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

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:

\[\text{A body which resolves disputes between citizen and state and between private parties by making binding decisions according to law, does so by a process of adjudication which is specialised, relatively informal and less adversarial as}\]

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\(^2\) 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).

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

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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 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. 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: The Society further notes that the Justice Committee has requested comment on the first three and the fifth of those objectives set out on page 5 in paragraph 1.7.

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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

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5 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, 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.’

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.\(^\text{10}\)

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\(^\text{13}\) (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\(^\text{14}\) 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\(^\text{15}\) 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.\textsuperscript{16} Certain sections of the bill are subject to the affirmative procedure. This includes the chamber structure in the First-tier Tribunal.\textsuperscript{17} 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.\textsuperscript{18} 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.

\textsuperscript{16} Section(s) 10 - 11
\textsuperscript{17} Section 19(2)
\textsuperscript{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 26(2)(a)
\textsuperscript{23} Section 35(1)
\textsuperscript{24} 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.\(^{27}\)

**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\(^{28}\) 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\(^{29}\) without the consent, or against the will, of the patient\(^{30}\). 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’. The tribunal would be ‘user-friendly’ and ‘would sit on an ad-hoc basis as and when appeals arose’. 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. SCAP’s procedures are governed by the Scottish Charity Appeals Panel Rules 2006, 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.

**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, 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, retain the possibility of challenging the decisions of the regulator without professional

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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.

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.

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’. 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

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39 Section 64.
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