge of a court or tribunal in a country or territory outwith Scotland (whether or not another part of the United Kingdom).

(3) Any request for the purpose of subsection (1) may not be made without—

(a) the Lord President’s approval, and

(b) the agreement of the person concerned.

(5) An authorisation under subsection (1) is for the person concerned to act as if a judicial member of the Upper Tribunal during the period for which it is issued.

(6) The period mentioned in subsection (5)—

(a) requires the same approval and agreement as is referred to in subsection (3), and

(b) may be extended by the Scottish Ministers (with such approval and agreement).
(7) The Scottish Ministers may make payments of sums with respect to any time spent by a person while acting as mentioned in subsection (5) by virtue of authorisation under subsection (1).

(7A) An authorisation under subsection (1) may not be issued if the person concerned—
(a) is aged 75 years or over, or
(b) has been removed from judicial office because of unfitness by reason of inability, neglect of duty or misbehaviour (or is for the time being suspended from such office in connection with an investigation into the question of such unfitness).

(7B) In the case of a person mentioned in subsection (2)(b)—
(a) subsections (1) and (6) are subject to such further arrangements as the Scottish Ministers may make with a governmental or other body in the person’s country or territory for the purposes of those subsections,
(b) if the person has not previously taken the required oaths, the person must take them in the presence of the President of Tribunals before acting as mentioned in subsection (5).

(8) In addition—
(a) the previous taking by a person of the required oaths counts (so far as necessary) as if it were the taking of them in connection with acting as mentioned in subsection (5),
(b) section 3 applies in relation to a person who is authorised to act as mentioned in subsection (5)—
(i) as it does in relation to the members of the Scottish Tribunals, and
(ii) during the period for which the relevant authorisation is issued.

(8A) In this section, “the required oaths” means the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868.

18 Judicial membership

(1) In this Act, a reference to a judicial member of the First-tier Tribunal is to a sheriff who is authorised for the purpose of section 16(3)(a).

(2) In this Act, a reference to a judicial member of the Upper Tribunal is to—
(a) the Lord President or the President of Tribunals, or
(b) a person who is authorised for the purpose of section 16(3)(b) or (4).

(3) A reference in this Act to a judicial member of the Upper Tribunal does not include an extra judge even where authorised to act as mentioned in section 17(5).

(4) In this Act, a reference to an extra judge in relation to the Upper Tribunal is to a person falling within section 17(2) (as read with section 17(5)).
CHAPTER 2
INTERNAL STRUCTURE

Structure of First-tier Tribunal

19 Chambers in the Tribunal
(1) The First-tier Tribunal is to be organised into a number of chambers, having regard to—
(a) the different subject-matters falling within the Tribunal’s jurisdiction, and
(b) any other factors relevant in relation to the exercise of the Tribunal’s functions.

(2) Accordingly, the Scottish Ministers may by regulations make provision for and in connection with—
(a) the organisation of the Tribunal as required by subsection (1),
(b) the allocation of the Tribunal’s functions between the chambers.

20 Chamber Presidents
(1) Each chamber of the First-tier Tribunal is to have—
(a) a single Chamber President to preside over the chamber, or
(b) two Chamber Presidents to preside over the chamber.

(2) A Chamber President may not preside over more than one chamber of the Tribunal at the same time.

(3) In this Act—
(a) a reference to a Chamber President in the First-tier Tribunal is to a Chamber President of a chamber of the Tribunal,
(b) where a chamber of the Tribunal has two Chamber Presidents, a reference to a Chamber President of such a chamber is to either or both of them (as the context requires).

21 Appointment to post
(1) It is for the Scottish Ministers to make an appointment of a Chamber President to that position.

(2) Before making an appointment under subsection (1), the Scottish Ministers must consult the Lord President (including as to the person to be appointed).

(3) A person is eligible for appointment under subsection (1) only if the person is—
(a) a legal member of the Upper Tribunal, or
(b) if not falling within paragraph (a), eligible to be appointed as such a member of the Tribunal (whether or not already any type of member of the First-tier or Upper Tribunal).

(4) An appointment made under subsection (1) is for the Chamber President to preside over a particular chamber of the Tribunal.
Structure of Upper Tribunal

22 Divisions of the Tribunal

(1) The Upper Tribunal is to be organised into a number of divisions, having regard to—
(a) the different subject-matters falling within the Tribunal’s jurisdiction, and
(b) any other factors relevant in relation to the exercise of the Tribunal’s functions.

(2) Accordingly, the Scottish Ministers may by regulations make provision for and in connection with—
(a) the organisation of the Tribunal as required by subsection (1),
(b) the allocation of the Tribunal’s functions between the divisions.

23 Vice-Presidents

(1) Each division of the Upper Tribunal is to have—
(a) a single Vice-President to preside over the division, or
(b) two Vice-Presidents to preside over the division.

(2) A Vice-President may not preside over more than one division of the Tribunal at the same time.

(3) Subsections (1) and (2) are subject to section 24(1)(b).

(4) In this Act—
(a) a reference to a Vice-President of the Upper Tribunal is to a Vice-President of a division of the Tribunal,
(b) where a division of the Tribunal has two Vice-Presidents, a reference to a Vice-President of such a division is to either or both of them (as the context requires).

24 Assignment to post

(1) The President of Tribunals may assign himself or herself—
(a) as a Vice-President of the Upper Tribunal,
(b) to preside over one or more than one division of the Tribunal.

(2) Apart from the Lord President, any other judicial member of the Upper Tribunal may be assigned by the President of Tribunals—
(a) as a Vice-President of the Tribunal,
(b) to preside over a particular division of the Tribunal.

(3) Assignment under subsection (1)—
(a) remains in effect until such time as the President of Tribunals may determine,
(b) does not affect the exercise by the President of Tribunals of the functions arising in that capacity.

(4) Assignment under subsection (2)—
(a) requires—
Part 3—Acquisition of functions

(i) the Lord President’s approval (including as to the judicial member to be assigned),
(ii) the assignee’s agreement,
(b) remains in effect until such time as the President of Tribunals may determine (with such approval and agreement),
(c) does not affect the exercise by the assignee of any other functions as respects the Scottish Tribunals.

25 Appointment to post

(1) If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a person as a Vice-President of the Upper Tribunal.
(2) Before making an appointment under subsection (1), the Scottish Ministers must consult the Lord President (including as to the person to be appointed).
(3) A person is eligible for appointment as a Vice-President only if the person is—
   (a) a legal member of the Upper Tribunal, or
   (b) if not falling within paragraph (a), eligible to be appointed as such a member of the Tribunal (whether or not already any type of member of the First-tier or Upper Tribunal).
(4) An appointment made under subsection (1) is for the Vice-President to preside over a particular division of the Tribunal.

PART 3

ACQUISITION OF FUNCTIONS

Transfer-in from listed tribunals

26 Listed tribunals

(1) For the purposes of this Part, the listed tribunals are the tribunals for the time being included in the list in Part 1 of schedule 1 as read in conjunction with the further specification in Part 2 of that schedule.
(2) The Scottish Ministers may by regulations modify—
   (a) the list in Part 1 of schedule 1,
   (b) the further specification in Part 2 of that schedule.
(3) Regulations under subsection (2) may add a tribunal to the list only if it is established by or under an enactment (whenever passed or made).
(4) In this section, the references to a tribunal include any body, office-holder or individual having decision-making functions that are exercisable in the manner of a tribunal (but only in so far as such functions are so exercisable).
(5) But the references in this section to a tribunal do not include—
   (a) any of the Scottish courts referred to in section 2 of the Judiciary and Courts (Scotland) Act 2008 (see subsection (6) of that section),
   (b) the Scottish Land Court,
(c) a tribunal—
   (i) constituted under section 35 of the Judiciary and Courts (Scotland) Act 2008,
   (ii) constituted under section 12A of the Sheriff Courts (Scotland) Act 1971, or
   (iii) appointed under section 71(2) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, or
   (d) a fitness assessment tribunal constituted under paragraph 13 of schedule 8.

27 Transfer-in of functions

(1) The functions of each of the listed tribunals are to become the functions of the Scottish Tribunal at such time and in so far as the Scottish Ministers consider appropriate.

(2) Accordingly, the Scottish Ministers may by regulations provide for some or all of the functions of a listed tribunal to be transferred from it—
   (a) to the First-tier Tribunal only,
   (b) to the Upper Tribunal only, or
   (c) to the First-tier Tribunal and the Upper Tribunal.

(3) If regulations under subsection (2) provide for any functions of a listed tribunal to be transferred as mentioned in paragraph (c) of that subsection, the regulations may also—
   (a) give particular functions to one of the Tribunals (but not the other), or
   (b) make provision of the sort allowed by subsection (5).

(4) Where by virtue of regulations made under subsection (2) any functions of a listed tribunal have been transferred as mentioned in paragraph (a), (b) or (c) of that subsection, the Scottish Ministers may by regulations—
   (a) provide for the functions, or particular functions, to be redistributed between the Tribunals by—
      (i) transferring them from either of the Tribunals to the other,
      (ii) taking them away from one of the Tribunals (but not the other), or
      (iii) causing them to be exercisable by both of the Tribunals (instead of one only),
   (b) if they are so redistributed by causing them to be exercisable by both of the Tribunals, also make provision of the sort allowed by subsection (5).

(5) This subsection allows provision enabling the question as to which of the Tribunals is to exercise particular functions in a specific case or in specified circumstances to be determined, including as against any prescribed criteria—
   (a) in accordance with Tribunal Rules, or
   (b) by the President of Tribunals (whether or not by reference to Tribunal Rules).

(6) Regulations under subsection (2) or (4) may include provision for the purposes of or in connection with, or for giving full effect to, a transfer or redistribution of any functions to which the regulations apply.

(7) Provision included in such regulations by virtue of subsection (6) may modify any enactment concerning a listed tribunal.
(8) A particular instrument containing regulations under subsection (2) may not relate to the functions of more than one of the listed tribunals.

28 Transfer-in of members

Schedule 2 contains provision for the transfer of certain persons from the listed tribunals into the Scottish Tribunals to hold—

(a) particular named positions,
(b) ordinary or legal membership generally.

Conferral of functions by another Act

28A Accommodation of functions

(1) Subsections (2) and (3) apply where any functions are conferred on either or both of the Scottish Tribunals by or under an Act other than this Act.

(2) The Scottish Ministers may by regulations modify this Act so that this Act specifies the relevant provisions of the other Act (whether in existing or new provisions of this Act).

(3) The Scottish Ministers may by regulations modify this Act or the other Act so as to make the functions exercisable in accordance with or subject to (as far as not already so exercisable)—

(a) the whole of this Act, or
(b) particular provisions of this Act.

28B Redistribution of functions

(1) Where any functions are conferred on either or both of the Scottish Tribunals by or under an Act other than this Act, the Scottish Ministers may by regulations—

(a) provide for the functions, or particular functions, to be redistributed between the Tribunals by—

(i) transferring them from either of the Tribunals to the other,
(ii) taking them away from one of the Tribunals (but not the other), or
(iii) causing them to be exercisable by both of the Tribunals (instead of one only),

(b) if they are so redistributed by causing them to be exercisable by both of the Tribunals, also make provision of the sort allowed by subsection (2).

(2) This subsection allows provision enabling the question as to which of the Tribunals is to exercise particular functions in a specific case or in specified circumstances to be determined, including as against any prescribed criteria—

(a) in accordance with Tribunal Rules, or
(b) by the President of Tribunals (whether or not by reference to Tribunal Rules).

(3) Regulations under subsection (1) may include provision for the purposes of or in connection with, or for giving full effect to, a redistribution of any functions to which the regulations apply.

(4) Provision included in such regulations by virtue of subsection (3) may modify any enactment relating to the functions being redistributed by the regulations.
(5) Subsection (1) is subject to any express provision in the other Act prohibiting or limiting the making of regulations under that subsection.

PART 4
MORE ABOUT MEMBERSHIP ETC.

Appointment and assignment

29 Scheduled provisions

(1) Schedule 3 contains provision for the First-tier Tribunal about eligibility for and appointment to—
   (a) ordinary membership,
   (b) legal membership.

(2) Schedule 4 contains provision for the First-tier Tribunal relating to—
   (a) appointment or assignment to—
       (i) a Deputy position,
       (ii) a Temporary position,
   (b) assignment of ordinary, legal and judicial members.

(3) Schedule 5 contains provision for the Upper Tribunal about eligibility for and appointment to—
   (a) ordinary membership,
   (b) legal membership.

(4) Schedule 6 contains provision for the Upper Tribunal relating to—
   (a) assignment to a Temporary position,
   (b) assignment of ordinary, legal and judicial members.

30 Assignment policy

(1) The Lord President must publish a document recording the policy adopted in relation to the assignment of the ordinary, legal and judicial members within each of the First-tier Tribunal and the Upper Tribunal.

(2) The Lord President must—
   (a) keep the assignment policy under review,
   (b) re-publish it if it is amended materially.

(3) The assignment policy—
   (a) must be in terms designed to secure that appropriate use is made of the knowledge and experience of the members of the Scottish Tribunals (including their expertise in a particular area of the law),
   (b) may include—
       (i) specific provision for each of the Tribunals,
       (ii) different provision for different purposes in any other respects.
Training, conditions and conduct

31 Training and review

(1) The Lord President is responsible for making and maintaining appropriate arrangements for the training and guidance—

(a) of the ordinary members, legal members and judicial members of the Scottish Tribunals,

(b) for the purpose of acting as mentioned in section 17(5), of any extra judges who are authorised to act as so mentioned.

(2) The Lord President may make arrangements for the review of the ordinary members and legal members of the Scottish Tribunals.

(3) Arrangements under subsection (1) or (2) may (in particular) require participation in activities for the purpose of training, guidance or review.

(4) For the purpose of subsection (2), “review” includes ad hoc or continuing review of professional competency and development.

32 Conditions of membership etc.

(1) Schedule 7 contains provision for the terms and conditions on which ordinary and legal members of the Scottish Tribunals hold their positions.

(2) The Scottish Ministers may by regulations make provision enabling a relevant appointment or transfer to be made or have effect in such terms as to cause a person to hold permanently the type of membership or (as the case may be) particular position in question.

(3) The Scottish Ministers must consult the President of Tribunals before—

(a) making regulations under subsection (2), or

(b) exercising in relation to a relevant appointment or transfer the discretion allowed by such regulations.

(4) The operation of paragraphs 2 to 7A of schedule 7 is subject to provision made by regulations under subsection (2).

(5) For the purposes of subsection (2)—

(a) a relevant appointment is appointment or reappointment by the Scottish Ministers—

(i) of a person as an ordinary or legal member of the Scottish Tribunals,

(ii) of a legal member of the First-tier Tribunal as a Chamber President or Deputy Chamber President in the Tribunal, or

(iii) of a legal member of the Upper Tribunal as a Vice-President of the Tribunal,

(b) a relevant transfer is transfer-in to the Scottish Tribunals—

(i) of a person as an ordinary or legal member of the Tribunals by virtue of section 28(b), or

(ii) of a person to a particular position within the Tribunals by virtue of section 28(a).
33 **Conduct and fitness etc.**

Schedule 8 contains provision for and in connection with—

(a) investigation of members’ conduct and imposition of disciplinary measures,
(b) assessment of members’ fitness for position and removal from position.

**PART 5**

DECISION-MAKING AND COMPOSITION

*Decisions in First-tier Tribunal*

34 **Decisions in the Tribunal**

(1) The First-tier Tribunal’s function of deciding any matter in a case before the Tribunal is to be exercised by one, or two or more, of the members of the Tribunal chamber to which the case is allocated.

(2) The member or members are to be chosen by the Chamber President of the chamber (who may choose himself or herself).

(3) The Chamber President’s discretion in choosing the member or members is subject to—

(a) any relevant provisions in regulations made under section 35(1),
(b) any relevant directions given by virtue of section 42(5)(b).

(4) In this section—

“Tribunal chamber” means chamber of the Tribunal,

“member”, in relation to a Tribunal chamber, means ordinary, legal or judicial member of the Tribunal who is assigned to the chamber.

35 **Composition of the Tribunal**

(1) The Scottish Ministers may by regulations make provision for determining the composition of the First-tier Tribunal when convened to decide any matter in a case before the Tribunal.

(2) Where regulations under subsection (1) provide for a matter to be decided by a single member of the Tribunal, the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

(3) Where regulations under subsection (1) provide for a matter to be decided by two or more members of the Tribunal, the regulations must include provision for determining how many (if any) of those members are to be—

(a) an ordinary member,
(b) a legal member,
(c) a judicial member.

(4) Regulations under subsection (1) may include provision for determining what relevant criteria are to be met by an ordinary member of the Tribunal for the member’s involvement in decision-making in particular types of case.
(5) In subsection (4), “relevant criteria” includes criteria as to qualifications, experience and training.

Decisions in Upper Tribunal

36 Decisions in the Tribunal

5 (1) The Upper Tribunal’s function of deciding any matter in a case before the Tribunal is to be exercised by one, or two or more, of the members of the Tribunal division to which the case is allocated.

(2) The member or members are to be chosen by the Vice-President of the division (who may choose himself or herself).

10 (3) The Vice-President’s discretion in choosing the member or members is subject to—

(a) subsection (4),
(b) any relevant provisions in regulations made under section 37(1),
(c) any relevant directions given by virtue of section 44(5)(b).

(4) Each of the Lord President and the President of Tribunals has the right to be chosen and may exercise that right as he or she considers appropriate (but this is also subject to any relevant provisions in regulations made under section 37(1)).

(5) In this section—

“Tribunal division” means division of the Tribunal,
“member”, in relation to a Tribunal division—

(a) means ordinary, legal or judicial member of the Tribunal who is assigned to the division,
(b) while assigned to the division, also includes an extra judge who is authorised to act as mentioned in section 17(5).

37 Composition of the Tribunal

25 (1) The Scottish Ministers may by regulations make provision for determining the composition of the Upper Tribunal when convened to decide any matter in a case before the Tribunal.

(2) Regulations under subsection (1) may treat separately the Tribunal’s decision-making functions—

(a) at first instance,
(b) on review or appeal.

(3) Where regulations under subsection (1) provide for a matter to be decided by a single member of the Tribunal, the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

35 (4) Where regulations under subsection (1) provide for a matter to be decided by two or more members of the Tribunal, the regulations must include provision for determining how many (if any) of those members are to be—

(a) an ordinary member,
(b) a legal member,
(c) a judicial member.

(5) Regulations under subsection (1) may include provision about the involvement in decision-making of—

(a) a judicial member of a particular description,

(b) an extra judge who is authorised to act as mentioned in section 17(5).

(6) Regulations under subsection (1) may include provision for determining what relevant criteria are to be met by an ordinary member of the Tribunal for the member’s involvement in decision-making in particular types of case.

(7) In subsection (6), “relevant criteria” includes criteria as to qualifications, experience and training.

Decisions by two or more members

37A Voting for decisions

(1) The Scottish Ministers may by regulations make provision for the purposes of sections 34(1) and 36(1) in so far as a matter in a case before the First-tier Tribunal or the Upper Tribunal is to be decided by two or more members of the Tribunal, including—

(a) for a decision to be made unanimously or by majority,

(b) where a decision is to be made by majority, for the chairing member to have a casting vote in the event of a tie.

(2) Subsection (1) applies in relation to the Upper Tribunal as if an extra judge who is authorised to act as mentioned in section 17(5) were a member of the Tribunal (with section 37B(1) so applying accordingly).

37B Chairing members

(1) Tribunal Rules may make provision for determining the question as to who is to be the chairing member where a matter in a case before the First-tier Tribunal or the Upper Tribunal is to be decided by two or more members of the Tribunal.

(2) Rules making provision as described in subsection (1) may (in particular)—

(a) allow the President of Tribunals to determine the question,

(b) specify criteria as against which the question is to be determined (including by reference to type of member or particular expertise).
PART 6
REVIEW OR APPEAL OF DECISIONS

CHAPTER 1
TRIBUNAL DECISIONS

38 Review of decisions
(1) Each of the First-tier Tribunal and the Upper Tribunal may review a decision made by it in any matter in a case before it.

(2) A decision is reviewable—
(a) at the Tribunal’s own instance, or
(b) at the request of a party in the case.

(3) But—
(a) there can be no review under this section of an excluded decision,
(b) Tribunal Rules may make provision—
(i) excluding other decisions from a review under this section,
(ii) otherwise restricting the availability of a review under this section (including by specifying grounds for a review).

(4) The exercise of discretion whether a decision should be reviewed under this section cannot give rise to a review under this section or to an appeal under section 41 or 43.

(5) A right of appeal under section 41 or 43 is not affected by the availability or otherwise of a review under this section.

39 Actions on review
(1) In a review by the First-tier Tribunal or the Upper Tribunal under section 38, the Tribunal may—
(a) take no action,
(b) set the decision aside, or
(c) correct a minor or accidental error contained in the decision.

(2) Where a decision is set aside by the First-tier Tribunal in a review, it may—
(a) re-decide the matter concerned,
(b) refer that matter to the Upper Tribunal, or
(c) make such other order as the First-tier Tribunal considers appropriate.

(3) If a decision set aside by the First-tier Tribunal in a review is referred to the Upper Tribunal, the Upper Tribunal—
(a) may re-decide the matter concerned or make such other order as it considers appropriate,
(b) in re-deciding that matter, may do anything that the First-tier Tribunal could do if re-deciding it.

(4) Where a decision is set aside by the Upper Tribunal in a review, it may—
   (a) re-decide the matter concerned, or
   (b) make such other order as it considers appropriate.

(5) In re-deciding a matter under this section, the First-tier or Upper Tribunal may reach such findings in fact as it considers appropriate.

40 Review once only

(1) A particular decision of the First-tier Tribunal or the Upper Tribunal may not be reviewed under section 38 more than once.

(2) These are to be regarded as different decisions for the purpose of subsection (1)—
   (a) a decision set aside under section 39(1)(b),
   (b) a decision made by virtue of section 39(2)(a), (3)(a) or (4).

(3) Nothing in this section prevents the taking, after a review in which the decision concerned is not set aside, of administrative steps by the First-tier or Upper Tribunal to correct a minor or accidental error made in disposing of the review.

Appeal from First-tier Tribunal

41 Appeal from the Tribunal

(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.

(2) An appeal under this section is to be made—
   (a) by a party in the case,
   (b) on a point of law only.

(3) An appeal under this section requires the permission of—
   (a) the First-tier Tribunal, or
   (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.

(5) This section—
   (a) is subject to sections 38(4) and 50(2),
   (b) does not apply in relation to an excluded decision.

42 Disposal of an appeal

(1) In an appeal under section 41, the Upper Tribunal may uphold or quash the decision on the point of law in question.

(2) If the Upper Tribunal quashes the decision, it may—
Part 6—Review or appeal of decisions

Chapter 1—Tribunal decisions

(a) re-make the decision,
(b) remit the case to the First-tier Tribunal, or
(c) make such other order as the Upper Tribunal considers appropriate.

(3) In re-making the decision, the Upper Tribunal may—

(a) do anything that the First-tier Tribunal could do if re-making the decision,
(b) reach such findings in fact as the Upper Tribunal considers appropriate.

(4) In remitting the case, the Upper Tribunal may give directions for the First-tier Tribunal’s reconsideration of the case.

(5) Such directions may relate to—

(a) issues of law or fact (including the Upper Tribunal’s opinion on any relevant point),
(b) procedural issues (including as to the members to be chosen to reconsider the case).

Appeal from Upper Tribunal

43 Appeal from the Tribunal

(1) A decision of the Upper Tribunal in any matter in a case before the Tribunal may be appealed to the Court of Session.

(2) An appeal under this section is to be made—

(a) by a party in the case,
(b) on a point of law only.

(3) An appeal under this section requires the permission of—

(a) the Upper Tribunal, or
(b) if the Upper Tribunal refuses its permission, the Court of Session.

(4) Such permission may be given in relation to an appeal under this section only if the Upper Tribunal or (as the case may be) the Court of Session is satisfied that there are arguable grounds for the appeal.

(5) This section—

(a) is subject to sections 38(4) and 50(2),
(b) does not apply in relation to an excluded decision.

44 Disposal of an appeal

(1) In an appeal under section 43, the Court of Session may uphold or quash the decision on the point of law in question.

(2) If the Court quashes the decision, it may—

(a) re-make the decision,
(b) remit the case to the Upper Tribunal, or
(c) make such other order as the Court considers appropriate.
(3) In re-making the decision, the Court may—
   (a) do anything that the Upper Tribunal could do if re-making the decision,
   (b) reach such findings in fact as the Court considers appropriate.

(4) In remitting the case, the Court may give directions for the Upper Tribunal’s reconsideration of the case.

(5) Such directions may relate to—
   (a) issues of law or fact (including the Court’s opinion on any relevant point),
   (b) procedural issues (including as to the members to be chosen to reconsider the case).

**Procedure on second appeal**

(1) Section 43(4) is subject to subsections (3) and (4) as regards a second appeal.

(2) Section 44 is subject to subsections (5) and (6) as regards a second appeal.

(3) For the purpose of subsection (1), the Upper Tribunal or (as the case may be) the Court of Session may not give its permission to the making of a second appeal unless also satisfied that subsection (4) applies.

(4) This subsection applies where, in relation to the matter in question—
   (a) a second appeal would raise an important point of principle or practice, or
   (b) there is some other compelling reason for allowing a second appeal to proceed.

(5) For the purpose of subsection (2), subsections (2)(b) and (3)(a) of section 44 have effect in relation to a second appeal as if the references in them to the Upper Tribunal include, as alternative references, references to the First-tier Tribunal.

(6) Where, in exercising the choice arising by virtue of subsection (5) (and instead of re-making the decision in question), the Court of Session remits the case to the Upper Tribunal rather than the First-tier Tribunal—
   (a) the Upper Tribunal, instead of reconsidering the case itself, may remit the case to the First-tier Tribunal,
   (b) if the Upper Tribunal does so, it must send to the First-tier Tribunal any directions accompanying the Court’s remittal of the case to the Upper Tribunal.

(7) In this section, “second appeal” means appeal under section 43 against a decision in an appeal under section 41.

**Excluded decisions**

A decision falling within any of sections 47 to 49 is an excluded decision for the purposes of—

(a) a review under section 38,
(b) an appeal under section 41 or 43.
47 Decisions on review

(1) Falling within this section is—
   (a) a decision set aside in a review under section 38 (see section 39(1)(b)),
   (b) a decision in such a review, except a decision of the kind mentioned in subsection (2).

(2) That is, a decision made by virtue of section 39(2)(a), (3)(a) or (4) (and accordingly a decision so made is not an excluded decision).

48 Other appeal rights

(1) Falling within this section is a decision against which there is a right of appeal under an enactment apart from this Act.

(2) The Scottish Ministers may by regulations make provision—
   (a) to which subsection (1) is subject (for example, by specifying an exception to what falls within this section),
   (b) for a right of appeal under an enactment apart from this Act to cease to be exercisable in relation to a decision no longer falling within this section.

49 Position on transfer-in

(1) Where any functions are transferred to the First-tier Tribunal or Upper Tribunal by virtue of regulations made under section 27(2), a decision made in the exercise of the functions falls within this section if it is specified in regulations made by the Scottish Ministers under this subsection.

(2) Regulations under subsection (1) may specify a decision only if, immediately before the transfer of the functions in the exercise of which it is made, there is no right of appeal against the decision.

Miscellaneous procedure

50 Process for permission

(1) The Scottish Ministers may by regulations specify a time limit within which the permission required by section 41(3) or 43(3) must be sought.

(2) A refusal to give the permission required by section 41(3) or 43(3) is not—
   (a) reviewable under section 38, or
   (b) appealable under section 41 or 43.

51 Participation of non-parties

(1) Subsection (2) applies for the purposes of—
   (a) a review under section 38,
   (b) an appeal under section 41 or 43.

(2) The Scottish Ministers may by regulations make provision extending any reference to a party in a case so that it also includes a person falling within a specified description.
CHAPTER 2
SPECIAL JURISDICTION

52 Judicial review cases

(1) Subsection (2) applies where a petition is made to the Court of Session for judicial review.

(2) The Court may by order remit the petition to the Upper Tribunal if—
   (a) both of Conditions A and B are met, and
   (b) having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition, the Court considers that it is appropriate to do so.

(3) Condition A is that the petition does not seek anything other than the exercise of the Court’s judicial review function.

(4) Condition B is that the petition falls within a category specified by an act of sederunt made by the Court for the purpose of this subsection.

53 Decision on remittal

(1) The Upper Tribunal is to determine the issues raised in each petition remitted to it under section 52.

(2) In relation to a petition so remitted, the Upper Tribunal—
   (a) has the same powers as the Court of Session has on a petition to it for judicial review,
   (b) is to apply the same principles as the Court applies in the exercise of its judicial review function.

(3) An order made by the Upper Tribunal on a petition so remitted has the same effect as an order made by the Court of Session on a petition for judicial review (and the order is therefore enforceable accordingly).

(4) Subsection (3) does not limit the operation of section 43 in connection with a determination under subsection (1).

54 Additional matters

(1) Where a petition is remitted to the Upper Tribunal under section 52, any order made or step taken by the Court of Session in relation to the petition is to be treated as if made or taken by the Tribunal (except the order by which the petition is so remitted (or an associated step)).

(2) Tribunal Rules may make further provision with respect to the exercise by the Upper Tribunal of its functions under this Chapter.

55 Meaning of judicial review

In this Chapter—
   (a) a reference to a petition to the Court of Session for judicial review is to an application to the supervisory jurisdiction of the Court,
(b) a reference to the exercise of the Court of Session’s judicial review function is to the exercise of the Court’s supervisory jurisdiction (and includes the making of any order in connection with or in consequence of the exercise of that function).

PART 7
POWERS, PROCEDURE AND ADMINISTRATION

CHAPTER 1
POWERS AND ENFORCEMENT

56 Venue for hearings

(1) Each of the First-tier Tribunal and the Upper Tribunal may be convened at any time and place in Scotland to hear or decide a case or for any other purpose relating to its functions.

(2) Subsection (1) is subject to any provision made by Tribunal Rules as to the question of when and where in Scotland the Scottish Tribunals are to be convened (and such Rules may allow the President of Tribunals to determine the question).

57 Conduct of cases

(1) In relation to the things mentioned in subsection (3), each of the First-tier Tribunal and the Upper Tribunal has such powers, rights, privileges and other authority with respect to any case before it as are provided for in Tribunal Rules.

(2) Rules making provision for the purpose of subsection (1) may (in particular) do so in relation to any kind of authority by reference to any authority of a relevant description exercisable by the sheriff or the Court of Session.

(3) The things are—
   (a) the citation, attendance or examination of witnesses,
   (b) the recovery, production or inspection of relevant materials,
   (c) the commissioning of reports of any relevant type,
   (d) other procedural, evidential or similar measures.

(4) In subsection (3)(b), “materials” means documents and other items.

58 Enforcement of decisions

(1) A decision made by the First-tier Tribunal or the Upper Tribunal in any matter in a case before it is enforceable by the means provided for in Tribunal Rules.

(2) Subsection (1) applies to a decision—
   (a) on the merits of such a case,
   (b) as to—
       (i) payment of a sum of money, or
       (ii) expenses by virtue of section 59, or
(c) otherwise affecting the rights, obligations or interests of a party in such a case.

(3) Subsection (1) is subject to section 53(3) as respects a determination to which that section relates.

(4) Rules making provision for the purpose of subsection (1) may (in particular) do so in relation to a relevant order by reference to the means of enforcing an order of the sheriff or the Court of Session.

(5) In subsection (4), “relevant order” means order of either of the Tribunals giving effect to a decision to which subsection (1) applies.

### 59 Award of expenses

(1) In connection with proceedings in a case before the First-tier Tribunal or the Upper Tribunal, the Tribunal may award expenses so far as allowed in accordance with Tribunal Rules.

(2) Where such expenses are awarded, the awarding Tribunal is to specify by and to whom they are to be paid (and to what extent).

(3) Tribunal Rules may make provision—

(a) for scales or rates of awardable expenses,

(b) for—

(i) such expenses to be set-off against any relevant sums,

(ii) interest at the specified rate to be chargeable on such expenses where unpaid,

(d) stating the general or particular factors to be taken into account when exercising discretion as to such expenses,

(e) about such expenses in other respects.

(3A) Tribunal Rules may make provision—

(a) for disallowing any wasted expenses,

(b) for requiring a person who has given rise to such expenses to meet them.

(4) Rules making provision as described in subsection (3) or (3A) may also prescribe meanings for “relevant sums”, “specified rate” and “wasted expenses” as used in this section.

### Supplementary provisions

### 60 Additional powers

(1) The Scottish Ministers may by regulations confer on the First-tier Tribunal and the Upper Tribunal such additional powers as are necessary or expedient for the proper exercise of their functions.

(2) Regulations under subsection (1) may include provision—

(a) relying on the effect of an act of sederunt made by the Court of Session,
(b) causing Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to apply to the making of a relevant act of sederunt as it does to the making of Tribunal Rules.

(3) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

### 61 Application of enactments

(1) The Scottish Ministers may by regulations modify the application of any enactment so far as they consider to be necessary or expedient for the purposes of or in connection with the matters to which this subsection applies.

(2) Regulations under subsection (1) may include provision—

(a) relying on the effect of an act of sederunt made by the Court of Session,

(b) causing Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to apply to the making of a relevant act of sederunt as it does to the making of Tribunal Rules.

(3) Subsection (1) applies to—

(a) the making of Tribunal Rules,

(b) the effect of—

(i) this Part, or

(ii) Tribunal Rules.

(4) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

### 61A Offences in relation to proceedings

(1) The Scottish Ministers may by regulations make provision, in relation to proceedings before the First-tier Tribunal or the Upper Tribunal—

(a) for offences and penalties—

(i) for making a false statement in an application in a case,

(ii) for failure by a person to attend, or give evidence in, such proceedings when required to do so in accordance with Tribunal Rules,

(iii) for alteration, concealment or destruction by a person of, or failure by a person to produce, something that is required to be produced in such proceedings in accordance with Tribunal Rules,

(b) about the circumstances in which a person need not give evidence or produce something (for example, where a person could not be compelled to give evidence or produce something in proceedings in a case before the sheriff or in the Court of Session).

(2) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.
CHAPTER 2

PRACTICE AND PROCEDURE

Tribunal Rules

62

(1) There are to be rules regulating the practice and procedure to be followed in proceedings at—
   (a) the First-tier Tribunal,
   (b) the Upper Tribunal.

(2) Rules of the kind mentioned in subsection (1) are to be known as Scottish Tribunal Rules (and in this Act they are referred to as Tribunal Rules).

(3) Tribunal Rules are to be made by the Court of Session by act of sederunt.

(4) Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 includes further provision about the making of Tribunal Rules.

63

Exercise of functions

(A1) Tribunal Rules may confer functions on the persons mentioned in subsection (4) or the other members of the Scottish Tribunals.

(1) Tribunal Rules may, in relation to any functions exercisable by the persons mentioned in subsection (4) or the other members of the Scottish Tribunals—
   (a) state—
      (i) how a function is to be exercised,
      (ii) who is to exercise a function,
   (b) cause something to require further authorisation,
   (c) permit something to be done on a person’s behalf,
   (d) allow a specified person to make a decision about any of those matters.

(2) Tribunal Rules may make provision relying on the effect of directions issued, or to be issued, under section 68.

(3) Neither Tribunal Rules nor directions under section 68 may make provision altering the operation of section 34(1) or 36(1).

(4) For the purpose of subsections (A1) and (1), the persons are—
   (a) the Lord President,
   (b) the President of Tribunals,
   (c) in the First-tier Tribunal—
      (i) a Chamber President,
      (ii) a Deputy Chamber President,
   (d) a Vice-President of the Upper Tribunal.
64 Extent of rule-making

(1) Tribunal Rules may make—
   (a) provision applying—
      (i) equally to both of the First-tier Tribunal and the Upper Tribunal, or
      (ii) specifically to one of them,
   (b) particular provision for each of them about the same matter.

(2) Tribunal Rules may make particular provision for different—
   (a) chambers or divisions,
   (b) types of proceedings.

(3) Tribunal Rules may make different provision for different purposes in any other respects.

(4) The generality of section 62(1) is not limited by—
   (a) sections 65 to 67, or
   (b) any other provisions of this Act about the content of Tribunal Rules.

(5) As well as Chapter 1, see (for example) sections 27(5), 37B(1), 38(3)(b) and 54(2).

Particular matters

65 Proceedings and steps

(1) Tribunal Rules may make provision about proceedings in a case before the Scottish Tribunals.

(2) Rules making provision as described in subsection (1) may (in particular)—
   (a) provide for the form and manner in which a case is to be brought,
   (b) allow for the withdrawal of a case (with or without restrictions on subsequent proceedings as respects the same matter),
   (c) set time limits for—
      (i) making applications,
      (ii) taking particular steps,
   (ca) enable two or more applications to be conjoined in certain circumstances,
   (d) specify circumstances in which the Tribunals may take particular steps of their own initiative.

66 Hearings in cases

(1) Tribunal Rules may make provision about hearings in a case before the Scottish Tribunals.

(2) Rules making provision as described in subsection (1) may (in particular)—
   (a) provide for certain matters to be dealt with—
      (i) without a hearing,
(ii) at a private hearing,
(iii) at a public hearing,
(b) require notice to be given of a hearing (and for the timing of such notice),
(c) specify persons who may—
   (i) appear on behalf of a party in a case,
   (ii) attend a hearing in order to provide support to a party or witness in a case,
(d) specify circumstances in which particular persons may appear or be represented at a hearing,
(e) specify circumstances in which a hearing may go ahead—
   (i) at the request of a party in a case despite no notice of it having been given to another party in the case,
   (ii) in the absence of a particular member chosen to exercise the function of deciding any matter in a case,
(ea) enable two or more sets of proceedings to be taken concurrently at a hearing in certain circumstances,
(f) allow for an adjournment of a hearing for the purpose of giving the parties in a case an opportunity to use a process of negotiation, mediation, arbitration or adjudication for resolving a dispute to which the case relates,
(g) allow for the imposition of reporting restrictions for particular reasons arising in a case.

67 Evidence and decisions

(1) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals—
   (a) make provision about the giving of evidence and the administering of oaths,
   (b) modify the application of any other rules relating to either of those matters so far as they would otherwise apply to such proceedings.

(2) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals, provide for the payment of expenses and allowances to a person who—
   (a) gives evidence,
   (b) produces a document, or
   (c) attends such proceedings (or is required to do so).

(3) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals, make provision by way of presumption (for example, as to the serving of something on somebody).

(4) Tribunal Rules may make provision about decisions of the Scottish Tribunals, including as to—
   (a) the manner in which such decisions are to be made,
   (b) the incorporation in such decisions of findings in fact,
   (c) the recording, issuing, and publication of such decisions.
Issuing directions

68 Practice directions
(1) The President of Tribunals may issue directions as to the practice and procedure to be followed in proceedings in—
   (a) the First-tier Tribunal,
   (b) the Upper Tribunal.
(2) A Chamber President in the First-tier Tribunal may issue directions as to the practice and procedure to be followed in proceedings in the chamber over which the Chamber President presides.
(3) A Vice-President of the Upper Tribunal may issue directions as to the practice and procedure to be followed in proceedings in the division over which the Vice-President presides.
(4) Directions under subsection (2) or (3) may not be issued without the approval of the President of Tribunals.

69 Publication and effect
(A1) The President of Tribunals must arrange for directions under section 68(1), (2) or (3) to be published in such manner as the President of Tribunals considers appropriate.
(B1) Directions under section 68(1), (2) or (3) may—
   (a) vary or revoke earlier such directions,
   (b) make different provision for different purposes (in the same respects as Tribunal Rules).
(2) If (and to the extent that) any conflict arises between—
   (a) directions issued under section 68(1), and
   (b) directions issued under section 68(2) or (3),
those issued under section 68(1) are to prevail.

CHAPTER 3
FEES AND ADMINISTRATION

70 Tribunal fees
(1) The Scottish Ministers may by regulations make provision for the reasonable fees that are to be payable in respect of any matter that may be dealt with by the Scottish Tribunals.
(2) Regulations under subsection (1) may provide for (in particular)—
   (a) scales or rates of fees,
   (b) in relation to fees—
      (i) reduction in amount,
      (ii) exemption or waiver.
(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

(a) the Lord President,

(b) to such extent as they consider appropriate, persons having an interest in the operation and business of the Scottish Tribunals.

71 Administrative support

(1) The Scottish Ministers must ensure that the Scottish Tribunals are provided with such property, services and personnel as the Scottish Ministers consider to be reasonably required for—

(a) the proper operation of the Tribunals, and

(b) the discharge of the Lord President’s responsibility as to the efficient disposal of business in the Scottish Tribunals (see section 7(1)).

(2) The Scottish Ministers must have regard to any representations made to them by the Lord President in relation to the fulfilment of the duty under subsection (1).

(3) In fulfilling the duty under subsection (1), the Scottish Ministers may—

(a) fund or supply property, services and personnel for use by the Tribunals,

(b) appoint persons as members of staff of the Tribunals.

(4) The Scottish Ministers may make arrangements as to—

(a) the payment of remuneration or expenses to or in respect of persons so appointed,

(b) the payment of pensions, allowances and gratuities to or in respect of persons so appointed,

(c) contributions or other payments towards provision for such pensions, allowances and gratuities.

(5) The references in subsection (4) to pensions, allowances and gratuities include pensions, allowances and gratuities to be paid by way of compensation for loss of office.

72 Annual reporting

(1) The President of Tribunals is to prepare an annual report about the operation and business of the Scottish Tribunals.

(2) An annual report is to be given to the Lord President at the end of each financial year.

(3) An annual report—

(a) must explain how the Scottish Tribunals have exercised their functions during the financial year,

(b) may contain such other information as—

(i) the President of Tribunals considers appropriate, or

(ii) the Lord President requires to be covered.

(4) The Lord President must—

(a) publish each annual report in a manner suitable for bringing it to the attention of persons having an interest in the operation and business of the Scottish Tribunals,
(b) before so publishing it, send a copy of the report to the Scottish Ministers.

PART 8

FINAL PROVISIONS

General and ancillary

73 Regulation-making

(1) Regulations under the preceding Parts of this Act may—
   (a) make different provision for different purposes,
   (b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations under the following provisions of those Parts are subject to the affirmative procedure—
   (a) section 19(2) or 22(2),
   (b) section 26(2) or 27(2),
   (c) section 35(1), 37(1) or 37A(1),
   (d) section 60(1), 61(1) or 61A(1).

(3) Regulations under any other provisions of those Parts are subject to the negative procedure.

74 Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—
   (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act (including this Act),
   (b) otherwise, are subject to the negative procedure.

75 Transitional and consequential

For the purposes of or in connection with this Act, schedule 9 contains—
   (a) transitional and other provision,
   (b) modification of enactments.

Interpretation, commencement and short title

76 List of expressions

(1) In this Act, “Lord President” means Lord President of the Court of Session.

(2) Schedule 10 is a list of expressions used in this Act together with a note of some key provisions.
77 Commencement

(1) Section 76, this section and section 78 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

78 Short title

The short title of this Act is the Tribunals (Scotland) Act 2013.
SCHEDULE 1
(introduced by section 26)

LISTED TRIBUNALS

PART 1

LIST OF TRIBUNALS

1 An Additional Support Needs Tribunal
2 A Scottish Charity Appeals Panel
3 The Crofting Commission
4 An Education Appeal Committee
5 In relation to certain Housing and other Acts—
   (a) a private rented housing committee,
   (b) a homeowner housing committee
6 The Lands Tribunal for Scotland
7 The Mental Health Tribunal for Scotland
8 In relation to the National Health Service—
   (a) the NHS National Appeal Panel,
   (b) the NHS Tribunal
9 A Parking Adjudicator
10 A Police Appeals Tribunal
11 A Valuation Appeal Committee.

PART 2

FURTHER SPECIFICATION

12 The operation of section 27(1) and (2) is informed by and subject to the further specification in paragraph 13 (and the entries above are to be construed accordingly).

13 (1) The entry in paragraph 1 relates to the functions exercisable by any of the Additional Support Needs Tribunals for Scotland by virtue of section 17(1A) of the Education (Additional Support for Learning) (Scotland) Act 2004.

(2) The entry in paragraph 2 relates to the functions exercisable by a Scottish Charity Appeals Panel by virtue of section 75(1) of the Charities and Trustee Investment (Scotland) Act 2005.

(3) The entry in paragraph 3 relates to the functions exercisable by the Crofting Commission by virtue of the Crofters (Scotland) Act 1993 or any other enactment, but only in so far as they are decision-making functions—
   (a) for the resolution of disputes, and
   (b) exercisable in the manner of a tribunal.
(4) The entry in paragraph 4 relates to the functions exercisable by an education appeal committee set up under section 28D(1) of the Education (Scotland) Act 1980.

(5) In the entry in paragraph 5—
   (a) paragraph (a) relates to the functions exercisable by a private rented housing committee by virtue of section 21(3) of the Housing (Scotland) Act 2006,
   (b) paragraph (b) relates to the functions exercisable by a homeowner housing committee by virtue of section 16(1) of the Property Factors (Scotland) Act 2011.

(6) The entry in paragraph 6 relates to the functions exercisable by the Lands Tribunal for Scotland by virtue of the Lands Tribunal Act 1949 or any other enactment.

(7) The entry in paragraph 7 relates to the functions exercisable by the Mental Health Tribunal for Scotland by virtue of section 21(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

(8) In the entry in paragraph 8—
   (a) paragraph (a) relates to the functions exercisable by the NHS National Appeal Panel or its chair by virtue of paragraph 5(4) to (6) in Schedule 3 to the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (S.S.I. 2009/183),
   (b) paragraph (b) relates to the functions exercisable by the NHS Tribunal by virtue of sections 29 to 32E of the National Health Service (Scotland) Act 1978.

(9) The entry in paragraph 9 relates to the functions exercisable by a parking adjudicator by virtue of sections 72(2) and 73(3) of the Road Traffic Act 1991.

(10) The entry in paragraph 10 relates to the functions exercisable by a police appeals tribunal by virtue of section 56(3) of the Police and Fire Reform (Scotland) Act 2012.

(11) The entry in paragraph 11 relates to the functions exercisable by a valuation appeal committee by virtue of section 29(1)(a) of the Local Government etc. (Scotland) Act 1994.

SCHEDULE 2
(introduced by section 28)
TRANSFER-IN OF MEMBERS

1 (1) The Scottish Ministers may by regulations provide for some or all of the transferable persons to become the holders of any of the particular named or other membership positions within the Scottish Tribunals specified in paragraph 4(1) or (2).

(2) In sub-paragraph (1), the transferable persons are the persons who—
   (a) are members—
      (i) of any of the listed tribunals, or
      (ii) of any panel or other body from which the members of any of the listed tribunals are drawn,
   (b) are authorised decision-makers for any of the listed tribunals, or
   (c) by reason of holding particular offices, constitute any of the listed tribunals.

(3) But sub-paragraph (2) does not apply in relation to—
Tribunals (Scotland) Bill
Schedule 2—Transfer-in of members

(a) any—
  (i) judges of the Court of Session, or
  (ii) sheriffs, or
(b) if appointed by reason of holding judicial office, the President of the Lands Tribunal for Scotland.

Subject to the relevant provisions of schedule 7, regulations under paragraph 1(1) may contain provision for the terms and conditions under which the persons concerned are to hold those positions, including by—

(a) preserving or altering the terms and conditions under which they are members of a listed tribunal, or
(b) replacing those terms and conditions with new ones.

Regulations under paragraph 1(1) may be made only where some or all functions of the tribunal have been, or are to be, transferred by regulations under section 27(2) (whenever made).

Regulations under paragraph 1(1) must not cause any of the persons concerned to become the holder of any particular or other position to which the person would not be eligible for appointment under the relevant provisions of schedules 3 to 6.

A particular instrument containing regulations under paragraph 1(1) may not relate to the members of more than one of the listed tribunals.

In relation to the First-tier Tribunal—

(a) the particular positions are—
  (i) Chamber President in the Tribunal,
  (ii) Deputy Chamber President in the Tribunal,
(b) the other positions are—
  (i) ordinary member of the Tribunal,
  (ii) legal member of the Tribunal (apart from Chamber President (or Deputy)).

In relation to the Upper Tribunal—

(a) the particular position is Vice-President of the Tribunal,
(b) the other positions are—
  (i) ordinary member of the Tribunal,
  (ii) legal member of the Tribunal (apart from Vice-President).
Schedule 3—Appointment to First-tier Tribunal

Part 1—Ordinary members

Appointment and eligibility

1  (1) It is for the Scottish Ministers to appoint a person as an ordinary member of the First-tier Tribunal.

(2) A person is eligible for such appointment only if the person meets such relevant criteria as are prescribed by the Scottish Ministers in regulations.

2  In paragraph 1(2), “relevant criteria” includes criteria as to qualifications, experience and training.

Part 2—Legal members

Application of Part

3  (1) This schedule Part applies in relation to appointment of the legal members of the First-tier Tribunal other than—

(a) a Chamber President in the Tribunal, or

(b) a Deputy Chamber President in the Tribunal.

(2) The references in this schedule Part to a legal member of the First-tier Tribunal are to be read accordingly.

Appointment and eligibility

4  (1) It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal.

(2) A person is eligible for such appointment only if qualifying under paragraph 5(1) or (2).

5  (1) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 5 years, as a solicitor or advocate in Scotland.

(2) A person qualifies under this sub-paragraph if the person falls within a description specified by the Scottish Ministers by regulations.

Eligibility under regulations

6  (1) Regulations under paragraph 5(2) may specify a description of a person by reference to the matters mentioned in sub-paragraph (2) or (3).

(2) That is—

(a) previous engagement in practice for a period of not less than 5 years, as—

(i) a solicitor or advocate in Scotland, or
(ii) a solicitor or barrister in England and Wales or Northern Ireland, and
(b) subsequent engagement in any of the activities listed in sub-paragraph (4).

(3) That is, suitability attributable to experience in law through engagement in—
(a) any of the activities listed in sub-paragraph (4),
(b) an activity that is of a broadly similar nature to any of the activities listed in that
sub-paragraph.

(4) The activities are—
(a) exercising judicial functions in any court or tribunal,
(b) practice or employment as a lawyer of any kind,
(c) whether or not in the course of practice or employment as a lawyer—
   (i) advising on the application of the law,
   (ii) drafting documents intended to affect rights or obligations under the law,
   (iii) assisting persons involved in a legal or other process for the resolution of
        disputes as to the law,
   (iv) acting as a mediator or arbitrator for the purpose of resolving disputes that
        are (or could be) the matter of legal proceedings,
(d) teaching or researching law at or for an educational institution.

(1) The Scottish Ministers may by regulations make provision—
(a) as regards the calculation of the 5-year period mentioned in paragraph 5(1) or
    6(2)(a) (for example, by reference to recent or continuous time),
(b) to which paragraph 6(2)(a) is subject (for example, by reference to debarment
    from practice),
(c) for the purpose of paragraph 6(3), about—
   (i) the criteria for suitability (for example, by reference to equivalence to past
       or present practice as a solicitor),
   (ii) the nature of experience required (for example, by reference to engagement
       for a particular period of time (within the United Kingdom or elsewhere)).

(2) The Scottish Ministers may by regulations modify the list in paragraph 6(4).

SCHEDULE 4
(introduced by section 29)

POSITIONS IN FIRST-TIER TRIBUNAL

PART 1

DEPUTY OR TEMPORARY PRESIDENT

Deputy President

1 If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a
person as a Deputy Chamber President of a particular chamber in the First-tier Tribunal.
2 (1) A person is eligible for appointment as a Deputy Chamber President only if the person is—
   (a) a legal member of the First-tier Tribunal (other than a Chamber President), or
   (b) if not falling within paragraph (a), eligible to be appointed as such a member
       (whether or not already any type of member of the First-tier or Upper Tribunal).

(2) Before requesting that a person be appointed as a Deputy Chamber President, the President of Tribunals must consult the Chamber President of the chamber concerned.

(3) If the Scottish Ministers decide not to make an appointment as a Deputy Chamber President, they must give the President of Tribunals written reasons.

3 (1) The functions of a Chamber President are exercisable by a Deputy Chamber President to such extent and in such manner as the Chamber President may direct.

(2) Except where the context otherwise requires, a reference in a provision in or under this Act to a Chamber President excludes a Deputy Chamber President.

**Temporary President**

4 If there is a temporary vacancy in the presidency of a particular chamber, the President of Tribunals may assign a person as a Temporary Chamber President during the vacancy.

5 (1) A person is eligible to be assigned as a Temporary Chamber President only if the person is a legal or judicial member of the First-tier Tribunal (other than a Chamber President).

(2) The functions of a Chamber President are exercisable by a Temporary Chamber President.

(3) Except where the context otherwise requires, a reference in or under this Act to a Chamber President includes a Temporary Chamber President.

**PART 2**

**ASSIGNMENT INTERNALLY**

**Assignment by the President of Tribunals**

6 (1) The President of Tribunals has the function of assigning the members of the First-tier Tribunal among the chambers (including re-assignment or ending assignment).

(2) The President of Tribunals is to assign those members among the chambers in accordance with paragraphs 7 to 9.

**Assignment of Chamber Presidents**

7 (1) A Chamber President of a chamber—
       (a) is to be assigned to that chamber,
       (b) may be assigned to act as a legal member also in another chamber.

(2) A Deputy Chamber President of a chamber—
       (a) is to be assigned to that chamber,
       (b) may be assigned to act as a legal member also in another chamber,
(c) is to act as such under the direction of the Chamber President of any chamber to which assigned.

(3) Assignment under sub-paragraph (1)(b) or (2)(b) is to act otherwise than as a Chamber President or Deputy Chamber President in the other chamber.

(4) Assignment under sub-paragraph (1)(b) or (2)(b) requires—

(a) the concurrence of the Chamber President of the other chamber, and
(b) the agreement of the member concerned.

Assignment of other members

8 (1) This paragraph applies in relation to an ordinary member or legal member by virtue of—

(a) appointment as such, or
(b) transfer-in as such.

(2) Each member to whom this paragraph applies—

(a) is to be assigned to at least one of the chambers,
(b) may be assigned to different chambers at different times.

(3) Any such member may be assigned to a particular chamber only with—

(a) the concurrence of its Chamber President, and
(b) the agreement of the member concerned.

(4) The assignment of any such member to a particular chamber may be ended only with the concurrence of its Chamber President.

(5) This paragraph does not apply to a legal member to whom paragraph 7(1) or (2) relates.

Assignment of judicial members

9 (1) A judicial member is to be assigned to at least one of the chambers.

(2) A judicial member—

(a) may be assigned to different chambers at different times,
(b) may be assigned to a particular chamber only with—

(i) the concurrence of its Chamber President, and
(ii) the agreement of the assignee concerned.

(3) The assignment of such a member to a particular chamber may be ended only with the concurrence of its Chamber President.
SCHEDULE 5
(introduced by section 29)

APPOINTMENT TO UPPER TRIBUNAL

PART 1

ORDINARY MEMBERS

Appointment and eligibility

1 (1) It is for the Scottish Ministers to appoint a person as an ordinary member of the Upper Tribunal.

(2) A person is eligible for such appointment only if the person meets such relevant criteria as are prescribed by the Scottish Ministers in regulations.

2 In paragraph 1(2), “relevant criteria” includes criteria as to qualifications, experience and training.

PART 2

LEGAL MEMBERS

Application of Part

3 (1) This schedule Part applies in relation to appointment of the legal members of the Upper Tribunal other than—

(a) a Vice-President of the Tribunal,

(b) a legal member of the Tribunal by reason of being a Chamber President in the First-tier Tribunal.

(2) The references in this schedule Part to a legal member of the Upper Tribunal are to be read accordingly.

Appointment and eligibility

4 (1) It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal.

(2) A person is eligible for such appointment only if qualifying under paragraph 5(1) or (2).

5 (1) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 7 years, as a solicitor or advocate in Scotland.

(2) A person qualifies under this sub-paragraph if the person falls within a description specified by the Scottish Ministers by regulations.

Eligibility under regulations

6 (1) Regulations under paragraph 5(2) may specify a description of a person by reference to the matters mentioned in sub-paragraph (2) or (3).

(2) That is—

(a) previous engagement in practice for a period of not less than 7 years, as—

(i) a solicitor or advocate in Scotland, or
(ii) a solicitor or barrister in England and Wales or Northern Ireland, and

(b) subsequent engagement in any of the activities listed in sub-paragraph (4).

(3) That is, suitability attributable to experience in law through engagement in—

(a) any of the activities listed in sub-paragraph (4),

(b) an activity that is of a broadly similar nature to any of the activities listed in that sub-paragraph.

(4) The activities are—

(a) exercising judicial functions in any court or tribunal,

(b) practice or employment as a lawyer of any kind,

(c) whether or not in the course of practice or employment as a lawyer—

(i) advising on the application of the law,

(ii) drafting documents intended to affect rights or obligations under the law,

(iii) assisting persons involved in a legal or other process for the resolution of disputes as to the law,

(iv) acting as a mediator or arbitrator for the purpose of resolving disputes that are (or could be) the matter of legal proceedings,

(d) teaching or researching law at or for an educational institution.

(1) The Scottish Ministers may by regulations make provision—

(a) as regards the calculation of the 7-year period mentioned in paragraph 5(1) or 6(2)(a) (for example, by reference to recent or continuous time),

(b) to which paragraph 6(2)(a) is subject (for example, by reference to debarment from practice),

(c) for the purpose of paragraph 6(3), about—

(i) the criteria for suitability (for example, by reference to equivalence to past or present practice as a solicitor),

(ii) the nature of experience required (for example, by reference to engagement for a particular period of time (within the United Kingdom or elsewhere)).

(2) The Scottish Ministers may by regulations modify the list in paragraph 6(4).

SCHEDULE 6
(introduced by section 29)

POSITIONS IN UPPER TRIBUNAL

PART 1

TEMPORARY VICE-PRESIDENT

Temporary Vice-President

1 If there is a temporary shortage in the number of Vice-Presidents of the Upper Tribunal or a temporary vacancy in the position, the President of Tribunals may assign a person as a Temporary Vice-President of a particular division during the shortage or vacancy.
2 (1) A person is eligible for assignment as a Temporary Vice-President only if the person is a legal member of the Upper Tribunal (other than a Vice-President).

(2) The functions of a Vice-President are exercisable by a Temporary Vice-President.

(3) Except where the context otherwise requires, a reference in or under this Act to a Vice-President includes a Temporary Vice-President.

PART 2

Assignment Internally

Assignment of and by the President of Tribunals

3 (1) The President of Tribunals has the function of assigning the members of the Upper Tribunal among the divisions (including re-assignment or ending assignment).

(2) The President of Tribunals is to assign those members among the divisions in accordance with paragraphs 4 to 7.

Assignment of Vice-Presidents etc.

4 (1) A Vice-President of a division—

(a) is to be assigned to that division,

(b) may be assigned to act—

(i) in the case of a judicial member assigned as a Vice-President, as a judicial member also in another division,

(ii) in any other case, as a legal member also in another division.

(2) Assignment under sub-paragraph (1)(b) is to act otherwise than as a Vice-President of the other division.

(3) Assignment under sub-paragraph (1)(b) requires—

(a) the concurrence of the Vice-President of the other division, and

(b) the agreement of the member concerned.

5 (1) This paragraph applies in relation to a legal member by reason of being a Chamber President in the First-tier Tribunal.

(2) Each member to whom this paragraph applies may be assigned to—

(a) one or more of the divisions, and

(b) different divisions at different times.

(3) Any such member may be assigned to a particular division only with—

(a) the concurrence of its Vice-President,

(b) the agreement of the member concerned.

(4) The assignment of any such member to a particular division may be ended only with the concurrence of its Vice-President.
Assignment of other members

6 (1) This paragraph applies in relation to an ordinary member or legal member by virtue of—
   (a) appointment as such, or
   (b) transfer-in as such.

5 (2) Each member to whom this paragraph applies—
   (a) is to be assigned to at least one of the divisions,
   (b) may be assigned to different divisions at different times.

3 (3) Any such member may be assigned to a particular division only with—
   (a) the concurrence of its Vice-President, and
   (b) the agreement of the member concerned.

4 (4) The assignment of any such member to a particular division may be ended only with the concurrence of its Vice-President.

5 (5) This paragraph does not apply to a legal member to whom paragraph 4 or 5 relates.

Assignment of judicial members etc.

7 (1) A judicial member is to be assigned to at least one of the divisions.

2 (2) An extra judge who is authorised to act as mentioned in section 17(5) is to be assigned to at least one of the divisions.

3 (3) A judicial member or such an extra judge—
   (a) may be assigned to different divisions at different times,
   (b) may be assigned to a particular division only with—
      (i) the concurrence of its Vice-President, and
      (ii) the agreement of the assignee concerned.

4 (4) The assignment of a judicial member to a particular division may be ended only with the concurrence of its Vice-President.

5 (5) Concurrence under sub-paragraph (3)(b)(i) or (4) is not required in relation to the assignment of the Lord President or the President of Tribunals.

6 (6) This paragraph does not apply to a judicial member to whom paragraph 4 relates.

SCHEDULE 7
(introduced by section 32)

CONDITIONS OF MEMBERSHIP ETC.

Application of schedule

1 (1) This schedule applies in relation to the positions of ordinary member and legal member of the Scottish Tribunals (but not the position of judicial member of the Tribunals).

2 (2) The references in this schedule to—
       (a) a position in the Scottish Tribunals, or
(b) a member of the Scottish Tribunals,

are to be read accordingly.

Initial period of office

2 (1) A person who is appointed to a position in the Scottish Tribunals holds the position for the period of 5 years beginning with the date of the appointment.

(2) A person who is transferred-in to a position in the Scottish Tribunals holds the position for the period mentioned in sub-paragraph (3).

(3) That period is the first-ending of either—

(a) the period for which the member would have continued to hold office in the listed tribunal in question if the transfer to the Scottish Tribunals had not taken place, or

(b) the period of 5 years beginning with the date on which the person becomes a member of the Scottish Tribunals.

3 (1) Sub-paragraph (2) applies where a person—

(a) holds a position in the Scottish Tribunals, and

(b) is appointed to hold another such position in addition.

(2) The person holds the position mentioned in sub-paragraph (1)(b) for a period which expires on the same date as does the period for which the person holds the position mentioned in sub-paragraph (1)(a).

Automatic reappointment

4 (1) Unless sub-paragraph (3) applies, a member of the Scottish Tribunals is to be reappointed as such at the end of each period for which the position is held.

(2) Reappointment under sub-paragraph (1) is to the position for the period of 5 years beginning with the date of the reappointment.

(3) This sub-paragraph applies if—

(a) the member has declined to be reappointed,

(b) the member is ineligible for reappointment,

(c) the President of Tribunals has recommended to the Scottish Ministers that the member should not be reappointed.

(4) In sub-paragraph (1), the reference to the period for which a position is held is to—

(a) the period for which the position is held in accordance with paragraph 2 or 3, or

(b) any further period for which the position is held by virtue of reappointment in accordance with sub-paragraphs (1) and (2).

(5) A reference in this paragraph to reappointment includes appointment at the end of a period for which a position is held by virtue of paragraph 2(2) as well as reappointment at the end of a period for which a position is held by virtue of any relevant appointment (or reappointment).
5 For the purpose of paragraph 4(3)(b), a member is ineligible for reappointment only if the member would not be eligible for appointment to the position in accordance with the relevant provisions of schedule 3 or (as the case may be) schedule 5 were the member being appointed to the position for the first time.

6 For the purpose of paragraph 4(3)(c), the President of Tribunals may recommend to the Scottish Ministers that a member should not be reappointed only if satisfied that—
   (a) the member has failed to comply with—
      (i) any of the relevant terms and conditions of membership, or
      (ii) any other requirement imposed on the member by or under this Act, or
   (b) the Tribunal concerned no longer requires—
      (i) a member with the qualifications, experience and training of that member, or
      (ii) the same number of members for the efficient disposal of its business.

7 Reappointment by virtue of paragraph 4 is not subject to any process of appointment arising in relation to a position within the Scottish Tribunals by virtue of section 10(2A) of the Judiciary and Courts (Scotland) Act 2008.

Extension in senior post

7A(1) Sub-paragraphs (2) and (3) apply where—
   (a) a legal member of the First-tier Tribunal becomes by appointment a Chamber President or Deputy Chamber President in the Tribunal, or
   (b) a legal member of the Upper Tribunal becomes by appointment a Vice-President of the Tribunal.

(2) Despite paragraphs 2 and 3, the period for which the legal member holds that position does not end until the expiry of 5 years beginning with the date of the appointment mentioned in the relevant limb of sub-paragraph (1).

(3) In all other respects also, the appointment mentioned in the relevant limb of sub-paragraph (1) supersedes the earlier appointment or (as the case may be) transfer-in as a legal member.

Termination of appointment

8 A member of the Scottish Tribunals ceases to hold the position of member of the Tribunals if the member—
   (a) becomes disqualified from holding the position (see paragraph 11),
   (b) is removed from the position under paragraph 23 of schedule 8,
   (c) resigns the position by giving notice in writing to the Lord President, or
   (d) vacates the position in accordance with section 26 of the Judicial Pensions and Retirement Act 1993.

9 (1) Nothing in paragraphs 2 to 7A affects the operation of section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 in relation to a member of the Scottish Tribunals.
Accordingly, such a member’s continuation in office by virtue of that section may have the effect of extending the period for which the member is appointed or (as the case may be) reappointed by virtue of those paragraphs.

### Disqualification from office

A person is disqualified from holding, or continuing to hold, the position of member of the Scottish Tribunals if the person is or becomes—

1. a member of the House of Commons,
2. a member of the Scottish Parliament,
3. a member of the European Parliament,
4. a Minister of the Crown,
5. a member of the Scottish Government,
6. a civil servant.

### Required oaths

Each of the members of the Scottish Tribunals must take the required oaths in accordance with this paragraph.

1. A Vice-President of the Upper Tribunal is to take them in the presence of the President of Tribunals.
2. A Chamber President in the First-tier Tribunal is to take them in the presence of the President of Tribunals.
3. A Deputy Chamber President in the First-tier Tribunal is to take them in the presence of either the President of Tribunals or a Chamber President in the First-tier Tribunal.
4. An ordinary or legal member of the Upper Tribunal by virtue of appointment or transfer-in as such is to take them in the presence of either the President of Tribunals or a Vice-President of the Upper Tribunal.
5. An ordinary or legal member of the First-tier Tribunal by virtue of appointment or transfer-in as such is to take them in the presence of either the President of Tribunals or a Chamber President in the First-tier Tribunal.

If a member of the Scottish Tribunals has previously taken the required oaths in the circumstances mentioned in sub-paragraph (8), the previous taking of the oaths counts as if it were the taking of them in accordance with this paragraph.

1. In this paragraph, “the required oaths” means the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868.

### Pensions etc.

The Scottish Ministers may make arrangements as to—
(a) the payment of pensions, allowances and gratuities to or in respect of the members, or former members, of the Scottish Tribunals,

(b) contributions or other payments towards provision for such pensions, allowances and gratuities.

(2) Under sub-paragraph (1), such arrangements may (in particular)—

(a) include provision relating to payment of compensation for loss of office,

(b) make different provision for different types of member, different positions or other different purposes.

Other conditions

(1) Other than as provided for elsewhere in this Act or under it, the Scottish Ministers may determine the terms and conditions on which the members of the Scottish Tribunals hold their positions.

(2) Under sub-paragraph (1), a determination may (in particular)—

(a) include provision for sums to be payable by way of remuneration, allowances and expenses,

(b) make different provision for different types of member, different positions or other different purposes.

SCHEDULE 8
(introduced by section 33)

CONDUCT AND FITNESS ETC.

PART 1

CONDUCT AND DISCIPLINE

Application of Part

(1) This schedule Part applies in relation to the ordinary members and legal members of the Scottish Tribunals (but not the judicial members of the Tribunals).

(2) The references in this schedule Part to a member of the Scottish Tribunals are to be read accordingly.

Conduct Rules

(1) The Lord President is responsible for making and maintaining appropriate arrangements for the things for which Rules under paragraph 3(1) may make provision.

(1) The Lord President may make Rules for the purposes of or in connection with—

(a) the investigation and determination of any matter concerning the conduct of members of the Scottish Tribunals,

(b) the review of any such determination.

(2) Rules under sub-paragraph (1) may include provision about (in particular)—

(a) the circumstances in which an investigation must or may be undertaken,
(b) the making of a complaint by any person,
(c) the steps that are to be taken by a person making a complaint before it is to be investigated,
(d) the carrying out of an investigation (including any steps to be taken by the member whom it concerns or by any other person),
(e) the time limits for taking steps and procedures for extending such time limits,
(f) the person by whom an investigation (or part of an investigation) is to be carried out,
(g) the matters to be determined by the person carrying out an investigation (or part of an investigation), the Lord President or any other person,
(h) the making of recommendations by the person carrying out an investigation (or part of one),
(i) the obtaining of information relating to a complaint,
(j) the keeping of a record of an investigation,
(k) the confidentiality of communications or proceedings,
(l) the publication of information or its supply to any person.

Rules under paragraph 3(1)—
(a) may make different provision for different purposes,
(b) are to be published in such manner as the Lord President may determine.

Reprimand etc.

5 (1) Where the condition in sub-paragraph (2) is met in relation to a member of the Scottish Tribunals, the Lord President may, for disciplinary purposes, give the member—
(a) formal advice,
(b) a formal warning, or
(c) a reprimand.

(2) The condition is that—
(a) an investigation has been carried out with respect to the member in accordance with Rules made under paragraph 3(1), and
(b) the person carrying out the investigation has recommended that the Lord President exercise the power conferred by sub-paragraph (1).

6 Paragraph 5 does not limit what the Lord President may do—
(a) informally,
(b) for other purposes, or
(c) where no advice or warning is given in a particular case.
Suspension of membership

7 (1) If the Lord President considers that it is necessary for the purpose of maintaining public confidence in the Scottish Tribunals, the Lord President may suspend a member of the Tribunals.

(2) Suspension under sub-paragraph (1)—

(a) is for such period as the Lord President may specify when suspending the member,

(b) may be revoked or extended subsequently by the Lord President.

8 Suspension under paragraph 7(1) does not affect any remuneration payable to, or in respect of, the member concerned during the period of suspension.

Judicial Complaints Reviewer

9 (1) The Judicial Complaints Reviewer has the functions mentioned in sub-paragraph (2).

(2) The functions are—

(a) on the request of a relevant person, to review the handling of an investigation carried out in accordance with Rules made under paragraph 3(1) to consider whether the investigation has been carried out in accordance with the Rules,

(b) in any case where the Reviewer considers that such an investigation has not been carried out in accordance with such Rules, to refer the case to the Lord President,

(c) as directed by the Scottish Ministers, to prepare and publish reports on the investigations carried out in pursuance of such Rules, and

(d) to make written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of members of the Scottish Tribunals.

(3) The Lord President is to have regard to any written representations made under sub-paragraph (2)(d).

(4) In sub-paragraph (2)(a), “relevant person” means—

(a) person whose complaint led to the carrying out of the investigation, or

(b) member of the Scottish Tribunals with respect to whom the investigation has been carried out.

10 (1) Sub-paragraph (2) applies where a case is referred to the Lord President by virtue of paragraph 9(2)(b).

(2) The Lord President may—

(a) vary or revoke wholly or partly the determination made in the case to which the investigation relates,

(b) cause a fresh investigation to be carried out,

(c) confirm the determination in the case, or

(d) deal with the referral in such other way as the Lord President considers appropriate.
PART 2
FITNESS AND REMOVAL

Application of Part

11 (1) This schedule Part applies in relation to the ordinary members and legal members of the Scottish Tribunals (but not the judicial members of the Tribunals).

(2) The references in this schedule Part to a member of or position in the Scottish Tribunals are to be read accordingly.

12 In this schedule Part, the references to unfitness to hold the position of member of the Scottish Tribunals are to unfitness by reason of inability, neglect of duty or misbehaviour.

Constitution and procedure

13 (1) The First Minister must constitute a fitness assessment tribunal when requested to do so by the Lord President.

(2) The First Minister may constitute a fitness assessment tribunal—

(a) in such other circumstances as the First Minister thinks fit, and

(b) following consultation with the Lord President.

(3) The function of a fitness assessment tribunal is to investigate and report on whether a member of the Scottish Tribunals is unfit to hold the position of member of the Tribunals.

14 The Court of Session may by act of sederunt make provision as to the procedure to be followed in proceedings at a fitness assessment tribunal.

Composition and remuneration

15 (1) A fitness assessment tribunal is to consist of—

(a) one person who is, or has been—

(i) a judge of the Court of Session (except a temporary judge), or

(ii) a sheriff (except a part-time sheriff),

(b) one person who is—

(i) where the member under investigation is an ordinary member, another ordinary member, or

(ii) where the member under investigation is a legal member, another legal member, and

(c) one person who does not fall (and has never fallen) within a category of person who may be a member of the tribunal by virtue of sub-paragraph (a) or (b).

(2) The selection of persons to be members of the tribunal is to be made by the First Minister with the agreement of the Lord President.

16 (1) The Scottish Ministers—
Schedule 8—Conduct and fitness etc.
Part 2—Fitness and removal

(a) must pay such expenses as they consider are reasonably required to be incurred to enable a fitness assessment tribunal to carry out its functions,
(b) may pay such remuneration to, and expenses of, any member of such a tribunal as they think fit.

(2) Sub-paragraph (1)(b) does not apply in relation to such a member if the member is a sheriff or a judge of the Court of Session.

Proceedings before tribunal

17 (1) A fitness assessment tribunal may require any person—
(a) to attend its proceedings for the purpose of giving evidence,
(b) to produce documents in the person’s custody or under the person’s control.

(2) A person on whom such a requirement is imposed is not obliged to answer any question or produce any document which the person would be entitled to refuse to answer or produce in a court of law in Scotland.

18 (1) Sub-paragraph (2) applies where a person on whom a requirement has been imposed under paragraph 17(1)—
(a) refuses or fails, without reasonable excuse—
(i) to comply with the requirement,
(ii) while attending the tribunal proceedings to give evidence, to answer any question,
(b) deliberately alters, conceals or destroys any document which the person is required to produce.

(2) The Court of Session may, on an application made to it by the tribunal—
(a) make such order for enforcing compliance or otherwise as it thinks fit, or
(b) deal with the matter as if it were a contempt of the Court.

Suspension during investigation

19 (1) Sub-paragraph (2) applies if the Lord President requests the First Minister to constitute a fitness assessment tribunal to investigate whether a member of the Scottish Tribunals is unfit to hold the position of member of the Tribunals.

(2) The Lord President may suspend the member from the position at any time before the tribunal submits its report as required by paragraph 22(2).

(3) Suspension under sub-paragraph (2) lasts until (whichever is earlier)—
(a) the Lord President revokes it, or
(b) the report is laid as required by paragraph 22(3).

20 (1) Sub-paragraph (2) applies if a fitness assessment tribunal—
(a) recommends that a member of the Scottish Tribunals who is subject to its investigation should be suspended from the position as member of the Tribunals,
(b) does so in writing at any time before the tribunal submits its report as required by paragraph 22(2).
The First Minister may suspend the member from the position at any time before laying the report as required by paragraph 22(3).

Suspension under sub-paragraph (2) lasts until (whichever is earlier)—

(a) the First Minister revokes it, or

(b) the report is laid as required by paragraph 22(3).

Suspension under paragraph 19(2) or 20(2) does not affect any remuneration payable to, or in respect of, the member concerned during the period of suspension.

Report and removal

A report by a fitness assessment tribunal must—

(a) be in writing, and

(b) contain reasons for its conclusions.

As soon as reasonably practicable after it is completed, such a report must be submitted by the tribunal to—

(a) the First Minister, and

(b) the Lord President.

The First Minister must lay before the Scottish Parliament each report submitted under sub-paragraph (2).

If the relevant condition is met, the First Minister may remove a member of the Scottish Tribunals from the position of member of the Tribunals.

The relevant condition is that a fitness assessment tribunal has submitted a report under paragraph 22(2) concluding that the member is unfit to hold the position of member of the Scottish Tribunals.

SCHEDULE 9
(introduced by section 75)

TRANSITIONAL AND CONSEQUENTIAL

PART 1

TRANSITIONAL AND OTHER MATTERS

Exercise of functions

Sub-paragraph (2) applies for the purposes of—

(a) the exercise of functions by a member of the Scottish Tribunals by virtue of this Act, and

(b) the operation of provisions in or under this Act to which such a member is subject.

Except where the context otherwise requires, it is immaterial whether a person who is, or who is acting as, such a member is in place by virtue of appointment, assignment, transfer-in or other means under this Act.
Rules of listed tribunals

2 (1) Sub-paragraph (2) applies where some or all of the functions of a listed tribunal have been, or are to be, transferred by regulations under section 27(2).

(2) The Scottish Ministers may by regulations provide for the procedural rules of a listed tribunal that are in force immediately before the transfer to have effect for the purposes of either or both of the First-tier Tribunal and the Upper Tribunal.

(3) Regulations under sub-paragraph (2) may provide for the procedural rules to which the regulations relate to have such effect subject to such modifications as appear to the Scottish Ministers to be necessary or expedient with respect to the purposes mentioned in that sub-paragraph.

(4) In this paragraph—

“listed tribunal” is to be construed in accordance with Part 3 (see section 26(1)),

“procedural rules” means provision for the purposes of a listed tribunal (whether or not contained in an enactment and irrespective of whether called rules)—

(a) regulating the practice or procedure to be followed in proceedings at a listed tribunal, or

(b) otherwise applying in relation to the exercise by a listed tribunal of its functions.

3 (1) Regulations under paragraph 2(2) may—

(a) make different provision for different purposes,

(b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations under paragraph 2(2) are subject to the negative procedure.

Pre-SCJC rule-making

4 (1) Until the Scottish Civil Justice Council and the Court of Session are involved in the making of Tribunal Rules by virtue of the coming into force of paragraph 12(2) to (5)—

(a) section 62(3) and (4) is of no effect,

(b) instead of that section, sub-paragraph (2) applies for the purpose of making rules regulating the practice and procedure to be followed in proceedings at the Scottish Tribunals.

(2) The function of making such rules is exercisable by the Scottish Ministers by setting them out in regulations.

(3) Before making regulations under sub-paragraph (2), the Scottish Ministers must consult—

(a) the President of Tribunals, and

(b) such other persons as they consider appropriate.

5 (1) Regulations under paragraph 4(2) may—

(a) modify rules having effect for the purposes mentioned in paragraph 2(2) (that is, by virtue of regulations made under that paragraph),
(b) do anything that may be done by Tribunal Rules by virtue of Chapter 2 of Part 7 (including the making of different provision for different purposes).

(2) Regulations under paragraph 4(2) are subject to the negative procedure.

Adoption of inherited rules

5

6 (1) Sub-paragraph (2) applies to—

(a) rules having effect as mentioned in paragraph 2(2) (by virtue of regulations made under that paragraph),

(b) rules set out in regulations made by virtue of paragraph 4(2).

(2) Once the Scottish Civil Justice Council and the Court of Session are involved in the making of Tribunal Rules by virtue of the coming into force of paragraph 12(2) to (5)—

(a) all rules to which this sub-paragraph applies are to be regarded as if made as Tribunal Rules under Chapter 2 of Part 7,

(b) all such rules have effect accordingly (and may therefore be revoked, amended or remade by Tribunal Rules under Chapter 2 of Part 7).

Chambers and divisions

7 (1) For as long as it appears to the Scottish Ministers that the acquisition of functions by the First-Tier Tribunal for the time being is such that there is justification for not organising it into a number of chambers as required by section 19(1), regulations under section 19(2)—

(a) need not be made, or

(b) may provide for the Tribunal to have a single chamber only.

(2) For as long as it appears to the Scottish Ministers that the acquisition of functions by the Upper Tribunal for the time being is such that there is justification for not organising it into a number of divisions as required by section 22(1), regulations under section 22(2)—

(a) need not be made, or

(b) may provide for the Tribunal to have a single division only.

8 (1) Sections 19(1) and (2) and 22(1) and (2) are subject to paragraph 7(1) and (2) (until it appears to the Scottish Ministers that the relevant justification no longer exists).

(2) Any provision of this Act (apart from this schedule Part) that mentions a chamber or more than one chamber of the First-tier Tribunal is, for as long as by virtue of paragraph 7(1) the First-tier Tribunal has no chambers or a single chamber, to be read with such modifications as are necessary for the effective operation of the provision while the Tribunal is not organised into a number of chambers.

(3) Any provision of this Act (apart from this schedule Part) that mentions a division or more than one division of the Upper Tribunal is, for as long as by virtue of paragraph 7(2) the Upper Tribunal has no divisions or a single division, to be read with such modifications as are necessary for the effective operation of the provision while the Tribunal is not organised into a number of divisions.
9 For the purposes of paragraph 7(1) and (2), the Scottish Ministers must have regard to the following matters so far as relevant for the time being—

(a) the different subject-matters falling within the jurisdiction of the First-tier Tribunal or (as the case may be) the Upper Tribunal, and

(b) any other factors relevant in relation to the exercise of the functions of the First-tier Tribunal or (as the case may be) the Upper Tribunal.

Making appointments

9A(1) Until all of the functions of a listed tribunal have been transferred to the Scottish Tribunals by regulations under section 27(2)—

(a) paragraph 3(1)(d) of schedule 1 to the 2008 Act has effect in relation to that tribunal as if the reference in that paragraph to a person holding the position of Chamber President or of Vice-President within the Scottish Tribunals includes the President of, or the holder of an equivalent office in, any listed tribunal,

(b) paragraph 16A(2) and (3) of schedule 1 to the 2008 Act has effect in relation to that tribunal as if the references in that paragraph to a member of the Scottish Tribunals includes a member of any listed tribunal.

(2) In this paragraph—

“the 2008 Act” means the Judiciary and Courts (Scotland) Act 2008 (see paragraph 11(4)(b) and (5)),

“listed tribunal” is to be construed in accordance with Part 3 (see section 26(1)).

PART 2

CONSEQUENTIAL MODIFICATIONS

Judicial Pensions and Retirement Act 1993

10 (1) The Judicial Pensions and Retirement Act 1993 is amended as follows.

(2) In section 26 (retirement date for certain judicial officers)—

(a) in subsection (12), in the definition of “the appropriate person”, after paragraph (e) there is inserted—

“(f) the Scottish Ministers, in the case of a relevant member of the Scottish Tribunals;”,

(b) after subsection (15) there is inserted—

“(16) The Scottish Ministers must consult the President of Tribunals before exercising any function arising by virtue of subsection (12)(f) in relation to a relevant member of the Scottish Tribunals.

(17) In paragraph (f) of the definition of “the appropriate person” in subsection (12), and in subsection (16) above, a reference to a relevant member of the Scottish Tribunals is to an ordinary or legal member of either or both of the Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

(3) In section 30 (interpretation), after subsection (1) there is inserted—
“(1A) For the purposes of section 26(12)(f), (16) and (17), and the related entry in Schedule 5, “Scottish Tribunals” or “President of Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013.”.

(4) In Schedule 5 (relevant offices in relation to retirement provisions), at the end there is inserted—

“Ordinary or legal member of either or both of the Scottish Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

Judiciary and Courts (Scotland) Act 2008

11 (1) The Judiciary and Courts (Scotland) Act 2008 is amended as follows.

(2) In section 10 (judicial offices within the Board’s remit)—

(a) in subsection (1), the word “and” immediately preceding paragraph (g) is repealed,

(b) before paragraph (g) of that subsection there is inserted—

“(fa) the positions within the Scottish Tribunals mentioned in subsection (2A), and”,

(c) after subsection (2) there is inserted—

“(2A) The positions within the Scottish Tribunals are—

(a) Vice-President of the Upper Tribunal, if to be appointed under section 25(1) of the Tribunals (Scotland) Act 2013,

(b) Chamber President in the First-tier Tribunal, if to be appointed under section 21(1) of that Act,

(c) Deputy Chamber President in the First-tier Tribunal, if to be appointed under the relevant provisions of schedule 4 to that Act,

(d) ordinary member or legal member of the First-tier Tribunal or the Upper Tribunal, if to be appointed under the relevant provisions of schedule 3 or (as the case may be) schedule 5 to that Act.”.

(3) In section 30 (Judicial Complaints Reviewer), in subsection (5), after paragraph (h) there is inserted—

“(i) an ordinary or legal member of either or both of the Scottish Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

(4) In paragraph 3 of schedule 1—

(a) in sub-paragraph (1), the word “and” immediately preceding paragraph (c) is repealed,

(b) after that paragraph there is inserted—

“, and

(d) one person holding the position of Chamber President or of Vice-President within the Scottish Tribunals.”,

(c) after sub-paragraph (5) there is inserted—
“(6) For the purposes of sub-paragraph (1)(d)—

“Scottish Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013,

“Chamber President” means Chamber President in the First-tier Tribunal as referred to in that Act and “Vice-President” means Vice-President of the Upper Tribunal as referred to in that Act.”.

(5) After paragraph 16 of schedule 1 there is inserted—

“Proceedings relating to the Scottish Tribunals

16A (1) Sub-paragraph (2) applies where the Board is exercising any function under this Act in connection with a position mentioned in section 10(2A).

(2) At least one member of the Scottish Tribunals is to take part in any proceedings relating to the function (whether or not also a member of the Board).

(3) It is for the President of Tribunals to select a member of the Scottish Tribunals to take part as mentioned in sub-paragraph (2).

(4) Before making a selection under sub-paragraph (3), the President of Tribunals must consult the Chairing Member.

(5) Sub-paragraph (6) applies where a person taking part as mentioned in sub-paragraph (2) is not a member of the Board.

(6) The person is to be treated as if a member of the Board for the purposes of—

(a) sections 11 to 15 and 17, and

(b) paragraphs 5, 12 and 13 of this schedule.

(7) The Board may not make a determination under paragraph 15 which is inconsistent with this paragraph.

(8) In this paragraph, “President of Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013 and the references to a member of the Scottish Tribunals are to be construed in accordance with section 12(3) of that Act.”.

Scottish Civil Justice Council and Criminal Legal Assistance Act 2013

12 (1) The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 is amended as follows.

(2) In subsection (1) of section 2 (functions of the Council)—

(a) after paragraph (b) there is inserted—

“(ba) to review the practice and procedure followed in proceedings in the Scottish Tribunals,”,

(b) in paragraph (c)—

(i) the words “draft civil procedure rules” become sub-paragraph (i),

(ii) after that sub-paragraph (as so numbered) there is inserted—

“(ii) draft tribunal procedure rules,”.
(3) In subsection (3) of section 2, after paragraph (c) there is inserted—

“(ca) practice and procedure should, where appropriate, be similar in both of
the Scottish Tribunals (and in different chambers or divisions within
them),”.

(4) After subsection (6) of section 2 there is inserted—

“(7) For the purposes of this Part, “draft tribunal procedure rules” are draft rules
prepared with a view to the making by the Court of Session by act of sederunt
of Tribunal Rules with respect to the Scottish Tribunals.”.

(5) In section 4 (Court of Session to consider rules)—

(a) in subsection (1), after the words “draft civil procedure rules” there is inserted “or
draft tribunal procedure rules”,
(b) in subsection (2), after the words “draft civil procedure rules” there is inserted “or
draft tribunal procedure rules”.

(6) In section 6 (composition of the Council), in subsection (1)—

(a) for the word “20” there is substituted “22”,
(b) after paragraph (a) there is inserted—

“(aa) the President of Tribunals,”,
(c) after paragraph (e) there is inserted—

“(ea) from the membership of the Scottish Tribunals, 1 Chamber President or
1 Vice-President (“Tribunal representative member”),”.

(7) In section 8 (tenure)—

(a) in subsection (1), after the words “Lord President,” there is inserted “the President
of Tribunals,”,
(b) after subsection (3) there is inserted—

“(3A) A Tribunal representative member holds office for a period of 3 years unless,
prior to the expiry of that period, the Lord President replaces the representative
with another Tribunal representative member or requires the member to leave
office.”.

(8) The title of section 13 becomes “Committees generally”.

(9) After section 13 there is inserted—

“Tribunals

13A Tribunals committee

(1) The Council must establish a particular committee under section 13(1) in
connection with the exercise by it of the functions arising by virtue of section
2(1)(ba) and (c)(ii).
(2) The committee is to be chaired by the President of Tribunals or the Tribunal
representative member.
(3) The other members of the committee are to be selected by the President of
Tribunals.
(4) In selecting those members of the committee, the President of Tribunals is to have particular regard to the need to ensure that its membership includes persons with knowledge of how the Scottish Tribunals exercise their functions.

(5) The Council may not make a determination under section 12(3)(b) which is inconsistent with subsections (2) to (4).”.

(10) In section 16 (interpretation of Part 1)—

(a) the existing text becomes subsection (1),
(b) in that subsection (as so numbered), after the entry relating to draft civil procedure rules there is inserted—

“draft tribunal procedure rules” has the meaning given in section 2(7),”;

(c) after that subsection (as so numbered) there is inserted—

“(2) In this Part—

“Scottish Tribunals”, “President of Tribunals” and “Tribunal Rules” are to be construed in accordance with the Tribunals (Scotland) Act 2013,

“Chamber President” means Chamber President in the First-tier Tribunal as referred to in that Act and “Vice-President” means Vice-President of the Upper Tribunal as referred to in that Act (with “chamber” and “division” in relation to the Scottish Tribunals to be construed in accordance with that Act).”.

SCHEDULE 10
(introduced by section 76)
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Tribunals (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to establish the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland; and for connected purposes.

Introduced by: Kenny MacAskill
On: 8 May 2013
Bill type: Government Bill
INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these Revised Explanatory Notes are published to accompany the Tribunals (Scotland) Bill (introduced in the Scottish Parliament on 8 May 2013) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sideling in the right margin.

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill creates a new structure for tribunals dealing with devolved matters under the judicial leadership of the Lord President of the Court of Session as Head of the Scottish Tribunals.

5. The main features covered by the Bill are:
   - The creation of a First-tier Tribunal and an Upper Tribunal. The First-tier Tribunal will be divided into chambers, and the Upper Tribunal into divisions. The Bill creates a simplified framework to provide coherence across the tribunals system. The Bill allows the new structure to be capable of taking on new jurisdictions over time.
   - The First-tier Tribunal will deal with cases in the first instance to which a general right of appeal will lie to the Upper Tribunal. The Bill does, however, allow for the functions of a listed tribunal to be transferred to either or both Tribunals and it is envisaged that the Upper Tribunal may receive first-instance functions which are particularly complicated or controversial. The Upper Tribunal also has an express function, which is set out in section 41 of the Bill, to hear appeals from the First-tier
This document relates to the Tribunals (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

Tribunal. It may also decide on petitions for judicial review which are transferred to it from the Court of Session under section 52.

- The creation of a new office, the President of the Scottish Tribunals (“President of Tribunals”). The Lord President will be able to delegate some of the Lord President’s functions as Head of the Scottish Tribunals to the President of Tribunals.

- The Bill enables the First-tier Tribunal and the Upper Tribunal to review their own decisions where, for example, simple administrative errors have occurred. This does not affect the rights of appeal available.

- The Bill amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, to provide the Scottish Civil Justice Council (“SCJC”) with the power to propose rules of procedure for devolved Scottish tribunals.

- Each tribunal is to be composed of its members and the Bill provides a common system for appointing both legally qualified and lay members. The Bill also allows for the transfer-in of members of a listed tribunal at the point when its functions are transferred-in to the Scottish Tribunals. Members of the judiciary are also enabled to be assigned to act as tribunal members. Reflecting the primary functions of both tribunals, a sheriff will be eligible to act as a member of both the First-tier Tribunal and the Upper Tribunal while a judge of the Court of Session will be eligible to act as a member of the Upper Tribunal.

OVERVIEW OF THE STRUCTURE OF THE BILL

6. The Bill has 78 sections and 10 schedules. Section 76 contains definitions used in the Bill and schedule 10 is an index of expressions used in the Bill. The Bill is organised into 8 Parts and these explanatory notes are organised likewise. A brief overview of the structure of the Bill is set out below which is followed by a detailed description of the provisions of the Bill in the commentary on the sections. Terms are defined when first used but not otherwise. An explanation to accompany each schedule is contained within the section that introduces that schedule.

7. Part 1 makes provision for the establishment and leadership of the Scottish Tribunals.

8. Part 2 makes provision for the composition of the Scottish Tribunals and their internal structure.

9. Part 3 makes provision so that the functions and members of a tribunal listed in schedule 1 can be transferred-in to the Scottish Tribunals.

10. Part 4 contains more detail in relation to membership of the Scottish Tribunals. Schedules 3 to 6 deal with the appointment and assignment of members. Schedule 7 sets out the terms and conditions of membership including period in office, re-appointment, termination of appointment, disqualification from office, pensions and remuneration. Schedule 8 makes provision as to the training and fitness of members including the process for removing a member from office.
11. Part 5 makes provision as to the composition of the Scottish Tribunals when exercising their decision-making functions.

12. Part 6 enables both the First-tier Tribunal and Upper Tribunal to review their own decisions and to correct or set-aside those decisions. It also provides for a general right to appeal against a decision of the First-tier Tribunal to the Upper Tribunal and against a decision of the Upper Tribunal to the Court of Session. Chapter 2 of Part 6 also enables the Court of Session to remit an application for judicial review to the Upper Tribunal for determination.

13. Chapters 1 and 2 of Part 7 make provision in respect of the practice and procedure to be followed in proceedings before the Scottish Tribunals. Chapter 3 of Part 7 makes provision for the charging of fees by the Scottish Tribunals as well as the duty of the Scottish Ministers to ensure that the Scottish Tribunals are provided with the necessary property, services and personnel which are required for their proper operation, and reporting.


**COMMENTARY ON SECTIONS**

**PART 1 – THE SCOTTISH TRIBUNALS**

**Establishment and Leadership**

*Section 1 – Establishment of the Tribunals*

15. Section 1 establishes two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland.

*Section 2 – Head of the Tribunals*

16. Section 2 designates the Lord President as the Head of the Scottish Tribunals. The Bill confers a number of functions on the Lord President in this capacity. See, for example, section 4(2) (assigning a person to the office of the President of the Scottish Tribunals), section 6 (representation of interests), section 7 (business arrangements), section 30 (assignment policy) and section 31 (training and review).

*Section 3 – Upholding independence*

17. Section 3 places a duty on the First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament and any other person having responsibility for matters relating to the Scottish Tribunals or the administration of justice to uphold the independence of the members of the Scottish Tribunals. It also imposes two particular duties on the First Minister, the Lord Advocate and the Scottish Ministers for the purpose of upholding that independence.

18. The first is a duty not to seek to influence the decisions of the Scottish Tribunals through special access to its members which would not be afforded to the general public.

19. The second is a duty to have regard to the need for members of the Scottish Tribunals to have the support necessary to enable them to carry out their functions.
Sections 4 and 5 – President of the Tribunals

20. Section 4 establishes the office of the President of the Scottish Tribunals. It is the responsibility of the Lord President to assign a judge of the Court of Session (other than a temporary judge) to the office who will be the senior member of the Scottish Tribunals. Once assigned to office, the President of Tribunals continues in that office for such time as the Lord President considers appropriate.

21. Where no person is assigned to act or the person assigned to act as the President of Tribunals is unable to act in that capacity, the Lord President may nominate a Vice-President of the Upper Tribunal to act temporarily as the President of Tribunals provided that that person is also a judge of the Court of Session (other than a temporary judge).

22. The Bill confers a number of functions directly on the President of Tribunals (see, for example, section 24(2) by which the President of Tribunals may assign a judicial member of the Upper Tribunal as a Vice-President of that Tribunal) and also enables the Lord President to delegate a number of his or her functions to the President of Tribunals (see sections 8 and 9).

Overarching Responsibilities

Section 6 – Representation of interests

23. Under this section, the Lord President is responsible for representing the views of the members of the Scottish Tribunals to the Scottish Parliament and to the Scottish Ministers and for laying written representations before Parliament on matters of importance relating to the Scottish Tribunals. The Lord President is not authorised to delegate these specific duties under section 8.

Section 7 – Business arrangements

24. Under section 7, the Lord President is responsible for making and maintaining appropriate arrangements to ensure the efficient disposal of business by the Scottish Tribunals and the welfare of their members. The Lord President may delegate the discharge of these responsibilities to the President of Tribunals (see section 8).

Section 8 – Delegation of functions

25. Section 8 authorises the Lord President to delegate to the President of Tribunals the exercise of any of the functions listed in section 7(1) or (2) (business arrangements), section 30(1) and (2) (assignment policy) or section 31(1) or (2) (training and review). Section 8 should be read with section 9 which enables the Lord President to issue directions as to the exercise of any functions which are delegated under section 8.

Section 9 – Directions on functions

26. This section enables the Lord President to issue directions as to the exercise of the functions of the President of Tribunals in relation to the Scottish Tribunals. This would include any functions conferred directly on the President of Tribunals by the Bill or any functions which are delegated to the President of Tribunals by the Lord President under section 8.
Section 10 – Authority under regulations

27. Section 10 makes provision as to the exercise of the regulation-making powers contained in section 19(2) (chambers in the First-tier Tribunal), section 22(2) (divisions of the Upper Tribunal), section 35(1) (composition of the First-tier Tribunal), section 37(1) (composition of the Upper Tribunal) and 37A(1) (voting for decisions) by the Scottish Ministers. These are more fully explained in the explanatory notes relating to those sections.

Section 11 – Consultation on regulations

28. This section imposes a consultation requirement on the Scottish Ministers before the exercise of the regulation-making powers contained in sections 19(2), 22(2), 35(1), 37(1) and 37A(1). These are more fully explained in the explanatory notes relating to those sections.

Section 11A – Principle to be observed

29. This Section provides an overarching guiding principle for the Scottish Tribunals. Subsection (1) places a duty on the Scottish Ministers to have regard to this principle when exercising their regulation making functions. Subsection (2) places a duty on the Lord President and President of Scottish Tribunals that in exercising their leadership functions they must have regard to this principle. Subsection (3) contains the principle.

PART 2 – ORGANISATIONAL ARRANGEMENTS

Membership types

Section 12 – Overview of membership

30. Section 12 specifies the categories of member of the First-tier and Upper Tribunals. These are defined as ordinary members, legal members and judicial members. As can be seen from the more detailed provisions, judicial members will be those members of the courts judiciary who are authorised to act as members of the Scottish Tribunals (see section 16), legal members will be solicitors, advocates or persons possessing some other form of legal qualification (see Part 2 of schedule 3 and Part 2 of schedule 5) and ordinary members will comprise persons with such other qualifications, experience or training as are necessary for the Tribunals to exercise their functions (for example, doctors, surveyors, teachers or other lay persons) (see Part 1 of schedule 3 and Part 1 of schedule 5).

31. Subsection (2) provides that a member of one of the Scottish Tribunals (by virtue of being a member of that Tribunal) is not prevented from being a member of the other.

Section 13 – Capacity of members

32. The effect of section 13 is to clarify that all members of the Scottish Tribunals, when exercising the decision-making functions of the Tribunals are doing so with judicial status and capacity, regardless of the category of membership which they possess. Subsection (1) makes provision with respect to ordinary and legal members and subsection (2) clarifies that this does not affect the general status of judicial members (see section 16) and extra judges (see section 17).
Section 14 – First-tier members

33. Section 14 makes provision as to the membership of the First-tier Tribunal.

34. Under subsection (1), persons will become ordinary members of the First-tier Tribunal if they are transferred-in as ordinary members by virtue of section 28(b) or appointed as ordinary members by virtue of section 29(1). Similarly, subsection (2)(a) provides that persons will become legal members of the First-tier Tribunal if they are transferred-in as legal members by virtue of section 28(b) or are appointed as legal members by virtue of section 29(1).

35. Section 28(b) gives effect to paragraph 1 of schedule 2 which enables the Scottish Ministers, by regulations, to provide for a transferable person of a listed tribunal to transfer-in to the First-tier Tribunal as an ordinary or legal member. Further details are provided in the commentary on that section.

36. Section 29(1) gives effect to schedule 3 which enables the Scottish Ministers to appoint a person as an ordinary or legal member of the First-tier Tribunal. Further details are provided in the commentary on that section.

37. Subsections (2)(b) and (3) of section 14 provide that a person is also a legal member of the First-tier Tribunal if that person holds the position of Chamber President or Deputy Chamber President. Where a legal member of the First-tier Tribunal is assigned as a Temporary Chamber President under paragraph 4 of schedule 4, that Temporary Chamber President will also be regarded as a legal member of the First-tier Tribunal but where a judicial member of the First-tier Tribunal is assigned as a Temporary Chamber President, that person will continue to be a judicial member.

Section 15 – Upper members

38. Section 15 makes provision as to the membership of the Upper Tribunal.

39. Under subsection (1), persons will become ordinary members of the Upper Tribunal if they are transferred-in as ordinary members by virtue of section 28(b) or appointed as ordinary members by virtue of section 29(3). Similarly, subsection (2)(a) provides that persons will become legal members of the Upper Tribunal if they are transferred-in as legal members by virtue of section 28(b) or are appointed as legal members by virtue of section 29(3).

40. Section 28(b) gives effect to paragraph 1 of schedule 2 which enables the Scottish Ministers, by regulations, to provide for a transferable person of a listed tribunal to transfer-in to the Upper Tribunal as an ordinary or legal member. Further details are provided in the commentary on that section.

41. Section 29(3) gives effect to schedule 5 which enables the Scottish Ministers to appoint a person as an ordinary or legal member of the Upper Tribunal. Further details are provided in the commentary on that section.

42. The effect of subsection (2)(b) of section 15 is that a Chamber President of the First-tier Tribunal, by virtue of holding that position, will also be a legal member of the Upper Tribunal.
This document relates to the Tribunals (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

(without the requirement to be separately appointed as a legal member of the Upper Tribunal). This provision does not have the effect of making Deputy Chamber Presidents or Temporary Chamber Presidents of the First-tier Tribunal legal members of the Upper Tribunal.

43. Subsections (2)(c) and (3) of section 15 provide that a person is also a legal member of the Upper Tribunal if that person is transferred-in or appointed as a Vice-President of the Upper Tribunal. Where a member of the courts judiciary is assigned as a Vice-President or a Temporary Vice-President of the Upper Tribunal that person remains a judicial member of the Upper Tribunal rather than becoming a legal member.

Judiciary eligible to sit

Section 16 – Sheriffs and judges

44. Section 16 provides for the circumstances in which members of the courts judiciary can be assigned to act as members of the Scottish Tribunals. Such persons make up the judicial members of the Scottish Tribunals (see section 18).

45. By virtue of subsection (1), sheriffs principal, sheriffs and part-time sheriffs are eligible to act as members of the First-tier Tribunal. Such persons may only act as members of the First-tier Tribunal with the authorisation of the President of Tribunals (subsection (3)). Such authorisation can only be given with the Lord President’s approval and the agreement of the sheriff concerned (and, if that person is not a sheriff principal, the sheriff principal of the sheriffdom to which that sheriff is appointed) (subsection (6)).

46. By virtue of subsection (2), judges of the Court of Session (including temporary judges) together with the Chairman of the Scottish Land Court, sheriffs principal and sheriffs (but not part-time sheriffs) are eligible to act as members of the Upper Tribunal. Such persons may only act as members of the Upper Tribunal with the authorisation of the President of Tribunals (subsections (3) and (4)). Such authorisation can only be given with the Lord President’s approval and the agreement of that person (subsection (6)). Where the person is a sheriff (but not a sheriff principal), the authorisation of the President of Tribunals can only be given with the agreement of the sheriff principal of the sheriffdom to which that sheriff is appointed.

47. Subsection (2) does not apply to the Lord President and the President of Tribunals. Subsection (5) makes express provision for both the Lord President and President of Tribunals to act as members of the Upper Tribunal without any requirement for authorisation.

48. Any authorisation given by the President of Tribunals for a member of the courts judiciary to act as a member of the Scottish Tribunals remains in effect until such time as the President of Tribunals determines (which again requires the consent of the Lord President and the agreement of the person acting as a member (subsection (6))). Where the person is a sheriff (but not a sheriff principal), the determination of the President of Tribunals can also only be made with the agreement of the sheriff principal of the sheriffdom to which that sheriff is appointed.
Section 17 – Authorisation of others

49. Section 17 enables the Scottish Ministers, on receiving a request from the President of Tribunals, to authorise a former judge of the Court of Session, Chairman of the Land Court, sheriff (excluding part-time sheriff) or a judge of a court or tribunal in a country or territory outwith Scotland to assist in the disposal of the business of the Upper Tribunal by temporarily acting as a judicial member of the Upper Tribunal. It does not enable such a person to act as a member of the First-tier Tribunal.

50. The President of Tribunals cannot make a request for such an authorisation without the approval of the Lord President and the agreement of the person concerned (subsection (3)). Subsection (7) enables the Scottish Ministers to make payments in respect of any person authorised to act under section 17.

51. Subsection (7A) provides that former judicial office holders cannot be authorised if they have reached the age of 75 or if they have been removed from judicial office. The relevant grounds for removal from office are listed in the provision.

52. Subsection (7B) enables the Scottish Ministers to make further provision as necessary when authorising judges of a court or tribunal in a country or territory outwith Scotland to sit in the Upper Tribunal. It also places a duty such judges to take the judicial oath if they have not already done so.

53. Subsection (8) provides that the requirement to uphold the independence of the Scottish Tribunals in section 3 applies to any persons authorised to act under section 17 as it does in relation to the other members of the Scottish Tribunals. It also makes provision so that any previous oath taken by such a person will continue to apply in the person’s role in the Scottish Tribunals.

Section 18 – Judicial membership

54. Section 18 clarifies the people who are to be regarded as judicial members of the Scottish Tribunals. Any reference to a judicial member of the Upper Tribunal does not include a reference to a judge authorised to act as such under section 17.

Structure of the First-tier Tribunal

Section 19 – Chambers in the Tribunal

55. Section 19 provides for the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal’s functions among those chambers. The chambers are to be organised according to the subject-matter of the Tribunal’s functions as well as any other factors which are relevant to the exercise of the Tribunal’s functions.

56. The organisation into chambers and the allocation of the Tribunal’s functions are to be effected by regulations made by the Scottish Ministers (subsection (2)). By virtue of section 10(1), those regulations may make provision authorising the Lord President, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section
11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 19(2).

57. Paragraph 7(1) of schedule 9 makes transitional provision so that the First-tier Tribunal need not be organised into chambers or may have only one chamber for such period until it has acquired sufficient functions so as to merit this.

Section 20 – Chamber Presidents

58. Section 20 provides that each chamber of the First-tier Tribunal must have one or two Chamber Presidents to preside over it. Subsection (2) prohibits a Chamber President from presiding over more than one chamber at the same time.

Section 21 – Appointment to post

59. This section provides that the Scottish Ministers, after consultation with the Lord President, are to appoint a Chamber President to preside over a particular chamber (subsections (1), (2) and (4)).

60. By virtue of section 15(2)(b), a Chamber President of the First-tier Tribunal is also a legal member of the Upper Tribunal. Section 21(3), therefore, makes provision so as to ensure that any person appointed to the position of Chamber President also meets the eligibility criteria which would be required of a person to be appointed as a legal member of the Upper Tribunal. The effect of subsection (3) is to provide that a person will only be eligible to be appointed as a Chamber President if he or she is, or meets the eligibility criteria for being appointed as, a legal member of the Upper Tribunal.

61. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.

Structure of the Upper Tribunal

Section 22 – Divisions of the Tribunal

62. Section 22 provides for the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal’s functions among those divisions. The divisions are to be organised according to the subject-matter of the Tribunal’s functions as well as any other factors which are relevant to the exercise of the Tribunal’s functions (for example, whether or not the function relates to a decision at first instance or an appeal from a decision of the First-tier Tribunal).

63. The organisation into divisions and the allocation of the Tribunal’s functions are to be effected by regulations made by the Scottish Ministers (subsection (2)). By virtue of section 10(1), those regulations may make provision authorising the Lord President, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 22(2).
64. Paragraph 7(2) of schedule 9 makes transitional provision so that the Upper Tribunal need not be organised into divisions or may have only one division for such period until it has acquired sufficient functions so as to merit this.

Section 23 – Vice-Presidents

65. Section 23(1) and (2) provides that each division of the Upper Tribunal must have one or two Vice-Presidents to preside over it. Subsection (2) prohibits a Vice-President from presiding over more than one division at the same time.

66. Section 23 is subject to section 24(1)(b) which enables the President of Tribunals to assign himself or herself as a Vice-President of one or more divisions of the Upper Tribunal.

67. Section 24 sets out the procedure where the President of Tribunals or another judicial member of the Upper Tribunal may be assigned to act as a Vice-President. Section 25 sets out the procedure by which a person who is not a judicial member of the Upper Tribunal may be appointed to that position.

Section 24 – Assignment to post

68. Section 24 provides for the assignment of a judicial member of the Upper Tribunal as a Vice-President.

69. Subsection (1) enables the President of Tribunals to assign himself or herself as a Vice-President. As a Vice-President, the President of Tribunals may preside over more than one division of the Upper Tribunal.

70. Subsection (2) enables the President of Tribunals to assign any other judicial member of the Upper Tribunal (other than the Lord President) as a Vice-President to preside over a particular division. Such an assignment can only be made with the Lord President’s approval and the assignee’s agreement (subsection (4)).

Section 25 – Appointment to post

71. Section 25(1) enables the Scottish Ministers, following a request by the President of Tribunals and after consultation with the Lord President, to appoint a person as a Vice-President to preside over a particular division of the Upper Tribunal (subsections (1), (2) and (4)).

72. By virtue of section 15(2)(c) and (3) a person appointed as a Vice-President is a legal member of the Upper Tribunal. Section 25(3), therefore, makes provision so as to ensure that any person appointed to the position of Vice-President meets the eligibility criteria which would be required of a person to be appointed as a legal member of the Upper Tribunal. The effect of subsection (3) is to provide that a person will only be eligible to be appointed as a Vice-President if he or she is, or meets the eligibility criteria to be appointed as, a legal member of the Upper Tribunal. It excludes a person who is already appointed as Vice-President of the Upper Tribunal.

73. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.
PART 3 – TRANSFER-IN FROM LISTED TRIBUNALS

Section 26 and schedule 1 – Listed tribunals

74. Section 26(1) gives effect to schedule 1 which sets out a list of tribunals from which the functions and members can be transferred-in to the Scottish Tribunals by virtue of regulations made under sections 27 and 28.

75. Part 1 of schedule 1 contains the list of tribunals. Part 2 of that schedule contains further elaboration to assist in identifying the tribunal and the functions which may be the subject of transfer. For example, in relation to the entry for a Scottish Charity Appeals Panel, paragraph 12(2) of schedule 1 provides that it is only the functions exercisable by virtue of section 75(1) of the Charities and Trustee Investment (Scotland) Act 2005 which may be transferred-in to the Scottish Tribunals. Similarly, the Crofting Commission exercises a number of executive functions under the Crofters (Scotland) Act 1993 which it is not intended to transfer-in to the Scottish Tribunals. In relation to the entry for the Crofting Commission, paragraph 12(3) of schedule 1 provides that it is only the Commission’s functions in relation to the resolution of disputes which are exercisable in the manner of a tribunal that may be transferred-in to the Scottish Tribunals.

76. Subsection (2) allows the Scottish Ministers to modify the listed tribunals and further details of those tribunals as set out in schedule 1.

77. Subsection (3) provides that regulations can only add a tribunal to the list in Part 1 of schedule 1 if it is established by or under an enactment. Subsection (4) makes provision in order to clarify what is meant by the term tribunal for this purpose and to clarify that a body may be listed if, and to the extent that, it has decision-making functions which are exercisable in the manner of a tribunal. The effect of this is that a body can only be added to the list in schedule 1 if, and to the extent that, it has functions for the independent resolution of disputes in a similar fashion to those traditionally exercised by tribunals.

78. Subsection (5)(a) and (b) makes express provision to make it clear that the Scottish Land Court or any other Scottish court cannot be added to the list in schedule 1. Accordingly, the Bill does not enable any functions of the Scottish Land Court or the other Scottish courts to be transferred-in to the Scottish Tribunals. Subsection (5)(c) also prevents the functions of the tribunals mentioned in that subsection from being transferred-in to the Scottish Tribunals.

Section 27 – Transfer-in of functions

79. Section 27(2) enables the Scottish Ministers, by regulations, to provide for some or all of the functions of a listed tribunal to be transferred to the Scottish Tribunals. The regulations may provide for the functions to be transferred to the First-tier Tribunal, the Upper Tribunal or both Tribunals.

80. Where regulations made under subsection (2) provide for the functions of a listed tribunal to be transferred to both of the Scottish Tribunals, the regulations may make provision transferring certain functions to one Tribunal and certain functions to the other. They can also provide for a particular function to be transferred to both Tribunals but, where they do so, subsections (3) and (5) require the regulations to make provision so that it can be ascertained
when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules (see commentary on section 62) or by the President of Tribunals.

81. Subsection (4) enables the Scottish Ministers, by regulations, to provide for a redistribution of any functions which have been transferred-in to the Scottish Tribunals between those Tribunals.

82. Subsection (6) provides that any regulations made under subsection (2) or (4) may make further provision in order to give full effect to the transfer or redistribution of functions. This includes the modification of any enactment which makes provision in relation to a listed tribunal (subsection (7)).

83. Regulations made under subsection (2) may only relate to one of the listed tribunals (subsection (8)). This will require separate regulations to be made in respect of each listed tribunal.

Section 28 and schedule 2 – Transfer-in of members

84. Section 28 introduces schedule 2 which makes provision enabling the transfer of members of the listed tribunals to the Scottish Tribunals where some or all of their functions are, similarly, transferred.

85. Paragraph 1 of schedule 2 enables the Scottish Ministers, by regulations, to make provision to transfer some or all of the transferable persons to a position or positions in the Scottish Tribunals.

86. In relation to a listed tribunal, a transferable person is a member (of the tribunal or any panel or other body from which the tribunal members are selected) or an authorised decision-maker of that tribunal, or a person who constitutes the tribunal (paragraph 1(2) of schedule 2).

87. Paragraph 1(3) of schedule 2 excludes from transfer, a sheriff or judge of the Court of Session or the President of the Lands Tribunal for Scotland (if he or she holds another judicial office) who may, otherwise, fall within the definition of transferable persons. Rather than transferring-in as a legal or ordinary member of the Scottish Tribunals, it is anticipated that such persons will be authorised to act as judicial members in accordance with sections 16 and 18.

88. Paragraph 2 of schedule 2 enables regulations made under paragraph 1(1) of schedule 2 to make provision preserving, altering or replacing the terms and conditions on which a transferable person is transferred to the Scottish Tribunals.

89. Paragraph 3 of schedule 2 sets out limitations on the regulation-making power contained in paragraph 1(1) of schedule 2. Such regulations may only be made where some or all of the functions of a listed tribunal have been or are to be transferred to the Scottish Tribunals (paragraph 3(1)). The regulations may not transfer a person to a position in the Scottish Tribunals for which he or she would not be eligible to be appointed (paragraph 3(2)). The regulations may also make provision in relation to members of only one listed tribunal at a time (paragraph 3(3)).
Paragraph 4 of schedule 2 sets out the positions in the Scottish Tribunals to which a transferable person may be transferred.

Section 28A - Accommodation of functions

90. Section 28A(2) enables the Scottish Ministers, by regulations, to modify the Tribunals Act so that it specifies the relevant provisions of the Act conferring functions on the Scottish Tribunals. Subsection (3) allows the Scottish Ministers, by regulations, to modify the Tribunals Act or the Act conferring functions on the Scottish Tribunals to ensure that the jurisdiction can operate effectively in the tribunals structure.

Section 28B – Redistribution of functions

91. Section 28B enables the Scottish Ministers, by regulations, to redistribute functions which have been conferred directly on the Scottish Tribunals by another Act. Subsection (1) provides that regulations can redistribute functions conferred directly on the Scottish Tribunals between tribunals or can make provision that the functions will be exercised by both tribunals. Subsection (2) allows the question of which tribunal is to exercise particular functions in a particular case or in a specified circumstance to be determined by tribunal rules or by the President of Tribunals (whether or not by reference to Tribunal Rules).

PART 4 – MORE ABOUT MEMBERSHIP ETC.

Section 29 – Scheduled provisions

92. Section 29 introduces schedules 3 to 6.

Schedule 3 – Appointment to First-tier Tribunal

Schedule Part 1 – Ordinary members

93. Section 29(1) introduces schedule 3 which makes provision as to the eligibility and appointment of ordinary and legal members of the First-tier Tribunal.

94. Paragraphs 1 and 2 of schedule 3 provide that it is for the Scottish Ministers to appoint a person as an ordinary member of the First-tier Tribunal. A person may only be appointed as such, if the person has the qualifications, experience and training which are prescribed by the Scottish Ministers in regulations made under paragraph 1(2). The effect of this provision will be to allow the Scottish Ministers to prescribe a wide range of criteria by which a person will qualify to be appointed as an ordinary member. Regulations made under section 35(1) providing for the composition of the First-tier Tribunal when convened to exercise its decision-making functions may also make reference to these criteria. See the commentary on that section.

Schedule Part 2 – Legal members

95. Paragraphs 3 to 7 of schedule 3 make provision as to the eligibility and appointment of legal members of the First-tier Tribunal other than Chamber Presidents (about whom section 20 makes provision) and Deputy Chamber Presidents (about whom paragraphs 1 to 3 of schedule 4 make provision).
96. It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal (paragraph 4(1)).

97. A person may be appointed as a legal member if he or she is practising as a solicitor or advocate in Scotland and has been practising for a period of not less than 5 years (paragraphs 4(2) and 5(1)).

98. A person may also be appointed as a legal member if he or she falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 3 (paragraphs 4(2) and 5(2)).

99. Paragraph 6(2) enables regulations made under paragraph 5(2) of schedule 3 to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have engaged in another law-related activity. Paragraph 6(3) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(4) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(4) include the exercise of judicial functions, practice as a lawyer, teaching or researching law at an educational institution and certain other legal activities such as advising on the application of the law, drafting legal documents and assisting in the resolution of disputes.

100. Paragraph 7 also enables the Scottish Ministers to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the First-tier Tribunal including the calculation of the 5 year qualification period and modifying the list of activities set out in paragraph 6(4).

Schedule 4 – Positions in the First-tier Tribunal

101. Section 29(2) introduces schedule 4 which makes provision as to the appointment and assignment of Deputy Chamber Presidents and Temporary Chamber Presidents as well as the assignment of the members among chambers.

Schedule Part 1 – Deputy or Temporary President

Deputy President

102. Paragraph 1 provides that the Scottish Ministers may appoint a person as a Deputy Chamber President of a particular chamber if they are requested to make such an appointment by the President of Tribunals.

103. A person is eligible for appointment as a Deputy Chamber President if the person is already a legal member of the First-tier Tribunal (other than a Chamber or Deputy Chamber President) or if the person is not already a legal member of the First-tier Tribunal but is eligible to be appointed as a legal member in accordance with paragraph 4(2) of schedule 3 (paragraph 2(1)).

104. The President of Tribunals may only request the Scottish Ministers to appoint a person as a Deputy Chamber President after consultation with the Chamber President of the chamber to which the appointment is to be made (paragraph 2(2)).
105. Paragraph 2(3) places a duty on the Scottish Ministers to give written reasons to the President of Tribunals where they do not make an appointment of a Deputy Chamber President following such a request.

106. Paragraph 3 makes provision so that a Deputy Chamber President can assist with the exercise of the functions of the Chamber President.

Temporary President

107. Paragraphs 4 and 5 enable the President of Tribunals to assign a legal or judicial member of the First-tier Tribunal as a Temporary Chamber President in the event of a temporary vacancy in the presidency of a chamber. A Chamber President cannot be assigned as a Temporary Chamber President of another chamber.

Schedule Part 2 – Assignment internally

108. Schedule Part 2 makes provision for assigning the various members of the First-tier Tribunal among the chambers.

109. The function of assigning the members of the First-tier Tribunal vests in the President of Tribunals (paragraph 6(1)) but is subject to the provision made in paragraphs 7 to 9 (paragraph 6(2)).

110. A Chamber President is to be assigned to the chamber to which he or she is appointed to preside over and may also be assigned to act as a legal member in another chamber (but cannot be assigned to another chamber to act as a Chamber President or Deputy Chamber President) (paragraph 7(1)). Any assignment of a Chamber President to act as a legal member of another chamber requires the concurrence of the Chamber President of that chamber as well as the agreement of the member being assigned.

111. A Deputy Chamber President is to be assigned to the chamber to which he or she is appointed and may also be assigned to act as a legal member in another chamber (but cannot be assigned to another chamber to act as a Chamber President or Deputy Chamber President) (paragraph 7(2)). Any assignment of a Deputy Chamber President to act as a legal member of another chamber requires the concurrence of the Chamber President of that chamber as well as the agreement of the member being assigned.

112. All other legal members of the First-tier Tribunal and its ordinary members are to be assigned to at least one chamber but may be assigned to more than one chamber (paragraph 8(2)). Any assignment to a chamber under paragraph 8 requires the concurrence of the Chamber President and the agreement of the member to be assigned (paragraph 8(3)).

113. Judicial members of the First-tier Tribunal are to be assigned to at least one chamber but may be assigned to more than one chamber (paragraph 9(1)). Any assignment to a chamber under paragraph 9 requires the concurrence of the Chamber President and the agreement of the member being assigned (paragraph 9(2)).
Schedule 5 – Appointment to Upper Tribunal

Schedule Part 1 – Ordinary members

114. Section 29(3) introduces schedule 5 which makes provision as to the eligibility and appointment of ordinary and legal members of the Upper Tribunal.

115. Paragraphs 1 and 2 of schedule 5 provide that it is for the Scottish Ministers to appoint a person as an ordinary member of the Upper Tribunal. A person may only be appointed as such, if the person has the qualifications, experience and training which are prescribed by the Scottish Ministers in regulations made under paragraph 1(2). The effect of this provision will be to allow the Scottish Ministers to prescribe a wide range of criteria by which a person will qualify to be appointed as an ordinary member. Regulations made under section 37(1) providing for the composition of the Upper Tribunal when convened to exercise its decision-making functions may also make reference to these criteria. See the commentary on that section.

Schedule Part 2 – Legal members

116. Paragraphs 3 to 7 of schedule 5 make provision as to the eligibility and appointment of legal members of the Upper Tribunal other than Vice-Presidents (about whom section 23 makes provision) or a person who is a legal member of the Upper Tribunal by virtue of being a Chamber President in the First-tier Tribunal by virtue of section 15(2)(b).

117. It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal (paragraph 4(1)).

118. A person may be appointed as a legal member if he or she is practising as a solicitor or advocate in Scotland and has been practising for a period of not less than 7 years (paragraphs 4(2) and 5(1)).

119. A person may also be appointed as a legal member if he or she falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 5 (paragraphs 4(2) and 5(2)).

120. Paragraph 6(2) enables regulations made under paragraph 5(2) of schedule 5 to make provision in relation to persons previously practising as solicitors, advocates or barristers who have engaged in another law-related activity. Paragraph 6(3) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(4) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(4) include the exercise of judicial functions, practice as a lawyer, teaching or researching law at an educational institution and certain other legal activities such as advising on the application of the law, drafting legal documents and assisting in the resolution of disputes.

121. Paragraph 7 also enables the Scottish Ministers to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the Upper Tribunal including the calculation of the 7 year qualification period and modifying the list of activities set out in paragraph 6(4).
Schedule 6 – Positions in Upper Tribunal

122. Section 29(4) introduces schedule 6 which makes provision for assigning a Temporary Vice-President and the assignment of the members of the Upper Tribunal among the divisions.

Schedule Part 1 – Temporary Vice-President

123. Paragraphs 1 and 2 enable the President of Tribunals to assign a legal member of the Upper Tribunal as a Temporary Vice-President in the event of a temporary shortage in the number of Vice-Presidents or a temporary vacancy in a position. A Vice-President cannot be assigned as a Temporary Vice-President of another division.

Schedule Part 2 – Assignment internally

124. Schedule Part 2 makes provision for assigning the various members of the Upper Tribunal among the divisions.

125. The function of assigning the members of the Upper Tribunal vests in the President of Tribunals (paragraph 3(1)) but is subject to the provision made in paragraphs 4 to 7 (paragraph 3(2)).

126. A Vice-President is to be assigned to the division to which he or she is appointed or assigned to preside over. A judicial member who is assigned to act as a Vice-President under section 24(2) may also be assigned to act as a judicial member in another division (but cannot be assigned to another division to act as a Vice-President) while a legal member who is appointed to act as a Vice-President under section 25(1) may also be assigned to act as a legal member in another division (but cannot be assigned to act as a Vice-President of that Division) (paragraph 4). This requires the concurrence of the Vice-President of the division to which the member is being assigned.

127. All other legal members of the Upper Tribunal (including a person who is a legal member of the Upper Tribunal by virtue of being a Chamber President in the First-tier Tribunal) and its ordinary members are to be assigned to at least one division but may be assigned to more than one division (paragraphs 5 and 6). Any assignment to a division under paragraphs 5 and 6 requires the concurrence of the Vice-President and the agreement of the member to be assigned (paragraph 5(3) or 6(3)).

128. All other judicial members of the Upper Tribunal are to be assigned to at least one division but may be assigned to more than one division (paragraph (7(1)). A person who is authorised to act as a judicial member of the Upper Tribunal under section 17(5) is also to be assigned to at least one division but may be assigned to more than one division (paragraph 7(2)). Any assignment to a division under paragraph 7 requires the concurrence of the Vice-President and the agreement of the member being assigned (paragraph 7(3)).

Section 30 – Assignment Policy

129. This section places a duty on the Lord President to publish, and keep under review, a document setting out the policy to be adopted in relation to the assignment of the members of the Scottish Tribunals within each Tribunal.
130. Subsection (3) requires the policy to be designed to ensure that appropriate use is made of the knowledge and experience of the members.

131. The Lord President’s functions under section 30(1) and (2) may be delegated to the President of Tribunals under section 8.

Section 31 – Training and review

132. Section 31(1) confers the responsibility for making and maintaining arrangements for the training and guidance of the members of the Scottish Tribunals (including any extra judges authorised to act under section 17(5)) on the Lord President.

133. Section 31(2) also enables the Lord President to make arrangements for the review of the competence and development of the ordinary and legal members of the Scottish Tribunals. The review of the competence and development of the judicial members is to continue to be assessed in their capacity as members of the courts judiciary in accordance with arrangements made under the Judiciary and Courts (Scotland) Act 2008.

134. The Lord President’s functions under section 31 may be delegated to the President of Tribunals under section 8.

Section 32 and schedule 7 – Conditions of membership etc.

135. Section 32 introduces schedule 7 which makes provision as to the terms and conditions on which the ordinary and legal members of the Scottish Tribunals hold office as such. The terms of schedule 7 do not apply to judicial members (paragraph 1(1) of schedule 7).

136. Subsection (2) enables the Scottish Ministers, by regulations, to disapply certain provisions in schedule 7 to certain tribunal members, with the effect that those members become permanent members within the tribunals structure. Subsection (3) places a duty on the Scottish Ministers to consult the Lord President before making regulations under subsection (2). Subsection (4) specifies that the operation of paragraphs 2 to 7A of schedule 7 is subject to provision made by regulations under subsection (2) to the effect that the provisions which automatically re-appoint tribunal members on five-yearly terms of appointment can be dis-applied.

Initial period of office

137. Where a person is appointed as a member of the Scottish Tribunals, paragraph 2(1) of schedule 7 provides for that person to hold that position for an initial period of 5 years.

138. Where a person is transferred-in as a member of the Scottish Tribunals, paragraph 2(2) and (3) of schedule 7 provides for that person to hold that position either until the end of the unexpired period of the appointment to the listed tribunal or the period of 5 years from the date of transfer (whichever comes first).

139. Paragraph 3 of schedule 7 provides that where a person holds a position in the Scottish Tribunals and is appointed to hold an additional position then the initial period of appointment...
for the additional appointment is to expire on the same date as the period of the earlier appointment.

140. Paragraph 7A of schedule 7 provides that where a person holds a position in the Scottish Tribunals and is appointed to hold a more senior position with the Scottish Tribunals (for example a legal member appointed to Chamber President) their 5-year term begin with the date of the later appointment.

Reappointment

141. Where a member’s period of appointment expires (or, in the case of a member who is transferred-in, the initial period of office expires), paragraph 4 provides for that person to be reappointed for a period of 5 years unless the member declines to be reappointed, is no longer eligible for reappointment or the President of Tribunals has recommended to the Scottish Ministers that the member should not be reappointed. Paragraph 5 also requires the member to meet the eligibility criteria set out in schedule 3 or 5 as if that person was being appointed to the position for the first time.

142. Paragraph 6 sets out the bases on which the President of Tribunals can recommend to the Scottish Ministers that a member should not be reappointed.

143. Paragraph 7 clarifies that the re-appointment of a member is not subject to the same process as the initial appointment as set out in section 10(2A) of the Judiciary and Courts (Scotland) Act 2008. The act of re-appointing a member is, therefore, for the Scottish Ministers alone.

Termination of appointment

144. Paragraphs 8 and 9 set out the circumstances in which a person ceases to hold a position in the Scottish Tribunals. A member ceases to hold that position upon becoming disqualified from acting as a member of the Scottish Tribunals (see paragraph 11 of schedule 7); being removed from the position by the First Minister under paragraph 23 of schedule 8 following a conclusion by a fitness assessment tribunal that the member is unfit to hold that position; or resigning or retiring.

145. Section 26 of the Judicial Pensions and Retirement Act 1993 applies to the legal and ordinary members of the Scottish Tribunals which requires such a member to retire at the age of 70 subject to continuing in office in accordance with the provisions of subsections (4) to (6) of that section. See the commentary on paragraph 10 of schedule 9.

Disqualification from office

146. Paragraph 11 sets out those persons who are disqualified from being a member of the Scottish Tribunals.

Oaths

147. Paragraph 13 sets out a requirement for all legal and ordinary members of the Scottish Tribunals to take the oath of allegiance and the judicial oath as set out in the Promissory Oaths
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Act 1868. It also makes provision regarding the person before whom the oaths are to be taken and for oaths which have been previously taken to continue to apply.

Pensions etc.

148. Paragraph 13A enables the Scottish Ministers to make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, members or former members of the Scottish Tribunals.

Other conditions

149. Paragraph 14 is a general provision that enables the Scottish Ministers to determine the terms and conditions of a member of the Scottish Tribunals which are not provided for in the Bill including the payment of remuneration, expenses and allowances.

Section 33 and schedule 8 – Conduct and fitness etc.

150. Section 33 introduces schedule 8 which makes provision in connection with the conduct and fitness of the legal and ordinary members of the Scottish Tribunals.

151. Schedule 8 only applies to the legal and ordinary members of the Scottish Tribunals and not to the judicial members (paragraphs 1(1) and 11(1)). The conduct and fitness of the judicial members of the Scottish Tribunals will continue to be covered by the provision made in the Judiciary and Courts (Scotland) Act 2008.

152. The functions of the Lord President under schedule 8 may not be delegated under section 8.

Conduct and discipline

153. Paragraph 2 confers responsibility for making and maintaining appropriate arrangements for the investigation and determination of any matter concerning the conduct of the members of the Scottish Tribunals and the review of any such determination on the Lord President. The Lord President may make provision to this effect through Conduct Rules (paragraph 3). Paragraph 3(2) sets out a non-exhaustive list of the matters that may be covered by the Conduct Rules, which are required to be published under paragraph 4.

154. Paragraph 5 enables the Lord President to administer one of three types of disciplinary sanction where an investigation has been carried out and the investigator has recommended a disciplinary sanction. The disciplinary sanctions are set out in sub-paragraph (1) and are, in ascending order of severity: formal advice, a formal warning and a reprimand. This is a discretionary power and paragraph 6 makes it clear that this does not restrict what the Lord President may do informally.

155. Paragraph 7 provides for the suspension of a member of the Scottish Tribunals where the Lord President considers it necessary for the purpose of maintaining public confidence in the Scottish Tribunals. Such suspension does not affect any remuneration payable to, or in respect of the suspended member. An example of a situation where this might be used is when an allegation of a serious nature is made against a member of the Scottish Tribunals. This power is
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separate from the suspension provisions in paragraph 19 of schedule 8 which applies during an investigation by a fitness assessment tribunal.

156. Paragraph 9 confers the following functions on the Judicial Complaints Reviewer (established under section 30 of the Judiciary and Courts (Scotland) Act 2008): on the request of the person who had made the complaint which was the subject of an investigation or the member whose conduct has been investigated, to review the handling of an investigation in terms of procedure; where the procedure has not been followed, to refer such a case to the Lord President; to prepare and publish reports on investigations; and to make written representations to the Lord President about such procedures (to which the Lord President must have regard). The functions of the Judicial Complaints Reviewer only relate to the procedure adopted in an investigation and not the merits of the findings of the investigation.

157. Where the Reviewer refers a case to the Lord President under paragraph 9(2)(b), the Lord President may vary or revoke the determination (or part of it); cause a fresh investigation to be carried out; confirm the determination; or deal with the referral in such other way as the Lord President considers to be appropriate (paragraph 10).

158. Section 32 of the 2008 Act requires the Reviewer to comply with any guidance issued by the Scottish Ministers on the functions of the Reviewer set out in the Bill.

Fitness and removal

159. Paragraphs 11 to 22 provide for fitness assessment tribunals to be set up to investigate and report on whether a member of the Scottish Tribunals is unfit to hold the position by reason of inability, neglect of duty or misbehaviour.

160. The First Minister must constitute a tribunal when requested to do so by the Lord President (paragraph 13(1)). The First Minister may (but is not required to) constitute a tribunal in other circumstances if the First Minister thinks fit but only after consultation with the Lord President (paragraph 13(2)).

161. Paragraph 14 enables the Court of Session to make provision, by act of sederunt, with regard to the procedure to be adopted by a tribunal.

162. Paragraphs 15 and 16 provide for the composition and voting, and remuneration and expenses of the tribunal. Paragraph 15(2) provides for the members of a fitness assessment tribunal to be selected by the First Minister with the agreement of the Lord President. In selecting the members, the First Minister must ensure that the composition of the tribunal reflects the requirements set out in paragraph 15(1). Paragraph 16 enables the Scottish Ministers to pay remuneration and expenses to the members of a fitness assessment tribunal. Remuneration cannot, however, be paid to those members of a fitness assessment tribunal who are sheriffs or judges of the Court of Session.

163. Paragraphs 17 and 18 make provision with regard to the conduct of proceedings of a tribunal. Paragraph 17 enables a fitness assessment tribunal to require the attendance of persons to give evidence and the production of documents in the same fashion as a court of law in Scotland. Where these requirements are not fulfilled, paragraph 18 provides for the tribunal to...
make an application to the Court of Session. The Court of Session may make such order as it thinks fit to ensure compliance with the requirements of the tribunal or deal with the matter as if it were a contempt of the Court.

164. Paragraphs 19 to 21 set out the circumstances in which a member of the Scottish Tribunals can be suspended pending a decision of a tribunal. Paragraph 19 enables the Lord President to suspend a member of the Scottish Tribunals if the Lord President has made a request to the First Minister to constitute a fitness assessment tribunal to investigate whether that member is unfit to hold the position of member of the Scottish Tribunals. The Lord President may suspend the member at any time prior to the point that the fitness assessment tribunal submits its report to the First Minister and the Lord President under paragraph 22(2). Such a suspension will terminate on being revoked by the Lord President or, if not revoked, when the report is laid in the Scottish Parliament. Paragraph 20 enables the First Minister to suspend the member of the Scottish Tribunals where the fitness assessment tribunal has recommended that the member is suspended. The First Minister may suspend the member at any time prior to the tribunal’s report being laid in the Parliament. Such a suspension will terminate on being revoked by the First Minister or, if not revoked, when the report is laid in the Parliament. Paragraph 21 provides that any suspension under paragraph 19 or 20 does not affect any remuneration payable to the suspended member.

165. Paragraph 22 makes provision for the form and content of a tribunal’s report. The First Minister must lay the report before the Scottish Parliament.

166. Paragraph 23 provides that the First Minister may remove a member of the Scottish Tribunals from his or her position if a fitness assessment tribunal has submitted a report concluding that the member is unfit to hold office by reason of inability, neglect of duty or misbehaviour.

PART 5 – DECISION-MAKING AND COMPOSITION

Decisions in First-tier Tribunal

Section 34 – Decisions in the Tribunal

167. Section 34 makes provision as to the exercise of the First-tier Tribunal’s function of deciding any matter in a case within its jurisdiction. This function is to be exercised by one or two or more members of the chamber to which the case is allocated. It is for regulations made under section 19(2)(b) (chambers in the Tribunal) to make provision for the allocation of the First-tier Tribunal’s functions among the chambers.

168. The Chamber President has the responsibility for selecting the members but, in so doing, must comply with any relevant provision made by regulations under section 35 (composition of the Tribunal).

169. If the First-tier Tribunal is exercising a function in a case which has been remitted to it by the Upper Tribunal under section 42(2)(b) (disposal of an appeal by the Upper Tribunal), the Chamber President must also comply with any directions given by the Upper Tribunal under section 42(5)(b) as to the members to be chosen to reconsider the case.
Section 35 – Composition of the Tribunal

170. This section provides for the Scottish Ministers to make regulations providing for the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. Such regulations may provide for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be.

171. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (4)).

172. By virtue of section 10(2), regulations made under section 35 may make provision authorising the President of Tribunals, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(2), the Scottish Ministers must consult the President of Tribunals before making regulations under section 35.

Decisions in Upper Tribunal

Section 36 – Decisions in the Tribunal

173. Section 36 makes provision as to the exercise of the Upper Tribunal’s function of deciding any matter in a case falling within its jurisdiction. This function is to be exercised by one or two or more members of the division to which the case is allocated. It is for regulations made under section 22(2)(b) (Divisions of the Tribunal) to make provision for the allocation of the Upper Tribunal’s functions among the divisions.

174. The Vice-President has the responsibility for selecting the members but, in so doing, the Vice-President must comply with any relevant provision made by regulations under section 37(1) (composition of the Tribunal).

175. The Vice-President must also comply with subsection (4) which enables the Lord President and the Tribunals President to exercise a right to be selected (provided that this complies with the provisions of any regulations made under section 37(1) (composition of the Tribunal)).

176. If the Upper Tribunal is exercising a function in a case which has been remitted to it by the Court of Session under section 44(2)(b) (disposal of an appeal by the Court of Session), the Vice-President must also comply with any directions given by the Court of Session under section 44(5)(b) as to the members to be chosen to reconsider the case.

Section 37 – Composition of the Tribunal

177. This section provides for the Scottish Ministers to make regulations providing for the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction. Such regulations may provide for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members should be.
178. Such regulations may also make separate provision depending on whether the Upper Tribunal is exercising functions at first instance or on review or appeal (subsection (2)).

179. Where the regulations provide for a judicial member to be part of the convened Tribunal, the regulations may also make provision requiring the judicial member to be of a particular type (whether a sheriff, sheriff principal or judge of the Court of Session) as well as for the involvement of any extra judge who is authorised to act under section 17(5) (subsection (5)).

180. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (6)).

181. By virtue of section 10(2), regulations made under section 37 may make provision authorising the President of Tribunals, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(2), the Scottish Ministers must consult the President of Tribunals before making regulations under section 37.

Section 37A – Voting for Decisions

182. Section 37A makes provision for voting for decisions. Subsection (1) allows the Scottish Ministers, by regulations, to make provision regarding how decisions are voted for in panels of two or more members and how ties are resolved.

Section 37B – Chairing Members

183. Section 37B makes provision for chairing members where a decision is being taken by two or more members. Subsection (1) specifies that Tribunal Rules may make provision for determining who will be the chairing member in a case before the First-tier or Upper Tribunal. Subsection (2) makes further provision for what can be specified in Tribunal Rules in relation to chairing members.

PART 6 – REVIEW OR APPEAL OF DECISIONS

Internal review

Section 38 – Review of decisions

184. Section 38 provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. The power is discretionary and it will be for each Tribunal to decide whether or not it should review one of its own decisions.

185. Under section 38(2), a decision may be reviewed at the Tribunal’s own instance or, with the Tribunal’s agreement, at the request of a party in the case.

186. Under section 38(3), no decision may be the subject of a review if it is an excluded decision (see sections 46 to 49 on excluded decisions). Tribunal Rules (see commentary on section 62) made under section 38(3)(b) may also make provision excluding other decisions from being reviewed or otherwise restricting the powers of the Scottish Tribunals to review their own decisions.
187. A decision to review or not to review a prior decision of the Tribunal may not, itself, be reviewed or appealed (section 38(4)) and the fact that a decision has been reviewed does not affect a party’s rights of appeal under the Bill (section 38(5)).

Section 39 – Actions on review

188. Section 39 sets out the courses of action which are available to the Tribunals in determining any review. These include taking no action, setting the decision aside, and correcting minor or accidental errors. If the First-tier Tribunal sets aside a decision of its own it must either re-decide the matter concerned or refer the matter to the Upper Tribunal to re-decide. Where the Upper Tribunal sets aside a decision of its own, it must re-decide the matter itself.

Section 40 – Review only once

189. Section 40 provides that no decision of the First-tier or Upper Tribunal may be reviewed on more than one occasion. A decision on review to set aside an earlier decision and a re-made decision are, however, to be regarded as separate decisions from the earlier decision which was subjected to review and can, therefore, be the subject of a further review. Subsection (3) provides that the power of the Scottish Tribunals to review their own decisions does not affect their powers to correct minor or accidental errors in a decision administratively.

Appeal from First-tier Tribunal

Section 41 – Appeal from the Tribunal

190. Section 41 makes provision for a general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal. Such an appeal can only be made by a party in the case on a point of law and with the permission of the First-tier Tribunal or (if refused by the First-tier Tribunal) the Upper Tribunal.

191. The general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal under section 41 is not universal and does not apply to excluded decisions (see sections 46 to 49) or a decision of the First-tier Tribunal to review or not to review one of its own decisions (see section 38(4)). Section 50 (process for permission) also prevents a decision of the First-tier Tribunal to refuse permission to appeal to the Upper Tribunal from being appealed to the Upper Tribunal (a separate application can, however, be made to the Upper Tribunal under section 41(3)(b) should the First-tier Tribunal refuse permission to appeal).

192. Permission to appeal to the Upper Tribunal under section 41 is only to be granted if the Tribunal whose permission is sought is satisfied that there are arguable grounds for the appeal (section 41(4)).

Section 42 – Disposal of an appeal

193. Section 42 provides that, in determining an appeal made under section 41, the Upper Tribunal may uphold or quash the decision of the First-tier Tribunal on a point of law. Where the Upper Tribunal quashes the decision of the First-tier Tribunal it may re-make the decision, remit the case back to the First-tier Tribunal to be re-decided or make such other order as the Court considers is appropriate.
194. Where the Upper Tribunal elects to re-make a decision, subsection (3) enables the Upper Tribunal to make findings in fact and, otherwise, to do anything that could have been done by the First-tier Tribunal if it was re-making the decision.

195. Where the Upper Tribunal elects to remit the case to the First-tier Tribunal, it may direct the First-tier Tribunal as to issues of fact, law and procedure (subsections (4) and (5)).

**Appeal from Upper Tribunal**

*Section 43 – Appeal from the Tribunal*

196. Section 43 makes provision for a general right to appeal a decision of the Upper Tribunal to the Court of Session. Such an appeal can only be made by a party in the case on a point of law and with the permission of the Upper Tribunal or (if refused by the Upper Tribunal) the Court of Session.

197. The general right to appeal a decision of the Upper Tribunal to the Court of Session under section 43 is not universal and does not apply to excluded decisions (see sections 46 to 49) or a decision of the Upper Tribunal to review or not to review one of its own decisions (see section 38(4)). Section 50 (process for permission) also prevents a decision of the Upper Tribunal to refuse permission to appeal to the Court of Session from being appealed to the Court of Session (a separate application can, however, be made to the Court of Session under section 43(3)(b) should the Upper Tribunal refuse permission to appeal).

198. Permission to appeal to the Court of Session under section 43 is only to be granted if the Upper Tribunal or Court of Session is satisfied that there are arguable grounds for the appeal (section 43(4)) except in relation to permission to make a second appeal (see commentary on section 45).

*Section 44 – Disposal of an appeal*

199. Section 44 provides that, in determining an appeal made under section 43, the Court of Session may uphold or quash the decision of the Upper Tribunal in question on a point of law. Where the Court of Session quashes the decision of the Upper Tribunal it may re-make the decision, remit the case back to the Upper Tribunal to be re-decided or make such other order as the Court considers appropriate.

200. Where the Court of Session elects to re-make a decision, subsection (3) enables the Court of Session to make findings in fact and, otherwise, to do anything that could have been done by the Upper Tribunal if it was re-making the decision.

201. Where the Court of Session elects to remit the case to the Upper Tribunal, it may direct the Upper Tribunal as to issues of fact, law and procedure (subsection (4) and (5)).

*Section 45 – Procedure on second appeal*

202. Section 45 makes provision in relation to a ‘second appeal’ which is an appeal to the Court of Session under section 43 against a decision of the Upper Tribunal on an appeal from a decision of the First-tier Tribunal under section 41 (see the definition in subsection (7)).
203. The effect of subsections (1), (3) and (4) is to prevent the Upper Tribunal and the Court of Session from giving permission to make a second appeal unless the Tribunal or Court (as appropriate) is satisfied that the appeal would raise an important issue of principle or practice or there is another compelling reason for allowing the appeal to proceed.

204. The effect of subsections (2), (5) and (6) is to enable the Court of Session, where it quashes the decision of the Upper Tribunal in relation to a second appeal, to do anything in re-making the decision that could have been done by the First-tier Tribunal or the Upper Tribunal if either of them was re-making the decision. It also enables the Court of Session to remit the case back to either the Upper Tribunal or the First-tier Tribunal with directions as to issues of fact, law and procedure. In addition, if the Court of Session remits the case to the Upper Tribunal, the Upper Tribunal itself may remit the case to the First-tier Tribunal with the directions from the Court of Session.

Excluded decisions

Section 46 – Excluded decisions

205. Sections 46 to 49 make provision with respect to decisions of the Scottish Tribunals which may not be the subject of a review under section 38 or the subject of the general right of appeal contained in sections 41 and 43. By virtue of section 46, such decisions are known as “excluded decisions”.

Section 47 – Decisions on review

206. Section 47 provides that certain decisions and determinations in a review under section 38 are excluded decisions. The effect of section 47 is to exclude decisions which have already been set aside under a review under section 38 as well as any decision or determination made as part of such a review (other than any matter which has been re-decided) from being appealed or further reviewed.

Section 48 – Other appeal rights

207. Section 48 provides that any decision against which there is a right of appeal under any enactment other than the right to review contained in section 38 or the rights of appeal in sections 41 and 43 is an excluded decision. The effect of section 48 is to create a general rule excluding from the rights of review and appeal established by the Bill, any decision for which another enactment makes express provision for a right of appeal. Subsection (2) enables the Scottish Ministers, by regulations, to make exceptions to that general rule.

Section 49 – Position on transfer-in

208. Section 49 provides that any decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal which is specified by the Scottish Ministers in regulations made under subsection (1) is an excluded decision. Subsection (2) provides that a decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal may only be specified in regulations if the functions were transferred-in from a listed tribunal by regulations made under subsection 27(2) and, immediately prior to the transfer of those functions, there was no statutory right of appeal against the decision.
209. The effect of section 49 is to enable the Scottish Ministers, by regulations, to exclude the rights of review and appeal established by the Bill in relation to decision-making functions which have been transferred-in to the Scottish Tribunals from a listed tribunal from which there was previously no statutory right of appeal.

Miscellaneous procedure

Section 50 – Process for permission

210. Section 50(1) enables the Scottish Ministers, by regulations, to specify time limits within which permission to appeal must be sought.

211. Section 50(2) provides that a decision of the First-tier Tribunal or the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal to the Upper Tribunal cannot be the subject of review or appeal under the Bill. Similarly, a decision of the Upper Tribunal to refuse permission to appeal a decision of the Upper Tribunal to the Court of Session cannot be reviewed or appealed under the Bill.

Section 51 – Participation of non-parties

212. It is only a party in a case who can apply for a review of a Tribunal decision under section 38 or appeal a Tribunal decision under section 41 or 43. Section 51(2) enables the Scottish Ministers, by regulations, to make provision so that persons falling within a specified description can be regarded as a party to a case for the purposes of sections 38, 41 and 43.

Special jurisdiction

Section 52 – Judicial review cases

213. Section 52 makes provision so that the Court of Session may, by order of the Court, remit a petition for judicial review to the Upper Tribunal for determination. The Court may only remit a petition for judicial review to the Upper Tribunal where the petition does not seek anything other than the exercise of the Court’s judicial review function (section 52(3)) and it falls within a category specified by an act of sederunt made by the Court for the purposes of section 52(4). The effect of subsection (4) is that no petition for judicial review will be able to be transferred unless an act of sederunt has been made specifying the categories of petitions which may be transferred and the petition falls within one of those categories.

214. In addition, the Court may only remit a petition to the Upper Tribunal if it considers it appropriate to do so having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition (subsection (2)(b)).

Section 53 – Decision on remittal

215. Section 53 provides that the Upper Tribunal has the same powers and should apply the same principles as the Court of Session when determining a petition for judicial review. Subsection (4) makes it clear that a determination of a petition for judicial review remitted to the Upper Tribunal under section 52 is not an excluded decision and can be appealed to the Court of Session in accordance with section 43.
Section 54 – Additional matters

216. Section 54 makes further provision so that where a petition for judicial review is remitted to the Upper Tribunal, any order made or steps taken by the Court of Session are to be treated as if made or taken by the Tribunal. Subsection (2) enables the procedural rules of the Upper Tribunal to make further provision as to the exercise of the Upper Tribunal’s functions in relation to a petition for judicial review.

Section 55 – Meaning of judicial review

217. Section 55 provides that references in sections 52 to 54 to judicial review are to the supervisory jurisdiction of the Court of Session.

PART 7 – POWERS, PROCEDURE AND ADMINISTRATION

Powers and enforcement

Section 56 – Venue for hearings

218. Section 56 enables the Scottish Tribunals to be convened at any time and place in Scotland. Tribunal Rules may make further provision in this respect.

Section 57 – Conduct of cases

219. Section 57 enables Tribunal Rules to make further provision in respect of the conduct of cases before the Scottish Tribunals. The Tribunal Rules may make provision so as to ensure that the Scottish Tribunals have the necessary powers, rights, privileges and authority regarding the citation attendance or examination of witnesses, the production of evidence, the preparation of reports and other matters relating to the conduct of a case.

220. Subsection (2) enables the Tribunal Rules to make provision by reference to the authority which is exercisable by a sheriff or the Court of Session.

Section 58 – Enforcement of decisions

221. This section enables Tribunal Rules to provide for the means by which an order of the Scottish Tribunals giving effect to a decision of the Tribunals is to be enforced.

222. Subsection (3) makes provision so that an order made by the Upper Tribunal under section 53 (judicial review cases) continues to have the same effect as an order made by the Court of Session on a petition for judicial review. Subsection (4), otherwise, enables the Tribunal Rules to make provision by reference to the means by which an order of a sheriff or the Court of Session is enforced.

Section 59 – Award of expenses

223. Section 59 enables the Scottish Tribunals to award expenses only where this is provided for in Tribunal Rules. Where Tribunal Rules make provision for the award of expenses these may include provision as to the scales or rates of the expenses that are to be awarded; for the Tribunals to set-off the expenses against specified other sums; for interest to be paid at a rate to be specified in Tribunal Rules in the event of the expenses remaining unpaid; for wasted
expenses to be disregarded (and to specify what constitutes wasted expenses); as well as such other factors that the Tribunals may take into account (subsections (3) and (4)).

Section 60 – Additional powers
224. This section enables the Scottish Ministers, by regulations, to confer such additional powers on the Scottish Tribunals as are necessary or expedient for the proper exercise of their functions. Such regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules (see section 62(4)). The Lord President’s approval is required before making any such regulations.

Section 61 – Application of enactments
225. The effect of this section is to enable the Scottish Ministers, by regulations, to modify the application of any enactment so far as they consider is necessary or expedient for the purposes of making or giving effect to Tribunal Rules. Such regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules (see section 62(4)). The Lord President’s approval is required before making any such regulations.

Section 61A – Offences in relation to proceedings
226. Section 61A allows the Scottish Ministers, by regulations, to create certain types of offences in relation to proceedings before the First-tier and Upper Tribunals. This allows offences to be created in connection with tribunals, for things like making false statements and concealing or destroying evidence. Section 61A(1)(b) allows regulations to be made specifying circumstances in which a person cannot be compelled to give or produce evidence.

Practice and procedure

Section 62 – Tribunal rules
227. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals which are to be known as Scottish Tribunal Rules (but are referred to in the Bill as Tribunal Rules).

228. Subsections (3) and (4) of section 62 set out the process for making Tribunal Rules. Tribunal Rules are to be made by the Court of Session by act of sederunt and in accordance with Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

229. Paragraph 12 of schedule 9 amends Part 1 of the 2013 Act so that the SCJC has the function of reviewing the practice and procedure used in the Scottish Tribunals (section 2(1)(ba) of the 2013 Act) and the function of preparing and submitting draft Tribunal Rules to the Court of Session (section 2(1)(c)(ii) of the 2013 Act). Section 4(1) and (2) of the 2013 Act also sets out the role of the Court of Session in approving, approving with modification, or rejecting the rules proposed by the SCJC.
230. Sub-paragraphs (6) to (10) of paragraph 12 of schedule 9 amend the 2013 Act with the effect of increasing the membership of the SCJC so as to include members representing the Scottish Tribunals and providing for the SCJC to establish a committee in pursuance of its functions in relation to the Scottish Tribunals under section 13A of the 2013 Act. The Committee is to be chaired by one of the members of the SCJC representing the Scottish Tribunals, and its members are to be selected by the President of Tribunals.

Section 63 – Exercise of functions

231. Section 63 allows Tribunal Rules to make provision about how a function of the Tribunals is to be exercised and by whom, or allow a specified person to make a decision about those matters. It also allows Tribunal Rules to confer functions on the persons named in subsection (4). Such Rules may provide for something to require further authorisation, allow something to be done on a person’s behalf, or allow a specified person to make a decision about those matters. They may rely on the effect of practice directions issued under section 68.

Section 64 – Extent of rule-making

232. The extent of the provision which may be made by Tribunal Rules is set out in section 64. In particular, the generality of the power to make provision regulating the practice and procedure followed in the Scottish Tribunals is not limited by any other more specific provisions in the Bill regarding the content of Tribunal Rules (subsection (4)). Tribunal Rules may also make equal or different provision in respect of the First-tier Tribunal and the Upper Tribunal (subsection (1)), particular provision for different chambers or divisions or different types of proceedings (subsection (2)) and, more generally, different provision for different purposes (subsection (3)).

Section 65 – Proceedings and steps

233. Sections 65 to 67 set out specific matters on which Tribunal Rules may make provision.

234. Section 65 allows Tribunal Rules to make provision for the purpose of proceedings in a case before the Tribunals, including as to the form and manner in which a case is to be brought before them, withdrawal of a case, whether or not two or more applications can be conjoined, time limits for making a referral of a matter to the Scottish Tribunals for decision or for taking steps as part of the proceedings, and circumstances in which the Tribunals may act of their own initiative.

Section 66 – Hearings in cases

235. Section 66 allows Tribunal Rules to make provision about hearings, including as to when matters can be dealt with without one, whether a hearing is to be held in private or public, appearance and representation at hearings, notice of hearings, whether two or more sets of proceedings can be taken concurrently, adjournment with a view to resolution, and the imposition of reporting restrictions.

Section 67 – Evidence and decisions

236. Section 67 allows Tribunals Rules to make provision about evidence given before the Scottish Tribunals, including as to the administering of oaths and presumptions to apply, and about their decisions (for example, how they are recorded and published).
237. Sections 10(1)(b) and (2)(b) (authority under regulations), 27(3) (transfer-in of functions), 38(3) (review of decisions), 54(2) (additional matters), 56(2) (venue for hearings), 57(1) (conduct of cases), 58(1) (enforcement of decisions) and 59(1) and (3) (award of expenses) also deal with matters on which Tribunal Rules may make provision.

Section 68 – Practice directions

238. This section sets out the process for issuing directions as to the practice and procedure to be followed in the Scottish Tribunals. Directions by the President of Tribunals may make provision with regard to both the First-tier Tribunal and the Upper Tribunal (subsection (1)).

239. Directions by a Chamber President may only make provision in respect of the chamber over which the Chamber President presides (subsection (2)) and can only be issued with the approval of the President of Tribunals (subsection (4)).

240. Directions by a Vice-President may only make provision in respect of the division over which the Vice-President presides (subsection (3)) and can only be issued with the approval of the President of Tribunals (subsection (4)).

Section 69 – Reconciling differences

241. Section 69 makes provision that the President of Scottish Tribunals must arrange for directions under section 68(1), (2) or (3) to be published in a manner they consider appropriate. Subsection (B1) specifies that directions may make different provision for different purposes as well as vary and revoke earlier directions.

242. In the event of any conflict arising between Tribunal Rules and directions issued by the Lord President under section 9 or by the President of Tribunals, a Chamber President or a Vice-President under section 68. The effect of section 69 is, in the event of any conflict, to provide for Tribunal Rules to prevail over any directions, directions of the Lord President to prevail over directions of the President of Tribunals, a Chamber President or Vice-President and directions of the President of Tribunals to prevail over directions of a Chamber President or Vice-President.

Fees and administration

Section 70 – Tribunal fees

243. This section allows the Scottish Ministers by regulations to make provision for the Scottish Tribunals to charge reasonable fees in respect of any matter dealt with by the Scottish Tribunals. The Scottish Ministers are required to consult the Lord President and, to such an extent as they consider appropriate, persons having an interest in the operation of the business of the Scottish Tribunals before exercising this power.

Section 71 – Administrative support

244. Section 71 places a duty on the Scottish Ministers to provide property, services and personnel to the Scottish Tribunals so as to ensure their proper operation and the discharge of the Lord President’s responsibility for the efficient disposal of business in the Tribunals. The Scottish Ministers are obliged to have regard to any representations made to them by the Lord President in this respect (subsection (2)).
Section 72 – Annual reporting

245. Section 72 places a duty on the President of Tribunals to prepare an annual report for the Lord President on the operation and business of the Scottish Tribunals which must explain how the Tribunals have exercised their functions during the financial year (and may contain other information). The report is to be sent to the Scottish Ministers as well as published.

PART 8 – FINAL PROVISIONS

Section 73 – Regulation-making

246. Section 73 makes further provision with regard to the various regulation-making powers set out in the Bill including details as to the parliamentary procedure to be adopted.

Section 74 – Ancillary regulations

247. Section 74 allows the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider is necessary or expedient for the purposes or in connection with the Bill.

Section 75 and schedule 9 – Transitional and consequential

248. Section 75 introduces schedule 9 which makes transitional arrangements and consequential modifications to other enactments.

Transitional and other matters

249. Part 1 of schedule 9 sets out the transitional arrangements for the transfer of functions from existing tribunals to the Scottish Tribunals. Where the functions of a listed tribunal are transferred to the Scottish Tribunals by regulations made under section 27(2), paragraph 2 enables the Scottish Ministers to make provision, by regulations, for the procedural rules of the listed tribunal to continue to apply (with such modification as the Scottish Ministers consider to be necessary or expedient) to the exercise of those functions by the Scottish Tribunals.

250. The effect of paragraph 4 is to enable the Scottish Ministers, by regulations, to make Tribunal Rules until such time as the provisions conferring responsibility on the SCJC and the Court of Session for the making of Tribunal Rules are commenced. The Scottish Ministers are to consult the Lord President, the President of Tribunals and such other persons as they consider appropriate before making any such regulations.

251. Once the provisions conferring responsibility on the SCJC and the Court of Session for the making of Tribunal Rules are commenced, paragraph 6 has effect so that all rules applying by virtue of regulations made under paragraphs 2 and 4 are to be regarded as Tribunal Rules.

252. Paragraphs 7 to 9 of schedule 9 make provision so as to enable the First-tier Tribunal not to be organised into chambers and the Upper Tribunal not to be organised into divisions until such time as they have acquired sufficient functions from the listed tribunals.

253. Paragraph 9A allows any President, or equivalent of one, of the listed tribunals to sit as a Board member of the Judicial Appointments Board for Scotland (JABS) during the transfer-in
stage. It also allows for a member of any listed tribunal to sit on a recruitment panel where they would hold the relevant expertise in the subject matter.

Consequential modifications

254. Paragraph 10 of schedule 9 amends the Judicial Pensions and Retirement Act 1993 so that the ordinary and legal members of the Scottish Tribunals are added to the list of offices set out in Schedule 5 to that Act. By virtue of the operation of section 26 of that Act, those members of the Scottish Tribunals are required to retire from office on reaching the age of 70. Subsections (4) to (6) of that provision, however, enable those members to continue in office on an annual rolling basis up until the age of 75 if the Scottish Ministers, after consultation with the President of Tribunals, consider it is desirable in the public interest to allow those persons to continue in office.

255. Paragraph 11 amends the Judiciary and Courts (Scotland) Act 2008 to bring the ordinary and legal members of the Scottish Tribunals within the remit of JABS and to exclude them from holding office as the Judicial Complaints Reviewer.

256. Sub-paragraph (2) amends section 10 of that Act so that any persons appointed to the positions of Vice-President or ordinary or other legal member of the Upper Tribunal, or Chamber President, Deputy Chamber President or ordinary or other legal member of the First-tier Tribunal fall within the remit of JABS. By virtue of section 11 of the 2008 Act, an individual cannot be appointed to one of these positions unless recommended for appointment by JABS.

257. Sub-paragraph (3) amends section 30 of the 2008 Act so that the ordinary and legal members of the Scottish Tribunals are disqualified from being appointed as the Judicial Complaints Reviewer.

258. Sub-paragraph (4) amends the composition of JABS so as to include representation from the Scottish Tribunals and sub-paragraph (5) sets out the proceedings that are to apply in respect of an appointment to the Scottish Tribunals.

259. Paragraph 12 amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. These amendments are explained in the commentary on Tribunal Rules (section 62).

Section 76 and schedule 10 – List of expressions

260. Section 76 defines “Lord President” for the purposes of the Bill, and introduces a list of expressions used in the Bill in schedule 10.

Section 77 – Commencement

261. Section 77 makes provision as to the commencement of the Bill. Sections 76 to 78 come into force on the day after Royal Assent. All other provisions are to come into force on such day as the Scottish Ministers may, by order, appoint. Any such order may include transitional, transitory or saving provision.
SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Tribunals (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 28A(2) – Accommodation of functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

2. The two methods by which decision-making functions may be conferred on the Scottish Tribunals are transfer-in under section 27 of this Bill, or by the direct conferral of functions by an Act of the Scottish Parliament or subordinate legislation under an Act.

3. This power allows the Scottish Ministers to amend the Tribunals Bill whenever functions are directly conferred on the Scottish Tribunals. The amendment will specify the new functions on the face of the Tribunals Bill.

Reason for taking power

4. The intention is that the Tribunals Bill should be able to give the user a complete picture of the jurisdictions of the Scottish Tribunals. This power will be used to incorporate in the text of the Act references to decision-making functions directly conferred on the Scottish Tribunals.

Reason for choice of procedure

5. The Scottish Government considers that negative procedure is appropriate as this power can only be used to make descriptive, technical changes to the Tribunals Bill which will, in any
event, only be able to be made following direct conferral of functions on the Scottish Tribunals by another Act (which will have completed its own parliamentary procedure).

Section 28A(3) – Accommodation of functions

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<td>Negative procedure</td>
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<td>Amended or new power:</td>
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**Provision**

6. The two methods by which decision-making functions may be conferred on the Scottish Tribunals are transfer-in under section 27 of this Bill, or by the direct conferral of functions by an Act of the Scottish Parliament or subordinate legislation under an Act.

7. This power allows the Scottish Ministers to amend the Tribunals Bill or the legislation directly conferring new functions on the Scottish Tribunals whenever functions are directly conferred. Amendments can be made in order to make the new functions conferred on the Scottish Tribunals exercisable in accordance with the Tribunals Bill.

**Reason for taking power**

8. Under section 27(6), regulations which transfer in decision-making functions to the Scottish Tribunals are able to make provision to give full effect to that transfer. The new power in section 28A(3) allows equivalent provision to be made when a function is directly conferred on the Scottish Tribunals.

**Reason for choice of procedure**

9. Regulations made under section 27(2) and (6) are affirmative because they are principally made under 27(2), which provides for transfer-in. The policy choice whether to transfer in a jurisdiction is considered sufficiently important that it requires to be subject to the affirmative procedure. The regulation-making power in section 27(6) supplements this. The power in section 28A(3) is not equivalent to the regulation-making power in section 27(2) – it involves, in itself, no choice whether to transfer a jurisdiction into the Scottish Tribunals. Therefore, there does not exist the same justification for making it subject to the affirmative procedure. Instead, it more closely replicates only the supplementary ability of 27(6) to give full effect to the transfer of a jurisdiction into the Scottish Tribunals. The Scottish Ministers do not consider that this, independently, is a sufficiently significant power to justify the affirmative procedure.

10. It is worth giving an example for this. If primary legislation were to confer new decision-making functions directly on the Scottish Tribunals, it is not impossible that there might be unanticipated (consequential) adjustments required to legislation required to make the new jurisdiction work neatly with the new Tribunals system. Section 27(6) allows this to occur when the Scottish Tribunals gain a new jurisdiction as a result of regulations made under 27(2). For example, provisions might be adjusted so that other enactments explicitly make reference to relevant provisions in the Tribunals Bill or to remove provision that is no longer necessary as the result of the direct conferral of the new jurisdiction.
Section 28B(1) – Redistribution of functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

11. The two methods by which decision-making functions may be conferred on the Scottish Tribunals are transfer-in under section 27 of this Bill, or by the direct conferral of functions by an Act of the Scottish Parliament or subordinate legislation under an Act.

12. This power allows the Scottish Ministers to redistribute functions directly conferred on the Scottish Tribunals between the Scottish Tribunals.

Reason for taking power

13. Under section 27(4) regulations may be made which redistribute functions between the Scottish Tribunals if those functions were transferred in. This power completes the picture by granting Scottish Ministers the same powers of redistribution in respect of those functions which were directly conferred on the Scottish Tribunals.

Reason for choice of procedure

14. The Scottish Government considers that negative procedure is appropriate as this power complements the power in section 27(4), which is subject to negative procedure. The redistribution of functions is an operational matter and, although both powers can be used to amend primary legislation, this can only be done consequentially in connection with the transfer of functions between the Scottish Tribunals once they have been acquired by the Tribunals by other means.

Section 32(2) – Conditions of membership etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure
Amended or new power: New

Provision

15. Schedule 7 to the Bill contains detailed provisions concerning the terms of membership on which members of the Scottish Tribunals hold office. Paragraphs 2 to 9 provide that tribunal members hold office for a period of five years, after which they will be automatically re-appointed unless certain conditions are met.

16. This power allows the Scottish Ministers to provide for permanent appointments to the Scottish Tribunals by making regulations to which schedule 7 is subject.
Reason for taking power

17. After considering the recommendation in the Justice Committee’s Stage 1 Report, the Scottish Ministers agreed that the Bill should be amended to allow for the possibility of permanent appointments to the Scottish Tribunals if there was a business need for a permanent appointment identified. This power allows the Scottish Ministers to, in consultation with the President of Tribunals, make provision to this effect where necessary.

Reason for choice of procedure

18. The Scottish Government considers that negative procedure is appropriate as this power concerns operational matters and will be exercised only when the President of Tribunals has been consulted.

Section 37A(1) – Voting for decisions

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<td>Affirmative procedure</td>
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Provision

19. Sections 34 and 36 make provision about how decisions in the Scottish Tribunals are to be made.

20. This power allows the Scottish Ministers to provide for how decisions are to be voted for when tribunals are composed of more than one member, for example by giving a chairing member a casting vote in the event of a tie.

Reason for taking power

21. Regulations of this sort will only need to be made for jurisdictions which require it. Different jurisdictions might require different provision, or no provision, to be made in respect of their decision-making functions. For some tribunals the question may never arise as they consist of an individual member. For tribunals which consist of an odd number of members, there may be a need to make regulations (even though a majority is easily accomplished) because it is not impossible that a tie could occur. For some tribunals provision would obviously be required to resolve any questions about how decisions should be voted for. For instance, if the tribunal consists of an even number of members, a tie is naturally possible. Generally, a tie is something that needs to be dealt with. In addition, it may be that it is appropriate to make provision for particularly types of decisions to be taken unanimously. For example, in important or unusual cases. This is all for the sake of ensuring legal certainty and clarity in decision-making.

22. Tribunals Rules made under section 37B(1) can determine who is to be the chairing member. It is considered that this matter is appropriately addressed in Rules as it is largely an operational, rather than substantive question. All members of tribunals will have equal judicial capacity in all their functions, by virtue of section 13. The type and qualification of members who will comprise a tribunal is determined by composition regulations, made under section 37(1), and subject to the affirmative procedure. The substantive question of principle is whether this is a jurisdiction, or particular decision-making function, for which voting regulations should
provide that a chairing member has a casting vote. Regulations which provide for this are also subject to the affirmative procedure. The determination of the identity of the particular member who is to have that casting vote is not a question of principle, and is therefore most appropriately dealt with operationally by Rules made under section 37B(1). Also to be noted is the reference to types of member or particular expertise (and that different provision can be made for different purposes).

**Reason for choice of procedure**

23. The Scottish Government considers that affirmative procedure is appropriate as this power concerns the question of how decisions are made in the Scottish Tribunals, noting that the connected powers in sections 35(1) and 37(1) are subject to affirmative procedure.

**Section 48(2) – Other appeal rights**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Regulations made by Scottish statutory instrument
- **Parliamentary procedure:** Negative procedure
- **Amended or new power:** Amended

**Provision**

24. Section 48 provides for decisions against which there is a right of appeal in another Act to be excluded decisions for the purposes of section 46. Regulations under section 48(2)(a) allow the Scottish Ministers to make exceptions to that provision.

25. The power in section 48(2)(a) makes complementary provision allowing existing appeal rights to cease to be exercisable.

**Reason for taking power**

26. In its Stage 1 Report, the Delegated Powers and Law Reform Committee questioned whether the existing provision in section 48 allowed for a choice of appeal rights to be created. The new power in section 48(2)(b) is intended to make it clear that when an appeal right is specified using the power in section 48(1)(a), existing rights can be switched off using this power.

**Reason for choice of procedure**

27. The Scottish Government considers that negative procedure is appropriate as this power will simply be used to determine the application of a right of appeal rather than its existence.

**Section 61A(1) – Offences in relation to proceedings**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Regulations made by Scottish statutory instrument
- **Parliamentary procedure:** Affirmative procedure
- **Amended or new power:** New
Provision

28. This power allows the Scottish Ministers to create offences in connection with proceedings before the Scottish Tribunals. Subsection (1)(a) describes the things which may be made an offence.

29. As well as allowing offences to be created in respect of the failure of refusal to give or produce evidence, this power allows the Scottish Ministers to specify the circumstances in which a person can refuse to give or produce evidence in proceedings before the Scottish Tribunals.

Reason for taking power

30. This power allows offences to be created where jurisdictions within the Scottish Tribunals system require it. For example, see paragraph 12 of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 for provision made in respect of the Mental Health Tribunal for Scotland. In the mental health jurisdiction, it is considered that these matters are sufficiently grave to require to be criminalised. This provision allows Scottish Ministers to make equivalent provision in respect of this and other jurisdictions, where it is considered appropriate.

Reason for choice of procedure

31. The Scottish Government considers that affirmative procedure is appropriate, alongside a requirement for the approval of the Lord President, as this power concerns the creation of criminal offences.

Section 62(1) – Scottish Tribunal Rules

Power conferred on: The Court of Session
Power exercisable by: Act of sederunt made by Scottish statutory instrument
Parliamentary procedure: Laid, no procedure
Amended or new power: Amended

Provision

32. Section 62 confers a power on the Court of Session, by act of sederunt, to make rules (to be known as Scottish Tribunal Rules) regulating the practice and procedure to be followed in proceedings in the Scottish Tribunals. Various sections in the Bill allow Tribunal Rules to make provision on matters relating to the work of the Scottish Tribunals.

33. Ultimately, Tribunal Rules will be drafted by the Scottish Civil Justice Council, which will be required by an amendment made by this Bill to have a tribunals committee for the exercising of its tribunals-related functions: see schedule 9 at paragraph 12.

34. Until such time as the Scottish Civil Justice Council takes over this role, Scottish Ministers will continue to make the required Tribunal Rules. While Scottish Ministers make these Rules, paragraph 4 of schedule 9 requires these Rules to be set out in regulations, made subject to the negative procedure, with a requirement to consult the President of Tribunals and other persons considered appropriate.
35. Some amendments were made to the following sections at Stage 2, including some rearrangement for clarity and sense.

36. Section 37B(1) supplements section 37A(1), to allow Tribunal Rules to determine who is to be the chairing member of the tribunal. Sections 37A(1) and 37B(1) are discussed above.

37. The power at section 56(2) has been adjusted to expressly mention the time at which a tribunal could be convened as well as the place. This is for completeness.

38. The power at section 57 has been adjusted to expressly mention for completeness the citation of witnesses as well as the matters already referred to.

39. Section 59 has been restructured but with the same overall effect.

40. Section 63 has been adjusted to provide a more detailed scheme for when and to whom Tribunal Rules may confer functions.

41. Sections 65 and 66 have been adjusted so that Rules may conjoin applications or allow for two or more sets of proceedings to be heard at the same time.

42. Section 67(4) has been broadened to allow Tribunal Rules to make provision about further aspects of decisions of the Scottish Tribunals.

43. Provision is made in new section 28B(2) for Tribunal Rules to determine which tribunal should exercise a particular function when that function has been redistributed under that section.

Reason for taking power

44. Tribunal Rules will relate to technical, operational and procedural matters. These adjustments make appropriate expansions to and clarification of the scope of Tribunal Rules.

Reason for choice of procedure

45. An act of sederunt made by the Court of Session is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 70(1) – Tribunal fees

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Provision

46. This power allows the Scottish Ministers to provide for reasonable fees to be paid in respect of matters in proceedings before the Scottish Tribunals. This power has been amended to impose a new consultation requirement, including with the Lord President.

Reason for taking power

47. Certain tribunals which it is intended to transfer in to the Scottish Tribunals already charge fees. It is not possible to make provision of this sort until these Tribunals are transferred in. In its Stage 1 Report on the Bill, the Justice Committee recommended that the Scottish Ministers consider whether there should be a consultation requirement attached to the power to make regulations on fees in the Scottish Tribunals. Having considered this, Scottish Ministers are content that it is appropriate that consultation should be undertaken if there are any proposals to make regulations using this power. In particular, this will give interested parties the chance to make representations about any proposed fees.

Reason for choice of procedure

48. The Scottish Government considers that negative procedure is appropriate. Any fees charged are likely to have to vary over time and the power has been made subject to consultation requirements. This position is unchanged from that at Introduction as mentioned in the original Memorandum.
Delegated Powers and Law Reform Committee

20th Report, 2014 (Session 4)

Tribunals (Scotland) Bill as amended at stage 2

Published by the Scottish Parliament on 5 March 2014
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meeting on 4 March 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Tribunals (Scotland) Bill as amended at Stage 2 (“the Bill”)\(^1\). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill creates a new structure for tribunals dealing with devolved matters. At present, a number of individual tribunals exist, each with an individual specialised remit which is conferred by statute. The Bill creates two new tribunals: a First-tier Tribunal for Scotland and an Upper Tribunal for Scotland. These would be collectively known as “the Scottish Tribunals”. It is intended that the functions of the existing devolved tribunals will transfer to these new tribunals. Schedule 1 to the Bill lists the tribunals whose functions may be transferred.

3. The Lord President of the Court of Session would be the Head of the Scottish Tribunals. A new office would also be created, the President of the Scottish Tribunals, responsible for the efficient disposal of business.

4. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM\(^2\)).

5. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its 41st report of 2013.

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\(^1\) Tribunals (Scotland) Bill as amended at Stage 2 available at: [http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30as4-stage2-amend.pdf](http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30as4-stage2-amend.pdf)

\(^2\) Tribunals (Scotland) Bill Supplementary Delegated Powers Memorandum available at: [http://www.scottish.parliament.uk/S4_Bills/Tribunals_SDPM_.pdf](http://www.scottish.parliament.uk/S4_Bills/Tribunals_SDPM_.pdf)
DELEGATED POWERS PROVISIONS

6. The Committee considered each of the new or substantially amended delegated powers provisions in the Bill after Stage 2.

7. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the new or substantially amended delegated powers provisions listed below and that it is content with the Parliamentary procedure to which they are subject:

- Section 48(2) – Other appeal rights
- Section 62(1) – Scottish Tribunal Rules
- Section 68 – Practice directions
- Section 17(7B) – Authorisation of others
- Section 28A(2) – Accommodation of functions
- Section 28A(3) – Accommodation of functions
- Section 28B(1) – Redistribution of functions
- Section 32(2) – Conditions of membership etc.
- Section 37A(1) – Voting for decisions
- Section 37B(1) – Chairing members
- Schedule 7, paragraph 13A – Pensions etc.
- Section 61A(1) – Offences in relation to proceedings

8. However, insofar as the power at section 61A(1) is concerned, it should be noted that the Committee’s contentment is only as a consequence of the Scottish Government’s commitment to lodge an amendment at stage 3 amending this power.

9. The power in new section 61A(1) allows the Scottish Ministers to create offences and penalties in connection with proceedings before the Scottish Tribunals. Provision may be made making it an offence to give a false statement in an application in a case, to fail to attend or to give evidence before a Tribunal, or to alter, conceal or destroy, or fail to produce, something that is required to be produced in tribunal proceedings in accordance with Tribunal Rules. The power does not specify any maximum as regards the penalties which Ministers may impose when exercising their power to create offences of this kind. The Supplementary Delegated Powers Memorandum provides no explanation as to why Ministers require the power to set the maximum penalty rather than have that specified on the face of the Bill.
10. The Committee takes the view that it is for the Parliament to determine what the maximum penalty for an offence should be and that this is not a matter which should be delegated to Ministers. The Committee notes in this regard that the Government has agreed to bring forward an amendment at stage 3 which will clearly set out in the Bill the maximum penalties that can be imposed. The proposed maxima are: on summary conviction, imprisonment up to 12 months or a fine not exceeding the statutory maximum or both; and on conviction on indictment, imprisonment for a term not exceeding 2 years or a fine or both.

11. The Committee therefore welcomes the Scottish Government’s commitment to bring forward an amendment at stage 3 which will set the maximum penalties which may be imposed in relation to offences created by section 61(A) of the Bill.

12. There was only one power which the Committee agreed to draw to the Parliament’s attention. The Committee’s comments on that power are detailed below.

Section 70(1) – Tribunal fees

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>negative</td>
</tr>
</tbody>
</table>

13. Section 70(1) allows the Scottish Ministers, by regulations, to make provision for the Scottish Tribunals to charge reasonable fees in respect of any matter with which they deal. Ministers must consult the Lord President before making the regulations. The power has been amended at stage 2 to impose a new consultation requirement, to the effect that before making the regulations, the Scottish Ministers must consult “to such extent as they consider appropriate, persons having an interest in the operation and business of the Scottish Tribunals”.  

14. In its report at stage 1, the Justice Committee recommended that where it is proposed through regulations under section 70(1) that a tribunal be given the power to charge expenses and fees where it did not have such a power previously, consultation should be carried out with users and stakeholders of the tribunal concerned.

15. The Committee observes that the amendment made at stage 2 is more limited than this in two respects. First, the duty to consult only exists to the extent that Ministers consider it appropriate and second, the persons who have to be consulted are “persons having an interest in the operation and business of the Scottish Tribunals”. That may not necessarily include individual users of a particular tribunal.

16. Accordingly, while the amended power in section 70(1) could be used to require consultation in the manner recommended by the lead Committee, the provision as drafted does not require it to be used in this way. The Committee

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3 Tribunals (Scotland) Bill [as amended at stage 2] , Section 70(3)(b)
recognises that the current administration has stated clearly that it does not intend to use the power in section 70(1) to introduce new fees for tribunals, meaning that the issue of consultation on such a proposal is unlikely to arise under this administration. However, that commitment would not of course be binding on future administrations.

17. The Committee considers that whether or not it is appropriate for the power in section 70(1) to be subject to the limited consultation requirement added by amendment at stage 2 appears to be a matter of policy, which the Parliament as a whole will wish to be satisfied about.

18. The Committee therefore draws the power in section 70(1), as amended at stage 2, to the attention of the Parliament.
Tribunals (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 78
Schedules 1 to 10
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 11A

Elaine Murray

24 After section 11A, insert—

<Alternative dispute resolution

(1) In acting as the Head of the Scottish Tribunals, the Lord President must promote alternative methods of resolving disputes in cases of a type that may be brought before the Scottish Tribunals.

(2) The Lord President is do so to such extent, and by reference to such types of case, as he or she considers appropriate (including by having regard to the suitability of a process of negotiation, mediation, arbitration or adjudication in relation to particular types of case).>

Section 26

Roseanna Cunningham

1 In section 26, page 11, line 30, leave out <Regulations under subsection (2) may add a tribunal to the list> and insert <A tribunal may be added to the list in Part 1 of schedule 1>

Roseanna Cunningham

2 In section 26, page 11, line 32, leave out subsection (4) and insert—

<(4) For the purposes of this section, a reference to a tribunal includes any body, office-holder or individual having decision-making functions that are exercisable as follows (but only as far as having such or other functions that are so exercisable)—

(a) as, or in the manner of, a tribunal, and

(b) with respect to the determination or resolution of legal, administrative or other disputes between parties of any kind.>

Roseanna Cunningham

3 In section 26, page 11, line 35, leave out <But the references in this section to a tribunal do not> and insert <Despite that generality, a reference to a tribunal does not for the purposes of this section>
Section 61A

Roseanna Cunningham

In section 61A, page 27, line 35, at end insert—

<(  ) The maximum penalties that may be provided for in regulations under subsection (1) are—

(a) for an offence triable summarily only, imprisonment for a term not exceeding 12 months or a fine not exceeding level 5 on the standard scale (or both),

(b) for an offence triable either summarily or on indictment—

(i) on summary conviction, imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),

(ii) on conviction on indictment, imprisonment for a term not exceeding 2 years or a fine (or both).>  

Section 62

Roseanna Cunningham

In section 62, page 28, line 8, at end insert <, and

( ) containing provision of other sorts appropriate with respect to the Scottish Tribunals (including in relation to the exercise by them of their functions).>  

Section 68

Roseanna Cunningham

In section 68, page 31, line 4, leave out second <in> and insert <at>

Section 76

Roseanna Cunningham

In section 76, page 33, line 33, leave out <a list> and insert <an index>

Schedule 1

Roseanna Cunningham

In schedule 1, page 35, leave out lines 34 and 35 and insert <exercisable—

( ) in the manner of a tribunal, and

( ) with respect to the determination or resolution of disputes.>

Schedule 2

Roseanna Cunningham

In schedule 2, page 36, line 31, leave out <named or other membership> and insert <or other>
Schedule 3

Roseanna Cunningham

10 In schedule 3, page 38, line 32, after <sub-paragraph> insert <(1A),>

Roseanna Cunningham

11 In schedule 3, page 38, line 32, at end insert—

<(1A) That is—

(a) current practice as a solicitor or barrister in England and Wales or Northern Ireland, and

(b) engagement in practice as such for a period of not less than 5 years.>

Roseanna Cunningham

12 In schedule 3, page 39, line 3, after <through> insert <current or previous>

Roseanna Cunningham

13 In schedule 3, page 39, line 20, leave out <6(2)(a)> and insert <6(1A)(b) or (2)(a)>

Schedule 5

Roseanna Cunningham

14 In schedule 5, page 42, line 33, after <sub-paragraph> insert <(1A),>

Roseanna Cunningham

15* In schedule 5, page 42, line 33, at end insert—

<(1A) That is—

(a) current practice as a solicitor or barrister in England and Wales or Northern Ireland, and

(b) engagement in practice as such for a period of not less than 7 years.>

Roseanna Cunningham

16 In schedule 5, page 43, line 3, after <through> insert <current or previous>

Roseanna Cunningham

17 In schedule 5, page 43, line 20, leave out <6(2)(a)> and insert <6(1A)(b) or (2)(a)>

Schedule 7

Roseanna Cunningham

18 In schedule 7, page 48, line 5, leave out paragraph 11

Schedule 9

Roseanna Cunningham

19 In schedule 9, page 55, line 30, at end insert <, or
( ) containing provision of other sorts appropriate with respect to the Scottish Tribunals (including in relation to the exercise by them of their functions).> 

**Roseanna Cunningham**  
20 In schedule 9, page 55, line 38, leave out <for the purposes mentioned in paragraph 2(2) (that is,> and insert <as mentioned in paragraph 2(2) (>

**Margaret Mitchell**  
25 In schedule 9, page 56, line 3, leave out <negative> and insert <affirmative>

**Roseanna Cunningham**  
21 In schedule 9, page 57, line 16, after <of> insert <, or a person who exercises functions as,>

**Roseanna Cunningham**  
22 In schedule 9, page 57, line 35, leave out <above>

**Roseanna Cunningham**  
23 In schedule 9, page 58, line 35, leave out <that paragraph> and insert <paragraph (c) of sub-paragraph (1)>

**Elaine Murray**  
26 In schedule 9, page 59, line 32, at end insert—

< ( ) after paragraph (a) there is inserted—

“(aa) to keep matters relating to the administrative justice system within the jurisdiction of the Scottish Tribunals under review,”,>

**Elaine Murray**  
27 In schedule 9, page 59, line 39, at end insert—

< ( ) after paragraph (d) there is inserted—

“(da) to provide advice and make recommendations to the Lord President on the development of, and changes to, matters relating to the administrative justice system within the jurisdiction of the Scottish Tribunals,,”,>

**Elaine Murray**  
28 In schedule 9, page 59, line 39, at end insert—

< ( ) after paragraph (e) there is inserted—

“(ea) to provide such advice on any matter relating to the administrative justice system within the jurisdiction of the Scottish Tribunals as may be requested by the Lord President.”,>

**Elaine Murray**  
29* In schedule 9, page 60, line 35, leave out <2(1)(ba) and (c)(ii)> and insert <2(1)(aa), (ba), (c)(ii), (da) and (ea)>
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 3 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1: Alternative dispute resolution**
24

**Group 2: Listed tribunals**
1, 2, 3, 8

Debate to end no later than 20 minutes after proceedings begin

**Group 3: Maximum penalties under section 61A**
4

**Group 4: Provision for tribunal rules**
5, 6, 19, 20, 25

**Group 5: Minor drafting points**
7, 9, 22, 23

**Group 6: Eligibility and process for appointment**
10, 11, 12, 13, 14, 15, 16, 17, 21

Debate to end no later than 40 minutes after proceedings begin
Group 7: Disqualification from position
18

Group 8: Role of the Scottish Civil Justice Council
26, 27, 28, 29

Debate to end no later than 55 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 3, No. 87        Session 4

Meeting of the Parliament

Tuesday 11 March 2014

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-09286—That the Parliament agrees that, during stage 3 of the Tribunals (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 2: 20 minutes
Groups 3 to 6: 40 minutes
Groups 7 to 8: 55 minutes.

The motion was agreed to.

Tribunals (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22 and 23.

The following amendments were agreed to (by division)—
18 (For 102, Against 13, Abstentions 0)
19 (For 102, Against 13, Abstentions 0)

The following amendments were disagreed to (by division)—
25 (For 14, Against 101, Abstentions 0)
26 (For 55, Against 60, Abstentions 0)
27 (For 43, Against 73, Abstentions 0)
28 (For 43, Against 73, Abstentions 0)

Amendment 24 was moved and, with the agreement of the Parliament, withdrawn.

Amendment 29 was not moved.

Tribunals (Scotland) Bill - Stage 3: The Minister for Community Safety and Legal Affairs (Roseanna Cunningham) moved S4M-09272—That the Parliament agrees that the Tribunals (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Tribunals (Scotland) Bill: Stage 3

14:21

The Deputy Presiding Officer (John Scott): The next item of business is stage 3 of the Tribunals (Scotland) Bill. Members should have copies of the bill as amended at stage 2, the marshalled list and the groupings of amendments. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon, the period of voting for which will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate. Members who wish to speak in the debate on any group of amendments should press their request-to-speak buttons as soon as possible after the group is called.

After section 11A

The Deputy Presiding Officer: We start with group 1. Amendment 24, in the name of Dr Elaine Murray, is the only amendment in the group.

Elaine Murray (Dumfriesshire) (Lab): At stage 2, both the Minister for Community Safety and Legal Affairs and I lodged amendments to address concerns that witnesses had expressed that the bill did not—unlike the equivalent United Kingdom legislation—contain a definition of “tribunal”. The minister’s amendment was successful. However, committee members expressed sympathy for the policy direction of one of the paragraphs in one of my amendments, which would have required the Lord President to consider and to develop innovative methods of resolving disputes. At the time, Justice Committee members objected to how it was expressed, although it replicated the wording in section 2(3)(d) of the Tribunals, Courts and Enforcement Act 2007.

Nevertheless, I have tried to take on board both the positive views of committee members regarding dispute resolution and their concerns that the previous wording was too woolly, so I offer instead a new section on alternative dispute resolution to be inserted in section 11A.

Amendment 24 would require the Lord President, in his or her capacity as head of the Scottish tribunals, to “promote alternative methods of resolving disputes”—for example, negotiation, mediation, adjudication or arbitration—that would be suitable for the type of case that is under consideration.

I move amendment 24, and offer it to the Parliament for consideration.

Margaret Mitchell (Central Scotland) (Con): I support amendment 24. I commend Elaine Murray for the rewording, which seems to be entirely sensible and reasonable.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): Elaine Murray’s amendment 24 would place a duty on the Lord President to promote alternative dispute resolution in cases that are brought before the Scottish tribunals, to the extent that the Lord President would believe that that would be appropriate.

There are a couple of difficulties with amendment 24. It has been lodged at stage 3, which has not provided enough time to seek the Lord President’s views on it; I do not think that it would be appropriate to place a duty on the Lord President without first having had the opportunity to discuss it with him.

The Scottish Government has supported and encouraged the use of alternative methods of dispute resolution in appropriate cases. The Government agrees that alternative dispute resolution is a valuable component of the administrative justice landscape, but it is for the founding legislation for each tribunal jurisdiction to provide for that.

Different ADR methods are already used by some tribunals that will transfer into the new structure. For example, the Private Rented Housing Panel uses mediation in some disputes, as does the Additional Support Needs Tribunal for Scotland. In valuation appeals, negotiation is provided for. Members might also be interested to know that the Homeowner Housing Panel has recently embarked on a mediation pilot project, which will be undertaken over the next 12 months. That will gauge whether mediation is appropriate in some property factor or land maintenance cases.

In some cases, ADR is not appropriate. The Mental Health Tribunal for Scotland is one instance of that, because it deals with persons’ liberty. It would be wrong to use ADR in those circumstances.

Amendment 24 is unnecessary, so I ask Elaine Murray to withdraw it.

Elaine Murray: I note what the minister said about founding legislation, which is the mechanism by which new tribunals are set up. I understand that a new tribunal process is proposed in the Housing (Scotland) Bill, which is before the Infrastructure and Capital Investment Committee. Has the requirement to consider alternative methods been built in to that bill? If we have an environment tribunal—which I know the Minister for Environment and Climate Change is considering—will we ensure that such a requirement is in the legislation to establish that? If ministers assure me that the requirement will be
included in all future legislation, I will be happy to withdraw amendment 24.

The Deputy Presiding Officer: Unusually, I call the minister to respond.

Roseanna Cunningham: I cannot answer for the Minister for Housing and Welfare on the Housing (Scotland) Bill. However, in some support of Elaine Murray’s position, I add that section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 provides for the Scottish Civil Justice Council to have regard to specific principles in carrying out its functions. One of those principles is that “methods of resolving disputes which do not involve the courts should, where appropriate, be promoted.” Because that council will in the future be responsible for tribunal rules, that provides adequately for promotion of ADR in tribunals in the way that Elaine Murray wishes.

Elaine Murray: I am content to withdraw amendment 24.

Amendment 24, by agreement, withdrawn.

Section 26—Listed tribunals

The Deputy Presiding Officer: We move to group 2. Amendment 1, in the name of the minister, is grouped with amendments 2, 3 and 8.

Roseanna Cunningham: At stage 2, Elaine Murray lodged an amendment to include in the bill a definition of “tribunal”. I explained then that section 26 of the bill describes a tribunal for the purposes of the bill. However, having reflected on the stage 2 discussions, I have lodged amendments 1 to 3, which will make clearer the description that section 26 provides. Amendment 8 is consequential on the new description that will be in section 26(4), which is more inclusive than the specification in paragraph 13(3) of schedule 1. The amendments will make a technical adjustment to make the provisions fit better.

I move amendment 1.

Elaine Murray: I am pleased that our stage 2 discussions affected the minister, and I welcome the amendments.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Roseanna Cunningham]—and agreed to.

Section 61A—Offences in relation to proceedings

The Deputy Presiding Officer: We move to group 3. Amendment 4, in the name of the minister, is the only amendment in the group.

Roseanna Cunningham: At stage 2, we lodged an amendment that provided that the Scottish ministers could make regulations on offences in proceedings that are before the Scottish tribunals. However, the Delegated Powers and Law Reform Committee has previously taken the view that it is inappropriate for Parliament to confer on ministers a power to create offences and penalties in regulations without specifying a limit on the penalties that can be imposed. The committee takes the view that setting of maximum penalties is a matter for Parliament and should not be delegated. I have reflected on the committee’s view and have lodged amendment 4 to make provision for setting of the maximum penalties that may be provided for in regulations.

I move amendment 4.

14:30

Margaret Mitchell: I fully accept the need to ensure that statements and evidence that are given in tribunals are accurate, but I have concerns that creating a raft of new offences with severe penalties could harm the informal nature of some tribunals. Therefore, I seek an assurance from the minister that amendment 4 will not pave the way to excessive penalties, and that the power will be used only when it is deemed to be absolutely necessary to do so.

Roseanna Cunningham: I cannot predict the future, of course, but I think that I am fairly safe in saying that the power is likely to be used very rarely. It is simply to ensure that, should circumstances arise, it can be used.

Amendment 4 agreed to.

Section 62—Tribunal Rules

The Deputy Presiding Officer: We move to group 4. Amendment 5, in the name of the minister, is grouped with amendments 6, 19, 20 and 25.

Roseanna Cunningham: Amendment 5 clarifies that, as well as making provisions that regulate the practice and procedure to be followed in proceedings, tribunals’ rules may contain “provision of other sorts” connected to the Scottish tribunals, but not strictly to do with procedure or proceedings. In particular, provision can be made that is connected to the exercise of functions by a tribunal.

The bill will already empower tribunals’ rules to deal with matters of that sort in sections 27(5), 58, 63(A1) and 63(1). For example, section 58 allows tribunals’ rules to make provision concerning the manner in which a decision can be enforced. Amendment 5 makes it clear that the general rule-making power also includes the ability to make
rules of that kind. Rules will not be able to override or conflict with any substantive provision that is made by the bill, or to deal with decision making by the tribunal.

Amendment 19 will amend schedule 9 so that the terms of section 62 as amended are reflected in the provisions that relate to the period before the Scottish Civil Justice Council takes over rule making for tribunals—that is, the transitional period.

Amendments 6 and 20 will make technical drafting adjustments.

Margaret Mitchell’s amendment 25 seeks to change the procedure for making regulations for tribunal rules from negative procedure to affirmative procedure. As explained at stage 2, the power for the Scottish ministers to continue to make rules is a transitional arrangement until the Scottish Civil Justice Council is ready to take over. The Scottish ministers currently make rules that are subject to negative procedure, so I do not think that the amendment is necessary.

The bill makes explicit provision in paragraph 4(3) of schedule 9 for when the Scottish ministers are making rules in the interim period. They will not make them in isolation without consulting the president of tribunals or “such other persons as they consider appropriate.”

In practice, ministers will involve people with the appropriate jurisdictional expertise when they make or change rules. Those experts would be the same people who would sit on the specialist committees of the Scottish Civil Justice Council when it takes over responsibility. They are the jurisdictional experts.

I move amendment 5.

Margaret Mitchell: My amendment 25 would require the ministerial order-making power to be the subject of affirmative procedure rather than negative procedure. The bill will currently, by virtue of paragraph 4 of schedule 9, allow the Scottish ministers to draft procedural rules. The Scottish Government’s intention is that that will be an interim arrangement, as the minister outlined, before the newly created Scottish Civil Justice Council has the capacity to take over responsibility for those rules. However, the council will be fully occupied drafting new civil court procedural rules and—withstanding what the minister said about consultation—that is likely to be the case for the foreseeable future.

I accept that the Government’s intention is to ensure that rules are drafted as soon as possible and I acknowledge that ministers already have a limited role in drafting tribunal rules, but as the Faculty of Advocates pointed out, that arrangement is undesirable on constitutional grounds, because the rule-making power allows ministers, who can themselves be subject to tribunal consideration, to draft the rules.

The Government accepts that point, which is why the Scottish Civil Justice Council will take on that role and there is reference to ministers’ consultation of its members. However, in the meantime, we need full transparency. The bill will give ministers considerable power to shape independent tribunals and to draft all the rules for the new upper tribunal for proceedings—proceedings to which they may find themselves subject.

Furthermore, if amendment 19 is passed, that will make amendment 25 all the more pertinent because that would extend the scope of the ministerial order-making power. In those circumstances, ideally the Government would set up an interim independent body to draft procedural rules. However, given the resources that would be required to do that, it is clear that it will not happen. I hope that the Government will, notwithstanding the minister’s opening remarks, reconsider and agree to the rules being subject to affirmative procedure, in particular because that would not be overly onerous and would—crucially—give Parliament a greater role in scrutinising the new rules while introducing a limited but desirable set of checks and balances.

Elaine Murray: On the face of it, amendment 25 looks attractive because it appears to suggest that there ought to be more scrutiny of the rules by Parliament. However, given that the Government produces such rules using negative procedure, and that we are talking only about an interim arrangement until the SCJC is up and running and is able to draft such rules itself, I do not see any point in changing the procedure for a short time.

Were we to become aware of tribunal rules that were offensive in some way, we have the opportunity under negative procedure to annul them, in any case. Therefore, as long as we are vigilant to the possibility of rules being drafted in such a way that Parliament would not agree to them, we can take action.

Roseanna Cunningham: I make it very clear to Parliament that the process that we are intending to continue through the transitional period is precisely the process that we work under now, that the previous coalition Government here worked under, and which previous United Kingdom Governments worked under prior to 1999. Therefore, the bill reflects nothing other than the practice that has been in place for a great number of years. Had a serious question been raised about that practice, we might have heard more about it. I ask Parliament to reject amendment 25.

Amendment 5 agreed to.
Section 68—Practice directions
Amendment 6 moved—[Roseanna Cunningham]—and agreed to.

Section 76—List of expressions
The Deputy Presiding Officer: Group 5 is on minor drafting points. Amendment 7, in the name of the minister, is grouped with amendments 9, 22 and 23.

Roseanna Cunningham: I will be brief. The amendments in the group are minor drafting adjustments.
I move amendment 7.
Amendment 7 agreed to.

Schedule 1—Listed tribunals
Amendment 8 moved—[Roseanna Cunningham]—and agreed to.

Schedule 2—Transfer-in of members
Amendment 9 moved—[Roseanna Cunningham]—and agreed to.

Schedule 3—Appointment to First-tier Tribunal
The Deputy Presiding Officer: Group 6 is on eligibility and process for appointment. Amendment 10, in the name of the minister, is grouped with amendments 11 to 17 and 21.

Roseanna Cunningham: Amendments 10 to 17 address an anomaly in the bill. Provision is made in schedules 3 and 5 for solicitors and barristers in England, Wales and Northern Ireland who have previous experience to be eligible for appointment to the first-tier and upper tribunals, should ministers make regulations to that effect. No account has been taken of those who have current experience as solicitors or barristers in England, Wales and Northern Ireland: individuals with previous experience have been included, but those who have current experience have not.

The amendments in the group will address that anomaly by allowing people who have current experience to be eligible for appointment, should the Scottish ministers decide to make such regulations. The result will be a coherent set of powers that will allow the Scottish ministers to make lawyers who are qualified in England, Wales and Northern Ireland eligible for appointment in the future, should an appropriate jurisdiction require that.

Amendment 21 will make a minor change to the provision in paragraph 9A(1)(b) of schedule 9 to allow persons who exercise functions as a listed tribunal—such as parking adjudicators—to be chosen by the Judicial Appointments Board for Scotland when it is undertaking appointments, before all the functions of listed tribunals are transferred in to the Scottish tribunals. Currently, reference is made only to “a member of any listed tribunal”.

That does not account for individuals who exercise functions as a listed tribunal.
I move amendment 10.
Amendment 10 agreed to.
Amendments 11 to 13 moved—[Roseanna Cunningham]—and agreed to.

Schedule 5—Appointment to Upper Tribunal
Amendments 14 to 17 moved—[Roseanna Cunningham]—and agreed to.

Schedule 7—Conditions of membership etc
The Deputy Presiding Officer: We move to group 7. Amendment 18, in the name of the minister, is the only amendment in the group.

Roseanna Cunningham: Amendment 18 will remove the disqualification provision in paragraph 11 of schedule 7 to the bill.

The bill creates a framework into which the functions of members of listed tribunals may be transferred. It is flexible enough to allow other or new jurisdictions to be added to schedule 1, which contains the list of tribunals. The functions of a new jurisdiction can also be transferred directly into the Scottish tribunals through the founding legislation. A tribunal, whether currently appearing as a listed tribunal in the bill or in a newly created jurisdiction, will continue to operate under its founding legislation once it is transferred in to the new structure.

All tribunals are unique and have different membership requirements; I do not want inadvertently to disqualify a category of membership. For example, there may in the future be jurisdictions that would not want to disqualify from becoming members civil servants who were sitting in a voluntary capacity. That would be a matter for the people in the policy teams that originated the legislation that set up that tribunal.

Founding legislation is the correct place for such provision. The bill contains other provisions that will ensure that only people who are suitable will be appointed as members of the Scottish tribunals. For example, the Judicial Appointments Board for Scotland will make recommendations to the Scottish ministers on suitable candidates for appointment. Recommendation for appointment can be made only on the basis of jurisdictionally specific criteria, which the Scottish ministers will set in regulations.
There are enough safeguards, whether in founding legislation or in the bill, to ensure that only those who are suitable to hold office in the Scottish tribunals will be appointed.

I move amendment 18.

Margaret Mitchell: Amendment 18 seeks to remove the automatic disqualification of tribunal members who go on to become elected politicians or civil servants. That provision was sensible; therefore, I remain to be convinced of the need to remove it at this late stage, especially because there are justifiable concerns that amendment 18 could result in, and encourage, political interference in tribunals.

On the example that the minister cites, a solution would be for civil servants to be allowed to sit as advisory members by alternative provision. Although it could be appropriate for civil servants to sit in such an advisory capacity, it is not appropriate for elected politicians to sit as full tribunal members. That would surely create a situation wherein section 3, which protects judicial independence, could be breached.

Therefore, amendment 18 is not an improvement to the bill. I support paragraph 11 of schedule 3.

14:45

Elaine Murray: Like Margaret Mitchell, I was slightly puzzled by this amendment when I first saw it, because it appears to remove the disqualification of people such as ourselves, MPs, MEPs and councillors from sitting on tribunals, and there will be many circumstances in which that would be completely inappropriate. However, I had assumed that it is because the provision might be duplicating other legislation. Perhaps the minister can clarify that she is telling us that the disqualifications already exist in founding legislation, so people such as ourselves could not sit on existing tribunals.

Roseanna Cunningham: This is about is the difference between having a situation in which we—in the process of the bill—make a decision that will apply to all tribunals, even those that have not yet been brought into being, and a situation in which we agree that the decision-making process is better located in the policy side of the argument, when a proposal for a new tribunal is made.

I have nothing in my mind about how it might come about that it would be considered appropriate for certain people to be on or not on a tribunal, but my feeling is that it is better for us to deal with the matter on a case-by-case basis, when a tribunal is being considered, rather than now, when we are perhaps not in complete command of the facts with regard to particular subject areas. It is not really for us to make decisions on behalf of individual tribunals that have yet to be set up.

The Deputy Presiding Officer: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As it is the first vote of the afternoon, there will be a five-minute suspension.

14:44

Meeting suspended.

14:51

On resuming—

The Deputy Presiding Officer: We move to the division on amendment 18.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh South) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)

Against

Baxter, Jayne (Mid Scotland and Fife) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh South) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
The Deputy Presiding Officer: The result of the division is: For 102, Against 13, Abstentions 0.

Amendment 18 agreed to.

Schedule 9—Transitional and consequential
Amendment 19 moved—[Roseanna Cunningham].

The Deputy Presiding Officer: The question is, that amendment 19 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabianari, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)

Against
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McGregor, Jamie (Highlands and Islands) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

The Deputy Presiding Officer: The result of the division is: For 102, Against 13, Abstentions 0.

Amendment 18 agreed to.
The Deputy Presiding Officer: The result of the division is: For 102, Against 13, Abstentions 0.

Amendment 19 agreed to.

Amendment 20 moved—[Roseanna Cunningham]—and agreed to.

Amendment 25 moved—[Margaret Mitchell].

The Deputy Presiding Officer: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, John (Edinburgh North and Musselburgh) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Dorris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Finnie, John (Highlands and Islands) (Ind)
The Deputy Presiding Officer: The result of the division is: For 14, Against 101, Abstentions 0.
Amendment 25 disagreed to.

The Deputy Presiding Officer: We move to group 8. Amendment 26, in the name of Dr Elaine Murray, is grouped with amendments 27 to 29.

Elaine Murray: Amendments 26, 27 and 28 replicate amendments that I lodged at stage 2 but did not move. They reflect concerns raised by Citizens Advice Scotland, which, as members will be aware, specialises in taking people through the tribunals process and is expert in doing so.

CAS is concerned that a gap has been left by the abolition of the Administrative Justice and Tribunals Council, with regard to the independent review of tribunals. Since 1957, there has been a clear and statutory link between the oversight of tribunals and the making of procedural rules, which has now been broken. The remit of the now-defunct AJTC included keeping under review the administrative justice system as a whole, with a view to making it accessible, fair and efficient.

Clearly, the bill deals only with tribunals; the administrative justice system as a whole is outwith its scope. My amendments therefore refer to the responsibilities of the Scottish Civil Justice Council with respect to tribunals only; they do not address in their entirety the concerns raised by CAS. However, we are about to consider the Courts Reform (Scotland) Bill, which may provide a mechanism for addressing concerns about the oversight of the administrative justice system as a whole.

Amendments 26, 27 and 28 would require the SCJC to keep under review matters relating to the administrative justice system within the jurisdiction of the Scottish tribunals, to provide advice and recommendations to the Lord President and to provide advice on matters when requested to do so by the Lord President.

When we discussed my similar amendments at stage 2, the minister advised that the bill already contains an amendment to the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 requiring the SCJC to establish a tribunals committee, which will draft tribunal procedural rules. She argued that the amendments that I had lodged at stage 2 would replicate work that was already under way.

Amendment 29 therefore aims to prevent duplication by linking those duties placed on the SCJC with the functions of that tribunals committee. The committee would exercise those functions in addition to those that are already contained in the amendment to the 2013 act.
The four amendments taken together would mean that oversight duty is not lost; it becomes a function of the SCJC, but one that is exercised by the tribunals committee.

I move amendment 26.

Roseanna Cunningham: The amendments lodged by Elaine Murray still replicate what is already available on a wider scale. The amendments would give the Scottish Civil Justice Council the remit to oversee administrative justice within the Scottish tribunals system only, but the administrative justice system is wider than the jurisdiction of the Scottish tribunals; it covers all redress mechanisms for citizens to challenge or complain about a decision made by a public body, including courts and tribunals.

As I explained to the Justice Committee, where similar amendments were lodged by Elaine Murray at stage 2, I have set up a non-statutory interim committee—the Scottish tribunals and administrative justice advisory committee—to keep the administrative justice and tribunal landscape under review. That committee contains members with backgrounds in consumer advice, the law, independent advocacy and mediation. It will provide an independent perspective on administrative justice from outside the system.

I wrote to the convener of the Justice Committee on 19 February providing further information on the work of the advisory committee. Its work is well under way. It has developed a clear remit that will ensure what Elaine Murray is seeking is to address with her amendments. I think that there is more value in co-ordinated scrutiny of the administrative justice system as a whole by an independent committee than in narrow oversight restricted to within the jurisdiction of the Scottish tribunals.

I informed the Justice Committee at stage 2 that the advisory committee will hold a stakeholder event on 1 April and publish its progress online. I believe that Elaine Murray’s amendments are unnecessary and duplicate work by the Scottish tribunals and administrative justice advisory committee that is already under way. I invite Elaine Murray to withdraw, or not move, her amendments.

Elaine Murray: The minister said that the administrative justice system is wider than tribunals. I recognise that and the amendments are drafted to reflect the scope of the bill. Citizens Advice Scotland was slightly disappointed that they could not have a wider remit, but we cannot have that in the scope of the bill.

The minister referred to the non-statutory interim committee, which I am very interested to hear more about. I hope that I will be able to attend part of the stakeholder event on 1 April, because I would be very interested to learn more about the committee’s activities and remit. However, as the minister said, it is a non-statutory interim committee. It will not be there forever and it is non-statutory. Citizens Advice Scotland told us that it is concerned about the breaking of the statutory link with the oversight of administrative justice. I do not think that the interim committee totally addresses Citizens Advice Scotland’s concerns. Given CAS’s expertise—I am sure that it is highly valued by all members for its work on tribunals—I press amendment 26.

The Deputy Presiding Officer: The question is, that amendment 26 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (Central Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnson, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)

Against
Bibby, Neil (West Scotland) (Lab)
Baker, Claire (Mid Scotland and Fife) (LD)
Baker, Richard (North East Scotland) (LD)
Boyack, Sarah (Lothian) (LD)
Brown, Gavin (Lothian) (LD)
Carlaw, Jackson (West Scotland) (LD)
Chisholm, Malcolm (Edinburgh Northern and Leith) (LD)
Dugdale, Kezia (Lothian) (LD)
Fee, Mary (West Scotland) (LD)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (LD)
Fergusson, Alex (Galloway and West Dumfries) (LD)
Finnie, John (Highlands and Islands) (LD)
Fraser, Murdo (Mid Scotland and Fife) (LD)
Goldie, Annabel (Central Scotland) (LD)
Grant, Rhoda (Highlands and Islands) (LD)
Gray, Iain (East Lothian) (LD)
Griffin, Mark (Central Scotland) (LD)
Harvie, Patrick (Glasgow) (LD)
Henry, Hugh (Renfrewshire South) (LD)
Hilton, Cara (Dunfermline) (LD)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (LD)
Johnson, Alison (Lothian) (LD)
Kelly, James (Rutherglen) (LD)
Lamont, Johann (Glasgow Pollok) (LD)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (LD)
Macdonald, Lewis (North East Scotland) (LD)
Macintosh, Ken (Eastwood) (LD)
Malik, Hanzala (Glasgow) (LD)
Marra, Jenny (North East Scotland) (LD)
Martin, Paul (Glasgow Provan) (LD)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (LD)
McDougall, Margaret (West Scotland) (LD)
McGrigor, Jamie (Highlands and Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (LD)

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McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Rowley, Alex (Cowdenbeath) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 55, Against 60, Abstentions 0.

Amendment 26 disagreed to.

Amendment 27 moved—[Elaine Murray].

The Deputy Presiding Officer: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Ruterglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Rowley, Alex (Cowdenbeath) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against
Adair, Phil (Bute and Bute) (SNP)
Alison, Tony (Midlothian) (SNP)
Alex, Alex (Glasgow) (SNP)
Andrews, Alasdair (Inverness) (SNP)
Alexander, John (Midlothian) (SNP)
Alexander, Sarah (North East Scotland) (SNP)
Alexander, Stephen (Highlands and Islands) (SNP)
Alexander, Tim (Central Scotland) (SNP)
Alexander, David (North East Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Amendment 27 disagreed to.

Amendment 28 moved—[Elaine Murray].

The Deputy Presiding Officer: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Fergusson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marr, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McNeill, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Rowley, Alex (Cowdenbeath) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)

The Deputy Presiding Officer: The result of the division is: For 43, Against 73, Abstentions 0.
The Deputy Presiding Officer: The result of the division is: For 43, Against 73, Abstentions 0.

Amendment 28 disagreed to.

Amendment 29 not moved.

The Deputy Presiding Officer: That ends consideration of amendments.
Tribunals (Scotland) Bill

The Deputy Presiding Officer (Elaine Smith): The next item of business is a debate on motion S4M-09272, in the name of Roseanna Cunningham, on the Tribunals (Scotland) Bill.

15:06

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I thank the convener and members of the Justice Committee for their careful consideration of the bill. I appreciate that the bill might not, at the outset, have seemed like the most exciting legislation to be discussing. However, in reality, once one begins to look at the subject matter one realises that the bill affects a huge number of people, as tribunals are a rather unsung part of the justice system, and that it is appropriate that the bill was given serious consideration.

I also thank the stakeholders, in particular the tribunal presidents and members, and those who gave evidence to the committee, for their contributions. By listening to their views and learning from their knowledge and experience, we ensured that the bill was fit for purpose. In developing the bill’s provisions we worked closely with the Lord President’s judicial office and his representatives; they will play a major role in the new tribunal structure, and I am grateful for their assistance.

Tribunals are a mechanism for dispute resolution. They are different from courts as they are in the main—but not always—more informal and inquisitorial. They are perceived to be quicker, cheaper, more knowledgeable in their area of expertise and more accessible. There has been some debate during the bill process about what exactly constitutes a tribunal. Tribunals have developed over many years on an ad hoc basis without any underpinning framework, which has resulted in some uncertainty around what the term “tribunal” includes and how a tribunal should function.

There is significant diversity in the forms that are taken by the bodies that we call tribunals, and in their characteristics. A tribunal can sometimes be a person rather than a body—for example, a parking adjudicator. The bill caters for that diversity and has avoided using too tight a definition for those reasons.

On the subject of definitions, I recall that at stage 2 the Justice Committee sought a definition of the term “wasted expenses” that arises in section 59 of the bill, which covers the award of expenses. In its simplest terms, wasted expenses means that there was an unnecessary or improper act or omission and expenses have been incurred as a result. That could include a situation in which a party has incurred expenses unnecessarily due to the other side’s conduct. For example, if a tribunal hearing is postponed because of one party not turning up at a hearing and, as a result, the other party has had to pay a fee for legal representation for a hearing that ultimately did not take place, those expenses could be classed as wasted. The bill also allows for rules to prescribe a precise meaning for the term “wasted expenses”. I hope that that helps to clarify what we mean by the phrase in Scots law, as it was a matter of some bemusement in the committee’s consideration of the bill.

We have debated tribunal reform in this chamber on two previous occasions, and on each occasion, we agreed that reform was well overdue. I am pleased to get to the point that we are at now and to have legislation that will address the issues that were raised in the independent reports by Franks, Leggatt and Lord Philip.

In formulating the provisions of the Tribunals (Scotland) Bill, we took particular note of the key findings from the Philip report in 2008. They were: the present tribunal system in Scotland is “extremely complex and fragmented”; many tribunals are not sufficiently independent of the Scottish Government; and there is no consistent system of appointment of tribunal chairs and members. The bill that is before the Parliament today addresses those concerns by simplifying the structure, guaranteeing independence, and introducing a uniform appointment system for members.

The Tribunals (Scotland) Bill creates a framework within which devolved tribunals in Scotland will be placed. It is an enabling bill and quite technical. It is probably difficult to get very enthused by the bill’s content, but we should not forget the important elements that will make up the new structure: the individual jurisdictions dealing with matters such as mental health, housing or charities.

In considering the bill’s provisions, we were careful to include safeguards that protected all jurisdictions to ensure that their individual characteristics and specialisms were secured. We made an amendment at stage 2 to include a guiding principle in the bill that will ensure that the user is placed at the centre of any proceedings before the tribunals. The principle is that tribunal proceedings should be accessible to the user, fair to the parties involved and handled quickly and effectively.

We recognise that the tribunals that will transfer to the new structure are all different, and the way in which they operate has to vary, depending on the subject matter with which they are dealing. There was debate about whether the Lands
Tribunal for Scotland is a tribunal in our modern understanding of the word, but that is how it was set up and how it was termed. The Mental Health Tribunal for Scotland is very much in and of itself, because it may deal with the liberty of individuals.

We can see the enormous variation that can arise within the terminology. That is why we have allowed for the tribunals to transfer in with existing rules of procedure specific to the jurisdiction involved. Occasionally, that gave rise to some concern. For example, with the Lands Tribunal for Scotland there were issues around costs that are not necessarily involved in some of the other tribunals, and there was worry about whether that would spread across to every other tribunal. We have tried to ensure that each tribunal is protected within its own particular jurisdiction, and that is important.

We also specified that any new rules will be made in future by a specialist committee of the Scottish Civil Justice Council that will be specifically convened and will include the president of the Scottish tribunals as well as experts in tribunals and the subject matters involved. Those experts will be the same people whom Scottish ministers will consult in the transitional period, when ministers will continue to make tribunal rules, prior to the Scottish Civil Justice Council taking over the role.

I assure members that, during that interim period, Scottish ministers will not make rules in isolation of expert advice or consultation. We have ensured that those who are appointed to the tribunals will have to meet specific criteria for appointment that will guarantee that they have the knowledge and experience that they require to make decisions in their own jurisdictions. The bill achieves the right balance of providing protection, while still allowing flexibility.

The new upper tribunal will benefit the tribunal user by removing, in most cases, appeals from courts, providing easier access and a less intimidating appeal process for users. It will also allow specialism and expertise to develop among its members.

The bill allows that, when a petition is made to the Court of Session for judicial review, it can be remitted to the upper tribunal for consideration. The court might consider that the upper tribunal has the expertise in the subject matter to hear the petition. That will bring a level of consistency to the type of member who will hear cases related to tribunal business.

The bill establishes a strong leadership structure under the Lord President of the Court of Session, who will provide expert guidance and supervision to the tribunal members and jurisdictions within his authority. In addition to his responsibilities for the efficient disposal of business within tribunals, the Lord President, as head of the Scottish tribunals, will also be responsible for the welfare and conduct of members of the tribunals. The bill clearly sets out when the Lord President may make rules for a consistent process for the suspension or removal from office of any member when he regards public confidence in the Scottish tribunals to have been lost.

The new role of president of the Scottish tribunals that is created in the bill will provide a voice for tribunals in the administrative justice landscape, and ensure that tribunal interests are safeguarded and their good work championed.

At stage 2, concern was raised about oversight of tribunals and administrative justice following the United Kingdom Government’s abolition of the Administrative Justice and Tribunals Council and its Scottish committee. Those concerns were rehearsed again earlier this afternoon. As members are aware, in response to the abolition, I set up a new interim advisory committee to provide external expert scrutiny of the devolved administrative justice and tribunals landscape. I have set up the committee on an interim basis, as we are at a time of significant reform of tribunals and administrative justice and I feel that it is important that we have a model that can adapt and change as the landscape in Scotland develops.

As part of the interim committee’s remit, it has been asked to consider and recommend how its functions should be carried out in the longer term. The committee is also expected to scrutinise the way in which the tribunal system is working as jurisdictions are brought into the new structure. As I explained earlier this afternoon, the work of the committee is well under way. On 1 April, the committee will hold an event to inform stakeholders of the existence of the committee and outline its remit; to build relationships with a wide range of stakeholders; to engage with stakeholders on the reach and impact of administrative justice; and to understand the concerns and issues that arise in its delivery. The committee will also seek input on where it should focus its work priorities for the next two years.

I believe that the bill brings the tribunal system in Scotland into the 21st century and provides a clear and robust structure within which tribunals can operate according to their individual needs.

I move,

That the Parliament agrees that the Tribunals (Scotland) Bill be passed.

15:16

Elaine Murray (Dumfriesshire) (Lab): I, too, thank the witnesses who provided evidence by
writing to and attending the Justice Committee. I also thank the committee clerks, the Scottish Parliament information centre and the legislation team, who always provide invaluable assistance with drafting amendments. We do not always give them the credit that we ought to give them.

As the minister said, tribunals are an important part of the justice system. They affect many areas of everyday life and safeguard the rights of citizens. The majority of cases that proceed through the tribunal system are heard by United Kingdom tribunals; only 4,000 cases are heard annually by devolved tribunals in Scotland, which is 2 to 3 per cent of the total case load.

I have discovered that the tribunal system across the UK commenced with the passing of the National Insurance Act 1911, which included provision for the adjudication of disputes. In 1954, we had the Crichel Down affair, when the Ministry of Agriculture appropriated and leased out land that had been compulsorily purchased by the Ministry of Defence. That is of some interest to me, as I sometimes deal with the Crichel Down rules when constituents attempt to buy parcels of land along the M74 that were purchased by the Scottish Office. The rules still apply in that situation. In 1957, the Franks report, which arose from the scandal around the Crichel Down affair, made recommendations regarding the constitution, procedure and appeals process of tribunals and informed the Tribunals and Inquiries Act 1958.

As we have heard, in 2006, the UK Tribunals Service was created to manage and administer tribunals, and the UK Government then passed the Tribunals, Courts and Enforcement Act 2007, which created a unified structure for tribunals, to which the pre-existing tribunals transferred. The structure comprises a first-tier tribunal and an upper tribunal, with a tribunal procedure committee that makes the rules governing tribunal practice and procedure. The bill, which I am pretty sure we will pass at decision time today, mirrors much of that legislation.

The bill proposes the transfer of 13 tribunals to the new structures. One is the Additional Support Needs Tribunal, which was established in 2005 to consider appeals against the decisions of education authorities regarding the provision of co-ordinated support plans. Since 2011, it has also considered appeals relating to discrimination on the grounds of disability. The Scottish Charity Appeals Panel considers appeals against decisions that are made by the Office of the Scottish Charity Regulator. The Private Rented Housing Panel deals with repair and fair rent issues, and the Homeowner Housing Panel determines whether property factors have failed to carry out their factoring duties or to comply with the code of conduct that was introduced by the Property Factors (Scotland) Act 2011.

The status of some tribunals in the new structure has attracted some discussion. For example, the Mental Health Tribunal for Scotland determines applications for compulsory treatment orders and appeals against compulsory measures that are made under the Mental Health (Care and Treatment) (Scotland) Act 2003. Initially, that tribunal will be in a chamber on its own, but some witnesses, such as those from the Law Society of Scotland, felt that that should not be a temporary measure. The specific concern is that the intention of the founding act was to remove jurisdiction from the generic courts in Scotland and to ensure expertise. As the Mental Health Tribunal has powers to deprive someone of their liberty or to impose conditions on them, that expertise must be preserved.

I lodged an amendment on that issue at stage 2, but it was not agreed to by the committee. The minister argued at the time that a new tribunal jurisdiction could be created that would naturally sit alongside the MHT in the same chamber. I have not lodged a similar amendment at stage 3, partly in recognition of the fact that the MHT has not lobbied to be in a separate chamber.

I welcome the minister giving assurances on the record about her intentions regarding the MHT. However, we need to take cognisance of the warning from Adrian Ward of the Law Society of Scotland that a significant change in the status of the Mental Welfare Commission for Scotland almost slipped through in the context of the Public Services Reform (Scotland) Act 2010.

Within the UK tribunals, the mental health tribunal in England is part of the first-tier health, education and social care chamber. It shares that chamber with the care standards, special educational needs and disability and primary health lists tribunals. I am not aware of any evidence that there have been problems with the English mental health tribunal sharing a chamber, but legislation in those areas is fully devolved to Scotland and is potentially quite different from that in England. Indeed, our legislation on mental health preceded that which has been passed by the UK Government.

It will be important to ensure that if, in the future, another tribunal is created that could share a chamber with the Mental Health Tribunal for Scotland, that change does not slip through but is properly scrutinised. We do not know whether or when that might happen, and ministers cannot bind their successors. However, I hope that those of us who are involved in the passing of the bill today can agree that any change in the status of the Mental Health Tribunal regarding its position
within the Scottish tribunals should be properly scrutinised.

The Lands Tribunal for Scotland has statutory powers to deal with disputes involving land and property, and it can also act as an arbiter. It is closely associated with the Scottish Land Court but has separate administrative staff and systems. The bill places the Lands Tribunal in the upper tier. However, some witnesses felt that that is not appropriate either because the Lands Tribunal for Scotland differs from the lands chamber for England and Wales. Lord Gill argued that the Lands Tribunal for Scotland is a court in all but name and, therefore, should be outwith the tribunal structure.

The minister has already referred to the fact that the matter of a tribunal that is not a tribunal has not really been resolved during the passage of the bill. However, there was no prevailing view on the alternatives to the bill’s provisions, and although external organisations gave evidence to the committee none argued that there should be an amendment or, indeed, produced an amendment. Therefore, no amendment to the structure that is proposed by the Scottish Government has been lodged or debated during the passage of the bill. Nevertheless, I think that the suitability of the arrangement for the Lands Tribunal for Scotland should be monitored over time, as it may be that it should be part of the court system. The structure is not all set in stone for the future, and the situation needs to be monitored with a view to considering in future whether alternative arrangements need to be made.

Despite the issues that I have raised on the detail of the bill, I am pleased to say that Scottish Labour will support the bill at decision time this evening. We agree that the tribunal system in Scotland is a very important part of the justice system—one that is experienced by far more people than experience the rest of the justice system. Therefore, it needs to be fit for purpose and modernised to be so.

15:23

Margaret Mitchell (Central Scotland) (Con): I welcome the opportunity to speak in the stage 3 debate on the Tribunals (Scotland) Bill.

Although they are not the most riveting topic, tribunals are nonetheless an important part of our civil justice system. For example, some tribunals are a forum for citizens to challenge decisions that have been made by public bodies on their entitlement to benefits and services. For that reason, it is imperative that tribunals are independent from Government and the public organisations whose decisions they regulate. Others, such as the Lands Tribunal for Scotland or tribunals that consider employment issues, are a forum for the resolution of private disputes. They offer a less formal and less costly dispute resolution mechanism that is an alternative to the courts. That said, tribunals are still costly, so I support attempts to use alternative forms of dispute resolution, whenever that is possible.

The bill’s main features include the creation of a first-tier tribunal for first instance decisions, an upper tribunal, which will deal primarily with appeals, and a standard system of appointment, training and appeals. Those provisions, which will simplify and standardise the system, are generally to be welcomed.

However, a few concerns remain about some areas of the bill. It provides that sheriffs, sheriffs principal and part-time sheriffs will be eligible to act as judicial members of the first-tier tribunal by virtue of their judicial office alone. Although the Lord President welcomed that, there is still a concern that the possibility of an influx of judges and former judges risks tipping tribunals from their current informal, generally non-adversarial format into becoming courts in all but name. The minister has given assurances that the use of judges in the new system will be reasonable, and that there are safeguards in the bill to prevent an overreliance on judicial members. Time will tell. Suffice it to say that it would be a mistake if the bill were to result in tribunals losing their informal status.

The bill also makes provision for the newly established Scottish Civil Justice Council to propose procedural rules for the Scottish tribunals through a specialised tribunals committee, but given that the SCJC has the monumental task of rewriting civil court rules, it will be years before it can even consider tribunal rules.

In the interim, the bill will allow the Scottish ministers—for what is an unspecified period of time—to write the rules for the Scottish tribunals. That gives rise to a potential conflict of interests, as it means that ministers will be able to make rules governing tribunals to which they themselves may be subject at some point. Although the minister stated that that does not represent a radical shift from the current set-up and that rules will be made only following full consultation, the rule-making power will give ministers considerably more influence over tribunals, as ministers will be required to design the rules for the newly created upper tribunal, which, of course, does not yet have any procedural rules.

Furthermore, one of the amendments that were agreed to at stage 3 will allow ministers to draft rules to cover any matter that is considered appropriate with respect to Scottish tribunals. That poses serious constitutional issues. The Scottish ministers can be challenged in tribunals, so it is not appropriate for them to be involved in setting
the rules. It is disappointing that we could not agree an alternative, such as the one suggested by the amendment that I lodged to provide a very modest safeguard that would have increased the Parliament’s influence over and scrutiny of the process by making the relevant regulations subject to the affirmative procedure.

Notwithstanding those concerns, the bill represents a welcome development in the tribunal landscape and the Scottish Conservatives will support it tonight.

The Deputy Presiding Officer: We come to the open debate. We are quite tight for time, so I ask for speeches of four minutes.

15:28
Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I am relieved to hear that we are tight for time, because I do not want to replicate what other people have said.

First, I thank Elaine Murray, as deputy convener of the Justice Committee, for thanking on my behalf—I have been usurped again—the witnesses who gave evidence, the committee’s clerks and its hard-working members. I also thank her for reminding us that only 3 to 4 per cent of tribunal cases involve devolved areas, but I point out that those cases are extremely important to the people concerned.

Although, as other members have said, tribunals might not be the most fascinating of subjects—I assure members that they are not—a vast and diverse range of tribunals exist, and they are extremely important.

The Mental Health Tribunal for Scotland deals with such serious issues as personal liberty and the enforcement of compulsory treatment for mental health issues. The Additional Support Needs Tribunal deals with situations in which people have to fight to get provision for their children in school. Parents who want to get their children into schools that are suitable for them can also appeal the refusal of placing requests. Then there are valuation appeals, which can impact on businesses. However, the most important to me is the parking appeals service. I did not know previously that people could appeal a parking ticket. I have found that out too late in life, but now we know that the service exists. If anyone feels that they have been done wrong on a parking ticket issued by the City of Edinburgh Council or any other council, there is somewhere that might provide them with a remedy.

As the minister said, the tribunals have grown up in an ad hoc fashion from the ground up—sometimes quite rightly. However, it is now time to rationalise and professionalise them, without judicialising them, and get them into some kind of structure. Through the bill, we will now have what are known as chambers. The mental health chamber speaks for itself as to what it is, and the Mental Health Tribunal will be on its own in that chamber—I heard what Elaine Murray had to say on that. The housing, land and property chamber will take in private rented housing, valuation and crofting; the learning chamber will deal with additional support needs and education; and the general regulatory issues chamber will deal with issues to do with charities, the police and, inevitably, parking. The appeals process will mean that cases will not have to go to the Court of Session, which is an expensive process.

Each tribunal has a very different culture. For example, the Lands Tribunal is, to all intents and purposes, very judicial, with Queen’s counsels on their feet and so on. However, much more ordinary people are involved in education appeals—I presume that that is also the case in relation to the parking appeals service, which I might visit sometime. We do not expect to see senior counsel involved in such cases, and those tribunals are supposed to have a different culture. That all had to be brought into the proposed new system, which will still have to be flexible enough to recognise the different cultures of the various tribunals.

The independence of tribunals is important. Margaret Mitchell referred to that, although I do not agree with what she said. Their independence is essential because they often deal with appeals against Government or local authority decisions. I do not in any way criticise the quality of tribunal members, but I think that a degree of specialism and expertise is important for specific tribunals.

I heard what the minister said about the interim advisory committee, which I welcome. I also welcome the fact that it is to have a wide range of members from what we now call the tribunal landscape—the mot du jour. However, most of all, I am pleased that the Mental Health Tribunal will stand alone for the time being and that any change will be dealt with under the affirmative procedure. That tribunal is very different because it deals with the imperilling of an individual’s liberty and the imposition of treatments to which a person might object. It is a very different tribunal and I am glad that it will be in a chamber on its own.

15:32
Graeme Pearson (South Scotland) (Lab): I rise to support the bill and its general principle of restructuring devolved tribunals in Scotland. I am not a member of the committee, but I commend it, its clerks and the bill drafting staff for the work that they have done.
There is no doubt that tribunals facilitate a very vital part of public life in Scotland. I am sure that those who live in nation states where no such facility is available to them would love to be able to challenge the state and decisions that are made in the state's name. I witnessed a tribunal as a citizen and was very heartened to see the way in which the decisions made by officials were weighed and listened to, as were citizens' views.

Tribunals are an unheralded but vital element of the Scottish legal process. I acknowledge that they cover more cases each year than the criminal and civil courts combined. Tribunals provide a vital service to citizens who are seeking redress in relation to employment, mental health, housing and other areas that are of great significance across the board. Tribunals in Scotland have evolved in an ad hoc and disparate manner, as has been said, which has made it difficult for ordinary members of the public to understand the approach that they take. I hope that the bill will create a more uniform tribunal system that will improve the independence and quality of devolved tribunals and the service that they offer users.

The Government's amendment 2 further defines the nature of a tribunal to an extent, but in general a tribunal resolves disputes between citizens and the state or between private parties by making binding decisions according to law. It does so by a process of adjudication that is specialised and which, on many occasions, is relatively informal and less adversarial than the model of adjudication that is applied by the courts. A tribunal is independent of the executive, the legislature and the parties that appear before it.

As much as tribunals are complex, it is important that they move into the 21st century, and I therefore welcome the fact that the Lord President of the Court of Session will from now on produce leadership on behalf of those who are engaged in day-to-day tribunals and, through the newly established office of the president of the Scottish tribunals, indicate the appropriate governance and legitimate accountability arrangements that should be in place in the operation of the tribunal system of adjudication.

The first tier will be split into chambers, as has been commented on. Particular sensitivities are attached to mental health issues, and again much has been said in that regard. There is no doubt that the challenges of deciding matters in relation to mental health and the cases that the Mental Health Tribunal for Scotland considers mean that mental health is worthy of having a chamber of its own within the first tier. Although some concerns have been expressed that the current commitment to retain that tribunal in an individual chamber appears to be temporary, I am heartened by the fact that the minister has indicated that sensitivity will be maintained.

In the round, today's discussions showed that the Parliament supports the proposition in the bill, and I, too, am happy to support it.

15:36

Alison McInnes (North East Scotland) (LD): I, too, acknowledge the work of the legislation team during the passage of the bill, and I thank the witnesses, who took the time to make their views known, and our Justice Committee clerks, whose assistance has, as ever, been very helpful.

Scottish Liberal Democrats have been clear that the Tribunals (Scotland) Bill provides a welcome opportunity to improve a tribunals system that historically developed in a disjointed fashion. The consensus seems to be that inconsistencies in the approaches of the various tribunals mean that they can prove difficult for legal professionals, let alone the wider public, to comprehend and therefore effectively interact with.

We should be asking more of a system that arbitrates cases that are often already challenging and stressful for participants, so I welcome the changes, which will mean that access to redress is transparent and straightforward and that rules and procedures are clearer and more consistent. Although I am instinctively cautious of any centralisation proposals, I am satisfied that the bill should enable those things to be achieved without compromising the intrinsic traits and distinctive ethos that set tribunals apart from the courts—the specialist expertise of legal and lay tribunal members, the inquisitorial rather than adversarial approach and the opportunity to secure reparation at an affordable cost within a comparatively informal environment.

I appreciate that the Government reflected on the committee's comments and introduced section 11A, which establishes guiding principles that focus on users' needs for a fair, quick and effective disposal of business. It is also right that there will be a duty on the Scottish ministers to consult stakeholders before any regulations are made to introduce further fees. However, I caution that many tribunal users cannot afford to incur significant costs, and I remain firmly of the view that the establishment of financial barriers should not become the norm.

As members know, the future of the Mental Health Tribunal for Scotland was the subject of much attention during consideration of the bill, including this afternoon, and during the consultation that preceded the bill. The tribunal has the capacity to determine what will happen next in the lives of some of the most vulnerable people in our society, and its powers include the
ability to impose treatment against an individual’s will and the ability to deprive individuals of their liberty. Elaine Murray was persuasive in her argument that mental health should therefore be assigned an exclusive chamber in statute, as the committee suggested in its report. However, I also note the need for flexibility in the institutional framework and the minister’s assurance that safeguards will preserve its distinctiveness in the long term.

Finally, it strikes me that the bill’s progress through the Parliament has been characterised by amiable and intelligent debate. Perhaps that is because the bill is technical rather than ideological in nature; it is less contentious than some bills that come before us. Nonetheless, members have disagreed on some points. The respectful and rational manner in which the minister and other members have addressed those points should be commended.

Two weeks ago, the Cabinet Secretary for Justice suggested—absurdly—in a bombastic closing speech that a unionist cabal was out to scupper his Criminal Justice (Scotland) Bill against its own principles and instincts, for no reason other than to embarrass him. The approach of the Scottish Liberal Democrats to the passage of the Tribunals (Scotland) Bill demonstrates that, when reforms establish a system that is better placed to deliver the right outcome and empower people through greater understanding, we will back them. The Scottish Liberal Democrats will support the bill at decision time.

15:40

Roderick Campbell (North East Fife) (SNP): I refer members to my registered interest as a member of the Faculty of Advocates.

I recognise that, for most people, justice might well involve not the formality of courts but the relative informality of tribunals, so it is important that we get the structure of tribunals right. I acknowledge the bill’s importance and the generally consensual way in which the Justice Committee and the Parliament have dealt with it, but I recognise that concerns were expressed—particularly the concern of Lands Tribunal for Scotland personnel that their well-developed expertise and working arrangement might be threatened by the new structure and that tribunal’s incorporation in the upper tribunal rather than in a pillar of its own.

I hope that those concerns will prove to be unfounded. It is as well to remember that an appeal will still be available to the Court of Session on points of law and that the Lands Tribunal will be located in the upper tribunal and not in the first-tier tribunal. However, I hope that sufficient time will be taken in due course to monitor the new structure’s effectiveness, certainly in relation to the Lands Tribunal.

In the interests of balance, it is appropriate to stress that a spokesperson for the Additional Support Needs Tribunal gave evidence that current appeals to the Court of Session work well but accepted that a new system of appeal to the upper tribunal should be cheaper and speedier.

In a sense, the new system will be measured not only by its openness and transparency but by how it measures up on turning round decisions in a reasonable period. We heard evidence at stage 1 from Jon Shaw of the Child Poverty Action Group that one of the big issues in the reserved system is delay, especially in welfare cases. He said that, for such cases, automatic strike-out rules had been changed to avoid the appeals that frequently followed as a result of failures to send forms back in time, causing delay to the process. We need to learn from that experience.

We also need to remember that the bill’s purpose is not just to deal with the here and now but to provide a template for the long term, so that new tribunals can be added as and when appropriate. Let us not forget that, as other members have said, the bill will cover only about 2 to 3 per cent of tribunals in Scotland at present; the social entitlement chamber, employment and immigration fall completely outside it. The political desire to change the administration of those tribunals—let alone the substantive law—seems somewhat muted in Westminster, but times may change, and we need to ensure that the system can respond as and when that occurs.

I welcome the changes that were made during scrutiny of the bill, such as the removal of section 68(5), the Government amendment to provide for the possibility of permanent salaried appointments to tribunals and the Government’s acceptance that any change in the chamber structure will be made only following consultation and the use of the affirmative procedure. I hope that any concerns of the Mental Health Tribunal have been allayed.

The Government responded to the committee’s concern that any plan to introduce fees should not proceed without appropriate consultation. I hope that we can preserve tribunals from becoming fee orientated—except the Lands Tribunal, which is somewhat different in that respect. I certainly hope that we will not see the drift to payment of fees that is now proceeding in the employment field. If that happened, the idea of an open and accessible tribunal system would come under strain.

We do not know precisely when any integration of the court and tribunal systems might take place—Lord Gill said that it could be three years away. We know that any attempt to produce...
unified tribunal procedural rules is some years hence. However, I welcome the minister's invitation to hear more about the work of the interim scrutiny committee, which the Justice Committee should take up.

I welcome the bill, which is an important step forward in making justice work.

The Deputy Presiding Officer: I call John Pentland.

15:44

John Pentland (Motherwell and Wishaw) (Lab): This is the third time that I have spoken on tribunals reform—

The Deputy Presiding Officer: Could John Pentland's microphone be switched on, please?

John Pentland: My card is not in my console—I apologise, Presiding Officer.

This is the third time that I have spoken about tribunals reform. I referred to my previous speeches, of course, only to be reminded that much of the bill is not particularly contentious. Indeed, I have not seen the minister, Roseanna Cunningham, or the cabinet secretary, Kenny MacAskill, looking so relaxed for a long time.

There was consensus around the bill's objectives. Where disagreements occurred, they were about the exceptions to the general thrust of the bill and how best to achieve the objectives.

The advantages of reforming tribunals are clear. There can be economies of scale and the sharing of good practice and resources. However, a strong desire has been expressed to retain the specialist support and knowledge that are embodied in the current arrangements. The question is how best to do that without losing the lay involvement, the less adversarial approach and the simpler, relatively informal, user-centred nature of existing tribunals, and by avoiding the judicialisation of tribunals, which may lead to the erosion of their character. For particular tribunals, there was the danger that those positive attributes would be compromised by the process.

It was suggested that clarity in the definition of tribunals would be helpful. Unfortunately, the amendment lodged by my colleague Elaine Murray that would have provided that clarity was not supported at stage 2.

Attention has been given to the reserved tribunals being brought into the structure at a later date, although I note that there were questions relating to the obstacles that are faced by those with experience of the reserved tribunals whose qualifications are not Scotland based. That could restrict the expertise that is available in the event of the reserved tribunals becoming part of the Scottish structure.

The Mental Health Tribunal for Scotland was a particular sticking point. Attempts were made at stage 2 to preserve and protect its character, but the argument against that was that the amendments would prevent new tribunals being brought under the arrangements for the Mental Health Tribunal. That seemed odd because, as my colleague Elaine Murray pointed out, any new tribunal would by created by primary legislation, which could easily resolve that. The amendment was rejected without that matter being settled.

I am pleased to note that the issue of consultation on the introduction of or significant increase in fees and charges associated with tribunals was taken on board at stage 2 and that consultation in such circumstances will be guaranteed.

There were questions about tribunals that the bill does not address, such as on the enforceability of awards. As a consequence, we will probably revisit them in the future.

Finally, I want to make a small observation. In reading through the changes that have been made since stage 1, I was struck by the frequency with which additional powers are given to the Scottish ministers to issue regulations. That may be justified in certain circumstances, but I think that there is a worrying trend towards legislation that gives more and more powers for ministers to introduce secondary legislation. I am sure that that is also a matter to which we will return in the future.

15:48

John Finnie (Highlands and Islands) (Ind): I, too, spoke in the previous debates. I am sure that some people found them riveting.

I was a member of the police appeals tribunal. I mention that because I do not think that I mentioned it in the previous debates. The role highlighted how important tribunals are. Possibly career-changing and life-changing decisions were made. Those decisions affected not only the individuals who were the subject of the tribunal but their family, friends, loved ones and colleagues. My experience of the employment tribunal was also illuminating in that respect.

The 1957 Franks report said that tribunals should act in an open, fair and impartial way. Despite my frustrations at some of the decisions made by tribunals, I found that to be the case. The Franks report also said:

“We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.”
A number of members have alluded to that need for clear separation.

Franks went on to say:

"The essential point is that in all cases Parliament has deliberately provided a decision independent of the department concerned... and the intention of Parliament to provide for the independence of tribunal is clear and unmistakable."

That view is reinforced in the 2001 Leggatt report, as was mentioned by the minister. That UK report talked about the need for increased independence from Government, and likewise Lord Philips’s 2008 report, in talking about Scotland, said:

"there is evidence of a lack of independence in the operation of some existing tribunals."

It is for those reasons that the Justice Committee welcomed the revision of the administrative justice landscape. We noted that tribunals are specialist bodies and that that status must be retained. The Scottish Parliament information centre briefing refers to tribunals as relatively informal. Formality of procedure is important, but we do not want tribunals to be court-like, not least because, as many members have said, that is the façade of the justice system that most people are likely to access for the many reasons that have been outlined.

Like Alison McInnes, I am pleased that the purpose of tribunals is included on the face of the bill. That sends a very important signal. We certainly had a lot of lobbying for that.

As part of the Justice Committee report, we also encouraged the Scottish Government to work closely with the UK Government to ensure progress on discussions with the other reserved tribunals, but we can anticipate that not much is likely to happen on that issue at least in the immediate future.

I mentioned employment tribunals. I would be particularly keen to see those dealt with in Scotland because that would be an opportunity to annul many of the punitive aspects that have been imposed. Those include the qualifying periods of one or two years and fees—a number of members have talked about fees—including the £250 fee to lodge a claim for unfair dismissal and a £950 fee to go to a hearing. Provision is made in the employment tribunal case law to have financial penalties imposed on frivolous cases. I also want to see the reduction in compensation for judges sitting alone.

Employment tribunals would be inherently different beasts were they relocated to Scotland. That would reinstate fairness. Indeed, I want to see all tribunals treated in that same way, not least those that deal with pensions. What I do not want to be brought into any doubt is the dedication of the tribunal members regardless of their status and the structure in which they sit.

At decision time, I will support the bill.

15:52

Margaret Mitchell: Tribunals in Scotland deal with 80,000 cases annually. Without them, people would lose an avenue for redress or would be forced to take their grievances to an already overstretched court system.

The case for reform of the complicated tribunal system, which has developed on an ad hoc basis over past decades, has been well made, and the bill is a welcome step towards simplification. However, the legislation deals only with devolved tribunals. In fact, out of the 50-plus tribunals that have jurisdiction in Scotland, schedule 1 lists only 13 tribunals that will eventually be brought into the new system. As such, according to estimates by Jonathan Mitchell QC, the bill will apply only to around 2 per cent of Scottish tribunals. That clearly limits the bill’s ability to create a simplified uniform structure. Nevertheless, users and experts generally welcome the legislation as a step towards revising the administrative justice landscape.

I ask the minister to comment on three areas of slight concern. First, the Scottish Government has removed the provision that would have automatically disqualified tribunal members who become elected representatives. Notwithstanding the minister’s reasons for that, a conflict of interest could occur if tribunal members were to become figures who could be subject to tribunal proceedings themselves, at least indirectly.

The bill also introduces new offences to be created in connection with tribunals. Those relate to matters such as making false statements and concealing or destroying evidence. Although I fully appreciate that some tribunals can already impose penalties and I agree that proceedings must be conducted robustly, it would not be desirable for a raft of offences to be created for every tribunal, as it could only put at risk the informal, non-adversarial nature of tribunals if those who attend them are subject to disproportionate penalties.

Much of the detail on the new tribunal landscape is not contained in the bill but will, instead, be left to delegated legislation. During stage 1, the Justice Committee heard from witnesses including Citizens Advice Scotland that that lack of detail meant that it was impossible to guarantee fairness, openness and impartiality in the new system. Others expressed concern that it hampered scrutiny.

I accept that the bill seeks to provide a framework for the new structure and needs to be
flexible, but the amount of detail that will be left to delegated legislation is not ideal. I have full confidence that the Justice Committee will closely scrutinise the forthcoming secondary legislation but, given the committee’s already considerable workload, it would have been preferable for the Parliament to have had more information now about the detail of the proposed new structure.

15:56

Elaine Murray: Several members commented on the uncontroversial nature of the bill and the fact that it attracted little public interest. However, we all agree that it introduces regulation into an important part of the justice system that, as my colleague Graeme Pearson said, enables individuals to challenge decisions that were made by, or on behalf of, the state.

I will reflect on some of the changes that were made, or not made, to the bill during its passage but, before I do that, I will comment on Christine Grahame’s observation about the parking appeals service. Now that Police Scotland has got rid of some of its traffic wardens, I wonder whether that tribunal will have a lighter workload than it has done previously.

I was surprised by the number of drafting amendments that were lodged in the name of the minister at stages 2 and 3. There were some 107 Government amendments, most of which were technical. Most were minor, but one related to a fairly serious error, which caused considerable consternation among witnesses at stage 1. That was the original section 68(5), which the minister removed at stage 2. It gave the president of tribunals the power to issue directions, including instructions or guidance on the application or interpretation of the law.

That turned out to be a mistake, and it was rectified, but it raises the question how such a profound mistake found its way into the bill in the first place. I am not trying in any way to suggest that ministers write their own bills—they are not responsible for the errors that are contained in them—but I wonder whether the number of bills coming through the justice portfolio is placing undue strain on the bill teams. At times, as members of the Justice Committee, we have wondered whether we have sufficient time to exercise all our responsibilities because of the pressure of legislation, and I wonder whether that pressure might be affecting the quality of legal drafting.

I will move on to specifics. One of the ways in which the stage 1 bill differed from the UK legislation was by the absence of guiding principles that provided a definition of the nature of a tribunal. Many of the witnesses at stage 1 felt that the inclusion of similar overarching principles in our bill was important, as far more people will experience administrative justice through a tribunal than will go through the rest of the justice system. The committee also agreed that the character and nature of tribunals should be protected.

The Minister for Community Safety and Legal Affairs accepted that recommendation. She and I both lodged amendments at stage 2 for consideration. I am happy to say that the minister’s amendments were successful. They recognised the character of Scottish tribunals—to be fair, to be accessible and to be handled quickly and efficiently—and the need for tribunal members to be experts in the subject matter of the tribunal. That will now be in primary legislation, and any new tribunals that are created in future or transferred from UK responsibility, if the UK Government goes along with that, will be required to adhere to those principles.

A number of members commented on that, including John Pentland and John Finnie, and Margaret Mitchell raised some continuing concerns. However, I believe that having the guiding principles in the bill should remove concerns that the bill might introduce the judicialisation—or even courtification, as it has been described—of the tribunal system.

The principles now are sufficiently general not to threaten the specialisms, expertise and character of individual tribunals, but they should facilitate the transfer of reserved tribunals and the inclusion of any new tribunals arising from future legislation.

Another area that had caused concern, partly because of recent experience with the UK employment tribunals, was the capacity for tribunals to levy charges. A number of members mentioned that, including Alison McInnes, Roderick Campbell, John Pentland and John Finnie. The committee recommended that consultation must be undertaken if there were any plans to introduce fees where they had not previously existed—of course, some tribunals already charge fees. The stage 2 amendment placing a duty on the Scottish ministers to consult stakeholders before making any regulations with regard to the introduction of fees has been widely welcomed, and the minister’s assurance that the Scottish Government does not intend to use the provision in section 70 to introduce fees was also welcome.

As the minister said, the term “wasted expenses” has survived the passage of the bill, despite many of us at first not knowing what it was. We were enlightened at stage 2 and I am grateful to the minister for further elucidation today. At stage 2, officials told us that the expenses were awarded
"to express judicial disapproval of unnecessary steps in
litigation."—[Official Report, Justice Committee, 4 February
2014; c 4195.]

That might have been a disappointment to the
convener, as she suggested at the time that the
phrase might refer to the purchasing of unsuitable
shoes.

With regard to the amendments that I lodged for
debate today, I was pleased to receive the
minister's assurance that the parent departments
of the tribunals that were created before the
emphasis on alternative means of dispute
resolution will be encouraged to address that, and
that any future tribunals will be encouraged to
have, within their founding legislation, a means of
alternative dispute resolution.

The concerns that were expressed by Citizens
Advice Scotland about the oversight of
administrative justice are substantial and
deserving of further consideration by the Scottish
ministers. I accept that administrative justice is
wider than the tribunals system, as I said when I
spoke to my amendments. I wonder whether there
might be another opportunity to examine how the
oversight issue might be addressed in the Courts
Reform (Scotland) Bill, and I would be grateful if,
either in the minister’s closing speech or
subsequently, the Government might indicate
whether the matter might be dealt with within the
remit of that bill, and whether the concerns of CAS
might be further considered in that context. In fact,
CAS will give evidence on the Courts Reform
(Scotland) Bill to the committee next week, and we
might be able to pursue the issue further then.

Overall, I am happy with the way in which the
bill has proceeded through the Parliament, and the
Labour Party is happy to support the bill.

16:02

Roseanna Cunningham: I am pleased that our
consideration of the bill is coming to a close. The
Tribunals (Scotland) Bill will bring much-needed
cohesion and consistency to tribunals in Scotland
and I am proud of the work that has been done,
including that done by the civil servants. Elaine
Murray was concerned about their workload; they
will be heartened to know that they are in the
minds of members when legislation is going
through.

It has also been heartening to observe how
much consensus the subject of tribunals has
attracted in the chamber. They are a valued and
distinctive part of our justice system. They provide
protection against unfair treatment by the state
and increase individual resilience and public
confidence. They also provide specialist forums for
efficient and accessible legal dispute resolution.

I think that I am correct in saying that, apart from
Graeme Pearson, all those who have spoken this
afternoon are Justice Committee members, so I do
not propose to summarise each contribution—I
hope that members will forgive me.

Margaret Mitchell and, I think, Elaine Murray
mentioned disqualification. That is about excluding
those who might be eligible to sit on tribunals,
such as civil servants. Much has been made about
the issue in relation to MSPs, but we are not really
who it is about. Our feeling is that it is easier to
leave the matter to the founding legislation, rather
than bringing it into a bill such as this. For
example, the Mental Health Tribunal for Scotland
already has provisions covering disqualification.
The issue is most correctly dealt with in the
founding legislation.

In respect of the new offences that Margaret
Mitchell was concerned about, I assure her that
the power will be used only where a particular
jurisdiction requires it. Legislation relating to the
Mental Health Tribunal, for example, already
makes similar provision allowing for offences to be
created. It is not a general offence-making power
that we will all pile in and use; it will have to come
from the founding legislation. I hope that the
member is reassured by that.

I am, however, grateful to Elaine Murray for her
mini history lesson. As she discussed, since their
early beginnings at the start of the 20th century,
the number of established tribunals has increased
and their total case load has grown. There are
now more than 40 tribunals in Scotland, dealing
with devolved and reserved matters and covering
a multitude of subject areas. More are on the way.
We have the prospect of a new housing tribunal
covering the private rented housing sector and
new tax tribunals dealing with, in the first instance,
decisions and appeals covering land and buildings
transaction tax and Scottish landfill tax.

The Housing (Scotland) Bill and the Revenue
Scotland and Tax Powers Bill have recently been
introduced to the Parliament and will give effect to
those proposals. They are the founding bills for
those new tribunals.

The Revenue Scotland and Tax Powers Bill,
which creates the new tax tribunals, follows on
from the provisions of the Scotland Act 2012,
gave this Parliament legislative competence
over devolved areas of taxation. The functions and
members of the new tax tribunals will be
transferred-in to the Scottish tribunals in due
course.

The Housing (Scotland) Bill confers functions for
a proposed new jurisdiction covering the private
rented sector directly on the new Scottish
tribunals. That takes away the need to create a
tribunal in its own right and takes advantage of
provisions within the bill. In this instance, we can see the benefits of the Tribunals (Scotland) Bill already in action.

It is very likely that further new jurisdictions will be created as things develop and grow over time. It is not possible to guess from where the proposals may emerge. The structure that we have created is flexible enough to cater for any new jurisdictions that may emerge.

While we are creating a structure for devolved tribunals, we must not lose sight of reserved jurisdictions—one or two members have raised that issue—and the prospect of their administration being devolved to Scotland in future. I should say that we are discussing the devolution of the administration of those tribunals and not their subject matter. We should not get the two things confused. That is not a constitutional point, because the proposals for the devolution of the administration of those reserved tribunals came originally from the UK Government.

The bill provides a framework that reserved jurisdictions could come into in the future. Alison McInnes and Rod Campbell talked about fees. That is a concern with certain reserved tribunals. I am not certain about the extent to which we would have any capacity to change that, given that it is the administration of those tribunals that we would be talking about. We certainly have no intention of introducing fees to devolved tribunals, which are a different thing. In the meantime, the UK Government has put on hold further discussions. I can assure members that this Government remains committed to engaging with the UK Government on the issue at any point in future.

Today’s bill will ensure that we build on and improve upon the good foundation that is already there on an individual basis in each tribunal. In building on that foundation, we have ensured that individual specialism and ethos remains intact and untouched. We must never forget that users of the tribunals system are at the heart of this new structure. It is fundamentally right that users accessing the system will receive the same high level of service regardless of jurisdiction, that complaints processes are the same regardless of jurisdiction and that all members of tribunals are recruited to the same high standard, regardless of jurisdiction.

It is also for the benefit of users that, as far as is possible, tribunals business is taken out of the courts. The bill ensures that appeals are taken out of the courts in most circumstances, giving users the benefit of a more informal process and setting.

The bill also ensures that the important role of tribunal members is enhanced by the appointments system coming under the remit of the Judicial Appointments Board for Scotland, and by the automatic reappointment of members and their inclusion in the wider judicial community under the Lord President’s leadership. The bill also ensures that tribunal members have judicial status and capacity in their role as members of the Scottish tribunals.

It is important to note that recommendations for appointment to the Scottish tribunals will be made following jurisdictionally specific criteria that will be developed for each subject area. That cannot really be emphasised enough. That ensures that members are appointed on a jurisdictionally specific basis and that the specialist ethos of any subject area is protected.

Each jurisdiction will transfer-in to the new structure with its own rules of procedure and will continue to adhere to the provisions made in its founding legislation.

All those elements brought together will give us a devolved tribunal landscape that caters for the needs of the people of Scotland.

Members might recall from previous debates that tribunal reform is a phased process. We began with the creation of the Scottish tribunals service in 2010. Second came the Tribunals (Scotland) Bill to create the structure. The third element of this reform package is the merging of the Scottish Court Service with the Scottish tribunals service. That third step on the journey of reform proposes to put the administrative support of tribunals on the same footing as that of courts, to support the long-term independence of tribunals, with the Lord President as head of both courts and tribunals.

The provisions in the Courts Reform (Scotland) Bill will bring the judicial leadership and governance of courts and tribunals together under the leadership and chairmanship of the Lord President. It is important that members are aware that the merging of the two services will not change any of the commitments of principle outlined in the Tribunals (Scotland) Bill. Tribunal hearings will continue to be chosen to meet the needs of users attending proceedings. The same specialist tribunal staff will continue to support the Scottish tribunals.

This Parliament has much to be proud of in the development of the bill and in tribunals reform generally. I am very grateful to everyone who contributed. I commend the bill to the Parliament.
Decision Time

17:30

The Presiding Officer (Tricia Marwick): There are three questions to be put as a result of today’s business.

The first question is, that motion S4M-09272, in the name of Roseanna Cunningham, on the Tribunals (Scotland) Bill, be agreed to.

Motion agreed to.

That the Parliament agrees that the Tribunals (Scotland) Bill be passed.
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    Part 1—Ordinary members
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Schedule 4—Positions in First-tier Tribunal
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Schedule 5—Appointment to Upper Tribunal
    Part 1—Ordinary members
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    Part 1—Temporary Vice-President
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Schedule 7—Conditions of membership etc.
Schedule 8—Conduct and fitness etc.
    Part 1—Conduct and discipline
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Schedule 9—Transitional and consequential
    Part 1—Transitional and other matters
    Part 2—Consequential modifications
Schedule 10—List of expressions
Tribunals (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to establish the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland; and for connected purposes.

PART 1

THE SCOTTISH TRIBUNALS

CHAPTER 1

ESTABLISHMENT AND LEADERSHIP

Establishment and headship etc.

1 Establishment of the Tribunals

(1) There are established two tribunals to be known as—
   (a) the First-tier Tribunal for Scotland,
   (b) the Upper Tribunal for Scotland.

(2) The Tribunals mentioned in subsection (1) are referred to in this Act—
   (a) respectively as—
       (i) the First-tier Tribunal,
       (ii) the Upper Tribunal,
   (b) collectively as the Scottish Tribunals.

(3) The constitution, operation and administration of the Scottish Tribunals are as provided for by or under this Act or another Act.

(4) The jurisdiction, powers and other functions of the Scottish Tribunals are as conferred by or under this Act or another Act.

2 Head of the Tribunals

(1) The Lord President is the Head of the Scottish Tribunals.
(2) In that capacity, the Lord President has the functions exercisable by him or her by virtue of this Act.

3 Upholding independence

(1) The following persons must uphold the independence of the members of the Scottish Tribunals—
   (a) the First Minister,
   (b) the Lord Advocate,
   (c) the Scottish Ministers,
   (d) members of the Scottish Parliament,
   (e) all other persons with responsibility for matters relating to—
      (i) the members of the Scottish Tribunals, or
      (ii) the administration of justice,
      where that responsibility is to be discharged only in or as regards Scotland.

(2) In particular, the First Minister, the Lord Advocate and the Scottish Ministers—
   (a) must not seek to influence particular decisions of the members of the Scottish Tribunals through any special access to the members, and
   (b) must have regard to the need for the members to have the support necessary to enable them to carry out their functions.

President of the Tribunals

4 Assignment to office

(1) There is established the office to be known as that of President of the Scottish Tribunals.
(2) It is for the Lord President to assign a person to that office.
(3) An assignment of a person to that office continues for as long as the Lord President considers appropriate.
(4) The Lord President may nominate a Vice-President of the Upper Tribunal to act temporarily in that office—
   (a) if a person assigned to that office is for the time being unable to act in it, or
   (b) pending an assignment of a person to that office.
(5) A person assigned to that office under subsection (2) or nominated to act in it under subsection (4) must be a judge of the Court of Session (but may not be a temporary judge).

5 Functions of office

(1) Under the headship of the Lord President, the President of Tribunals is the senior member of the Scottish Tribunals.
(2) The President of Tribunals has the functions exercisable by him or her by virtue of this Act.
(3) In this Act, a reference to the President of Tribunals is to the President of the Scottish Tribunals (and a reference to the office of President of Tribunals is to be read accordingly).

CHAPTER 2

OVERARCHING RESPONSIBILITIES

Head of the Tribunals

6 Representation of interests
The Lord President is responsible for—
(a) representing the views of the membership of the Scottish Tribunals to—
   (i) the Scottish Ministers, and
   (ii) the Scottish Parliament,
(b) laying before the Scottish Parliament written representations on matters that appear to the Lord President to be of importance in relation to the Scottish Tribunals (including as to the administration of justice).

7 Business arrangements
(1) The Lord President is responsible for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals.
(2) The Lord President is responsible for ensuring that appropriate arrangements are made and maintained as to the welfare of the members of the Scottish Tribunals.

8 Delegation of functions
(1) The Lord President may delegate to the President of Tribunals the exercise of any of the functions mentioned in subsection (2).
(2) That is, the functions exercisable by the Lord President by virtue of—
   (a) section 7(1) or (2),
   (b) section 30(1) or (2), or
   (c) section 31(1) or (2).

9 Directions on functions
(1) The Lord President may give directions to the President of Tribunals as to the exercise of the functions exercisable by the President of Tribunals by virtue of this Act.
(2) Directions under subsection (1) may—
   (a) vary or revoke earlier such directions,
   (b) relate to particular functions or functions generally.
10 **Authority under regulations**

(1) Regulations under section 19(2) or 22(2) may—

(a) delegate to the Lord President authority to make arrangements of the kind to which that section relates,

(b) include provision relying on the effect of Tribunal Rules.

(2) Regulations under section 35(1), 37(1) or 37A(1) may—

(a) delegate to the President of Tribunals authority to determine the things to which that section relates,

(b) include provision relying on the effect of Tribunal Rules.

(3) Delegation of authority under subsection (1) or (2) is subject to such provision about the exercise or sub-delegation of the authority as may be made in the regulations referred to in that subsection.

11 **Consultation on regulations**

(1) Before making regulations under section 19(2) or 22(2), the Scottish Ministers must—

(a) obtain the Lord President’s approval,

(b) consult such other persons as they consider appropriate.

(2) Before making regulations under section 35(1), 37(1) or 37A(1), the Scottish Ministers must consult the President of Tribunals.

11A **Principle to be observed**

(1) In exercising their regulation-making functions under this Act, the Scottish Ministers must have regard to the principle below.

(2) In exercising their leadership functions under this Act, the Lord President and the President of Tribunals must have regard to the principle below.

(3) The principle is the need for proceedings before the Scottish Tribunals—

(a) to be accessible and fair, and

(b) to be handled quickly and effectively.
Overview and main types

(1) Each of the First-tier Tribunal and the Upper Tribunal is to consist of its ordinary, legal and judicial members.

(2) Any type of member of the First-tier Tribunal or the Upper Tribunal is not, merely by reason of having that type of membership of the Tribunal, precluded from having any type of membership of the other Tribunal.

(3) In this Act, the references to the members of the Scottish Tribunals are to—
   (a) the ordinary and legal members of either or both of the Tribunals by virtue of sections 14 and 15, and
   (b) the judicial members of either or both of the Tribunals by virtue of section 16 (as read with section 18).

Capacity of members

(1) Membership of the Scottish Tribunals as an ordinary or legal member of the Tribunals has the effect of granting such a member judicial status and capacity for the purpose for which this section makes provision.

(2) For avoidance of doubt—
   (a) a judicial member of the Scottish Tribunals has judicial status and capacity for the purpose for which this section makes provision by reason of holding judicial office,
   (b) an extra judge derives judicial status and capacity in relation to the Upper Tribunal for the purpose for which this section makes provision from authorisation to act as mentioned in section 17(5).

(3) This section makes provision—
   (a) in the case of an ordinary, legal or judicial member of the Scottish Tribunals, for the purpose of holding the position of and acting as such a member,
   (b) in the case of an extra judge of the Upper Tribunal, for the purpose of holding that position and acting as mentioned in section 17(5).

First-tier members

(1) A person is an ordinary member of the First-tier Tribunal if the person is that type of member of the First-tier Tribunal through—
   (a) transfer-in as such by virtue of section 28(b), or
   (b) appointment as such by virtue of section 29(1).

(2) A person is a legal member of the First-tier Tribunal if the person is—
(a) that type of member of the First-tier Tribunal through—
   (i) transfer-in as such by virtue of section 28(b), or
   (ii) appointment as such by virtue of section 29(1), or
(b) however holding the position, a Chamber President or Deputy Chamber President in the First-tier Tribunal.

(3) Despite subsection (2)(b), a person assigned as a Temporary Chamber President in the First-tier Tribunal, if a judicial member of the Tribunal, remains such a member of the Tribunal.

15 Upper members

(1) A person is an ordinary member of the Upper Tribunal if the person is that type of member of the Upper Tribunal through—
   (a) transfer-in as such by virtue of section 28(b), or
   (b) appointment as such by virtue of section 29(3).

(2) A person is a legal member of the Upper Tribunal if the person is—
   (a) that type of member of the Upper Tribunal through—
      (i) transfer-in as such by virtue of section 28(b), or
      (ii) appointment as such by virtue of section 29(3),
   (b) however holding the position, a Chamber President in the First-tier Tribunal except a Temporary Chamber President, or
   (c) however holding the position, a Vice-President of the Upper Tribunal.

(3) Despite subsection (2)(c)—
   (a) a person assigned as a Vice-President of the Upper Tribunal under section 24(1) or (2) remains a judicial member of the Tribunal,
   (b) a person assigned as a Temporary Vice-President of the Upper Tribunal, if a judicial member of the Tribunal, remains such a member of the Tribunal.

16 Sheriffs and judges

(1) By reason of holding judicial office, a person is eligible to act as a member of the First-tier Tribunal if the person is a sheriff (including a part-time sheriff).

(2) By reason of holding judicial office, a person is eligible to act as a member of the Upper Tribunal if the person is—
   (a) apart from the Lord President and the President of Tribunals, a judge of the Court of Session (including a temporary judge),
   (b) the Chairman of the Scottish Land Court, or
   (c) a sheriff (except a part-time sheriff).

(3) A sheriff may act as a member of—
   (a) the First-tier Tribunal, or
Part 2—Organisational arrangements
Chapter 1—Membership types

(b) the Upper Tribunal,

only if authorised to do so by the President of Tribunals.

(4) A judge of the Court of Session or the Chairman of the Scottish Land Court may act as a member of the Upper Tribunal only if authorised to do so by the President of Tribunals (but see next instead for the Lord President and the President of Tribunals).

(5) By reason of holding office within the Scottish Tribunals, each of the Lord President and the President of Tribunals is a member of the Upper Tribunal and needs no further authorisation to act as such.

(6) An authorisation for the purpose of subsection (3)(a) or (b) or (4)—

(a) requires—

(i) the Lord President’s approval (including as to the person to be authorised), and

(ii) the agreement of the person concerned,

(b) in the case of a sheriff (apart from a sheriff principal), also requires the concurrence of the relevant sheriff principal.

(7) An authorisation for the purpose of subsection (3)(a) or (b) or (4) remains in effect until such time as the President of Tribunals may determine (with the same approval, agreement and concurrence as is referred to in subsection (6)).

17 Authorisation of others

(1) If requested to do so by the President of Tribunals, the Scottish Ministers may issue a temporary authorisation for a person falling within subsection (2) to assist in the disposal of the business of the Upper Tribunal.

(2) A person falls within this subsection if the person is—

(a) a former—

(i) judge of the Court of Session (including temporary judge),

(ii) Chairman of the Scottish Land Court, or

(iii) sheriff (except part-time sheriff), or

(b) a judge of a court or tribunal in a country or territory outwith Scotland (whether or not another part of the United Kingdom).

(3) Any request for the purpose of subsection (1) may not be made without—

(a) the Lord President’s approval, and

(b) the agreement of the person concerned.

(5) An authorisation under subsection (1) is for the person concerned to act as if a judicial member of the Upper Tribunal during the period for which it is issued.

(6) The period mentioned in subsection (5)—

(a) requires the same approval and agreement as is referred to in subsection (3), and

(b) may be extended by the Scottish Ministers (with such approval and agreement).
(7) The Scottish Ministers may make payments of sums with respect to any time spent by a person while acting as mentioned in subsection (5) by virtue of authorisation under subsection (1).

(7A) An authorisation under subsection (1) may not be issued if the person concerned—

(a) is aged 75 years or over, or

(b) has been removed from judicial office because of unfitness by reason of inability, neglect of duty or misbehaviour (or is for the time being suspended from such office in connection with an investigation into the question of such unfitness).

(7B) In the case of a person mentioned in subsection (2)(b)—

(a) subsections (1) and (6) are subject to such further arrangements as the Scottish Ministers may make with a governmental or other body in the person’s country or territory for the purposes of those subsections,

(b) if the person has not previously taken the required oaths, the person must take them in the presence of the President of Tribunals before acting as mentioned in subsection (5).

(8) In addition—

(a) the previous taking by a person of the required oaths counts (so far as necessary) as if it were the taking of them in connection with acting as mentioned in subsection (5),

(b) section 3 applies in relation to a person who is authorised to act as mentioned in subsection (5)—

(i) as it does in relation to the members of the Scottish Tribunals, and

(ii) during the period for which the relevant authorisation is issued.

(8A) In this section, “the required oaths” means the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868.

18 Judicial membership

(1) In this Act, a reference to a judicial member of the First-tier Tribunal is to a sheriff who is authorised for the purpose of section 16(3)(a).

(2) In this Act, a reference to a judicial member of the Upper Tribunal is to—

(a) the Lord President or the President of Tribunals, or

(b) a person who is authorised for the purpose of section 16(3)(b) or (4).

(3) A reference in this Act to a judicial member of the Upper Tribunal does not include an extra judge even where authorised to act as mentioned in section 17(5).

(4) In this Act, a reference to an extra judge in relation to the Upper Tribunal is to a person falling within section 17(2) (as read with section 17(5)).
Chapter 2

Internal Structure

Structure of First-tier Tribunal

19 Chambers in the Tribunal

(1) The First-tier Tribunal is to be organised into a number of chambers, having regard to—
   (a) the different subject-matters falling within the Tribunal’s jurisdiction, and
   (b) any other factors relevant in relation to the exercise of the Tribunal’s functions.

(2) Accordingly, the Scottish Ministers may by regulations make provision for and in connection with—
   (a) the organisation of the Tribunal as required by subsection (1),
   (b) the allocation of the Tribunal’s functions between the chambers.

20 Chamber Presidents

(1) Each chamber of the First-tier Tribunal is to have—
   (a) a single Chamber President to preside over the chamber, or
   (b) two Chamber Presidents to preside over the chamber.

(2) A Chamber President may not preside over more than one chamber of the Tribunal at the same time.

(3) In this Act—
   (a) a reference to a Chamber President in the First-tier Tribunal is to a Chamber President of a chamber of the Tribunal,
   (b) where a chamber of the Tribunal has two Chamber Presidents, a reference to a Chamber President of such a chamber is to either or both of them (as the context requires).

21 Appointment to post

(1) It is for the Scottish Ministers to make an appointment of a Chamber President to that position.

(2) Before making an appointment under subsection (1), the Scottish Ministers must consult the Lord President (including as to the person to be appointed).

(3) A person is eligible for appointment under subsection (1) only if the person is—
   (a) a legal member of the Upper Tribunal, or
   (b) if not falling within paragraph (a), eligible to be appointed as such a member of the Tribunal (whether or not already any type of member of the First-tier or Upper Tribunal).

(4) An appointment made under subsection (1) is for the Chamber President to preside over a particular chamber of the Tribunal.
Divisions of the Tribunal

(1) The Upper Tribunal is to be organised into a number of divisions, having regard to—
(a) the different subject-matters falling within the Tribunal’s jurisdiction, and
(b) any other factors relevant in relation to the exercise of the Tribunal’s functions.

(2) Accordingly, the Scottish Ministers may by regulations make provision for and in connection with—
(a) the organisation of the Tribunal as required by subsection (1),
(b) the allocation of the Tribunal’s functions between the divisions.

Vice-Presidents

(1) Each division of the Upper Tribunal is to have—
(a) a single Vice-President to preside over the division, or
(b) two Vice-Presidents to preside over the division.

(2) A Vice-President may not preside over more than one division of the Tribunal at the same time.

(3) Subsections (1) and (2) are subject to section 24(1)(b).

(4) In this Act—
(a) a reference to a Vice-President of the Upper Tribunal is to a Vice-President of a division of the Tribunal,
(b) where a division of the Tribunal has two Vice-Presidents, a reference to a Vice-President of such a division is to either or both of them (as the context requires).

Assignment to post

(1) The President of Tribunals may assign himself or herself—
(a) as a Vice-President of the Upper Tribunal,
(b) to preside over one or more than one division of the Tribunal.

(2) Apart from the Lord President, any other judicial member of the Upper Tribunal may be assigned by the President of Tribunals—
(a) as a Vice-President of the Tribunal,
(b) to preside over a particular division of the Tribunal.

(3) Assignment under subsection (1)—
(a) remains in effect until such time as the President of Tribunals may determine,
(b) does not affect the exercise by the President of Tribunals of the functions arising in that capacity.

(4) Assignment under subsection (2)—
(a) requires—
Part 3—Acquisition of functions

25 
Appointment to post

(1) If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a person as a Vice-President of the Upper Tribunal.

(2) Before making an appointment under subsection (1), the Scottish Ministers must consult the Lord President (including as to the person to be appointed).

(3) A person is eligible for appointment as a Vice-President only if the person is—
   (a) a legal member of the Upper Tribunal, or
   (b) if not falling within paragraph (a), eligible to be appointed as such a member of the Tribunal (whether or not already any type of member of the First-tier or Upper Tribunal).

(4) An appointment made under subsection (1) is for the Vice-President to preside over a particular division of the Tribunal.

PART 3

ACQUISITION OF FUNCTIONS

Transfer-in from listed tribunals

26 
Listed tribunals

(1) For the purposes of this Part, the listed tribunals are the tribunals for the time being included in the list in Part 1 of schedule 1 as read in conjunction with the further specification in Part 2 of that schedule.

(2) The Scottish Ministers may by regulations modify—
   (a) the list in Part 1 of schedule 1,
   (b) the further specification in Part 2 of that schedule.

(3) A tribunal may be added to the list in Part 1 of schedule 1 only if it is established by or under an enactment (whenever passed or made).

(4) For the purposes of this section, a reference to a tribunal includes any body, office-holder or individual having decision-making functions that are exercisable as follows (but only as far as having such or other functions that are so exercisable)—
   (a) as, or in the manner of, a tribunal, and
   (b) with respect to the determination or resolution of legal, administrative or other disputes between parties of any kind.
(5) Despite that generality, a reference to a tribunal does not for the purposes of this section include—

(a) any of the Scottish courts referred to in section 2 of the Judiciary and Courts (Scotland) Act 2008 (see subsection (6) of that section),

(b) the Scottish Land Court,

(c) a tribunal—

(i) constituted under section 35 of the Judiciary and Courts (Scotland) Act 2008,

(ii) constituted under section 12A of the Sheriff Courts (Scotland) Act 1971, or

(iii) appointed under section 71(2) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, or

(d) a fitness assessment tribunal constituted under paragraph 13 of schedule 8.

27 Transfer-in of functions

(1) The functions of each of the listed tribunals are to become the functions of the Scottish Tribunals at such time and in so far as the Scottish Ministers consider appropriate.

(2) Accordingly, the Scottish Ministers may by regulations provide for some or all of the functions of a listed tribunal to be transferred from it—

(a) to the First-tier Tribunal only,

(b) to the Upper Tribunal only, or

(c) to the First-tier Tribunal and the Upper Tribunal.

(3) If regulations under subsection (2) provide for any functions of a listed tribunal to be transferred as mentioned in paragraph (c) of that subsection, the regulations may also—

(a) give particular functions to one of the Tribunals (but not the other), or

(b) make provision of the sort allowed by subsection (5).

(4) Where by virtue of regulations made under subsection (2) any functions of a listed tribunal have been transferred as mentioned in paragraph (a), (b) or (c) of that subsection, the Scottish Ministers may by regulations—

(a) provide for the functions, or particular functions, to be redistributed between the Tribunals by—

(i) transferring them from either of the Tribunals to the other,

(ii) taking them away from one of the Tribunals (but not the other), or

(iii) causing them to be exercisable by both of the Tribunals (instead of one only),

(b) if they are so redistributed by causing them to be exercisable by both of the Tribunals, also make provision of the sort allowed by subsection (5).

(5) This subsection allows provision enabling the question as to which of the Tribunals is to exercise particular functions in a specific case or in specified circumstances to be determined, including as against any prescribed criteria—

(a) in accordance with Tribunal Rules, or

(b) by the President of Tribunals (whether or not by reference to Tribunal Rules).
(6) Regulations under subsection (2) or (4) may include provision for the purposes of or in connection with, or for giving full effect to, a transfer or redistribution of any functions to which the regulations apply.

(7) Provision included in such regulations by virtue of subsection (6) may modify any enactment concerning a listed tribunal.

(8) A particular instrument containing regulations under subsection (2) may not relate to the functions of more than one of the listed tribunals.

28 Transfer-in of members

Schedule 2 contains provision for the transfer of certain persons from the listed tribunals into the Scottish Tribunals to hold—

(a) particular named positions,

(b) ordinary or legal membership generally.

Conferral of functions by another Act

28A Accommodation of functions

(1) Subsections (2) and (3) apply where any functions are conferred on either or both of the Scottish Tribunals by or under an Act other than this Act.

(2) The Scottish Ministers may by regulations modify this Act so that this Act specifies the relevant provisions of the other Act (whether in existing or new provisions of this Act).

(3) The Scottish Ministers may by regulations modify this Act or the other Act so as to make the functions exercisable in accordance with or subject to (as far as not already so exercisable)—

(a) the whole of this Act, or

(b) particular provisions of this Act.

28B Redistribution of functions

(1) Where any functions are conferred on either or both of the Scottish Tribunals by or under an Act other than this Act, the Scottish Ministers may by regulations—

(a) provide for the functions, or particular functions, to be redistributed between the Tribunals by—

(i) transferring them from either of the Tribunals to the other,

(ii) taking them away from one of the Tribunals (but not the other), or

(iii) causing them to be exercisable by both of the Tribunals (instead of one only),

(b) if they are so redistributed by causing them to be exercisable by both of the Tribunals, also make provision of the sort allowed by subsection (2).

(2) This subsection allows provision enabling the question as to which of the Tribunals is to exercise particular functions in a specific case or in specified circumstances to be determined, including as against any prescribed criteria—

(a) in accordance with Tribunal Rules, or

(b) by the President of Tribunals (whether or not by reference to Tribunal Rules).
(3) Regulations under subsection (1) may include provision for the purposes of or in connection with, or for giving full effect to, a redistribution of any functions to which the regulations apply.

(4) Provision included in such regulations by virtue of subsection (3) may modify any enactment relating to the functions being redistributed by the regulations.

(5) Subsection (1) is subject to any express provision in the other Act prohibiting or limiting the making of regulations under that subsection.

**PART 4**

**MORE ABOUT MEMBERSHIP ETC.**

10

Appointment and assignment

29 **Scheduled provisions**

(1) Schedule 3 contains provision for the First-tier Tribunal about eligibility for and appointment to—

(a) ordinary membership,

(b) legal membership.

(2) Schedule 4 contains provision for the First-tier Tribunal relating to—

(a) appointment or assignment to—

(i) a Deputy position,

(ii) a Temporary position,

(b) assignment of ordinary, legal and judicial members.

(3) Schedule 5 contains provision for the Upper Tribunal about eligibility for and appointment to—

(a) ordinary membership,

(b) legal membership.

(4) Schedule 6 contains provision for the Upper Tribunal relating to—

(a) assignment to a Temporary position,

(b) assignment of ordinary, legal and judicial members.

30 **Assignment policy**

(1) The Lord President must publish a document recording the policy adopted in relation to the assignment of the ordinary, legal and judicial members within each of the First-tier Tribunal and the Upper Tribunal.

(2) The Lord President must—

(a) keep the assignment policy under review,

(b) re-publish it if it is amended materially.

(3) The assignment policy—
(a) must be in terms designed to secure that appropriate use is made of the knowledge and experience of the members of the Scottish Tribunals (including their expertise in a particular area of the law),

(b) may include—

(i) specific provision for each of the Tribunals,

(ii) different provision for different purposes in any other respects.

Training, conditions and conduct

31 Training and review

(1) The Lord President is responsible for making and maintaining appropriate arrangements for the training and guidance—

(a) of the ordinary members, legal members and judicial members of the Scottish Tribunals,

(b) for the purpose of acting as mentioned in section 17(5), of any extra judges who are authorised to act as so mentioned.

(2) The Lord President may make arrangements for the review of the ordinary members and legal members of the Scottish Tribunals.

(3) Arrangements under subsection (1) or (2) may (in particular) require participation in activities for the purpose of training, guidance or review.

(4) For the purpose of subsection (2), “review” includes ad hoc or continuing review of professional competency and development.

32 Conditions of membership etc.

(1) Schedule 7 contains provision for the terms and conditions on which ordinary and legal members of the Scottish Tribunals hold their positions.

(2) The Scottish Ministers may by regulations make provision enabling a relevant appointment or transfer to be made or have effect in such terms as to cause a person to hold permanently the type of membership or (as the case may be) particular position in question.

(3) The Scottish Ministers must consult the President of Tribunals before—

(a) making regulations under subsection (2), or

(b) exercising in relation to a relevant appointment or transfer the discretion allowed by such regulations.

(4) The operation of paragraphs 2 to 7A of schedule 7 is subject to provision made by regulations under subsection (2).

(5) For the purposes of subsection (2)—

(a) a relevant appointment is appointment or reappointment by the Scottish Ministers—

(i) of a person as an ordinary or legal member of the Scottish Tribunals,

(ii) of a legal member of the First-tier Tribunal as a Chamber President or Deputy Chamber President in the Tribunal, or
(iii) of a legal member of the Upper Tribunal as a Vice-President of the Tribunal,

(b) a relevant transfer is transfer-in to the Scottish Tribunals—

(i) of a person as an ordinary or legal member of the Tribunals by virtue of section 28(b), or

(ii) of a person to a particular position within the Tribunals by virtue of section 28(a).

33 **Conduct and fitness etc.**

Schedule 8 contains provision for and in connection with—

(a) investigation of members’ conduct and imposition of disciplinary measures,

(b) assessment of members’ fitness for position and removal from position.

**PART 5**

**DECISION-MAKING AND COMPOSITION**

**Decisions in First-tier Tribunal**

34 **Decisions in the Tribunal**

(1) The First-tier Tribunal’s function of deciding any matter in a case before the Tribunal is to be exercised by one, or two or more, of the members of the Tribunal chamber to which the case is allocated.

(2) The member or members are to be chosen by the Chamber President of the chamber (who may choose himself or herself).

(3) The Chamber President’s discretion in choosing the member or members is subject to—

(a) any relevant provisions in regulations made under section 35(1),

(b) any relevant directions given by virtue of section 42(5)(b).

(4) In this section—

“Tribunal chamber” means chamber of the Tribunal,

“member”, in relation to a Tribunal chamber, means ordinary, legal or judicial member of the Tribunal who is assigned to the chamber.

35 **Composition of the Tribunal**

(1) The Scottish Ministers may by regulations make provision for determining the composition of the First-tier Tribunal when convened to decide any matter in a case before the Tribunal.

(2) Where regulations under subsection (1) provide for a matter to be decided by a single member of the Tribunal, the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

(3) Where regulations under subsection (1) provide for a matter to be decided by two or more members of the Tribunal, the regulations must include provision for determining how many (if any) of those members are to be—
Part 5—Decision-making and composition

(a) an ordinary member,
(b) a legal member,
(c) a judicial member.

(4) Regulations under subsection (1) may include provision for determining what relevant criteria are to be met by an ordinary member of the Tribunal for the member’s involvement in decision-making in particular types of case.

(5) In subsection (4), “relevant criteria” includes criteria as to qualifications, experience and training.

Decisions in the Tribunal

(1) The Upper Tribunal’s function of deciding any matter in a case before the Tribunal is to be exercised by one, or two or more, of the members of the Tribunal division to which the case is allocated.

(2) The member or members are to be chosen by the Vice-President of the division (who may choose himself or herself).

(3) The Vice-President’s discretion in choosing the member or members is subject to—

(a) subsection (4),
(b) any relevant provisions in regulations made under section 37(1),
(c) any relevant directions given by virtue of section 44(5)(b).

(4) Each of the Lord President and the President of Tribunals has the right to be chosen and may exercise that right as he or she considers appropriate (but this is also subject to any relevant provisions in regulations made under section 37(1)).

(5) In this section—

“Tribunal division” means division of the Tribunal,
“member”, in relation to a Tribunal division—

(a) means ordinary, legal or judicial member of the Tribunal who is assigned to the division,
(b) while assigned to the division, also includes an extra judge who is authorised to act as mentioned in section 17(5).

Composition of the Tribunal

(1) The Scottish Ministers may by regulations make provision for determining the composition of the Upper Tribunal when convened to decide any matter in a case before the Tribunal.

(2) Regulations under subsection (1) may treat separately the Tribunal’s decision-making functions—

(a) at first instance,
(b) on review or appeal.
(3) Where regulations under subsection (1) provide for a matter to be decided by a single member of the Tribunal, the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

(4) Where regulations under subsection (1) provide for a matter to be decided by two or more members of the Tribunal, the regulations must include provision for determining how many (if any) of those members are to be—

(a) an ordinary member,
(b) a legal member,
(c) a judicial member.

(5) Regulations under subsection (1) may include provision about the involvement in decision-making of—

(a) a judicial member of a particular description,
(b) an extra judge who is authorised to act as mentioned in section 17(5).

(6) Regulations under subsection (1) may include provision for determining what relevant criteria are to be met by an ordinary member of the Tribunal for the member’s involvement in decision-making in particular types of case.

(7) In subsection (6), “relevant criteria” includes criteria as to qualifications, experience and training.

Decisions by two or more members

37A Voting for decisions

(1) The Scottish Ministers may by regulations make provision for the purposes of sections 34(1) and 36(1) in so far as a matter in a case before the First-tier Tribunal or the Upper Tribunal is to be decided by two or more members of the Tribunal, including—

(a) for a decision to be made unanimously or by majority,
(b) where a decision is to be made by majority, for the chairing member to have a casting vote in the event of a tie.

(2) Subsection (1) applies in relation to the Upper Tribunal as if an extra judge who is authorised to act as mentioned in section 17(5) were a member of the Tribunal (with section 37B(1) so applying accordingly).

37B Chairing members

(1) Tribunal Rules may make provision for determining the question as to who is to be the chairing member where a matter in a case before the First-tier Tribunal or the Upper Tribunal is to be decided by two or more members of the Tribunal.

(2) Rules making provision as described in subsection (1) may (in particular)—

(a) allow the President of Tribunals to determine the question,
(b) specify criteria as against which the question is to be determined (including by reference to type of member or particular expertise).
PART 6

REVIEW OR APPEAL OF DECISIONS

CHAPTER 1

TRIBUNAL DECISIONS

38  Review of decisions

(1) Each of the First-tier Tribunal and the Upper Tribunal may review a decision made by it in any matter in a case before it.

(2) A decision is reviewable—

(a) at the Tribunal’s own instance, or

(b) at the request of a party in the case.

(3) But—

(a) there can be no review under this section of an excluded decision,

(b) Tribunal Rules may make provision—

(i) excluding other decisions from a review under this section,

(ii) otherwise restricting the availability of a review under this section (including by specifying grounds for a review).

(4) The exercise of discretion whether a decision should be reviewed under this section cannot give rise to a review under this section or to an appeal under section 41 or 43.

(5) A right of appeal under section 41 or 43 is not affected by the availability or otherwise of a review under this section.

39  Actions on review

(1) In a review by the First-tier Tribunal or the Upper Tribunal under section 38, the Tribunal may—

(a) take no action,

(b) set the decision aside, or

(c) correct a minor or accidental error contained in the decision.

(2) Where a decision is set aside by the First-tier Tribunal in a review, it may—

(a) re-decide the matter concerned,

(b) refer that matter to the Upper Tribunal, or

(c) make such other order as the First-tier Tribunal considers appropriate.

(3) If a decision set aside by the First-tier Tribunal in a review is referred to the Upper Tribunal, the Upper Tribunal—

(a) may re-decide the matter concerned or make such other order as it considers appropriate,
(b) in re-deciding that matter, may do anything that the First-tier Tribunal could do if re-deciding it.

(4) Where a decision is set aside by the Upper Tribunal in a review, it may—
   (a) re-decide the matter concerned, or
   (b) make such other order as it considers appropriate.

(5) In re-deciding a matter under this section, the First-tier or Upper Tribunal may reach such findings in fact as it considers appropriate.

40 Review once only

(1) A particular decision of the First-tier Tribunal or the Upper Tribunal may not be reviewed under section 38 more than once.

(2) These are to be regarded as different decisions for the purpose of subsection (1)—
   (a) a decision set aside under section 39(1)(b),
   (b) a decision made by virtue of section 39(2)(a), (3)(a) or (4).

(3) Nothing in this section prevents the taking, after a review in which the decision concerned is not set aside, of administrative steps by the First-tier or Upper Tribunal to correct a minor or accidental error made in disposing of the review.

Appeal from First-tier Tribunal

41 Appeal from the Tribunal

(1) A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.

(2) An appeal under this section is to be made—
   (a) by a party in the case,
   (b) on a point of law only.

(3) An appeal under this section requires the permission of—
   (a) the First-tier Tribunal, or
   (b) if the First-tier Tribunal refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the First-tier Tribunal or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.

(5) This section—
   (a) is subject to sections 38(4) and 50(2),
   (b) does not apply in relation to an excluded decision.

42 Disposal of an appeal

(1) In an appeal under section 41, the Upper Tribunal may uphold or quash the decision on the point of law in question.

(2) If the Upper Tribunal quashes the decision, it may—
(a) re-make the decision,
(b) remit the case to the First-tier Tribunal, or
(c) make such other order as the Upper Tribunal considers appropriate.

(3) In re-making the decision, the Upper Tribunal may—

(a) do anything that the First-tier Tribunal could do if re-making the decision,
(b) reach such findings in fact as the Upper Tribunal considers appropriate.

(4) In remitting the case, the Upper Tribunal may give directions for the First-tier Tribunal’s reconsideration of the case.

(5) Such directions may relate to—

(a) issues of law or fact (including the Upper Tribunal’s opinion on any relevant point),
(b) procedural issues (including as to the members to be chosen to reconsider the case).

Appeal from Upper Tribunal

43 Appeal from the Tribunal

(1) A decision of the Upper Tribunal in any matter in a case before the Tribunal may be appealed to the Court of Session.

(2) An appeal under this section is to be made—

(a) by a party in the case,
(b) on a point of law only.

(3) An appeal under this section requires the permission of—

(a) the Upper Tribunal, or
(b) if the Upper Tribunal refuses its permission, the Court of Session.

(4) Such permission may be given in relation to an appeal under this section only if the Upper Tribunal or (as the case may be) the Court of Session is satisfied that there are arguable grounds for the appeal.

(5) This section—

(a) is subject to sections 38(4) and 50(2),
(b) does not apply in relation to an excluded decision.

44 Disposal of an appeal

(1) In an appeal under section 43, the Court of Session may uphold or quash the decision on the point of law in question.

(2) If the Court quashes the decision, it may—

(a) re-make the decision,
(b) remit the case to the Upper Tribunal, or
(c) make such other order as the Court considers appropriate.
In re-making the decision, the Court may—

(a) do anything that the Upper Tribunal could do if re-making the decision,

(b) reach such findings in fact as the Court considers appropriate.

In remitting the case, the Court may give directions for the Upper Tribunal’s reconsideration of the case.

Such directions may relate to—

(a) issues of law or fact (including the Court’s opinion on any relevant point),

(b) procedural issues (including as to the members to be chosen to reconsider the case).

Procedure on second appeal

Section 43(4) is subject to subsections (3) and (4) as regards a second appeal.

Section 44 is subject to subsections (5) and (6) as regards a second appeal.

For the purpose of subsection (1), the Upper Tribunal or (as the case may be) the Court of Session may not give its permission to the making of a second appeal unless also satisfied that subsection (4) applies.

This subsection applies where, in relation to the matter in question—

(a) a second appeal would raise an important point of principle or practice, or

(b) there is some other compelling reason for allowing a second appeal to proceed.

For the purpose of subsection (2), subsections (2)(b) and (3)(a) of section 44 have effect in relation to a second appeal as if the references in them to the Upper Tribunal include, as alternative references, references to the First-tier Tribunal.

Where, in exercising the choice arising by virtue of subsection (5) (and instead of re-making the decision in question), the Court of Session remits the case to the Upper Tribunal rather than the First-tier Tribunal—

(a) the Upper Tribunal, instead of reconsidering the case itself, may remit the case to the First-tier Tribunal,

(b) if the Upper Tribunal does so, it must send to the First-tier Tribunal any directions accompanying the Court’s remittal of the case to the Upper Tribunal.

In this section, “second appeal” means appeal under section 43 against a decision in an appeal under section 41.

Excluded decisions

A decision falling within any of sections 47 to 49 is an excluded decision for the purposes of—

(a) a review under section 38,

(b) an appeal under section 41 or 43.
Part 6—Review or appeal of decisions
Chapter 1—Tribunal decisions

47 Decisions on review

(1) Falling within this section is—

(a) a decision set aside in a review under section 38 (see section 39(1)(b)),
(b) a decision in such a review, except a decision of the kind mentioned in subsection (2).

(2) That is, a decision made by virtue of section 39(2)(a), (3)(a) or (4) (and accordingly a decision so made is not an excluded decision).

48 Other appeal rights

(1) Falling within this section is a decision against which there is a right of appeal under an enactment apart from this Act.

(2) The Scottish Ministers may by regulations make provision—

(a) to which subsection (1) is subject (for example, by specifying an exception to what falls within this section),
(b) for a right of appeal under an enactment apart from this Act to cease to be exercisable in relation to a decision no longer falling within this section.

49 Position on transfer-in

(1) Where any functions are transferred to the First-tier Tribunal or Upper Tribunal by virtue of regulations made under section 27(2), a decision made in the exercise of the functions falls within this section if it is specified in regulations made by the Scottish Ministers under this subsection.

(2) Regulations under subsection (1) may specify a decision only if, immediately before the transfer of the functions in the exercise of which it is made, there is no right of appeal against the decision.

Miscellaneous procedure

50 Process for permission

(1) The Scottish Ministers may by regulations specify a time limit within which the permission required by section 41(3) or 43(3) must be sought.

(2) A refusal to give the permission required by section 41(3) or 43(3) is not—

(a) reviewable under section 38, or
(b) appealable under section 41 or 43.

51 Participation of non-parties

(1) Subsection (2) applies for the purposes of—

(a) a review under section 38,
(b) an appeal under section 41 or 43.

(2) The Scottish Ministers may by regulations make provision extending any reference to a party in a case so that it also includes a person falling within a specified description.
CHAPTER 2
SPECIAL JURISDICTION

52 Judicial review cases
(1) Subsection (2) applies where a petition is made to the Court of Session for judicial review.
(2) The Court may by order remit the petition to the Upper Tribunal if—
   (a) both of Conditions A and B are met, and
   (b) having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition, the Court considers that it is appropriate to do so.
(3) Condition A is that the petition does not seek anything other than the exercise of the Court’s judicial review function.
(4) Condition B is that the petition falls within a category specified by an act of sederunt made by the Court for the purpose of this subsection.

53 Decision on remittal
(1) The Upper Tribunal is to determine the issues raised in each petition remitted to it under section 52.
(2) In relation to a petition so remitted, the Upper Tribunal—
   (a) has the same powers as the Court of Session has on a petition to it for judicial review,
   (b) is to apply the same principles as the Court applies in the exercise of its judicial review function.
(3) An order made by the Upper Tribunal on a petition so remitted has the same effect as an order made by the Court of Session on a petition for judicial review (and the order is therefore enforceable accordingly).
(4) Subsection (3) does not limit the operation of section 43 in connection with a determination under subsection (1).

54 Additional matters
(1) Where a petition is remitted to the Upper Tribunal under section 52, any order made or step taken by the Court of Session in relation to the petition is to be treated as if made or taken by the Tribunal (except the order by which the petition is so remitted (or an associated step)).
(2) Tribunal Rules may make further provision with respect to the exercise by the Upper Tribunal of its functions under this Chapter.

55 Meaning of judicial review
In this Chapter—
(a) a reference to a petition to the Court of Session for judicial review is to an application to the supervisory jurisdiction of the Court,
(b) a reference to the exercise of the Court of Session’s judicial review function is to the exercise of the Court’s supervisory jurisdiction (and includes the making of any order in connection with or in consequence of the exercise of that function).

**PART 7**

**POWERS, PROCEDURE AND ADMINISTRATION**

**CHAPTER 1**

**POWERS AND ENFORCEMENT**

**Cases and proceedings**

56 **Venue for hearings**

10 (1) Each of the First-tier Tribunal and the Upper Tribunal may be convened at any time and place in Scotland to hear or decide a case or for any other purpose relating to its functions.

(2) Subsection (1) is subject to any provision made by Tribunal Rules as to the question of when and where in Scotland the Scottish Tribunals are to be convened (and such Rules may allow the President of Tribunals to determine the question).

57 **Conduct of cases**

(1) In relation to the things mentioned in subsection (3), each of the First-tier Tribunal and the Upper Tribunal has such powers, rights, privileges and other authority with respect to any case before it as are provided for in Tribunal Rules.

(2) Rules making provision for the purpose of subsection (1) may (in particular) do so in relation to any kind of authority by reference to any authority of a relevant description exercisable by the sheriff or the Court of Session.

(3) The things are—

(a) the citation, attendance or examination of witnesses,

(b) the recovery, production or inspection of relevant materials,

(c) the commissioning of reports of any relevant type,

(d) other procedural, evidential or similar measures.

(4) In subsection (3)(b), “materials” means documents and other items.

58 **Enforcement of decisions**

30 (1) A decision made by the First-tier Tribunal or the Upper Tribunal in any matter in a case before it is enforceable by the means provided for in Tribunal Rules.

(2) Subsection (1) applies to a decision—

(a) on the merits of such a case,

(b) as to—

(i) payment of a sum of money, or

(ii) expenses by virtue of section 59, or
(c) otherwise affecting the rights, obligations or interests of a party in such a case.

(3) Subsection (1) is subject to section 53(3) as respects a determination to which that section relates.

(4) Rules making provision for the purpose of subsection (1) may (in particular) do so in relation to a relevant order by reference to the means of enforcing an order of the sheriff or the Court of Session.

(5) In subsection (4), “relevant order” means order of either of the Tribunals giving effect to a decision to which subsection (1) applies.

59 Award of expenses

(1) In connection with proceedings in a case before the First-tier Tribunal or the Upper Tribunal, the Tribunal may award expenses so far as allowed in accordance with Tribunal Rules.

(2) Where such expenses are awarded, the awarding Tribunal is to specify by and to whom they are to be paid (and to what extent).

(3) Tribunal Rules may make provision—
   (a) for scales or rates of awardable expenses,
   (b) for—
      (i) such expenses to be set-off against any relevant sums,
      (ii) interest at the specified rate to be chargeable on such expenses where unpaid,
   (d) stating the general or particular factors to be taken into account when exercising discretion as to such expenses,
   (e) about such expenses in other respects.

(3A) Tribunal Rules may make provision—
   (a) for disallowing any wasted expenses,
   (b) for requiring a person who has given rise to such expenses to meet them.

(4) Rules making provision as described in subsection (3) or (3A) may also prescribe meanings for “relevant sums”, “specified rate” and “wasted expenses” as used in this section.

Supplementary provisions

60 Additional powers

(1) The Scottish Ministers may by regulations confer on the First-tier Tribunal and the Upper Tribunal such additional powers as are necessary or expedient for the proper exercise of their functions.

(2) Regulations under subsection (1) may include provision—
   (a) relying on the effect of an act of sederunt made by the Court of Session,
(b) causing Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to apply to the making of a relevant act of sederunt as it does to the making of Tribunal Rules.

(3) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

61 Application of enactments

(1) The Scottish Ministers may by regulations modify the application of any enactment so far as they consider to be necessary or expedient for the purposes of or in connection with the matters to which this subsection applies.

(2) Regulations under subsection (1) may include provision—

(a) relying on the effect of an act of sederunt made by the Court of Session,

(b) causing Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to apply to the making of a relevant act of sederunt as it does to the making of Tribunal Rules.

(3) Subsection (1) applies to—

(a) the making of Tribunal Rules,

(b) the effect of—

(i) this Part, or

(ii) Tribunal Rules.

(4) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

61A Offences in relation to proceedings

(1) The Scottish Ministers may by regulations make provision, in relation to proceedings before the First-tier Tribunal or the Upper Tribunal—

(a) for offences and penalties—

(i) for making a false statement in an application in a case,

(ii) for failure by a person to attend, or give evidence in, such proceedings when required to do so in accordance with Tribunal Rules,

(iii) for alteration, concealment or destruction by a person of, or failure by a person to produce, something that is required to be produced in such proceedings in accordance with Tribunal Rules,

(b) about the circumstances in which a person need not give evidence or produce something (for example, where a person could not be compelled to give evidence or produce something in proceedings in a case before the sheriff or in the Court of Session).

(1A) The maximum penalties that may be provided for in regulations under subsection (1) are—

(a) for an offence triable summarily only, imprisonment for a term not exceeding 12 months or a fine not exceeding level 5 on the standard scale (or both),
Part 7—Powers, procedure and administration

Chapter 2—Practice and procedure

(b) for an offence triable either summarily or on indictment—
(i) on summary conviction, imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
(ii) on conviction on indictment, imprisonment for a term not exceeding 2 years or a fine (or both).

(2) Before making regulations under subsection (1), the Scottish Ministers must obtain the Lord President’s approval.

CHAPTER 2

PRACTICE AND PROCEDURE

Tribunal Rules

(1) There are to be rules—
(a) regulating the practice and procedure to be followed in proceedings at—
(i) the First-tier Tribunal,
(ii) the Upper Tribunal, and
(b) containing provision of other sorts appropriate with respect to the Scottish Tribunals (including in relation to the exercise by them of their functions).

(2) Rules of the kind mentioned in subsection (1) are to be known as Scottish Tribunal Rules (and in this Act they are referred to as Tribunal Rules).

(3) Tribunal Rules are to be made by the Court of Session by act of sederunt.

(4) Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 includes further provision about the making of Tribunal Rules.

Exercise of functions

(A1) Tribunal Rules may confer functions on the persons mentioned in subsection (4) or the other members of the Scottish Tribunals.

(1) Tribunal Rules may, in relation to any functions exercisable by the persons mentioned in subsection (4) or the other members of the Scottish Tribunals—
(a) state—
(i) how a function is to be exercised,
(ii) who is to exercise a function,
(b) cause something to require further authorisation,
(c) permit something to be done on a person’s behalf,
(d) allow a specified person to make a decision about any of those matters.

(2) Tribunal Rules may make provision relying on the effect of directions issued, or to be issued, under section 68.

(3) Neither Tribunal Rules nor directions under section 68 may make provision altering the operation of section 34(1) or 36(1).
Part 7—Powers, procedure and administration
Chapter 2—Practice and procedure

(4) For the purpose of subsections (A1) and (1), the persons are—
(a) the Lord President,
(b) the President of Tribunals,
(c) in the First-tier Tribunal—
   (i) a Chamber President,
   (ii) a Deputy Chamber President,
(d) a Vice-President of the Upper Tribunal.

64 Extent of rule-making

(1) Tribunal Rules may make—
   (a) provision applying—
       (i) equally to both of the First-tier Tribunal and the Upper Tribunal, or
       (ii) specifically to one of them,
   (b) particular provision for each of them about the same matter.

(2) Tribunal Rules may make particular provision for different—
   (a) chambers or divisions,
   (b) types of proceedings.

(3) Tribunal Rules may make different provision for different purposes in any other respects.

(4) The generality of section 62(1) is not limited by—
   (a) sections 65 to 67, or
   (b) any other provisions of this Act about the content of Tribunal Rules.

(5) As well as Chapter 1, see (for example) sections 27(5), 37B(1), 38(3)(b) and 54(2).

Particular matters

65 Proceedings and steps

(1) Tribunal Rules may make provision about proceedings in a case before the Scottish Tribunals.

(2) Rules making provision as described in subsection (1) may (in particular)—
   (a) provide for the form and manner in which a case is to be brought,
   (b) allow for the withdrawal of a case (with or without restrictions on subsequent proceedings as respects the same matter),
   (c) set time limits for—
       (i) making applications,
       (ii) taking particular steps,
   (ca) enable two or more applications to be conjoined in certain circumstances,
(d) specify circumstances in which the Tribunals may take particular steps of their own initiative.

66 Hearings in cases

(1) Tribunal Rules may make provision about hearings in a case before the Scottish Tribunals.

(2) Rules making provision as described in subsection (1) may (in particular)—
   (a) provide for certain matters to be dealt with—
      (i) without a hearing,
      (ii) at a private hearing,
      (iii) at a public hearing,
   (b) require notice to be given of a hearing (and for the timing of such notice),
   (c) specify persons who may—
      (i) appear on behalf of a party in a case,
      (ii) attend a hearing in order to provide support to a party or witness in a case,
   (d) specify circumstances in which particular persons may appear or be represented at a hearing,
   (e) specify circumstances in which a hearing may go ahead—
      (i) at the request of a party in a case despite no notice of it having been given to another party in the case,
      (ii) in the absence of a particular member chosen to exercise the function of deciding any matter in a case,
   (ea) enable two or more sets of proceedings to be taken concurrently at a hearing in certain circumstances,
   (f) allow for an adjournment of a hearing for the purpose of giving the parties in a case an opportunity to use a process of negotiation, mediation, arbitration or adjudication for resolving a dispute to which the case relates,
   (g) allow for the imposition of reporting restrictions for particular reasons arising in a case.

67 Evidence and decisions

(1) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals—
   (a) make provision about the giving of evidence and the administering of oaths,
   (b) modify the application of any other rules relating to either of those matters so far as they would otherwise apply to such proceedings.

(2) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals, provide for the payment of expenses and allowances to a person who—
   (a) gives evidence,
   (b) produces a document, or
(c) attends such proceedings (or is required to do so).

(3) Tribunal Rules may, in connection with proceedings before the Scottish Tribunals, make provision by way of presumption (for example, as to the serving of something on somebody).

(4) Tribunal Rules may make provision about decisions of the Scottish Tribunals, including as to—

(a) the manner in which such decisions are to be made,
(b) the incorporation in such decisions of findings in fact,
(c) the recording, issuing and publication of such decisions.

Issuing directions

68 Practice directions

(1) The President of Tribunals may issue directions as to the practice and procedure to be followed in proceedings at—

(a) the First-tier Tribunal,

(b) the Upper Tribunal.

(2) A Chamber President in the First-tier Tribunal may issue directions as to the practice and procedure to be followed in proceedings in the chamber over which the Chamber President presides.

(3) A Vice-President of the Upper Tribunal may issue directions as to the practice and procedure to be followed in proceedings in the division over which the Vice-President presides.

(4) Directions under subsection (2) or (3) may not be issued without the approval of the President of Tribunals.

69 Publication and effect

(A1) The President of Tribunals must arrange for directions under section 68(1), (2) or (3) to be published in such manner as the President of Tribunals considers appropriate.

(B1) Directions under section 68(1), (2) or (3) may—

(a) vary or revoke earlier such directions,

(b) make different provision for different purposes (in the same respects as Tribunal Rules).

(2) If (and to the extent that) any conflict arises between—

(a) directions issued under section 68(1), and

(b) directions issued under section 68(2) or (3),

those issued under section 68(1) are to prevail.
CHAPTER 3
FEES AND ADMINISTRATION

70 Tribunal fees

(1) The Scottish Ministers may by regulations make provision for the reasonable fees that are to be payable in respect of any matter that may be dealt with by the Scottish Tribunals.

(2) Regulations under subsection (1) may provide for (in particular)—
   (a) scales or rates of fees,
   (b) in relation to fees—
       (i) reduction in amount,
       (ii) exemption or waiver.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—
   (a) the Lord President,
   (b) to such extent as they consider appropriate, persons having an interest in the operation and business of the Scottish Tribunals.

71 Administrative support

(1) The Scottish Ministers must ensure that the Scottish Tribunals are provided with such property, services and personnel as the Scottish Ministers consider to be reasonably required for—
   (a) the proper operation of the Tribunals, and
   (b) the discharge of the Lord President’s responsibility as to the efficient disposal of business in the Scottish Tribunals (see section 7(1)).

(2) The Scottish Ministers must have regard to any representations made to them by the Lord President in relation to the fulfilment of the duty under subsection (1).

(3) In fulfilling the duty under subsection (1), the Scottish Ministers may—
   (a) fund or supply property, services and personnel for use by the Tribunals,
   (b) appoint persons as members of staff of the Tribunals.

(4) The Scottish Ministers may make arrangements as to—
   (a) the payment of remuneration or expenses to or in respect of persons so appointed,
   (b) the payment of pensions, allowances and gratuities to or in respect of persons so appointed,
   (c) contributions or other payments towards provision for such pensions, allowances and gratuities.

(5) The references in subsection (4) to pensions, allowances and gratuities include pensions, allowances and gratuities to be paid by way of compensation for loss of office.
Annual reporting

(1) The President of Tribunals is to prepare an annual report about the operation and business of the Scottish Tribunals.

(2) An annual report is to be given to the Lord President at the end of each financial year.

(3) An annual report—
   (a) must explain how the Scottish Tribunals have exercised their functions during the financial year,
   (b) may contain such other information as—
      (i) the President of Tribunals considers appropriate, or
      (ii) the Lord President requires to be covered.

(4) The Lord President must—
   (a) publish each annual report in a manner suitable for bringing it to the attention of persons having an interest in the operation and business of the Scottish Tribunals,
   (b) before so publishing it, send a copy of the report to the Scottish Ministers.

Regulation-making

(1) Regulations under the preceding Parts of this Act may—
   (a) make different provision for different purposes,
   (b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations under the following provisions of those Parts are subject to the affirmative procedure—
   (a) section 19(2) or 22(2),
   (b) section 26(2) or 27(2),
   (c) section 35(1), 37(1) or 37A(1),
   (d) section 60(1), 61(1) or 61A(1).

(3) Regulations under any other provisions of those Parts are subject to the negative procedure.

Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—
   (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act (including this Act),
(b) otherwise, are subject to the negative procedure.

75 **Transitional and consequential**

For the purposes of or in connection with this Act, schedule 9 contains—

(a) transitional and other provision,

(b) modification of enactments.

*Interpretation, commencement and short title*

76 **Interpretation**

(1) In this Act, “Lord President” means Lord President of the Court of Session.

(2) Schedule 10 is an index of expressions used in this Act together with a note of some key provisions.

77 **Commencement**

(1) Section 76, this section and section 78 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

78 **Short title**

The short title of this Act is the Tribunals (Scotland) Act 2013.
SCHEDULE 1  
(introduced by section 26)  

LISTED TRIBUNALS

PART 1

LIST OF TRIBUNALS

1  An Additional Support Needs Tribunal
2  A Scottish Charity Appeals Panel
3  The Crofting Commission
4  An Education Appeal Committee
5  In relation to certain Housing and other Acts—
   (a) a private rented housing committee,
   (b) a homeowner housing committee
6  The Lands Tribunal for Scotland
7  The Mental Health Tribunal for Scotland
8  In relation to the National Health Service—
   (a) the NHS National Appeal Panel,
   (b) the NHS Tribunal
9  A Parking Adjudicator
10  A Police Appeals Tribunal
11  A Valuation Appeal Committee.

PART 2

FURTHER SPECIFICATION

12  The operation of section 27(1) and (2) is informed by and subject to the further
    specification in paragraph 13 (and the entries above are to be construed accordingly).
13  (1) The entry in paragraph 1 relates to the functions exercisable by any of the Additional
    Support Needs Tribunals for Scotland by virtue of section 17(1A) of the Education
    (2) The entry in paragraph 2 relates to the functions exercisable by a Scottish Charity
    Appeals Panel by virtue of section 75(1) of the Charities and Trustee Investment
    (Scotland) Act 2005.
    (3) The entry in paragraph 3 relates to the functions exercisable by the Crofting
    Commission by virtue of the Crofters (Scotland) Act 1993 or any other enactment, but
    only in so far as they are decision-making functions exercisable—
       (a) in the manner of a tribunal, and
       (b) with respect to the determination or resolution of disputes.
The entry in paragraph 4 relates to the functions exercisable by an education appeal committee set up under section 28D(1) of the Education (Scotland) Act 1980.

In the entry in paragraph 5—

(a) paragraph (a) relates to the functions exercisable by a private rented housing committee by virtue of section 21(3) of the Housing (Scotland) Act 2006,

(b) paragraph (b) relates to the functions exercisable by a homeowner housing committee by virtue of section 16(1) of the Property Factors (Scotland) Act 2011.

The entry in paragraph 6 relates to the functions exercisable by the Lands Tribunal for Scotland by virtue of the Lands Tribunal Act 1949 or any other enactment.

The entry in paragraph 7 relates to the functions exercisable by the Mental Health Tribunal for Scotland by virtue of section 21(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

In the entry in paragraph 8—

(a) paragraph (a) relates to the functions exercisable by the NHS National Appeal Panel or its chair by virtue of paragraph 5(4) to (6) in Schedule 3 to the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (S.S.I. 2009/183),

(b) paragraph (b) relates to the functions exercisable by the NHS Tribunal by virtue of sections 29 to 32E of the National Health Service (Scotland) Act 1978.

The entry in paragraph 9 relates to the functions exercisable by a parking adjudicator by virtue of sections 72(2) and 73(3) of the Road Traffic Act 1991.

The entry in paragraph 10 relates to the functions exercisable by a police appeals tribunal by virtue of section 56(3) of the Police and Fire Reform (Scotland) Act 2012.

The entry in paragraph 11 relates to the functions exercisable by a valuation appeal committee by virtue of section 29(1)(a) of the Local Government etc. (Scotland) Act 1994.

SCHEDULE 2
(introduced by section 28)

TRANSFER-IN OF MEMBERS

The Scottish Ministers may by regulations provide for some or all of the transferable persons to become the holders of any of the particular or other positions within the Scottish Tribunals specified in paragraph 4(1) or (2).

In sub-paragraph (1), the transferable persons are the persons who—

(a) are members—

(i) of any of the listed tribunals, or

(ii) of any panel or other body from which the members of any of the listed tribunals are drawn,

(b) are authorised decision-makers for any of the listed tribunals, or

(c) by reason of holding particular offices, constitute any of the listed tribunals.

But sub-paragraph (2) does not apply in relation to—
(a) any—

(i) judges of the Court of Session, or

(ii) sheriffs, or

(b) if appointed by reason of holding judicial office, the President of the Lands Tribunal for Scotland.

Subject to the relevant provisions of schedule 7, regulations under paragraph 1(1) may contain provision for the terms and conditions under which the persons concerned are to hold those positions, including by—

(a) preserving or altering the terms and conditions under which they are members of a listed tribunal, or

(b) replacing those terms and conditions with new ones.

Regulations under paragraph 1(1) may be made only where some or all functions of the tribunal have been, or are to be, transferred by regulations under section 27(2) (whenever made).

Regulations under paragraph 1(1) must not cause any of the persons concerned to become the holder of any particular or other position to which the person would not be eligible for appointment under the relevant provisions of schedules 3 to 6.

A particular instrument containing regulations under paragraph 1(1) may not relate to the members of more than one of the listed tribunals.

In relation to the First-tier Tribunal—

(a) the particular positions are—

(i) Chamber President in the Tribunal,

(ii) Deputy Chamber President in the Tribunal,

(b) the other positions are—

(i) ordinary member of the Tribunal,

(ii) legal member of the Tribunal (apart from Chamber President (or Deputy)).

In relation to the Upper Tribunal—

(a) the particular position is Vice-President of the Tribunal,

(b) the other positions are—

(i) ordinary member of the Tribunal,

(ii) legal member of the Tribunal (apart from Vice-President).
SCHEDULE 3
(introduced by section 29)

APPONTMENT TO FIRST-TIER TRIBUNAL

PART 1

ORDINARY MEMBERS

Appointment and eligibility

1 (1) It is for the Scottish Ministers to appoint a person as an ordinary member of the First-tier Tribunal.

(2) A person is eligible for such appointment only if the person meets such relevant criteria as are prescribed by the Scottish Ministers in regulations.

2 In paragraph 1(2), “relevant criteria” includes criteria as to qualifications, experience and training.

PART 2

LEGAL MEMBERS

Application of Part

3 (1) This schedule Part applies in relation to appointment of the legal members of the First-tier Tribunal other than—

(a) a Chamber President in the Tribunal, or

(b) a Deputy Chamber President in the Tribunal.

(2) The references in this schedule Part to a legal member of the First-tier Tribunal are to be read accordingly.

Appointment and eligibility

4 (1) It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal.

(2) A person is eligible for such appointment only if qualifying under paragraph 5(1) or (2).

5 (1) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 5 years, as a solicitor or advocate in Scotland.

(2) A person qualifies under this sub-paragraph if the person falls within a description specified by the Scottish Ministers by regulations.

Eligibility under regulations

6 (1) Regulations under paragraph 5(2) may specify a description of a person by reference to the matters mentioned in sub-paragraph (1A), (2) or (3).

(1A) That is—

(a) current practice as a solicitor or barrister in England and Wales or Northern Ireland, and

(b) engagement in practice as such for a period of not less than 5 years.
That is—

(a) previous engagement in practice for a period of not less than 5 years, as—
   (i) a solicitor or advocate in Scotland, or
   (ii) a solicitor or barrister in England and Wales or Northern Ireland, and
(b) subsequent engagement in any of the activities listed in sub-paragraph (4).

That is, suitability attributable to experience in law through current or previous engagement in—

(a) any of the activities listed in sub-paragraph (4),
(b) an activity that is of a broadly similar nature to any of the activities listed in that sub-paragraph.

The activities are—

(a) exercising judicial functions in any court or tribunal,
(b) practice or employment as a lawyer of any kind,
(c) whether or not in the course of practice or employment as a lawyer—
   (i) advising on the application of the law,
   (ii) drafting documents intended to affect rights or obligations under the law,
   (iii) assisting persons involved in a legal or other process for the resolution of disputes as to the law,
   (iv) acting as a mediator or arbitrator for the purpose of resolving disputes that are (or could be) the matter of legal proceedings,
(d) teaching or researching law at or for an educational institution.

The Scottish Ministers may by regulations make provision—

(a) as regards the calculation of the 5-year period mentioned in paragraph 5(1) or 6(1A)(b) or (2)(a) (for example, by reference to recent or continuous time),
(b) to which paragraph 6(2)(a) is subject (for example, by reference to debarment from practice),
(c) for the purpose of paragraph 6(3), about—
   (i) the criteria for suitability (for example, by reference to equivalence to past or present practice as a solicitor),
   (ii) the nature of experience required (for example, by reference to engagement for a particular period of time (within the United Kingdom or elsewhere)).

The Scottish Ministers may by regulations modify the list in paragraph 6(4).
SCHEDULE 4
(introduced by section 29)

POSITIONS IN FIRST-TIER TRIBUNAL

PART 1

DEPUTY OR TEMPORARY PRESIDENT

Deputy President

1 If requested to do so by the President of Tribunals, the Scottish Ministers may appoint a person as a Deputy Chamber President of a particular chamber in the First-tier Tribunal.

2 (1) A person is eligible for appointment as a Deputy Chamber President only if the person is—

(a) a legal member of the First-tier Tribunal (other than a Chamber President), or

(b) if not falling within paragraph (a), eligible to be appointed as such a member (whether or not already any type of member of the First-tier or Upper Tribunal).

(2) Before requesting that a person be appointed as a Deputy Chamber President, the President of Tribunals must consult the Chamber President of the chamber concerned.

(3) If the Scottish Ministers decide not to make an appointment as a Deputy Chamber President, they must give the President of Tribunals written reasons.

3 (1) The functions of a Chamber President are exercisable by a Deputy Chamber President to such extent and in such manner as the Chamber President may direct.

(2) Except where the context otherwise requires, a reference in a provision in or under this Act to a Chamber President excludes a Deputy Chamber President.

Temporary President

4 If there is a temporary vacancy in the presidency of a particular chamber, the President of Tribunals may assign a person as a Temporary Chamber President during the vacancy.

5 (1) A person is eligible to be assigned as a Temporary Chamber President only if the person is a legal or judicial member of the First-tier Tribunal (other than a Chamber President).

(2) The functions of a Chamber President are exercisable by a Temporary Chamber President.

(3) Except where the context otherwise requires, a reference in or under this Act to a Chamber President includes a Temporary Chamber President.

PART 2

ASSIGNMENT INTERNALLY

Assignment by the President of Tribunals

6 (1) The President of Tribunals has the function of assigning the members of the First-tier Tribunal among the chambers (including re-assignment or ending assignment).

(2) The President of Tribunals is to assign those members among the chambers in accordance with paragraphs 7 to 9.
Assignment of Chamber Presidents

7 (1) A Chamber President of a chamber—
   (a) is to be assigned to that chamber,
   (b) may be assigned to act as a legal member also in another chamber.

5 (2) A Deputy Chamber President of a chamber—
   (a) is to be assigned to that chamber,
   (b) may be assigned to act as a legal member also in another chamber,
   (c) is to act as such under the direction of the Chamber President of any chamber to which assigned.

10 (3) Assignment under sub-paragraph (1)(b) or (2)(b) is to act otherwise than as a Chamber President or Deputy Chamber President in the other chamber.

(4) Assignment under sub-paragraph (1)(b) or (2)(b) requires—
   (a) the concurrence of the Chamber President of the other chamber, and
   (b) the agreement of the member concerned.

Assignment of other members

8 (1) This paragraph applies in relation to an ordinary member or legal member by virtue of—
   (a) appointment as such, or
   (b) transfer-in as such.

(2) Each member to whom this paragraph applies—
   (a) is to be assigned to at least one of the chambers,
   (b) may be assigned to different chambers at different times.

15 (3) Any such member may be assigned to a particular chamber only with—
   (a) the concurrence of its Chamber President, and
   (b) the agreement of the member concerned.

20 (4) The assignment of any such member to a particular chamber may be ended only with the concurrence of its Chamber President.

25 (5) This paragraph does not apply to a legal member to whom paragraph 7(1) or (2) relates.

Assignment of judicial members

9 (1) A judicial member is to be assigned to at least one of the chambers.

30 (2) A judicial member—
   (a) may be assigned to different chambers at different times,
   (b) may be assigned to a particular chamber only with—
      (i) the concurrence of its Chamber President, and
      (ii) the agreement of the assignee concerned.
(3) The assignment of such a member to a particular chamber may be ended only with the concurrence of its Chamber President.

SCHEDULE 5
(introduced by section 29)

APPOINTMENT TO UPPER TRIBUNAL

PART 1
ORDINARY MEMBERS

Appointment and eligibility

1 (1) It is for the Scottish Ministers to appoint a person as an ordinary member of the Upper Tribunal.

(2) A person is eligible for such appointment only if the person meets such relevant criteria as are prescribed by the Scottish Ministers in regulations.

In paragraph 1(2), “relevant criteria” includes criteria as to qualifications, experience and training.

PART 2
LEGAL MEMBERS

Application of Part

3 (1) This schedule Part applies in relation to appointment of the legal members of the Upper Tribunal other than—

(a) a Vice-President of the Tribunal,

(b) a legal member of the Tribunal by reason of being a Chamber President in the First-tier Tribunal.

(2) The references in this schedule Part to a legal member of the Upper Tribunal are to be read accordingly.

Appointment and eligibility

4 (1) It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal.

(2) A person is eligible for such appointment only if qualifying under paragraph 5(1) or (2).

5 (1) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 7 years, as a solicitor or advocate in Scotland.

(2) A person qualifies under this sub-paragraph if the person falls within a description specified by the Scottish Ministers by regulations.

Eligibility under regulations

6 (1) Regulations under paragraph 5(2) may specify a description of a person by reference to the matters mentioned in sub-paragraph (1A), (2) or (3).
Tribunals (Scotland) Bill
Schedule 5—Appointment to Upper Tribunal
Part 2—Legal members

(1A) That is—
(a) current practice as a solicitor or barrister in England and Wales or Northern Ireland, and
(b) engagement in practice as such for a period of not less than 7 years.

(2) That is—
(a) previous engagement in practice for a period of not less than 7 years, as—
(i) a solicitor or advocate in Scotland, or
(ii) a solicitor or barrister in England and Wales or Northern Ireland, and
(b) subsequent engagement in any of the activities listed in sub-paragraph (4).

(3) That is, suitability attributable to experience in law through current or previous engagement in—
(a) any of the activities listed in sub-paragraph (4),
(b) an activity that is of a broadly similar nature to any of the activities listed in that sub-paragraph.

(4) The activities are—
(a) exercising judicial functions in any court or tribunal,
(b) practice or employment as a lawyer of any kind,
(c) whether or not in the course of practice or employment as a lawyer—
(i) advising on the application of the law,
(ii) drafting documents intended to affect rights or obligations under the law,
(iii) assisting persons involved in a legal or other process for the resolution of disputes as to the law,
(iv) acting as a mediator or arbitrator for the purpose of resolving disputes that are (or could be) the matter of legal proceedings,
(d) teaching or researching law at or for an educational institution.

(1) The Scottish Ministers may by regulations make provision—
(a) as regards the calculation of the 7-year period mentioned in paragraph 5(1) or 6(1A)(b) or (2)(a) (for example, by reference to recent or continuous time),
(b) to which paragraph 6(2)(a) is subject (for example, by reference to debarment from practice),
(c) for the purpose of paragraph 6(3), about—
(i) the criteria for suitability (for example, by reference to equivalence to past or present practice as a solicitor),
(ii) the nature of experience required (for example, by reference to engagement for a particular period of time (within the United Kingdom or elsewhere)).

(2) The Scottish Ministers may by regulations modify the list in paragraph 6(4).
SCHEDULE 6
(introduced by section 29)

POSITIONS IN UPPER TRIBUNAL

PART 1

TEMPORARY VICE-PRESIDENT

Temporary Vice-President

1 If there is a temporary shortage in the number of Vice-Presidents of the Upper Tribunal or a temporary vacancy in the position, the President of Tribunals may assign a person as a Temporary Vice-President of a particular division during the shortage or vacancy.

2 (1) A person is eligible for assignment as a Temporary Vice-President only if the person is a legal member of the Upper Tribunal (other than a Vice-President).

(2) The functions of a Vice-President are exercisable by a Temporary Vice-President.

(3) Except where the context otherwise requires, a reference in or under this Act to a Vice-President includes a Temporary Vice-President.

PART 2

ASSIGNMENT INTERNALLY

Assignment of and by the President of Tribunals

3 (1) The President of Tribunals has the function of assigning the members of the Upper Tribunal among the divisions (including re-assignment or ending assignment).

(2) The President of Tribunals is to assign those members among the divisions in accordance with paragraphs 4 to 7.

Assignment of Vice-Presidents etc.

4 (1) A Vice-President of a division—

(a) is to be assigned to that division,

(b) may be assigned to act—

(i) in the case of a judicial member assigned as a Vice-President, as a judicial member also in another division,

(ii) in any other case, as a legal member also in another division.

(2) Assignment under sub-paragraph (1)(b) is to act otherwise than as a Vice-President of the other division.

(3) Assignment under sub-paragraph (1)(b) requires—

(a) the concurrence of the Vice-President of the other division, and

(b) the agreement of the member concerned.

5 (1) This paragraph applies in relation to a legal member by reason of being a Chamber President in the First-tier Tribunal.

(2) Each member to whom this paragraph applies may be assigned to—
(a) one or more of the divisions, and
(b) different divisions at different times.

(3) Any such member may be assigned to a particular division only with—
(a) the concurrence of its Vice-President,
(b) the agreement of the member concerned.

(4) The assignment of any such member to a particular division may be ended only with the concurrence of its Vice-President.

Assignment of other members

6 (1) This paragraph applies in relation to an ordinary member or legal member by virtue of—
(a) appointment as such, or
(b) transfer-in as such.

(2) Each member to whom this paragraph applies—
(a) is to be assigned to at least one of the divisions,
(b) may be assigned to different divisions at different times.

(3) Any such member may be assigned to a particular division only with—
(a) the concurrence of its Vice-President, and
(b) the agreement of the member concerned.

(4) The assignment of any such member to a particular division may be ended only with the concurrence of its Vice-President.

(5) This paragraph does not apply to a legal member to whom paragraph 4 or 5 relates.

Assignment of judicial members etc.

7 (1) A judicial member is to be assigned to at least one of the divisions.

(2) An extra judge who is authorised to act as mentioned in section 17(5) is to be assigned to at least one of the divisions.

(3) A judicial member or such an extra judge—
(a) may be assigned to different divisions at different times,
(b) may be assigned to a particular division only with—
(i) the concurrence of its Vice-President, and
(ii) the agreement of the assignee concerned.

(4) The assignment of a judicial member to a particular division may be ended only with the concurrence of its Vice-President.

(5) Concurrence under sub-paragraph (3)(b)(i) or (4) is not required in relation to the assignment of the Lord President or the President of Tribunals.

(6) This paragraph does not apply to a judicial member to whom paragraph 4 relates.
SCHEDULE 7
(introduced by section 32)

CONDITIONS OF MEMBERSHIP ETC.

Application of schedule

1 (1) This schedule applies in relation to the positions of ordinary member and legal member of the Scottish Tribunals (but not the position of judicial member of the Tribunals).

(2) The references in this schedule to—

(a) a position in the Scottish Tribunals, or
(b) a member of the Scottish Tribunals,

are to be read accordingly.

Initial period of office

2 (1) A person who is appointed to a position in the Scottish Tribunals holds the position for the period of 5 years beginning with the date of the appointment.

(2) A person who is transferred-in to a position in the Scottish Tribunals holds the position for the period mentioned in sub-paragraph (3).

(3) That period is the first-ending of either—

(a) the period for which the member would have continued to hold office in the listed tribunal in question if the transfer to the Scottish Tribunals had not taken place, or

(b) the period of 5 years beginning with the date on which the person becomes a member of the Scottish Tribunals.

3 (1) Sub-paragraph (2) applies where a person—

(a) holds a position in the Scottish Tribunals, and

(b) is appointed to hold another such position in addition.

(2) The person holds the position mentioned in sub-paragraph (1)(b) for a period which expires on the same date as does the period for which the person holds the position mentioned in sub-paragraph (1)(a).

Automatic reappointment

4 (1) Unless sub-paragraph (3) applies, a member of the Scottish Tribunals is to be reappointed as such at the end of each period for which the position is held.

(2) Reappointment under sub-paragraph (1) is to the position for the period of 5 years beginning with the date of the reappointment.

(3) This sub-paragraph applies if—

(a) the member has declined to be reappointed,

(b) the member is ineligible for reappointment,

(c) the President of Tribunals has recommended to the Scottish Ministers that the member should not be reappointed.

(4) In sub-paragraph (1), the reference to the period for which a position is held is to—
(a) the period for which the position is held in accordance with paragraph 2 or 3, or
(b) any further period for which the position is held by virtue of reappointment in accordance with sub-paragraphs (1) and (2).

(5) A reference in this paragraph to reappointment includes appointment at the end of a period for which a position is held by virtue of paragraph 2(2) as well as reappointment at the end of a period for which a position is held by virtue of any relevant appointment (or reappointment).

For the purpose of paragraph 4(3)(b), a member is ineligible for reappointment only if the member would not be eligible for appointment to the position in accordance with the relevant provisions of schedule 3 or (as the case may be) schedule 5 were the member being appointed to the position for the first time.

For the purpose of paragraph 4(3)(c), the President of Tribunals may recommend to the Scottish Ministers that a member should not be reappointed only if satisfied that—

(a) the member has failed to comply with—
   (i) any of the relevant terms and conditions of membership, or
   (ii) any other requirement imposed on the member by or under this Act, or
(b) the Tribunal concerned no longer requires—
   (i) a member with the qualifications, experience and training of that member, or
   (ii) the same number of members for the efficient disposal of its business.

Reappointment by virtue of paragraph 4 is not subject to any process of appointment arising in relation to a position within the Scottish Tribunals by virtue of section 10(2A) of the Judiciary and Courts (Scotland) Act 2008.

Extension in senior post

7A(1) Sub-paragraphs (2) and (3) apply where—
(a) a legal member of the First-tier Tribunal becomes by appointment a Chamber President or Deputy Chamber President in the Tribunal, or
(b) a legal member of the Upper Tribunal becomes by appointment a Vice-President of the Tribunal.

(2) Despite paragraphs 2 and 3, the period for which the legal member holds that position does not end until the expiry of 5 years beginning with the date of the appointment mentioned in the relevant limb of sub-paragraph (1).

(3) In all other respects also, the appointment mentioned in the relevant limb of sub-paragraph (1) supersedes the earlier appointment or (as the case may be) transfer-in as a legal member.

Termination of appointment

8 A member of the Scottish Tribunals ceases to hold the position of member of the Tribunals if the member—
(a) becomes disqualified from holding the position (see paragraph ),
(b) is removed from the position under paragraph 23 of schedule 8,
(c) resigns the position by giving notice in writing to the Lord President, or
(d) vacates the position in accordance with section 26 of the Judicial Pensions and Retirement Act 1993.

9 (1) Nothing in paragraphs 2 to 7A affects the operation of section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 in relation to a member of the Scottish Tribunals.
(2) Accordingly, such a member’s continuation in office by virtue of that section may have the effect of extending the period for which the member is appointed or (as the case may be) reappointed by virtue of those paragraphs.

**Required oaths**

10 13 (1) Each of the members of the Scottish Tribunals must take the required oaths in accordance with this paragraph.

(2) A Vice-President of the Upper Tribunal is to take them in the presence of the President of Tribunals.

(3) A Chamber President in the First-tier Tribunal is to take them in the presence of the President of Tribunals.

(4) A Deputy Chamber President in the First-tier Tribunal is to take them in the presence of either the President of Tribunals or a Chamber President in the First-tier Tribunal.

(5) An ordinary or legal member of the Upper Tribunal by virtue of appointment or transfer-in as such is to take them in the presence of either the President of Tribunals or a Vice-President of the Upper Tribunal.

(6) An ordinary or legal member of the First-tier Tribunal by virtue of appointment or transfer-in as such is to take them in the presence of either the President of Tribunals or a Chamber President in the First-tier Tribunal.

(7) If a member of the Scottish Tribunals has previously taken the required oaths in the circumstances mentioned in sub-paragraph (8), the previous taking of the oaths counts as if it were the taking of them in accordance with this paragraph.

(8) The circumstances are—
(a) in the case of a member who is transferred-in as such, in connection with the office from which the person is transferred-in,
(b) in the case of a member whose position changes within the Scottish Tribunals, in connection with appointment or transfer-in to the previous position.

(9) In this paragraph, “the required oaths” means the oath of allegiance and the judicial oath as set out in the Promissory Oaths Act 1868.

**Pensions etc.**

13A(1) The Scottish Ministers may make arrangements as to—

(a) the payment of pensions, allowances and gratuities to or in respect of the members, or former members, of the Scottish Tribunals,
(b) contributions or other payments towards provision for such pensions, allowances and gratuities.

(2) Under sub-paragraph (1), such arrangements may (in particular)—
(a) include provision relating to payment of compensation for loss of office,
(b) make different provision for different types of member, different positions or other different purposes.

Other conditions

14 (1) Other than as provided for elsewhere in this Act or under it, the Scottish Ministers may determine the terms and conditions on which the members of the Scottish Tribunals hold their positions.

(2) Under sub-paragraph (1), a determination may (in particular)—
   (a) include provision for sums to be payable by way of remuneration, allowances and expenses,
   (b) make different provision for different types of member, different positions or other different purposes.

SCHEDULE 8
(introduced by section 33)

CONDUCT AND FITNESS ETC.

PART 1

CONDUCT AND DISCIPLINE

Application of Part

1 (1) This schedule Part applies in relation to the ordinary members and legal members of the Scottish Tribunals (but not the judicial members of the Tribunals).

(2) The references in this schedule Part to a member of the Scottish Tribunals are to be read accordingly.

Conduct Rules

2 The Lord President is responsible for making and maintaining appropriate arrangements for the things for which Rules under paragraph 3(1) may make provision.

3 (1) The Lord President may make Rules for the purposes of or in connection with—
   (a) the investigation and determination of any matter concerning the conduct of members of the Scottish Tribunals,
   (b) the review of any such determination.

(2) Rules under sub-paragraph (1) may include provision about (in particular)—
   (a) the circumstances in which an investigation must or may be undertaken,
   (b) the making of a complaint by any person,
   (c) the steps that are to be taken by a person making a complaint before it is to be investigated,
   (d) the carrying out of an investigation (including any steps to be taken by the member whom it concerns or by any other person),
(c) the time limits for taking steps and procedures for extending such time limits,

(f) the person by whom an investigation (or part of an investigation) is to be carried out,

(g) the matters to be determined by the person carrying out an investigation (or part of an investigation), the Lord President or any other person,

(h) the making of recommendations by the person carrying out an investigation (or part of one),

(i) the obtaining of information relating to a complaint,

(j) the keeping of a record of an investigation,

(k) the confidentiality of communications or proceedings,

(l) the publication of information or its supply to any person.

4 Rules under paragraph 3(1)—

(a) may make different provision for different purposes,

(b) are to be published in such manner as the Lord President may determine.

Reprimand etc.

5 (1) Where the condition in sub-paragraph (2) is met in relation to a member of the Scottish Tribunals, the Lord President may, for disciplinary purposes, give the member—

(a) formal advice,

(b) a formal warning, or

(c) a reprimand.

(2) The condition is that—

(a) an investigation has been carried out with respect to the member in accordance with Rules made under paragraph 3(1), and

(b) the person carrying out the investigation has recommended that the Lord President exercise the power conferred by sub-paragraph (1).

6 Paragraph 5 does not limit what the Lord President may do—

(a) informally,

(b) for other purposes, or

(c) where no advice or warning is given in a particular case.

Suspension of membership

7 (1) If the Lord President considers that it is necessary for the purpose of maintaining public confidence in the Scottish Tribunals, the Lord President may suspend a member of the Tribunals.

(2) Suspension under sub-paragraph (1)—

(a) is for such period as the Lord President may specify when suspending the member,
(b) may be revoked or extended subsequently by the Lord President.

8 Suspense under paragraph 7(1) does not affect any remuneration payable to, or in respect of, the member concerned during the period of suspension.

Judicial Complaints Reviewer

9 (1) The Judicial Complaints Reviewer has the functions mentioned in sub-paragraph (2).

(2) The functions are—

(a) on the request of a relevant person, to review the handling of an investigation carried out in accordance with Rules made under paragraph 3(1) to consider whether the investigation has been carried out in accordance with the Rules,

(b) in any case where the Reviewer considers that such an investigation has not been carried out in accordance with such Rules, to refer the case to the Lord President,

(c) as directed by the Scottish Ministers, to prepare and publish reports on the investigations carried out in pursuance of such Rules, and

(d) to make written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of members of the Scottish Tribunals.

(3) The Lord President is to have regard to any written representations made under sub-paragraph (2)(d).

(4) In sub-paragraph (2)(a), “relevant person” means—

(a) person whose complaint led to the carrying out of the investigation, or

(b) member of the Scottish Tribunals with respect to whom the investigation has been carried out.

10 (1) Sub-paragraph (2) applies where a case is referred to the Lord President by virtue of paragraph 9(2)(b).

(2) The Lord President may—

(a) vary or revoke wholly or partly the determination made in the case to which the investigation relates,

(b) cause a fresh investigation to be carried out,

(c) confirm the determination in the case, or

(d) deal with the referral in such other way as the Lord President considers appropriate.

PART 2

FITNESS AND REMOVAL

Application of Part

11 (1) This schedule Part applies in relation to the ordinary members and legal members of the Scottish Tribunals (but not the judicial members of the Tribunals).
The references in this schedule Part to a member of or position in the Scottish Tribunals are to be read accordingly.

In this schedule Part, the references to unfitness to hold the position of member of the Scottish Tribunals are to unfitness by reason of inability, neglect of duty or misbehaviour.

**Constitution and procedure**

13 (1) The First Minister must constitute a fitness assessment tribunal when requested to do so by the Lord President.

(2) The First Minister may constitute a fitness assessment tribunal—

(a) in such other circumstances as the First Minister thinks fit, and

(b) following consultation with the Lord President.

(3) The function of a fitness assessment tribunal is to investigate and report on whether a member of the Scottish Tribunals is unfit to hold the position of member of the Tribunals.

14 The Court of Session may by act of sederunt make provision as to the procedure to be followed in proceedings at a fitness assessment tribunal.

**Composition and remuneration**

15 (1) A fitness assessment tribunal is to consist of—

(a) one person who is, or has been—

(i) a judge of the Court of Session (except a temporary judge), or

(ii) a sheriff (except a part-time sheriff),

(b) one person who is—

(i) where the member under investigation is an ordinary member, another ordinary member, or

(ii) where the member under investigation is a legal member, another legal member, and

(c) one person who does not fall (and has never fallen) within a category of person who may be a member of the tribunal by virtue of sub-paragraph (a) or (b).

(2) The selection of persons to be members of the tribunal is to be made by the First Minister with the agreement of the Lord President.

16 (1) The Scottish Ministers—

(a) must pay such expenses as they consider are reasonably required to be incurred to enable a fitness assessment tribunal to carry out its functions,

(b) may pay such remuneration to, and expenses of, any member of such a tribunal as they think fit.

(2) Sub-paragraph (1)(b) does not apply in relation to such a member if the member is a sheriff or a judge of the Court of Session.
Proceedings before tribunal

17 (1) A fitness assessment tribunal may require any person—
   (a) to attend its proceedings for the purpose of giving evidence,
   (b) to produce documents in the person’s custody or under the person’s control.

(2) A person on whom such a requirement is imposed is not obliged to answer any question or produce any document which the person would be entitled to refuse to answer or produce in a court of law in Scotland.

18 (1) Sub-paragraph (2) applies where a person on whom a requirement has been imposed under paragraph 17(1)—

   (a) refuses or fails, without reasonable excuse—
      (i) to comply with the requirement,
      (ii) while attending the tribunal proceedings to give evidence, to answer any question,

   (b) deliberately alters, conceals or destroys any document which the person is required to produce.

(2) The Court of Session may, on an application made to it by the tribunal—

   (a) make such order for enforcing compliance or otherwise as it thinks fit, or
   (b) deal with the matter as if it were a contempt of the Court.

Suspension during investigation

19 (1) Sub-paragraph (2) applies if the Lord President requests the First Minister to constitute a fitness assessment tribunal to investigate whether a member of the Scottish Tribunals is unfit to hold the position of member of the Tribunals.

(2) The Lord President may suspend the member from the position at any time before the tribunal submits its report as required by paragraph 22(2).

(3) Suspension under sub-paragraph (2) lasts until (whichever is earlier)—

   (a) the Lord President revokes it, or
   (b) the report is laid as required by paragraph 22(3).

20 (1) Sub-paragraph (2) applies if a fitness assessment tribunal—

   (a) recommends that a member of the Scottish Tribunals who is subject to its investigation should be suspended from the position as member of the Tribunals,
   (b) does so in writing at any time before the tribunal submits its report as required by paragraph 22(2).

(2) The First Minister may suspend the member from the position at any time before laying the report as required by paragraph 22(3).

(3) Suspension under sub-paragraph (2) lasts until (whichever is earlier)—

   (a) the First Minister revokes it, or
   (b) the report is laid as required by paragraph 22(3).
21 Suspension under paragraph 19(2) or 20(2) does not affect any remuneration payable to, or in respect of, the member concerned during the period of suspension.

Report and removal

22 (1) A report by a fitness assessment tribunal must—

(a) be in writing, and

(b) contain reasons for its conclusions.

(2) As soon as reasonably practicable after it is completed, such a report must be submitted by the tribunal to—

(a) the First Minister, and

(b) the Lord President.

(3) The First Minister must lay before the Scottish Parliament each report submitted under sub-paragraph (2).

23 (1) If the relevant condition is met, the First Minister may remove a member of the Scottish Tribunals from the position of member of the Tribunals.

(2) The relevant condition is that a fitness assessment tribunal has submitted a report under paragraph 22(2) concluding that the member is unfit to hold the position of member of the Scottish Tribunals.

SCHEDULE 9
(introduced by section 75)

PART 1
TRANSITIONAL AND CONSEQUENTIAL

Exercise of functions

1 (1) Sub-paragraph (2) applies for the purposes of—

(a) the exercise of functions by a member of the Scottish Tribunals by virtue of this Act, and

(b) the operation of provisions in or under this Act to which such a member is subject.

(2) Except where the context otherwise requires, it is immaterial whether a person who is, or who is acting as, such a member is in place by virtue of appointment, assignment, transfer-in or other means under this Act.

Rules of listed tribunals

2 (1) Sub-paragraph (2) applies where some or all of the functions of a listed tribunal have been, or are to be, transferred by regulations under section 27(2).

(2) The Scottish Ministers may by regulations provide for the procedural rules of a listed tribunal that are in force immediately before the transfer to have effect for the purposes of either or both of the First-tier Tribunal and the Upper Tribunal.
(3) Regulations under sub-paragraph (2) may provide for the procedural rules to which the regulations relate to have such effect subject to such modifications as appear to the Scottish Ministers to be necessary or expedient with respect to the purposes mentioned in that sub-paragraph.

(4) In this paragraph—

“listed tribunal” is to be construed in accordance with Part 3 (see section 26(1)),
“procedural rules” means provision for the purposes of a listed tribunal (whether or not contained in an enactment and irrespective of whether called rules)—

(a) regulating the practice or procedure to be followed in proceedings at a listed tribunal, or

(b) otherwise applying in relation to the exercise by a listed tribunal of its functions.

(1) Regulations under paragraph 2(2) may—

(a) make different provision for different purposes,

(b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations under paragraph 2(2) are subject to the negative procedure.

Pre-SCJC rule-making

(1) Until the Scottish Civil Justice Council and the Court of Session are involved in the making of Tribunal Rules by virtue of the coming into force of paragraph 12(2) to (5)—

(a) section 62(3) and (4) is of no effect,

(b) instead of that section, sub-paragraph (2) applies for the purpose of making rules—

(i) regulating the practice and procedure to be followed in proceedings at the Scottish Tribunals, or

(ii) containing provision of other sorts appropriate with respect to the Scottish Tribunals (including in relation to the exercise by them of their functions).

(2) The function of making such rules is exercisable by the Scottish Ministers by setting them out in regulations.

(3) Before making regulations under sub-paragraph (2), the Scottish Ministers must consult—

(a) the President of Tribunals, and

(b) such other persons as they consider appropriate.

(1) Regulations under paragraph 4(2) may—

(a) modify rules having effect as mentioned in paragraph 2(2) (by virtue of regulations made under that paragraph),

(b) do anything that may be done by Tribunal Rules by virtue of Chapter 2 of Part 7 (including the making of different provision for different purposes).

(2) Regulations under paragraph 4(2) are subject to the negative procedure.
Adoption of inherited rules

6 (1) Sub-paragraph (2) applies to—

(a) rules having effect as mentioned in paragraph 2(2) (by virtue of regulations made under that paragraph),

(b) rules set out in regulations made by virtue of paragraph 4(2).

(2) Once the Scottish Civil Justice Council and the Court of Session are involved in the making of Tribunal Rules by virtue of the coming into force of paragraph 12(2) to (5)—

(a) all rules to which this sub-paragraph applies are to be regarded as if made as Tribunal Rules under Chapter 2 of Part 7,

(b) all such rules have effect accordingly (and may therefore be revoked, amended or remade by Tribunal Rules under Chapter 2 of Part 7).

Chambers and divisions

7 (1) For as long as it appears to the Scottish Ministers that the acquisition of functions by the First-Tier Tribunal for the time being is such that there is justification for not organising it into a number of chambers as required by section 19(1), regulations under section 19(2)—

(a) need not be made, or

(b) may provide for the Tribunal to have a single chamber only.

(2) For as long as it appears to the Scottish Ministers that the acquisition of functions by the Upper Tribunal for the time being is such that there is justification for not organising it into a number of divisions as required by section 22(1), regulations under section 22(2)—

(a) need not be made, or

(b) may provide for the Tribunal to have a single division only.

8 (1) Sections 19(1) and (2) and 22(1) and (2) are subject to paragraph 7(1) and (2) (until it appears to the Scottish Ministers that the relevant justification no longer exists).

(2) Any provision of this Act (apart from this schedule Part) that mentions a chamber or more than one chamber of the First-tier Tribunal is, for as long as by virtue of paragraph 7(1) the First-tier Tribunal has no chambers or a single chamber, to be read with such modifications as are necessary for the effective operation of the provision while the Tribunal is not organised into a number of chambers.

(3) Any provision of this Act (apart from this schedule Part) that mentions a division or more than one division of the Upper Tribunal is, for as long as by virtue of paragraph 7(2) the Upper Tribunal has no divisions or a single division, to be read with such modifications as are necessary for the effective operation of the provision while the Tribunal is not organised into a number of divisions.

9 For the purposes of paragraph 7(1) and (2), the Scottish Ministers must have regard to the following matters so far as relevant for the time being—

(a) the different subject-matters falling within the jurisdiction of the First-tier Tribunal or (as the case may be) the Upper Tribunal, and
(b) any other factors relevant in relation to the exercise of the functions of the First-tier Tribunal or (as the case may be) the Upper Tribunal.

Making appointments

9A(1) Until all of the functions of a listed tribunal have been transferred to the Scottish Tribunals by regulations under section 27(2)—

(a) paragraph 3(1)(d) of schedule 1 to the 2008 Act has effect in relation to that tribunal as if the reference in that paragraph to a person holding the position of Chamber President or of Vice-President within the Scottish Tribunals includes the President of, or the holder of an equivalent office in, any listed tribunal,

(b) paragraph 16A(2) and (3) of schedule 1 to the 2008 Act has effect in relation to that tribunal as if the references in that paragraph to a member of the Scottish Tribunals includes a member of, or a person who exercises functions as, any listed tribunal.

(2) In this paragraph—

“the 2008 Act” means the Judiciary and Courts (Scotland) Act 2008 (see paragraph 11(4)(b) and (5)),

“listed tribunal” is to be construed in accordance with Part 3 (see section 26(1)).

PART 2
CONSEQUENTIAL MODIFICATIONS

Judicial Pensions and Retirement Act 1993

10 (1) The Judicial Pensions and Retirement Act 1993 is amended as follows.

(2) In section 26 (retirement date for certain judicial officers)—

(a) in subsection (12), in the definition of “the appropriate person”, after paragraph (e) there is inserted—

“(f) the Scottish Ministers, in the case of a relevant member of the Scottish Tribunals;”,

(b) after subsection (15) there is inserted—

“(16) The Scottish Ministers must consult the President of Tribunals before exercising any function arising by virtue of subsection (12)(f) in relation to a relevant member of the Scottish Tribunals.

(17) In paragraph (f) of the definition of “the appropriate person” in subsection (12), and in subsection (16), a reference to a relevant member of the Scottish Tribunals is to an ordinary or legal member of either or both of the Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

(3) In section 30 (interpretation), after subsection (1) there is inserted—

“(1A) For the purposes of section 26(12)(f), (16) and (17), and the related entry in Schedule 5, “Scottish Tribunals” or “President of Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013.”.
In Schedule 5 (relevant offices in relation to retirement provisions), at the end there is inserted—

“Ordinary or legal member of either or both of the Scottish Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

The Judiciary and Courts (Scotland) Act 2008

11 (1) The Judiciary and Courts (Scotland) Act 2008 is amended as follows.

(2) In section 10 (judicial offices within the Board’s remit)—

(a) in subsection (1), the word “and” immediately preceding paragraph (g) is repealed,

(b) before paragraph (g) of that subsection there is inserted—

“(fa) the positions within the Scottish Tribunals mentioned in subsection (2A), and”,

(c) after subsection (2) there is inserted—

“(2A) The positions within the Scottish Tribunals are—

(a) Vice-President of the Upper Tribunal, if to be appointed under section 25(1) of the Tribunals (Scotland) Act 2013,

(b) Chamber President in the First-tier Tribunal, if to be appointed under section 21(1) of that Act,

(c) Deputy Chamber President in the First-tier Tribunal, if to be appointed under the relevant provisions of schedule 4 to that Act,

(d) ordinary member or legal member of the First-tier Tribunal or the Upper Tribunal, if to be appointed under the relevant provisions of schedule 3 or (as the case may be) schedule 5 to that Act.”.

(3) In section 30 (Judicial Complaints Reviewer), in subsection (5), after paragraph (h) there is inserted—

“(i) an ordinary or legal member of either or both of the Scottish Tribunals by virtue of section 14 or 15 of the Tribunals (Scotland) Act 2013.”.

(4) In paragraph 3 of schedule 1—

(a) in sub-paragraph (1), the word “and” immediately preceding paragraph (c) is repealed,

(b) after paragraph (c) of sub-paragraph (1) there is inserted—

“, and

(d) one person holding the position of Chamber President or of Vice-President within the Scottish Tribunals.”,

(c) after sub-paragraph (5) there is inserted—

“(6) For the purposes of sub-paragraph (1)(d)—

“Scottish Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013,
“Chamber President” means Chamber President in the First-tier Tribunal as referred to in that Act and “Vice-President” means Vice-President of the Upper Tribunal as referred to in that Act.”.

(5) After paragraph 16 of schedule 1 there is inserted—

“Proceedings relating to the Scottish Tribunals

16A(1) Sub-paragraph (2) applies where the Board is exercising any function under this Act in connection with a position mentioned in section 10(2A).

(2) At least one member of the Scottish Tribunals is to take part in any proceedings relating to the function (whether or not also a member of the Board).

(3) It is for the President of Tribunals to select a member of the Scottish Tribunals to take part as mentioned in sub-paragraph (2).

(4) Before making a selection under sub-paragraph (3), the President of Tribunals must consult the Chairing Member.

(5) Sub-paragraph (6) applies where a person taking part as mentioned in sub-paragraph (2) is not a member of the Board.

(6) The person is to be treated as if a member of the Board for the purposes of—

(a) sections 11 to 15 and 17, and

(b) paragraphs 5, 12 and 13 of this schedule.

(7) The Board may not make a determination under paragraph 15 which is inconsistent with this paragraph.

(8) In this paragraph, “President of Tribunals” is to be construed in accordance with the Tribunals (Scotland) Act 2013 and the references to a member of the Scottish Tribunals are to be construed in accordance with section 12(3) of that Act.”.

Scottish Civil Justice Council and Criminal Legal Assistance Act 2013

12 (1) The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 is amended as follows.

(2) In subsection (1) of section 2 (functions of the Council)—

(a) after paragraph (b) there is inserted—

“(ba) to review the practice and procedure followed in proceedings in the Scottish Tribunals,”,

(b) in paragraph (c)—

(i) the words “draft civil procedure rules” become sub-paragraph (i),

(ii) after that sub-paragraph (as so numbered) there is inserted—

“(ii) draft tribunal procedure rules.”.

(3) In subsection (3) of section 2, after paragraph (c) there is inserted—
“(ca) practice and procedure should, where appropriate, be similar in both of
the Scottish Tribunals (and in different chambers or divisions within
them),”.

(4) After subsection (6) of section 2 there is inserted—

“(7) For the purposes of this Part, “draft tribunal procedure rules” are draft rules
prepared with a view to the making by the Court of Session by act of sederunt
of Tribunal Rules with respect to the Scottish Tribunals.”.

(5) In section 4 (Court of Session to consider rules)—

(a) in subsection (1), after the words “draft civil procedure rules” there is inserted “or
draft tribunal procedure rules”,

(b) in subsection (2), after the words “draft civil procedure rules” there is inserted “or
draft tribunal procedure rules”.

(6) In section 6 (composition of the Council), in subsection (1)—

(a) for the word “20” there is substituted “22”,

(b) after paragraph (a) there is inserted—

“(aa) the President of Tribunals,”,

(c) after paragraph (e) there is inserted—

“(ea) from the membership of the Scottish Tribunals, 1 Chamber President or
1 Vice-President (“Tribunal representative member”),”.

(7) In section 8 (tenure)—

(a) in subsection (1), after the words “Lord President,” there is inserted “the President
of Tribunals,”,

(b) after subsection (3) there is inserted—

“(3A) A Tribunal representative member holds office for a period of 3 years unless,
prior to the expiry of that period, the Lord President replaces the representative
with another Tribunal representative member or requires the member to leave
office.”.

(8) The title of section 13 becomes “Committees generally”.

(9) After section 13 there is inserted—

“Tribunals committee

(1) The Council must establish a particular committee under section 13(1) in
connection with the exercise by it of the functions arising by virtue of section
2(1)(ba) and (c)(ii).

(2) The committee is to be chaired by the President of Tribunals or the Tribunal
representative member.

(3) The other members of the committee are to be selected by the President of
Tribunals.

(4) In selecting those members of the committee, the President of Tribunals is to
have particular regard to the need to ensure that its membership includes
persons with knowledge of how the Scottish Tribunals exercise their functions.
(5) The Council may not make a determination under section 12(3)(b) which is inconsistent with subsections (2) to (4).”.

(10) In section 16 (interpretation of Part 1)—
(a) the existing text becomes subsection (1),
(b) in that subsection (as so numbered), after the entry relating to draft civil procedure rules there is inserted—

“draft tribunal procedure rules” has the meaning given in section 2(7),”,
(c) after that subsection (as so numbered) there is inserted—

“(2) In this Part—

“Scottish Tribunals”, “President of Tribunals” and “Tribunal Rules” are to be construed in accordance with the Tribunals (Scotland) Act 2013,

“Chamber President” means Chamber President in the First-tier Tribunal as referred to in that Act and “Vice-President” means Vice-President of the Upper Tribunal as referred to in that Act (with “chamber” and “division” in relation to the Scottish Tribunals to be construed in accordance with that Act).”.

SCHEDULE 10
(introduced by section 76)

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Tribunals (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to establish the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland; and for connected purposes.

Introduced by: Kenny MacAskill
On: 8 May 2013
Bill type: Government Bill