The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

# JUSTICE COMMITTEE

Tuesday 4 February 2014

Session 4

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## JUSTICE COMMITTEE
**5th Meeting 2014, Session 4**

**CONVENER**

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

**DEPUTY CONVENER**

*Elaine Murray (Dumfriesshire) (Lab)

**COMMITTEE MEMBERS**

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)
Graeme Pearson (South Scotland) (Lab) (Committee Substitute)

**CLERK TO THE COMMITTEE**

Irene Fleming

**LOCATION**

Committee Room 1

# Scottish Parliament

## Justice Committee

*Tuesday 4 February 2014*

[The Convener *opened the meeting at 09:30*]

## Subordinate Legislation

### Proceeds of Crime Act 2002 (Disclosure of Information to and by Lord Advocate and Scottish Ministers) Amendment Order 2014 [Draft]

**The Convener (Christine Grahame):** I welcome everyone to the fifth meeting of the Justice Committee in 2014. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when they are switched to silent.

Apologies have been received from John Pentland. Graeme Pearson is here as his substitute.

Agenda item 1 is consideration of subordinate legislation. We will consider an affirmative instrument: the draft—not the daft—Proceeds of Crime Act 2002 (Disclosure of Information to and by Lord Advocate and Scottish Ministers) Amendment Order 2014. The instrument enables the Crown Office and Procurator Fiscal Service and the civil recovery unit to disclose information to the Law Society of Scotland in appropriate cases, and it supports the council of the Law Society in effectively discharging its functions as a supervisory authority under the Money Laundering Regulations 2007.

I welcome to the meeting the Minister for Community Safety and Legal Affairs, Roseanna Cunningham, and two Scottish Government officials. Alastair Hamilton is a policy officer in the organised crime unit, and Carla McCloy-Stevens is a lawyer in the directorate for legal services. Good morning to you all.

The minister will give evidence in advance of the debate on the draft order, starting with an opening statement.

**The Minister for Community Safety and Legal Affairs (Roseanna Cunningham):** Yes, convener. It might be helpful to make a brief statement.

I do not expect the order to be particularly controversial. Obviously, tackling serious organised crime is a top priority for this Scottish Government, as it would be for any Scottish Government. The order is aimed at strengthening the proceeds of crime legislation in Scotland.

There have been a few cases in which a proceeds of crime investigation has revealed information concerning the conduct of a particular solicitor that, although not criminal, could amount to professional misconduct. However, the Proceeds of Crime Act 2002 does not currently permit that information to be brought to the attention of the Law Society of Scotland, which is, of course, the regulatory professional body for solicitors. The order is intended to rectify that.

The Proceeds of Crime Act 2002 regulates the purposes for which the Lord Advocate and the Scottish ministers may disclose information that has been obtained in connection with their functions under the act. Those purposes generally relate to the exercise of certain public functions. In effect, the order extends those purposes to include the exercise of two additional public functions: the regulatory functions of the council of the Law Society of Scotland, as defined by sections 3F and 3G of the Solicitors (Scotland) Act 1980, and the functions of the Law Society of Scotland as a supervisory authority under the Money Laundering Regulations 2007.

That approach will enable the Lord Advocate and the Scottish ministers to share with the Law Society of Scotland any information that concerns alleged professional misconduct or non-compliance by a solicitor with the Money Laundering Regulations 2007. As a consequence, that will help the Law of Society of Scotland in discharging its functions. As the regulator or supervisory authority concerned, it will have the opportunity to investigate any such matter and decide whether disciplinary action is required.

Accordingly, the order both protects the consumers of legal services and provides a further means of disrupting the operation of organised crime groups in Scotland. It has therefore been welcomed by the Law Society of Scotland as well as by the Crown Office and Procurator Fiscal Service and the civil recovery unit, which exercise functions under the Proceeds of Crime Act 2002 on behalf of the Lord Advocate and the Scottish ministers.

Obviously, if members have any questions, I will do my best to answer them.

**The Convener:** Thank you very much. You have pre-empted me. Do members have any questions?

**John Finnie (Highlands and Islands) (Ind):** Minister, does the order have any retrospective application? I presume that something gave rise to the concerns that brought it about.

**Roseanna Cunningham:** The order will not change the law retrospectively. It switches on a function of disclosing information for specific purposes from the date of commencement. The small number of previous cases that would have been caught by the order—about 10 in total—will not be caught retrospectively.

**The Convener:** As there are no more questions, we move to the formal debate on the motion to approve the instrument. I invite the minister to move motion S4M-08881.

*Motion moved,*

That the Justice Committee recommends that the Proceeds of Crime Act 2002 (Disclosure of Information to and by Lord Advocate and Scottish Ministers) Amendment Order 2014 [draft] be approved.—[*Roseanna Cunningham*.]

*Motion agreed to.*

**The Convener:** As members are aware, the committee is required to report on all affirmative instruments. Are members content to delegate to me the authority to sign off the report?

**Members** *indicated agreement.*

# Tribunals (Scotland) Bill: Stage 2

09:36

**The Convener:** The next item is stage 2 proceedings on the Tribunals (Scotland) Bill. I think that we can probably get all the way through it today—I am advised that it does not appear to be that controversial. It will be good to get this one out of the in-tray, before we move on to consider our draft stage 1 report on the Criminal Justice (Scotland) Bill.

The Minister for Community Safety and Legal Affairs is staying with us for this item. I welcome her officials to the meeting, but I remind members that the minister's officials are here in a strictly supportive capacity and cannot speak during proceedings or be questioned by members. Any questions will be directed to the minister. She is on her tod.

Members should have a copy of the bill, the marshalled list and the groupings for today's consideration.

### Before section 1

**The Convener:** Amendment 1, in the name of Elaine Murray, is grouped with amendments 29 and 30.

**Elaine Murray (Dumfriesshire) (Lab):** In several recommendations in its stage 1 report, this committee reiterated its view that the particular nature and characteristics of tribunals should be preserved and that courtification should be avoided.

Recommendation 10 of our report suggests that there should be a provision in the bill that sets out what a tribunal is. Amendment 1 gives a clear and unambiguous definition of the term "tribunal" as a body that adjudicates on matters of administrative justice. According to the Law Society of Scotland, there is no such definition in Scottish legislation, and including a definition in the bill will avoid possible current and future uncertainty in light of the proposals to merge the tribunals service and the Scottish Court Service.

The Tribunals, Courts and Enforcement Act 2007 contains such a definition. In conjunction with amendments 8 and 68—I thought that my amendments would have been grouped together but they have not been—amendment 1 would promote parity with United Kingdom legislation and ensure a consistent experience for users of all tribunals in Scotland, whether their governance is reserved or devolved.

The amendments would also provide a framework for defining the principles for any new tribunals that could be created in Scotland in

future, and they would guarantee a standard to which all tribunals should operate.

I note from the purpose and effect notes that she very helpfully circulated last night that the minister feels that there are difficulties with defining exactly what a tribunal is and that amendment 1 might not be flexible enough to allow further tribunals to be added in future. I am a little puzzled by that because the definition of the function of a tribunal in the amendment is only

"to adjudicate on a matter concerning administrative justice between—

(a) a person and the state, or

(b) different persons".

The amendment goes on to say that a tribunal

"is independent of both the executive and legislature".

It also contains a definition of administrative justice. I am not sure why that would prevent any further new tribunals from being added in future.

I move amendment 1.

**The Convener:** I am sure that the minister will clarify that point, as I now call her to speak to amendment 29 and the other amendments in the group.

**Roseanna Cunningham:** In its stage 1 report, the committee called for the characteristics of tribunals to be protected in the bill and sought an amendment setting out general principles similar to those that are included in the Tribunals, Courts and Enforcement Act 2007.

The proposals to define what a tribunal is and to include a statement of tribunals' principles became, in my view, a bit confused during discussions on the bill. They are separate ideas, and the distinctive characteristics of tribunals are best protected by including a duty to consider principles rather than by including a difficult and limiting definition of what a tribunal is.

I see great value in including a statement of principle on the face of the bill, as committee members will see when we come to consider amendment 11 in group 3. However, I am not convinced of the merits of attempting a definition of what a tribunal is or does in the way proposed in amendment 1.

The tribunal system is very complicated. Tribunals come in many different forms and deal with many different subjects, and they are varied in their nature, specialisms and individual ethos. Including in the bill a defined statement on what a tribunal is could have the effect of narrowing the field and making things difficult when considering the type of tribunal that would be suitable for inclusion in the new structure. The bill reflects that point at section 26, which already explains—as far as is possible or appropriate—what is meant by "tribunal".

The difficulty of attempting to include the type of definition that Elaine Murray proposes is clear from the text of her amendment 1, in which tribunals are defined in terms of "administrative justice" and administrative justice is defined in relation to the work of tribunals. That is really a circular argument.

In addition, the first-tier tribunal and the upper tribunal as created by the bill are defined primarily with reference to the functions that are conferred on them by and under the bill. In a sense, they are self-defining, and no more needs to be said for it to be understandable what sort of bodies they are and what they do.

Furthermore, the description of a tribunal in section 26, along with the detailed specification of particular tribunals in schedule 1, is sufficient for the bill's purposes. The bill is not lacking detail in the definition of a tribunal, and I do not understand what actual gap in meaning and effect Elaine Murray is trying to fill with her amendment.

I do not consider that anything would be gained by including the definition that Elaine Murray suggests. Indeed, there would be risks to the future workability of the new tribunals system. The important protection of the essential elements in the new tribunals structure would be better achieved by having members accept my amendment 11 when we reach it.

Amendments 29 and 30 are minor drafting adjustments. Amendment 29 tidies up the numbering in the list at the end of section 26, and amendment 30 corrects the cross-reference in schedule 1 to an act relating to parking adjudicators.

I therefore invite Elaine Murray to withdraw amendment 1.

**The Convener:** Before Elaine Murray responds, does any other member wish to come in?

**Margaret Mitchell (Central Scotland) (Con):** Notwithstanding what the minister has just said, I believe that the definition of "tribunal" would be a welcome addition to the bill and would help to clarify a tribunal's characteristics. I do not see that it would interfere with the minister's proposed amendment 11, which I also consider to be a welcome addition.

**Roseanna Cunningham:** I remind members that, when we put definitions in the bill, we are by definition unintentionally—or intentionally—excluding the possibility that we might in future want to include things outside that definition. That is why we do not often find such precise definitions in legislation.

**Elaine Murray:** I am interested in what the minister says, but I am still not certain about what sort of tribunal would fall outwith the definition. I cannot imagine any tribunal that would not be covered by it. I press amendment 1.

**The Convener:** I am blocked up and cannot hear anything, so members will need to shout. The question is, that amendment 1 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

*Amendment 1 disagreed to.*

**The Convener:** I warn members that my deputy convener and I are struggling through shared head colds—it is a coalition of the cold—so they will have to shout.

### Section 1—Establishment of the Tribunals

09:45

**The Convener:** Amendment 6, in the name of the minister, is grouped with amendments 7, 31 and 32.

**Roseanna Cunningham:** The amendments in this group make provisions in relation to functions being conferred directly on the Scottish tribunals by another act.

When a new tribunal jurisdiction is created, it might directly confer functions on the first-tier tribunal, rather than create a new tribunal and then transfer its functions into the Scottish tribunals structure under section 27. Therefore, the bill needs to provide the same power to make the necessary legislative changes and do the required updating, as are available when jurisdictions are transferred in.

Amendment 31 allows the Scottish ministers to amend and update the bill to accommodate the new functions that are being directly conferred. That is in line with powers that already exist in section 27.

Amendment 32 allows the Scottish ministers to redistribute functions among the tribunals once they have been directly conferred. Again, that is in line with existing powers in section 27. The amendment gives flexibility when decisions are being taken about new tribunal jurisdictions that might be considered in future, and it takes away the need for new jurisdictions to be created in their own right before they can be transferred into the Scottish tribunals.

Amendments 6 and 7 pave the way for that approach.

I move amendment 6.

*Amendment 6 agreed to.*

*Amendment 7 moved—[Roseanna Cunningham]—and agreed to.*

*Section 1, as amended, agreed to.*

### Section 2—Head of the Tribunals

**The Convener:** Amendment 8, in the name of Elaine Murray, is grouped with amendments 11 and 68.

**Elaine Murray:** Amendment 8 seeks to place a duty on the Lord President in carrying out his or her functions to adhere to the principles for Scottish tribunals: the need for them to be accessible; the need for proceedings to be fair and handled quickly and efficiently; and the need for tribunal members to be experts in the subjects on which they decide. It also requires the Lord President to develop innovative methods of dispute resolution that are such that they may be brought before a tribunal.

The duties that are placed on the Lord President as head of the Scottish tribunals and the president of the tribunals would ensure that the long-standing principles of tribunals continued to be upheld. The expert status of tribunal members is fundamental to achieving those principles, as it would enable them to identify and focus on the key issues to be resolved.

Amendment 11, in the name of the minister, defines some of the principles of tribunals. As amendment 1 was not agreed to, I will certainly support amendment 11.

Obviously, there are some overlaps between amendments 8 and 11, although amendment 8 is a little bit wider. It includes the need for members of tribunals to be experts in the subject matter of the cases on which they decide and the need for the Lord President to develop innovative methods of dispute resolution. However, I do not know whether those two amendments would stand together as they are, so I might withdraw amendment 8 in the passage of amendment 11

and see whether we can add to amendment 11 at stage 3.

Amendment 68 would place a duty on the Court of Session in making tribunal rules to have regard to the need for those rules to be accessible, for proceedings to be fair and handled quickly and efficiently and for members of the tribunal to be experts in the subject matter on which they decide. The distinctive nature and character of tribunals must be taken into account and protected by the author of procedural rules. Those rules must ensure that users can use the system as easily as possible and that they remain at the heart of the system.

I notice that amendment 11, which covers much of the same ground, does not include reference to the Court of Session. I would be interested to hear from the minister why the Court of Session is not included.

I move amendment 8.

**Roseanna Cunningham:** Amendment 8, in the name of Elaine Murray, would place a duty on the Lord President to adhere to certain principles. I have reflected on what the committee and stakeholders said at stage 1 about the inclusion of a guiding principle in the bill. Government amendment 11 sets out the guiding principle that will ensure that the user is placed at the centre of any proceedings before the tribunals under the bill. That principle is that tribunals' proceedings should be accessible to the user, fair to the parties and handled quickly and effectively.

Amendment 11 ensures that the Scottish ministers, the Lord President and the president of the tribunals must have regard to the principle when undertaking their respective high-level roles. I believe that the amendment addresses the concerns of stakeholders and the committee, which were expressed at stage 1, by ensuring that the distinctive character of tribunals is respected by those who have responsibility for them. Members of the Scottish tribunals will be appointed on the basis of jurisdictionally specific criteria. There is no question but that they will be experts in the subject matter of, or the law to be applied in, cases in which they decide matters. There is no extra benefit in placing a specific duty on the Lord President to ensure that.

On that subject, I refer Elaine Murray to sections 34 to 37, which provide for the selection of tribunal members on a case-by-case basis. In addition, section 30 is designed to ensure that tribunal members are assigned in a way that ensures that the best use is made of particular expertise in relevant areas of the law. Those sections, taken with the appointment criteria in schedules 3 and 5, will ensure that the right people are in the right place within the new tribunal system.

Tribunal rules will be made by the Court of Session but will be drafted by the Scottish Civil Justice Council. The SCJC is already required to have regard to principles such as that

"the civil justice system should be fair, accessible and efficient,"

and that

"rules relating to practice and procedures should be as clear and easy to understand as possible".

Those principles appear in the Scottish Civil Justice Council and Civil Legal Assistance Act 2013.

The bill will amend the 2013 act to require the SCJC to form a committee, whose members will include the president of the tribunals and members with knowledge of how the tribunals exercise their functions, to draft tribunal procedure rules. It is not clear how amendment 68 would sit with the duties that the bill will impose on the SCJC and the principles that the SCJC must already observe. The result would be confusing, and I consider that my amendment should be preferred.

In my view, amendment 11 strikes the correct balance between overarching principles and the day-to-day operation of the tribunals. I therefore ask Elaine Murray to withdraw amendment 8 and not to move amendment 68.

**Roderick Campbell (North East Fife) (SNP):** I have just a small point to make. The Tribunals, Courts and Enforcement Act 2007, which is a UK act, states:

"The Lord Chancellor is under a duty to ensure that there is an efficient and effective system".

The language in amendments 8 and 11 alternates, as one uses the word "efficiently" and one uses the word "effectively". That is just a small point.

I have heard what the minister says and I largely agree with it. I have particular concerns about paragraph (d) in amendment 8 because it uses slightly woolly language. What is "develop innovative methods" supposed to mean? I am a big fan of dispute resolution and other ways of settling disputes, but I am not sure that having that wording in the bill is the way forward.

**The Convener:** I agree about the language of "innovative methods", but I would have liked some comment about mediation prior to tribunals. I agree with the minister's position on paragraph (c) in amendment 8—it is taken as read that that does not need to be in the bill. However, I have some sympathy for paragraph (d), which might be expressed in more acceptable language, as there is an issue about encouraging people to resolve matters before they go head to head.

**Roseanna Cunningham:** There is a bigger issue, across more than one piece of legislation,

about the need for mediation and I am not sure that introducing it as a paragraph in an amendment in this way would achieve what we are looking for across, I suspect, a wide area of Government.

**Elaine Murray:** I will not press amendment 8. Apart from anything else, there would be duplication and a certain amount of conflict if the two amendments were agreed to. I will deal with amendment 68 when we come to it.

*Amendment 8, by agreement, withdrawn.*

*Section 2 agreed to.*

*Sections 3 to 9 agreed to.*

### Section 10—Authority under regulations

**The Convener:** Amendment 9, in the name of the minister, is grouped with amendments 10, 49, 50 to 53, 73 to 76 and 83.

**Roseanna Cunningham:** These amendments provide more clarity and flexibility around decision making in the Scottish tribunals.

Amendment 52 sets out the arrangements for voting on decisions when they are made by two or more members. The Scottish ministers will be able to make provision in regulations for individual tribunals. For example, regulations might provide for the chairing member of the tribunal to have the decisive vote in the event of a tie. Amendment 53 makes provision allowing tribunal rules to determine who the chairing member of a particular tribunal should be.

The amendments simply provide another tool for jurisdictions to use if they require it, although some jurisdictions will never require it. That is not a decision for us now. The amendments are enabling ones that will help the Scottish ministers and the particular tribunal jurisdictions to create the decision-making framework that they need. That all fits with sections 34 to 37, as they anticipate tribunals sitting constituted by single members or two or more members as needs require.

Amendments 74 and 75 allow tribunal rules to make provision for multiple cases to be conjoined or heard at the same time, if that is appropriate. Those amendments, too, are enabling, for the sake of efficiency in the system. Amendment 76 expands on the type of provision that tribunal rules can make in respect of the decisions of tribunals. It provides more detail and more clarity for the sake of the completeness of the story.

Amendments 9, 10, 49, 50, 51, 73 and 83 make minor adjustments and changes that are necessary to implement the other amendments.

I move amendment 9.

*Amendment 9 agreed to.*

*Section 10, as amended, agreed to.*

### Section 11—Consultation on regulations

*Amendment 10 moved—[Roseanna Cunningham]—and agreed to.*

*Section 11, as amended, agreed to.*

### After section 11

*Amendment 11 moved—[Roseanna Cunningham]—and agreed to.*

*Section 12 agreed to.*

### Section 13—Capacity of members

**The Convener:** Amendment 12, in the name of the minister, is grouped with amendments 13 to 15.

**Roseanna Cunningham:** The amendments make changes to section 13, to make it absolutely clear that all tribunal members have judicial status and capacity by virtue of holding their positions as members. Amendment 15 replaces the current provision, which restricts their judicial capacity and status to the exercise of their decision-making functions. The result is that the capacity of members is broadened to cover all aspects of their tribunal work. Amendments 12 to 14 make minor adjustments.

In preparing the amendments, I have taken account of representations made to me by interested stakeholders.

I move amendment 12.

*Amendment 12 agreed to.*

*Amendments 13 to 15 moved—[Roseanna Cunningham]—and agreed to.*

*Section 13, as amended, agreed to.*

*Sections 14 and 15 agreed to.*

### Section 16—Sheriffs and judges

**The Convener:** Amendment 92, in the name of Margaret Mitchell, is grouped with amendments 16, 93, 17, 94, 95, 18, 96 and 97.

**Margaret Mitchell:** Amendments 92 to 97 all cover the appointment of judicial members. These are merely probing amendments so that we can hear the minister's views on the following points.

During stage 1, a number of witnesses raised concern about what was referred to as the judicialisation of tribunals. Tribunals are, by nature, generally less formal and less adversarial than courts and are, in the main, forums in which justice can be determined without the need for lawyers and judges.

Section 16 allows all sheriffs and part-time sheriffs, judges and temporary judges to be appointed as judicial members of tribunals. Although the appointment of judicial members is appropriate to allow tribunals to have access to important expertise, a number of witnesses expressed concern that the provision is drafted too widely.

10:00

Section 16 in particular states that all members of the judiciary are automatically eligible to act as judicial members purely by virtue of holding judicial office. Given the committee's view that the particular nature and characteristics of tribunals must be protected, I ask the minister to comment on the committee's recommendation in its stage 1 report that the Government consider whether section 16 should be amended to remove the automatic entitlement of members of the judiciary to be appointed as judicial members.

The amendments in my name seek to address that concern by making it clear that, although sheriffs and judges are eligible to become judicial members, they must be actively appointed by the president of the tribunals after consultation with the Lord President. Amendments 92 and 93 seek to remove the word "authorised" in section 16.

More significantly, amendment 94 seeks to provide for appointment by the president of the tribunals only when he or she is satisfied that a sheriff or judge is "suitably qualified" and he or she would also be required to identify a placement or position and the need for a judicial member on a particular tribunal. The term "suitably qualified" is taken from section 2 of the Lands Tribunal Act 1949 as amended. I would be grateful if the minister could clarify the instances in which judicial members would be appointed and respond to the suggestion that the automatic entitlement for appointments in section 16 be removed. In addition, I ask the minister to indicate whether the Government has considered any other safeguards to avoid the judicialisation of tribunals.

Do I move my amendment now, convener?

**The Convener:** You can probe away all you like, but you have to move amendment 92.

**Margaret Mitchell:** I move amendment 92.

**The Convener:** Excellent. I call the minister to speak to amendment 16 and the other amendments in the group.

**Roseanna Cunningham:** Margaret Mitchell's amendments seek to change the language that is used in sections 16 and 18 so that, instead of referring to the authorisation of judges to act as judicial members of the first-tier or upper tribunal, they refer to the appointment of judges to do so. Moreover, the amendments seek to impose an additional duty on the president of the tribunals to be satisfied that the judge concerned is "suitably qualified" to act as such.

I agree that at first blush these amendments seem reasonably anodyne and unobjectionable. However, they are fairly problematic and do not sit comfortably with other provisions in the bill. On the change of the term "authorised" to "appointed", in the judicial and tribunal context an appointment to a position normally refers to the process of appointment following an exercise by the Judicial Appointments Board for Scotland. The judges to whom sections 16 and 18 apply will already have been appointed as judges and will already be eligible to be judicial members of the Scottish tribunals under section 16(1) of the bill.

The term "appointment" is used for a specific process in the bill, such as that set out in sections 21 or 25 and, in my view, the term "authorisation", which is already used in section 17, better describes what will actually happen under these sections. Section 16 works perfectly well as it stands and there is no need to change its approach. Calling this process an "appointment" at best is confusing and at worst dangerously casts doubt on the effect of the surrounding provisions and the nature of the process.

Secondly, the requirement that the president of the tribunals be satisfied that each judge is "suitably qualified" to act as such is misconceived and fails to take into account the bill's other protections, which ensure that only appropriate and qualified members sit in each jurisdiction operating in each chamber of the tribunal. These sections relate to the authorisation of already appointed judges to act as judicial members of a tribunal, not as legal or ordinary members. Judicial members will sit in tribunals only where the composition order for that jurisdiction requires such a member to sit. For example, certain types of mental health tribunal are always chaired by a sheriff.

Under section 30, the Lord President must publish an assignment policy that will control how members, including judicial members of the tribunal, are assigned to sit in cases in each tribunal jurisdiction.

To take the first-tier tribunal as an example by reference to schedule 4, judicial members are assigned to a particular chamber by the president of the tribunals, with the consent of the relevant chamber president. Once assigned, they are selected to sit in individual cases by that chamber president under section 34. In addition, assignment by virtue of section 30 is designed to ensure that tribunal members are assigned in a way that ensures that best use is made of particular expertise in relevant areas of the law.

On all of this, the equivalent is true under the corresponding provisions for the upper tribunal. This detailed and considered scheme represents, in my view, a much more focused and rigorous way of ensuring that tribunals have as their members only those people who are most qualified to sit in any particular case.

In addition, I point out something obvious: namely, that sheriffs and judges are eminently qualified to exercise their judicial functions anywhere, whether in our courts or in our tribunals. It is not clear how Margaret Mitchell's amendments would interact with this scheme and I consider that they are not necessary or desirable.

Amendments 16 and 17 in this group make minor adjustments to the wording of section 16 for the sake of readability but involve no change in meaning or effect.

I invite Margaret Mitchell to withdraw amendment 92.

**Margaret Mitchell:** Those comments were helpful and will be good to reflect on in detail for stage 3. I will not be moving amendment 92.

**The Convener:** You have moved amendment 92. You are asking to withdraw it.

**Margaret Mitchell:** I ask permission to withdraw amendment 92.

**The Convener:** That is what we are doing; it is not that I am cleverer than you.

*Amendment 92, by agreement, withdrawn.*

*Amendment 16 moved—[Roseanna Cunningham]—and agreed to.*

*Amendment 93 not moved.*

*Amendment 17 moved—[Roseanna Cunningham]—and agreed to.*

*Amendments 94 and 95 not moved.*

*Amendment 18 moved—[Roseanna Cunningham]—and agreed to.*

*Section 16, as amended, agreed to.*

### Section 17—Authorisation of others

**The Convener:** Amendment 19 is grouped with amendments 20 to 28.

**Roseanna Cunningham:** Amendment 19 will add the chairman of the Scottish Land Court, judges and sheriffs—excluding part-time sheriffs—to the list of formal office holders who can be authorised to sit in the upper tribunal. That is in order to provide consistency with the list of judges who are ordinarily eligible to sit in the upper tribunal. Their inclusion will allow further flexibility in the disposal of business in the upper tribunal, should it be required, and is consistent with the eligibility of former judicial office holders to sit within the court system.

Amendment 24 will ensure that former office holders cannot be authorised to sit if they have reached the age of 75, or if they were removed from office, or are currently subject to fitness for office proceedings.

Amendments 20 to 23 and amendment 25 will allow Scottish ministers to authorise non-Scottish judges to sit in the upper tribunal and to make arrangements with other administrations, as necessary. Amendment 25 will also require those judges to take the judicial oath if they have not done so previously. The amendments will make the provision for use of non-Scottish judges more flexible. They will also allow for use of court or tribunal judiciary from any territory outwith Scotland to sit in the upper tribunal, with the appropriate authorisations. Amendments 26 to 28 will make minor changes that are necessary to implement the other amendments.

I move amendment 19.

*Amendment 19 agreed to.*

*Amendments 20 to 28 moved—[Roseanna Cunningham]—and agreed to.*

*Section 17, as amended, agreed to.*

### Section 18—Judicial membership

*Amendments 96 and 97 not moved.*

*Section 18 agreed to.*

### Section 19—Chambers in the Tribunal

**The Convener:** Amendment 2, in the name of Elaine Murray, is grouped with amendments 3 to 5.

**Elaine Murray:** In its stage 1 report, the committee welcomed the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the first-tier tribunal, but was sympathetic to the Mental Health Tribunal for Scotland's concerns that that commitment appears, from the policy memorandum, to be temporary. The committee recommended that amendments be lodged that would preserve the distinctiveness of the chamber.

The Mental Health Tribunal for Scotland was created under the Mental Health (Care and Treatment) (Scotland) Act 2003, with the intentions of removing jurisdiction from the generic courts in Scotland and of ensuring expertise. The MHTS has significant powers that other tribunals do not possess, including the power to deprive someone of their liberty, to impose treatment on a person and to impose conditions on how or where they may live.

The bill's current provisions will not sufficiently protect and preserve the level of specialisation of the MHTS. The amendments in the group would do so by setting out, in amendments 2 and 3, that the MHTS must be placed within a single chamber, and by stating, in amendments 4 and 5, that it may not be transferred into the first-tier tribunal until provision has been made for a single chamber to adjudicate exclusively on mental health.

I notice that, in the notes that the minister has provided, there is an objection to the amendments on the basis that they would not allow other tribunals to be transferred into the same chamber as the Mental Health Tribunal, but that is the amendments' very purpose. The idea is that the MHTS should remain in a chamber on its own; if we start transferring other tribunals in, we will dilute that commitment.

I move amendment 2.

**The Convener:** I have to say that I am sympathetic to Elaine Murray's amendments, but let us hear what the minister has to say.

**Graeme Pearson (South Scotland) (Lab):** I support the amendments in the group. People who are engaged in that area of tribunal work gave strong evidence to the committee to the effect that the relationships, culture and special knowledge that are exercised in the Mental Health Tribunal are so distinctive that the tribunal deserves a section of its own, and that it is important to maintain the boundaries of that section, for fear that in future years—whether by design or by accident—the way business is conducted is changed to such an extent that it would leave people who approach the tribunal at a disadvantage, for all the reasons that Elaine Murray explained. I hope that the minister will be sympathetic to the concerns that were expressed in the evidence.

**Roseanna Cunningham:** Elaine Murray's amendments seek to ensure that the bill will provide for a single chamber exclusively for the Mental Health Tribunal. As I explained in my response to the committee following stage 1, nothing—not one thing—that we are doing in the bill will affect the work of the Mental Health Tribunal for Scotland, the specialism of its members or the way in which the important decisions of that tribunal are made. There still seems to be a fundamental confusion in people's minds between the concept of a tribunal and a chamber.

Most significantly, the Mental Health Tribunal will still be governed by the Mental Health (Care and Treatment) Scotland Act 2003—the legislation that set up the Mental Health Tribunal and governs how it works—and it will still adhere to the Millan principles. The intention is that it will be transferred into the new tribunals structure intact, with its jurisdiction unchanged.

As the committee is aware, I have made a commitment to the Mental Health Tribunal's being in a chamber of its own in the first instance. The bill is clear that only similar subject matters can be located together in a chamber. I refer Elaine Murray to section 19, which will require that to be paramount when deciding how to organise the first-tier tribunal into chambers. That requirement is inescapable.

10:15

We should not entirely discount the possibility that a new tribunal jurisdiction could be created that would most naturally sit alongside mental health work in a chamber, and would benefit from shared chamber leadership. Even if that were to happen, section 19 will still ensure that collocation of something with mental health will be possible only if it is done in accordance with the requirement in section 19.

In any event, any creation of, or change to, the chamber structure can happen only following agreement to an affirmative order by Parliament and—where appropriate—consultation of stakeholders. Two or more jurisdictions being located in the same chamber will in no way amalgamate them or dilute their specialisms. The only thing that they will share is a chamber president. Members will continue to be appointed by subject-matter-specific criteria, and will be appointed following the recommendation of the Judicial Appointments Board for Scotland.

At section 30 there is a duty on the Lord President to publish an assignment policy, as I indicated in the debate on a previous group of amendments. Section 30(3) specifies that the policy must make use

"of the knowledge and experience of the members of the Scottish Tribunals".

Section 35 will allow ministers by regulation to determine composition orders that show what types of members can hear what cases. The composition order can specify what relevant criteria must be met by the ordinary member. We must also not forget that it is the chamber president who will pick the individuals to hear cases in their chamber.

The bill has many safeguards that will ensure that the only people who will be able to hear cases in the mental health jurisdiction will be people who have the skill, experience and knowledge to do so. We have engaged with stakeholders on the issue, and the presidents of the Mental Health Tribunal for Scotland and the Mental Welfare Commission are content with the safeguards in the bill. They

are also content with the commitment that I made that the Mental Health Tribunal for Scotland will be in a chamber of its own in the first instance.

Elaine Murray's amendments 2 to 5 do not offer any additional protection to the mental health jurisdiction that is not already adequately addressed by the safeguards in the bill. They would, however, restrict flexibility and the ability of a new tribunal structure to deal with new jurisdictions or approaches. I therefore ask Elaine Murray to seek to withdraw amendment 2.

**Elaine Murray:** I am still slightly confused by the argument about new tribunals. I would have thought that any new tribunal would be created by primary legislation; therefore, if stakeholders considered a shared tribunal to be necessary, surely there would be the opportunity to amend this legislation at that point.

**The Convener:** I will let the minister respond to that.

**Roseanna Cunningham:** It would be tempting to speculate where and in what area of wider mental health new tribunals might be set up. I do not think that that would be helpful, but we have to encompass the possibility that such new tribunals will be set up. If it does happen, it would be nonsensical not to allow for such a tribunal to be in the same chamber. Do not forget: if you were to assign the chamber to only the Mental Health Tribunal, you would create a problem if another mental health related tribunal were to be set up, for whatever reason.

**Elaine Murray:** My point is that any other tribunal will be set up through primary legislation and that if it became necessary to change this bill, surely it could be done through that subsequent bill.

**The Convener:** You are both still disagreeing, but you have aired your debate enough. I take it that you are pressing amendment 2.

**Elaine Murray:** Yes.

**The Convener:** The question is, that amendment 2 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)

**Against**

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

*Amendment 2 disagreed to.*

*Amendment 3 not moved.*

*Section 19 agreed to.*

*Sections 20 to 25 agreed to.*

### Section 26—Listed tribunals

*Amendment 29 moved—[Roseanna Cunningham]—and agreed to.*

*Section 26, as amended, agreed to.*

### Schedule 1—Listed tribunals

*Amendment 30 moved—[Roseanna Cunningham]—and agreed to.*

*Schedule 1, as amended, agreed to.*

*Sections 27 and 28 agreed to.*

*Schedule 2 agreed to.*

### After section 28

*Amendments 31 and 32 moved—[Roseanna Cunningham]—and agreed to.*

*Section 29 agreed to.*

### Schedule 3—Appointment to First-tier Tribunal

**The Convener:** Amendment 33, in the name of the minister, is grouped with amendments 34 to 45 and 86 to 88.

**Roseanna Cunningham:** Amendments 33 and 34 will amend schedules 3 and 5 as they relate to the appointment of lawyers as legal members of the new tribunals. I have reflected on the recommendation in the committee's stage 1 report that only people who are qualified in Scots law conduct business in devolved tribunals. The amendments will therefore remove the automatic right for a solicitor or barrister from England, Wales or Northern Ireland to be appointed as an elected member of the Scottish tribunals.

Amendment 36 addresses the concerns that were expressed at stage 1 by the committee and the Lord President that the bill should allow the possibility of permanent appointment to the Scottish tribunals. That will be achieved by allowing Scottish ministers, by regulations, to affect the operation of schedule 7, which contains the provisions that will automatically reappoint tribunal members to five-year terms of appointment.

Scottish ministers, after consulting the president of the tribunals, may make regulations in respect of a particular appointment or position in the Scottish tribunals. For instance, the power could be used to provide that the position of chamber president of a particular chamber of the first-tier tribunal, or of vice-president of a particular division of the upper tribunal, could become a permanent appointment. That will future proof the bill and provide a more flexible scheme of appointments for jurisdictions that might transfer in, in the future.

Amendment 37 confirms the provision that where a legal member obtains a new position—for example, being appointed as a chamber president—their five-year appointment term will begin from the day on which they take up that new office. That will ensure that they will have a full five-year term in their most recently appointed office.

Amendment 86 is a transitional provision that will increase the pool of people who will be eligible to sit on the Judicial Appointments Board for Scotland and take part in recruitment exercises. That is to allow for when there is only one tribunal, or a small number of tribunals, in the new structure. As the bill is currently drafted, when the first tribunal is transferred in to the new structure, only the president of that tribunal would be eligible to sit on the Judicial Appointments Board. Amendment 86 will allow people who hold leadership positions in the tribunals that are listed in schedule 1 of the bill also to participate in the work of the Judicial Appointments Board prior to their tribunal being transferred in.

Amendments 35, 38 to 45, 87 and 88 will make the necessary adjustments, rewordings and rearrangements to implement the substantive changes, or have other minor drafting purposes.

I move amendment 33.

**Roderick Campbell:** I thank the minister for taking note of the committee's and the Lord President's comments on the need to provide flexibility for permanent appointments.

**The Convener:** You just future proofed your career by thanking the Lord President, Roddy.

**Margaret Mitchell:** I take it that the original reason for including English barristers as legal members of the tribunals was to ensure that wider expertise would be available. By taking on board the committee's recommendation that only people who are qualified in Scots law should be eligible, thereby removing English barristers, will we be removing the possibility of using the expertise of such barristers, who may also be qualified in Scots law?

**Roseanna Cunningham:** If the person is qualified in Scots law, they will be qualified in terms of the bill. Such people will have to be members of the Faculty of Advocates or the Law Society of Scotland. I am aware that there are people who are qualified in both jurisdictions; it is not common, but it does happen. I might be right in saying that a member of the committee is qualified in both jurisdictions.

**Roderick Campbell:** No—only historically.

**Roseanna Cunningham:** I am sorry; I thought that you were qualified in both jurisdictions.

**Roderick Campbell:** I was once upon a time, minister, but I am authorised to practise only in Scotland at present.

**Roseanna Cunningham:** Some people qualify in both jurisdictions, or in more than one jurisdiction—the provision applies to jurisdictions other than the English jurisdiction.

**The Convener:** That was quite a sweet little exchange in a rather dull process.

**Elaine Murray:** I know that the UK Government is not keen on this at the moment, but in the event of the reserved tribunals transferring across into our jurisdiction, would there be a problem with excluding barristers?

**Roseanna Cunningham:** That is why I have put it on the record that if there is a need to reintroduce provisions in the future, we will do so. However, the bill is directed only at the devolved tribunals.

**Christine Grahame:** Do you wish to wind up, or have you answered all the questions?

**Roseanna Cunningham:** I think that we have done that.

*Amendment 33 agreed to.*

*Schedule 3, as amended, agreed to.*

*Schedule 4 agreed to.*

**Schedule 5—Appointment to Upper Tribunal**

*Amendment 34 moved—[Roseanna Cunningham]—and agreed to.*

*Schedule 5, as amended, agreed to.*

*Schedule 6 agreed to.*

*Sections 30 and 31 agreed to.*

**Section 32—Conditions of membership etc**

*Amendments 35 and 36 moved—[Roseanna Cunningham]—and agreed to.*

*Section 32, as amended, agreed to.*

**Schedule 7—Conditions of membership etc**

*Amendments 37 to 45 moved—[Roseanna Cunningham]—and agreed to.*

*Schedule 7, as amended, agreed to.*

*Section 33 agreed to.*

**Schedule 8—Conduct and fitness etc**

**The Convener:** Amendment 46, in the name of the minister, is grouped with amendments 47 and 48.

**Roseanna Cunningham:** I will be brief. The Lord President raised concerns in his stage 1 written evidence about the possibility that a fitness assessment tribunal could be convened without a full-time judge. By removing the provision for part-time sheriffs, excluding temporary judges and making other changes, amendment 46 ensures that there will always be a full-time judicial member in the composition of a fitness assessment tribunal.

I move amendment 46.

*Amendment 46 agreed to.*

*Amendments 47 and 48 moved—[Roseanna Cunningham]—and agreed to.*

*Schedule 8, as amended, agreed to.*

**Section 34—Decisions in the Tribunal**

*Amendment 49 moved—[Roseanna Cunningham]—and agreed to.*

*Section 34, as amended, agreed to.*

*Section 35 agreed to.*

**Section 36—Decisions in the Tribunal**

*Amendments 50 and 51 moved—[Roseanna Cunningham]—and agreed to.*

*Section 36, as amended, agreed to.*

*Section 37 agreed to.*

**After section 37**

*Amendments 52 and 53 moved—[Roseanna Cunningham]—and agreed to.*

*Sections 38 to 44 agreed to.*

**Section 45—Procedure on second appeal**

10:30

**The Convener:** Amendment 54, in the name of the minister, is grouped with amendments 55 and 56.

**Roseanna Cunningham:** Amendments 54 and 55 are minor drafting adjustments. They align the language of the second appeals test exactly with other statutory examples of the test.

Amendment 56 deals with switching off appeal rights. The Delegated Powers and Law Reform Committee felt that section 48(2) allowed a choice of appeal routes, so we lodged amendment 56 to ensure that no choice of appeal routes can or would be created.

I move amendment 54.

*Amendment 54 agreed to.*

*Amendment 55 moved—[Roseanna Cunningham]—and agreed to.*

*Section 45, as amended, agreed to.*

*Sections 46 and 47 agreed to.*

**Section 48—Other appeal rights**

*Amendment 56 moved—[Roseanna Cunningham]—and agreed to.*

*Section 48, as amended, agreed to.*

*Sections 49 to 55 agreed to.*

**The Convener:** I sense that we are running out of steam. That was a very limp “agreed”. Try to be enthusiastic.

**Section 56—Venue for hearings**

**The Convener:** Amendment 57, in the name of the minister, is grouped with amendments 58 to 66, 69 to 72 and 85. Amendment 85 is pre-empted by amendment 99, which is in the group entitled “Rule-making: transitional arrangements”.

**Roseanna Cunningham:** Amendments 57 to 59 clarify that hearings can be held at any time and at any place in Scotland. They allow tribunal rules to determine when and where hearings take place; they also allow the determination of when and where hearings take place to be made by the president of the tribunals, under tribunal rules. The amendments better explain the role and function of tribunal rules and of the president of the tribunals as regards the issue.

Amendments 60 to 66 and 85 make minor adjustments, rearrangements and changes for the sake of overall sense and effect. For instance, amendments 63 to 66 rearrange the provisions on wasted expenses for improved readability.

Amendments 69 to 72 make some adjustments to section 63 concerning the way in which tribunal rules may deal with the functions of members of the Scottish tribunals. The amendments clarify that rules may also confer functions on, and deal with the functions of, the particular postholders that are listed in amendment 72. Amendment 71 clarifies

that that does not refer to the function of actually deciding any matter in a case before the first-tier or upper tribunal. Rather, it refers to the procedural or administrative functions of tribunal members and those in leadership posts.

I move amendment 57.

**Elaine Murray:** In the stage 1 debate, we touched on the issue of wasted expenses, but none of us was terribly sure what wasted expenses are—including yourself, I think. There seems to be no definition of wasted expenses. Will that be addressed at stage 3?

**Roseanna Cunningham:** I see one of my officials scribbling furiously. We may get some clarity shortly.

**The Convener:** I think that somebody will say that it means a pair of shoes that I should not have bought.

**Roseanna Cunningham:** I have received my note—this is transparent government; I hope that you are impressed.

Wasted expenses are awarded to express judicial disapproval of unnecessary steps in litigation.

I guess that it is one of those legal terms that do not mean, legally, what they might mean in ordinary English.

**The Convener:** Not shoes, then.

**Roseanna Cunningham:** There are a few similar expressions. Basically, it concerns judicial disapproval. It sounds almost like a punishment expense. I see my officials nodding, so that is what it is. I hope that that helps people to understand it better.

**The Convener:** Our resident advocate is about to speak.

**Roderick Campbell:** It is a purely English concept at the present time.

**The Convener:** Well, there we are.

**Roderick Campbell:** Section 59(4) provides that rules may prescribe a meaning for wasted expenses. The minister may wish to take that on board and define the term at some stage.

**The Convener:** You should be sitting over there with the officials. I am so sorry—I am offending the officials; I am getting looks from them.

We have exhausted the discussion on what wasted expenses are, but we have not wasted time talking about the topic.

*Amendment 57 agreed to.*

*Amendments 58 and 59 moved—[Roseanna Cunningham]—and agreed to.*

*Section 56, as amended, agreed to.*

**Section 57—Conduct of cases**

*Amendment 60 moved—[Roseanna Cunningham]—and agreed to.*

*Section 57, as amended, agreed to.*

*Section 58 agreed to.*

**Section 59—Award of expenses**

*Amendments 61 to 66 moved—[Roseanna Cunningham]—and agreed to.*

*Section 59, as amended, agreed to.*

*Sections 60 and 61 agreed to.*

**After section 61**

**The Convener:** Amendment 67, in the name of the minister, is grouped with amendment 84.

**Roseanna Cunningham:** Amendment 67 allows offences to be created in connection with tribunal proceedings, such as those of making false statements and concealing or destroying evidence. Where tribunal jurisdictions require such a provision, the Scottish ministers will be able to make it under the proposed new section. That is consistent with the equivalent provisions governing the Mental Health Tribunal for Scotland. The amendment also allows regulations to be made that specify the circumstances in which a person cannot be compelled to give or produce evidence.

Amendment 84 is consequential on amendment 67.

I move amendment 67.

*Amendment 67 agreed to.*

**Section 62—Tribunal Rules**

*Amendment 68 not moved—[Elaine Murray].*

*Section 62 agreed to.*

**Section 63—Exercise of functions**

*Amendment 69 to 72 moved—[Roseanna Cunningham]—and agreed to.*

*Section 63, as amended, agreed to.*

**Section 64—Extent of rule-making**

*Amendment 73 moved—[Roseanna Cunningham]—and agreed to.*

*Section 64, as amended, agreed to.*

**Section 65—Proceedings and steps**

*Amendment 74 moved—Roseanna Cunningham]—and agreed to.*

*Section 65, as amended, agreed to.*

**Section 66—Hearings in cases**

*Amendment 75 moved—[Roseanna Cunningham]—and agreed to.*

*Section 66, as amended, agreed to.*

**Section 67—Evidence and decisions**

*Amendment 76 moved—[Roseanna Cunningham]—and agreed to.*

*Section 67, as amended, agreed to.*

**Section 68—Practice directions**

**The Convener:** Amendment 77, in the name of the minister, is grouped with amendments 78 to 81.

**Roseanna Cunningham:** We were persuaded by the arguments made by stakeholders and in the evidence at stage 1 that practice directions should not issue guidance on the interpretation of the law. Amendment 77 removes that provision.

The Delegated Powers and Law Reform Committee recommended that there should be a statutory requirement for directions to be published. Amendment 79 requires the president of the tribunals to arrange for the publication of directions.

Amendments 78 to 81 rearrange the provisions of sections 68 and 69 as a consequence of those changes, in light of other amendment and for other minor purposes.

I move amendment 77.

**Roderick Campbell:** I thank the minister for listening to the considerable concerns about section 68(5), and I welcome its proposed removal.

*Amendment 77 agreed to.*

*Amendment 78 moved—[Roseanna Cunningham]—and agreed to.*

*Section 68, as amended, agreed to.*

**Section 69—Reconciling differences**

*Amendments 79 to 81 moved—[Roseanna Cunningham]—and agreed to.*

*Section 69, as amended, agreed to.*

**Section 70—Tribunal fees**

**The Convener:** Amendment 82, in the name of the minister, is in a group on its own.

**Roseanna Cunningham:** The committee recommended at stage 1 that there should be a requirement for consultation if there were any plans to introduce fees for tribunals where there were no fees previously. Members will remember that we discussed fees and noted that one tribunal had already been set up with fees being charged as part of the structure.

Amendment 82 places a duty on Scottish ministers to consult stakeholders with an interest in tribunals before making any regulations with regard to the introduction of fees. As I stated in my response to the committee's stage 1 report, the Scottish Government does not intend to use the provisions in section 70 to introduce new fees for tribunals.

I move amendment 82.

**Elaine Murray:** I welcome the amendment, given that there were concerns in particular about the scale of fees in some of the reserved tribunals, such as the employment tribunals. It is good to see a guarantee that consultation will take place if there are any such plans.

**The Convener:** We did our work at stage 1, and got a response.

*Amendment 82 agreed to.*

*Section 70, as amended, agreed to.*

*Sections 71 and 72 agreed to.*

**Section 73—Regulation-making**

*Amendments 83 and 84 moved—[Roseanna Cunningham]—and agreed to.*

*Section 73, as amended, agreed to.*

*Sections 74 and 75 agreed to.*

**Schedule 9—Transitional and consequential**

**The Convener:** Amendment 98, in the name of Margaret Mitchell, is grouped with amendment 99. If amendment 99 is agreed to, I cannot call amendment 85, which was previously debated in the group on tribunal rules, because of pre-emption.

**Margaret Mitchell:** Amendments 98 and 99 relate to the issue of tribunal independence. The bill currently allows Scottish ministers to draft procedural rules by virtue of paragraph 4 of schedule 9. The Scottish Government intends that that will be an interim arrangement until the newly created Scottish Civil Justice Council has the capacity to take over the responsibility for those rules.

The council will certainly have a very heavy workload in drafting new civil court procedural rules, and I understand and agree with the Government's intention to ensure that the rules are drafted as soon as possible. I also appreciate

that someone has to draft the rules for the newly created upper tribunal.

In response to the committee's stage 1 report, the ministers made the point that the Government currently has a limited role in writing some tribunal rules and that, under the new tribunal landscape, it will draft rules only following consultation. However, the committee heard at stage 1 that that arrangement was undesirable on constitutional grounds. The Faculty of Advocates argued that the Scottish ministers should have the same rights as other parties to proceedings before tribunals to comment on proposed rules, but that they should not have the power to write them. That is a very serious matter. In fact, decisions that are taken by the Scottish ministers and Scottish Government agencies can themselves be subject to tribunal consideration. That means that, as the interim power provision stands, the Scottish Government is effectively acting as linesman in a match in which it is participating.

10:45

The interim rule-making power gives ministers more power than they currently enjoy. That is because the rules have to be written for the upper tribunal, which will deal with cases that are more serious and therefore more politically sensitive. Furthermore, the rule-making power does not specify a time limit, meaning that the Scottish ministers could retain the power indefinitely. I do not consider that to be a satisfactory situation, because giving the power to ministers, even as an interim measure, breaches the important principle of separation of powers.

Additionally, there are potential problems for the future if an agreed party who has lost a tribunal hearing against the Government later learns that the rules were drafted by the Scottish ministers. I understand why the bill takes the approach that it does, given the fact that the Scottish Civil Justice Council has a huge task ahead of it, but the Government could and should ensure that the Scottish Civil Justice Council is appropriately resourced to take on the role from the start. A new committee of the Scottish Civil Justice Council will be created at some point down the line, so it should be created now.

Amendment 98 therefore seeks to replace the relevant provisions in paragraphs 4 and 5 of schedule 9 to ensure that rules that are currently in place are to be regarded as if they are new tribunal rules until and if those rules are amended.

I move amendment 98.

**Roderick Campbell:** I heard what Margaret Mitchell said and I have a great deal of sympathy with it. In constitutional terms, it is clearly not ideal at all, and a number of stakeholders gave evidence to that effect. On the other hand, the practicality is that we also heard evidence that there is no way that the Scottish Civil Justice Council could embark upon this venture at the moment.

Would it be possible for the minister to reflect before stage 3 on whether there ought to be some provision that any rules made by the Government in the short term, even after consultation, would be subject to a prompt review by the Scottish Civil Justice Council at some point so that it would not necessarily be allowed to carry on ad infinitum without being subject to a proper and full review?

**Roseanna Cunningham:** We always listen to suggestions, so we will take that on board and have a think about it. I need to restate that the transitional provision is what happens currently and it has been the case for all previous Governments and ministers, not just this Government. We are discussing the way that things have been done throughout the tribunal experience. As a result of the conversations that we have had about this legislation, we might now come to the view that that state of affairs should come to an end. That is what we have done, in effect. All that the bill does is ensure that the transition towards that end point is as seamless as it can be. It does not confer any new powers on ministers, regardless of who is in Government. It simply continues the existing powers that ministers have always been able to exercise, and it foresees that there will be an end point to that situation.

In his written evidence at stage 1, the Lord President supported the transitional arrangements for the making of tribunal rules by the Scottish ministers. Discussions with his judicial office indicated that the Lord President would like to concentrate on the significant task of rewriting the court rules before taking on the work of tribunals. The transitional arrangements are merely a continuation of the current practice. I would not wish to place an additional burden on the Lord President and the Scottish Civil Justice Council before they felt able to take on the new task. Neither the removal of the transitional period by amendment 99, nor the consequential change to the nature of rules during the transitional period by amendment 98 are therefore desirable.

I am satisfied that the detailed scheme in schedule 9 for transitional rule making is the best way forward. The transitional phase, during which rules are made by the Scottish ministers, has additional protection built in. Rules are subject to negative parliamentary procedure and a consultation requirement is imposed on the Scottish ministers.

I believe that that is a sufficient safeguard to ensure that any rules that the Scottish ministers make are suitable for application in the tribunals

system. I remind members that ministers make rules now and have done so for many decades. That procedure will continue, and in making rules, ministers will always take expert advice. This area of the bill is really about timing and not resources. We have committed to providing the resources when required by the Scottish Civil Justice Council and the Lord President. I therefore ask Margaret Mitchell to withdraw amendment 98.

**Margaret Mitchell:** I thank the minister for her comments, but I do not find them convincing. The fact that something has been done in a certain way in the past does not necessarily mean that it should continue to be done in that way. We are looking at a new set of circumstances, and the powers are greater because they relate to the upper tribunal, which has the potential to deal with serious and politically sensitive cases.

I do not believe that the minister addressed the problem that could arise if the Scottish Government wins a tribunal case to which it is subject and the person who loses it then discovers that it was the ministers who set the rules.

I fully understand that the new committee of the Scottish Civil Justice Council that will be created will have its hands full with civil procedural rules, and I understand that the Lord President will want to get on with that work. However, that does not prevent the council from being adequately resourced to allow it to deal with the interim rules in the meantime.

For all those reasons, I press amendment 98.

**The Convener:** The question is, that amendment 98 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Mitchell, Margaret (Central Scotland) (Con)

**Against**

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 1, Against 8, Abstentions 0.

*Amendment 98 disagreed to.*

**The Convener:** I remind members that, if amendment 99 is agreed to, I will be unable to call amendment 85.

*Amendment 99 moved—[Margaret Mitchell].*

**The Convener:** The question is, that amendment 99 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Mitchell, Margaret (Central Scotland) (Con)

**Against**

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
White, Sandra (Glasgow Kelvin) (SNP)

**The Convener:** The result of the division is: For 1, Against 8, Abstentions 0.

*Amendment 99 disagreed to.*

*Amendment 85 moved—[Roseanna Cunningham]—and agreed to.*

*Amendments 4 and 5 not moved.*

*Amendments 86 to 88 moved—[Roseanna Cunningham]—and agreed to.*

**The Convener:** Amendment 89, in the name of Elaine Murray, is grouped with amendments 90 and 91.

**Elaine Murray:** Citizens Advice Scotland, which, as we all know, specialises in taking people through the tribunals process, advises that, in Scotland, there has been a clear and statutory link between the oversight of tribunals and the making of procedural rules since 1957, but that that is broken by the bill. CAS has major concerns about the current arrangements and the gap between oversight and the making of rules. It points out that the functions of the Scottish Civil Justice Council are imbalanced with regard to the treatment of administrative and civil justice. The SCJC has much wider policy and oversight functions for civil justice and the scope of what it can achieve for tribunals is much narrower.

As the committee is aware, an interim committee on administrative justice and tribunals is to be established as an independent advisory committee for ministers, and ministers will exercise the function of making procedural rules. At some stage, that function will pass to the SCJC, but without the duties of oversight and development being defined. My amendments 89 to 91 seek to remedy that by giving the SCJC the same statutory functions for administrative justice as it holds for civil justice. Amendment 89 requires the SCJC

"to keep matters relating to the administrative justice system within the jurisdiction of the Scottish Tribunals under review".

Amendment 90 inserts a duty

"to provide advice and make recommendations to the Lord President on the development of, and changes to"

such matters. Amendment 91 requires the SCJC to provide advice on any such matter

"as may be requested by the Lord President."

I move amendment 89.

**Roderick Campbell:** I heard what Elaine Murray said. Obviously, I raised the issue in the stage 1 debate, and I have read the Citizens Advice Scotland briefing. I have considerable sympathy with what has been proposed, because it seems to me that a gap will emerge, but there is an interim committee and things rather depend on what happens after it. At this stage, it seems to me that, if we were to agree to Elaine Murray's amendment, we would reduce the flexibility to think about how the tribunals system would be best overseen in the future.

I would be very pleased to hear the minister's views on the matter.

**The Convener:** I endorse what Roddy Campbell said. I am very sympathetic to the position of CAS, which is really the link between the perceived informality of the tribunals system and tribunals. It provides an important service there. Therefore, I, too, am interested in the minister's response.

**Roseanna Cunningham:** I think that I need to remind members that administrative justice is wider than tribunals and that it covers all redress mechanisms for citizens to challenge or complain about decisions that public bodies have made. It is not confined to what happens in tribunals. Obviously, it includes the courts and tribunals.

It is more appropriate that those who will have an overview are not part of the system that they scrutinise. I have set up a non-statutory committee to keep the administrative justice and tribunal landscape under review, and that committee's work is already well under way. It is developing its work plan, and I understand that it will hold a stakeholder event in April and publish its progress online.

Elaine Murray's suggested addition to the bill would replicate work that is already under way, which is wider than on tribunals alone. The bill ensures that the Scottish Civil Justice Council must establish a particular committee for the purpose of making tribunal rules. That committee will be chaired by the president of the tribunals, who, when selecting members of the committee, will have to consider the need to choose members who have knowledge of how the Scottish tribunals exercise their functions. I believe that that safeguard will ensure that tribunal rules are made with the appropriate expertise and with the user in mind. Therefore, I ask Elaine Murray to withdraw amendment 89.

**Elaine Murray:** Would it be possible to get more detail prior to stage 3 on the process that is under way? I am content not to press the amendments pending seeing a bit more detail on that process.

**Roseanna Cunningham:** The existence of the interim committee is in no doubt, and I can ensure that something straightforward is put to members that explains what is currently happening and what the immediate future holds. However, I am not sure when stage 3 will be and therefore where the interim committee's work will be at by the time that we discuss it at stage 3.

**Elaine Murray:** I am content not to press the amendments. I hope that we can get more detail.

*Amendment 89, by agreement, withdrawn.*

*Amendments 90 and 91 not moved.*

*Schedule 9, as amended, agreed to.*

*Section 76, schedule 10 and sections 77 and 78 agreed to.*

*Long title agreed to.*

**The Convener:** That ends stage 2 consideration of the bill. I thank the committee, the minister and her officials very much. We move into private session.

10:59

*Meeting continued in private until 13:35.*

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