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 chair 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 into 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