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 is 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 the 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 of 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,

(iii) Title Conditions – applications to discharge, vary, renew or preserve, or to
determine certain questions as to validity/enforceability: Title Conditions (Scotland)

(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