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-legal 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.

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2 August 2013