



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

15th Report, 2013 (Session 4)

Stage 1 Report on the Tribunals (Scotland) Bill

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The Scottish Parliament
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Justice Committee

Remit and membership

Remit:

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
John Pentland
Sandra White

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Ned Sharratt
Christine Lambourne



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

15th Report, 2013 (Session 4)

Stage 1 Report on the Tribunals (Scotland) Bill

The Committee reports to the Parliament as follows—

SUMMARY OF RECOMMENDATIONS

- 1. The Committee is sympathetic to the concerns raised (as set out in paragraphs 70 to 74). However, we note that the general view expressed is that the Bill's provisions are welcome. Therefore, despite these concerns, we agree that subject to these being addressed the Bill is a welcome development in revising the administrative justice landscape.**
- 2. The Committee notes the concerns regarding postponement of the inclusion of the reserved tribunals within the system. We concur with the position that, for this process to be most effective, reserved tribunals in Scotland should be included within the new structure. We note that this issue is not entirely in the hands of the Scottish Government but we urge it to work with the UK Government to ensure that early progress can be made on this matter. In doing so, we call on the Scottish Government to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals.**
- 3. The Committee welcomes the designation of the Lord President of the Court of Session as Head of the Scottish Tribunals.**
- 4. The Committee notes the intended appointment of Lady Smith to the role of President of the Tribunals. However, we are sympathetic to the concerns raised at the restriction of appointment to the post to a Senator of the College of Justice. While recognising the level of leadership that this appointment will bring, particularly in the early days of the Scottish Tribunals, we believe that consideration should be given, by amendment to the Bill at Stage 2, to extending the pool of eligible candidates.**
- 5. The Committee has reservations that adopting the term judge could over-judicialise this process. However, we note the status that using such language would afford and we accept the Lord President's point that the nomenclature used would be for the individual tribunals. We therefore**

consider that there would be benefit in enabling individual tribunals to use this terminology while leaving it for them to decide whether to do so. We therefore recommend that provision is made in the Bill to give individual tribunals this flexibility.

6. The Committee is strongly of the view that the particular nature and characteristics of the tribunals should be protected. We are therefore sympathetic to the concern that the provision for judicial members could potentially lead to the “judicialisation” of the process. However, we note that this provision would give tribunals access to the court judiciary which may also be of benefit. We welcome the safeguard that such appointments can only be made with the authority of the President of the Tribunals. Therefore on balance, we agree that this provision should be retained in the Bill with the proviso that the President’s discretion is applied in particular to ensure that the judicial members appointed have the necessary experience. We also recommend that consideration be given to the suggestion that the President of the Tribunals consults the President of the relevant Chamber before appointing a judicial member to a tribunal. We also ask the Scottish Government to give consideration to whether section 16 should be amended to remove the automatic entitlement for appointments of judicial members and whether additional safeguards are necessary to avoid the “judicialisation” of tribunals.

7. While the Committee is sympathetic to the need to be able to justify the costs of the Bill’s provisions, we also note the concerns raised by witnesses regarding the appointment of full-time salaried judges. The Minister for Community Safety and Legal Affairs has acknowledged that it is not clear what the circumstances will be in the future. We therefore believe that the Bill should allow for such posts to be created should the need arise. In doing so, we note the provision in section 71(4)(a) of the Bill which enables the Scottish Ministers to make arrangements as to the payment of remuneration or expenses of members of staff of the Tribunals. While this may address this point in the short-term (at least on the assumption that the term “members of staff” covers members of the Tribunals), it does not make provision for such payments to be made on a permanent basis and we therefore recommend that amendment is made to the Bill to enable this to happen in relation to both members of the Scottish Tribunals and members of staff.

8. The Committee notes this concern (as set out in paragraphs 120 and 121) and calls on the Scottish Government to review the appropriateness of this provision and give consideration to tightening up the language to ensure that, in the short-term, only those qualified in Scots law can conduct business in devolved tribunals.

9. The Committee notes that this is not a widespread concern (as set out in paragraphs 124) but recognises the point that the volume of business through the Upper Tribunal will be small. While noting the need to avoid unnecessary restrictions, we consider that there may be merit in retaining the division structure within the Upper Tribunal for the longer term,

particularly if there are future proposals to incorporate the reserved tribunals within the structure

10. The Committee sees merit in the suggestion of including a provision in the Bill setting out what a tribunal is. We are very concerned to protect the character and nature of tribunals and so consider that including this in the Bill would be a step towards achieving that. We therefore call on the Scottish Government to bring forward an amendment, for example in the same terms as section 2(3) and 22(4) of the Tribunals, Courts and Enforcement Act 2007, to set this out on the face of the Bill.

11. The Committee welcomes the provisions in section 30 that aim to ensure that specialism within tribunals is protected under the new structure. We therefore recommend that careful consideration be given to the provisions within this section to ensure that such protection is ensured.

12. In terms of cross-ticketing, the Committee welcomes the reassurance given by the Minister for Community Safety and Legal Affairs that the system currently in place works effectively and that it is not the expectation that tribunals would be assigned members without the necessary specialism. We also note the Lord President's comments that cross-ticketing allows for career development. Although we welcome these reassurances, we consider that close regard must be paid to whether this works well in practice. We therefore recommend that this is monitored during the early years of the new system being established to ensure that it is working effectively.

13. The Committee welcomes the commitment to ensuring tribunal independence. In particular, we welcome the new structure as a way of ensuring this and the statutory provision placing a duty on key individuals to ensure that independence of tribunals is upheld. We would ask the Scottish Government to give consideration to bring forward an amendment to include provision for judicial governance similar to that contained within the Judiciary and Courts (Scotland) Act 2008.

14. The Committee notes the concerns of witnesses regarding the interim arrangements for producing rules. However, we welcome the Minister for Community Safety and Legal Affairs's reassurance that this is a continuation of the existing arrangements, in particular, that expert input would be made to the drafting of rules of the individual tribunals.

15. We have more serious concerns regarding the production of rules for the Upper Tribunal and the delay in the Scottish Civil Justice Council being in a position to take on this role. We therefore urge the Scottish Government to examine whether there is scope to expedite this transfer of responsibilities, for example, by considering whether the resourcing of the Scottish Civil Justice Council could be reviewed to enable it to undertake this work.

16. The Committee notes the concerns raised by witnesses with regard to the provision set out in section 68(5)(a) regarding the issuing of practice

directions and welcomes the Minister for Community Safety and Legal Affairs' commitment to bring forward an amendment at Stage 2 to address these concerns.

17. The Committee notes the concerns raised regarding section 38, however, on balance we agree that such a provision needs to be cast in a general way in order not to restrict the options available to the reviewing body. We therefore do not have any concerns regarding the drafting of this provision. However, we suggest that it be kept under review to ensure that it is applied appropriately.

18. Again, the Committee notes the concerns raised regarding section 39. However, on balance, we recognise the benefits to be made from the Upper Tribunal being able to provide a general view and therefore, note that the provisions need to be drafted in a general way to enable this to happen. We therefore have no concerns regarding the drafting of this section.

19. The Committee notes the concerns raised regarding section 45, in particular, whether such a restriction is necessary in Scotland. We agree that further consideration needs to be given to the wording of the test applied and whether this is too restrictive. At a minimum we propose that this be reviewed in the short-term to ensure that the provision works effectively. We therefore call on the Scottish Government to give further consideration to this provision.

20. The Committee has some concerns regarding the provision to charge expenses and fees. We recognise the need to include this provision in the Bill to allow tribunals with the existing power to charge fees to continue to do so. However, we consider the wording of the provision to be drafted very generally and does not set out the circumstances where it would be appropriate for fees to be charged. We therefore recommend that, where there is a proposal for a tribunal to be given the power to charge expenses and fees where it did not previously, consultation should be carried out with users and stakeholders of the tribunal concerned.

21. The Committee notes the case put forward by the Lands Tribunal for Scotland that it should not be transferred in to the new system. We therefore urge the Scottish Government to review its position in this regard.

22. The Committee welcomes the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the First-tier Tribunal. We consider that taking such a step will ensure that the unique nature of the tribunal will be preserved within the new structure. However, we are sympathetic to the Mental Health Tribunal's concerns that this commitment appears to be made of a temporary nature and so we recommend that the Scottish Government bring forward an amendment to preserve the distinctiveness of the Mental Health Tribunal for Scotland.

23. The Committee recognises the complexity and importance of the Children's Hearing system in Scotland and notes that it has very recently been reformed. We also note that the power given to the Scottish Ministers

under section 26(2)(b) require regulations to be laid before the Parliament which will be subject to the affirmative procedure. It would be for the Scottish Ministers at the time to undertake the required consultation and background work before laying any regulations before the Parliament. We consider this to provide sufficient Parliamentary protection which would prevent Children's Hearings being transferred into the Scottish Tribunals inappropriately.

24. The Committee is sympathetic to the concerns caused by the lack of detail on the face of Bill. However, we also understand the need for the flexibility afforded by the use of delegated powers given the complexities of the legislation involved. We will therefore pay very close attention to the secondary legislation which will be brought forward under the Bill.

25. The Committee endorses the conclusions drawn by the Delegated Powers and Law Reform Committee on its Stage 1 report on the delegated powers in the Bill and calls on the Scottish Government to give particular consideration to the recommendations in respect of the powers in sections 48(2) and 56(2).

26. The Committee supports the general principles of the Bill. We consider that the Bill brings forward a much-needed restructuring of the tribunals system. In particular we believe that the provisions will simplify the existing process and will make the tribunals more accessible to users.

BACKGROUND

Parliamentary Scrutiny

27. The Tribunals (Scotland) Bill¹ was introduced in the Scottish Parliament on 8 May 2013 by the Cabinet Secretary for Justice, Kenny MacAskill MSP. The Parliamentary Bureau designated the Justice Committee as the lead committee at Stage 1.

28. The Justice Committee issued a call for written evidence on 5 June 2013. The Committee received 25 written submissions. The Committee took evidence on 3, 10 and 17 September 2013, hearing from a range witnesses including representatives of tribunals, users of tribunals, expert legal professionals, the Lord President of the Court of Session and the Minister for Community Safety and Legal Affairs.

29. The Finance Committee also issued a call for written evidence on the financial memorandum of the Bill, receiving six responses, which did not raise any substantial issues. The Finance Committee therefore decided not to undertake further scrutiny of the financial memorandum or to report to the Justice Committee on costs associated with the Bill.

¹ Tribunals (Scotland) Bill, as introduced (SP Bill 30, Session 4 (2013)). Available at: [http://www.scottish.parliament.uk/S4_Bills/Tribunals%20\(Scotland\)%20Bill/b30s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd.pdf).

30. The Delegated Powers and Law Reform Committee published its report on the delegated powers memorandum on the Bill² on 3 September 2013.

Background to the Bill

Tribunals in Scotland

31. While a definition of tribunals is not included in the Bill or the accompanying documents, the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC), in its 2011 report *Tribunal Reform in Scotland, A Vision for the Future*³ (the SCAJTC's 2011 report), defined a tribunal as:

'A body which resolves disputes between citizens 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 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.'

32. The SCAJTC's 2011 report listed 17 devolved tribunals or types of tribunals, although that total has increased to 18 with the establishment of the Homeowner Housing Panel. The powers, processes and subject matters of the devolved tribunals are very varied, including the making of decisions on compulsory treatment orders under the Mental Health (Care and Treatment) (Scotland) Act 2003 to adjudicating on disputed parking tickets.

33. The Scottish Tribunals Service (STS), part of the Scottish Government's Justice Directorate, provides administrative support to a number of the devolved tribunals⁴. Other tribunals, such as the Education Appeals Panel are supported by local authorities and other public bodies.

34. The majority of tribunals and tribunal cases are heard in UK tribunals with jurisdiction in Scotland on reserved matters, including those tribunals which deal with immigration, welfare and employment cases. The Bill does not apply to these tribunals.

Reform of UK tribunals

35. In 2001, Sir Andrew Leggatt carried out a review of the delivery of justice by UK tribunals (the Leggatt Report⁵). The Leggatt Report made a number of recommendations, including the need for increased independence from government and a more coherent and user-friendly system backed up by a single tribunals administration.

² Scottish Parliament Delegated Powers and Law Reform Committee. *41st Report, 2013 (Session 4): Tribunals (Scotland) Bill* (SP Paper 380).

³ Scottish Committee of the Administrative Justice and Tribunals Council (2011). *Tribunal Reform in Scotland, A Vision for the Future*. Available at <http://ajtc.justice.gov.uk/docs/tribunal-reform-scotland.pdf>

⁴ The following tribunals are currently supported by the STS: [Additional Support Needs Tribunals for Scotland](#); [Lands Tribunal for Scotland](#); [Mental Health Tribunal for Scotland](#); [Private Rented Housing Panel](#); [Homeowner Housing Panel](#); [Pensions Appeal Tribunals Scotland](#); [Scottish Charity Appeals Panel](#).

⁵ Sir Andrew Leggatt (2001). *Tribunals for Users – One System, One Service*. Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/index.htm>

36. In 2006 the UK Government launched a new UK Tribunals Service – an agency of the Ministry of Justice – designed to provide administrative support to a range of UK tribunals and organisations. The setting up of the UK Tribunals Service was followed by the Tribunals, Courts and Enforcement Act 2007 which implemented many of the recommendations in the Leggatt Report.

37. On 1 April 2011, the UK Tribunals Service was merged with HM Courts to create an integrated agency known as HM Courts and Tribunals Service.

38. While these reforms affected reserved tribunals sitting in Scotland, the devolved tribunals were not affected by the reforms.

Reform of Scottish tribunals

39. In 2008 the Administrative Justice Steering Group, chaired by Lord Philip, a retired senior judge, published a report⁶ (the Philip report) which reviewed devolved tribunals and presented options for their administration and supervision. Following the Philip report, the Scottish Tribunals Service was established in December 2010.

40. The SCAJTC undertook a further review into the tribunal system in Scotland. This review resulted in its 2011 report⁷ where the SCAJTC made the key recommendation that a more coherent and independent tribunals structure should be set up broadly along the lines of the UK system. The Bill broadly follows the main recommendations of this report.

41. In June 2013, after the introduction of the Bill, the Scottish Government launched a consultation on a proposed merger of the STS and the Scottish Court Service (SCS).⁸

Overview of the Bill

Policy objectives

42. The Policy Memorandum of the Bill notes that devolved tribunals have “been established in an ad hoc fashion, with no common leadership, appointments, practice and procedure or reviews and appeals”.⁹

43. The Policy Memorandum goes on to state that this complex and fragmented system can lead to “a narrowness of outlook” and a variation of the standard and performance of tribunals.¹⁰

⁶ Scottish Consumer Council (2008). *Options for the Future Administration and Supervision of Tribunals in Scotland*. Available at: http://ajtc.justice.gov.uk/docs/Tribunals_in_Scotland.pdf

⁷ Scottish Committee of the Administrative Justice and Tribunals Council (2011). *Tribunal Reform in Scotland, A Vision for the Future*. Available at <http://ajtc.justice.gov.uk/docs/tribunal-reform-scotland.pdf>

⁸ The Scottish Government (2013). *Consultation on the Proposed Merging of the Scottish Tribunals Service and the Scottish Court Service*. Available at: <http://www.scotland.gov.uk/Publications/2013/06/2764/downloads#res426122>.

⁹ Tribunals (Scotland) Bill. Policy Memorandum (SP Bill 30-PM, Session 4 (2013)), paragraph 2. Available at: [http://www.scottish.parliament.uk/S4_Bills/Tribunals%20\(Scotland\)%20Bill/b30s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Tribunals%20(Scotland)%20Bill/b30s4-introd-pm.pdf).

¹⁰ Policy Memorandum, paragraph 3.

44. The Bill is intended to create a system to improve the independence and perception of independence of the devolved tribunals and also to facilitate improvements in the quality of service offered to users of tribunals.

New structure

45. The Bill creates a new, two-tier structure for devolved tribunals. It establishes a First-tier Tribunal and an Upper Tribunal. Together the First-tier and Upper Tribunals will be known as the Scottish Tribunals. It is envisaged that the First-tier tribunal will hear most cases in the first instance and the Upper Tribunal will primarily hear appeals from the First-tier.¹¹

46. Schedule 1 of the Bill lists the devolved tribunals whose functions (and personnel) can be transferred into the new structure by the Scottish Ministers. In addition, the Scottish Ministers will be able to lay regulations before the Parliament to change the composition of schedule 1.

47. The First-tier will be split into chambers and each chamber will consider business according to subject-matter. The intention of grouping together similar jurisdictions is to “facilitate deployment of the members of the Scottish Tribunals”.¹² The Upper Tribunal will be divided into divisions.

48. Each chamber of the First-tier Tribunal will be presided over by a Chamber President and each division of the Upper Tribunal will be presided over by a Vice-President.

49. While the intention is that functions of differing tribunals will share chambers of the First-tier Tribunal, the Policy Memorandum notes the intention that the functions of the Mental Health Tribunal for Scotland (MHTS) will be transferred into a single chamber of the First-tier Tribunal without other jurisdictions.¹³ This is in recognition of the unique nature of the MHTS. Similarly, the Policy Memorandum states that the functions of the Lands Tribunal for Scotland (LTS) will be transferred into an individual division of the Upper Tribunal.¹⁴

Leadership and membership

50. The Lord President of the Court of Session will become head of both the First-tier and Upper Tribunals. The Lord President will appoint a President of the Scottish Tribunals from among the Senators of the College of Justice, who it is anticipated will be responsible for the general running of the tribunals.

51. The Policy Memorandum notes that the judicial leadership of the tribunals is intended to ensure that the Scottish Tribunals are well-managed, have a “strong identity with the justice system”, and tribunal members’ welfare and views are given weight.¹⁵

52. There are three types of membership of the First-tier Tribunal provided for in the Bill:

¹¹ Policy Memorandum, paragraph 7.

¹² Policy Memorandum, paragraph 42.

¹³ Policy Memorandum, paragraph 43.

¹⁴ Policy Memorandum, paragraph 46.

¹⁵ Policy Memorandum, paragraph 13.

- legal members, who are legally qualified;
- ordinary members, specialists in the subject areas of the tribunals (e.g. doctors, teachers, surveyors etc.); and
- judicial members, any sheriff, sheriff principal or part-time sheriff.

53. The Upper Tribunal will have the same three categories of membership as the First-tier. However, ordinary members will not be expected to sit on appeal cases and judicial members will include judges from the Court of Session, but not part-time sheriffs.

54. The Bill creates a system of appointment for new ordinary and legal members of tribunals whereby appointments are recommended to Scottish Ministers by the Judicial Appointments Board for Scotland (JABS). This is a similar process as for the appointment of the judiciary.

55. Members will be appointed for a period of five years and will be able to be re-appointed after that period until the age of 70. After reaching the age of 70, tribunal members may be re-appointed on an annual rolling basis up to the age of 75.

Review and appeal

56. The Bill provides for either the First-tier or Upper Tribunals to review their own decisions. The power to review is intended to be used when there has been a simple administrative error. A review could result in no action, a minor correction or for the decision to be set aside. The purpose of this provision is to reduce the number of appeals due to administrative errors.¹⁶

57. The Bill creates a general right of appeal, on a point of law, from the First-tier Tribunal to the Upper Tribunal. Decisions of the Upper Tribunal may be appealed to the Court of Session on a point of law.

58. Appeals from the First-tier to the Upper Tribunal will require leave to appeal from the First-tier Tribunal or, failing that, from the Upper Tribunal. Leave will only be granted if there are arguable grounds for appeal. Leave will also be required when an appeal from the Upper Tribunal to the Court of Session is envisaged. If the Upper Tribunal is dealing with a case in first instance (i.e. the case doesn't stem from a First-tier appeal) then the Upper Tribunal or, failing that, the Court of Session may grant leave if there are arguable grounds for appeal. However, in the case of a so-called "second appeal" (i.e. a case stemming from a First-tier appeal where the Upper Tribunal is acting as an appellate body) then the Upper Tribunal or, failing that, the Court of Session, may only grant leave if the case raises an important issue of principle or practice or if there are compelling reasons for allowing a second appeal.

59. The Bill provides for the Scottish Ministers to make regulations to allow certain exceptions to the default appeal rules.

¹⁶ Policy Memorandum, paragraph 57.

Practice and procedure

60. The Scottish Civil Justice Council (SCJC) will be given the power to review the practice and procedure of the Scottish Tribunals. The SCJC will also propose rules for the Scottish Tribunals.

61. The SCJC will not be in a position to immediately undertake the work required to draft the new tribunal rules. As an interim measure, the Scottish Ministers will be able to transfer in the rules of the tribunals listed in Schedule 1 and set out new rules. Both of these powers will require subordinate legislation subject to the negative procedure.

62. The President of the Tribunals may issue practice directions for the Scottish Tribunals. In addition, Chamber Presidents and Vice-Presidents may issue practice directions in their own chambers and divisions, respectively.

63. The Bill seeks to retain the “specialism, ethos and desirable distinctiveness”¹⁷ of the devolved tribunals. For example, it allows for the diversity of locations where tribunals currently sit; the Bill allows for tribunal hearings to take place in any place in Scotland.

64. The Bill allows for the tribunal rules to include provision for the awarding of expenses. The Bill also gives the Scottish Ministers the power to lay regulations to provide for reasonable fees to be payable to the Scottish Tribunals.

PROVISIONS IN THE BILL

Response to the Bill

65. The Bill was generally welcomed as an improvement on the existing system. Witnesses noted that the benefits of the new system would include providing the “opportunity for generic training”¹⁸, “dealing with questions about the conduct of tribunal judges”¹⁹ as well as “sharing the expertise that has been gained from the tribunals”.²⁰ The Bill would also “give coherence to what already exists”.²¹

66. Jonathan Mitchell QC from the Faculty of Advocates noted that the benefits from the new provisions may not be immediately apparent, however, this was “the first time that anyone has looked at creating a coherent and integrated structure for civil justice in Scotland. That will not be a big deal for most individuals in the street but they will see the benefits of it as the tribunals develop over the coming 10 years.”²²

67. The Policy Memorandum states that an intention of the Bill is to facilitate improvements in the quality of service offered to users of tribunals.²³ This need was also identified by a number of witnesses. May Dunsmuir from the Additional

¹⁷ Policy Memorandum, paragraph 14.

¹⁸ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3116.

¹⁹ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3117.

²⁰ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3116.

²¹ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3160.

²² Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3174.

²³ Policy Memorandum, paragraph 3.

Support Needs Tribunal for Scotland noted that “our concern must be the tribunal user, to whom the primary benefit must apply and who must be at the heart of the system”.²⁴

68. Lauren Wood from Citizens Advice Scotland welcomed the Bill’s provisions, noting that the new structure would mean “a guaranteed baseline standard among all the tribunals, which I think is important to users”.²⁵

69. In terms of user accessibility, Iain Nisbet from Govan Law Centre noted that an existing benefit of tribunals is that they are more accessible than going to court. He therefore concluded that the primary benefit of the new structure from a user’s point of view was “that those advantages will be extended to the first tier of appeals.” He noted that “it will be good for users and for the tribunals system, as many of the smaller jurisdictions do not have that flow of appellate decisions, which can be useful for clarifying the law and the process that the tribunals use”.²⁶

70. Although the new structure was generally welcomed, a number of reservations were expressed by witnesses. Richard Henderson from the Law Society of Scotland referred to the Bill as “a first step”²⁷ and Jonathan Mitchell QC from the Faculty of Advocates considered that “the basic idea is good and the way forward is correct, but a number of the details are wrong and some of them are very damagingly wrong”.²⁸

71. The Lands Tribunal for Scotland was a major critic of the Bill. It raised fundamental concerns at the general approach taken in the Bill, in particular, the creation of a uniform system.

72. In its written submission, it noted that “to aim for common standards and procedures, including review and appeal, as a significant plank of policy risks creation of a serious impediment to identifying the most efficient way of serving the different needs of individual users.”²⁹ Furthermore, it was “not persuaded that the approach of putting a number of tribunals into one and then seeking to discover how to preserve the characteristics of each is an efficient use of time and resources.”³⁰

73. John Wright QC from the Lands Tribunal for Scotland also had difficulty with the principle that a tribunal was either in or completely out of the new structure. He noted that there were benefits to be gained from the new structure, however, “these would only be available if the tribunal was transferred wholesale into the new system.” This was a particular issue for the Lands Tribunal for Scotland and other bodies which did not “really fit in with the scheme”.³¹

²⁴ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3116.

²⁵ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3130.

²⁶ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3129.

²⁷ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3168.

²⁸ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3164.

²⁹ Lands Tribunal for Scotland. Written submission, paragraph 11.

³⁰ Lands Tribunal for Scotland. Written submission, paragraph 1.

³¹ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3112.

74. Alastair Beattie from the Valuation Appeals Committee also warned against the homogenisation of the system. He noted that this could be a particular issue for the Valuation Appeals Committee as, for example, “if an age limit were imposed before the next revaluation, we would lose 60 per cent of our membership”. He was particularly concerned at the loss of experience this would entail. “Where you would find the successors, I do not know”.³²

75. The Committee is sympathetic to the concerns raised. However, we note that the general view expressed is that the Bill’s provisions are welcome. Therefore, despite these concerns, we agree that subject to these being addressed the Bill is a welcome development in revising the administrative justice landscape.

Reserved tribunals

76. The Policy Memorandum envisages a structure that will be capable of acquiring the functions of new or other jurisdictions which are not currently listed.³³ It is therefore anticipated that, over time, reserved tribunals would also be accommodated within the new structure.

77. The Lord Chancellor, in communication with the Scottish Government, has however, indicated that the UK Government has put on hold its plans to devolve reserved tribunals for the time being.

78. Jonathan Mitchell QC from the Faculty of Advocates observed that, without the inclusion of reserved tribunals, the Bill would only apply to “something like 2 per cent of Scottish tribunals and the elephant in the room is that the Bill itself puts out of mind the fact that the vast bulk of tribunals will remain in the reserved tribunals system”.³⁴

79. He noted that this was an issue that would have to be addressed in the longer term and that it was “critical that the Bill provides a system that is capable of being presented to members of UK tribunals and their users as one that they can come into.”³⁵

80. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal was more optimistic, noting that if reserved tribunals were one day devolved to Scotland “there will be a ready-made system into which to slot them”.³⁶

81. Lauren Wood from Citizens Advice Scotland emphasised the benefit to users of the inclusion of reserved tribunals, observing that “when somebody comes through the door, it does not matter to them whether an issue is reserved or devolved.”³⁷

³² Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3120.

³³ Policy Memorandum, paragraph 9

³⁴ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3155.

³⁵ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3161.

³⁶ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3160.

³⁷ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3126.

82. The Minister for Community Safety and Legal Affairs confirmed that it was originally a suggestion of the Ministry of Justice that the administration and organisation of reserved tribunals be transferred into the new Scottish system. However, she indicated that, although there were no ongoing discussions about the issue, she was not willing to hold back on reforming the Scottish structure on “the basis of the completely uncertain future of the reserved tribunals”.³⁸

83. The Committee notes the concerns regarding postponement of the inclusion of the reserved tribunals within the system. We concur with the position that, for this process to be most effective, reserved tribunals in Scotland should be included within the new structure. We note that this issue is not entirely in the hands of the Scottish Government but we urge it to work with the UK Government to ensure that early progress can be made on this matter. In doing so, we call on the Scottish Government to examine closely whether the Bill as drafted will create any barriers to the future inclusion of reserved tribunals.

Judicial leadership

84. Section 2 of the Bill designates the Lord President of the Court of Session as the Head of the Scottish Tribunals. The Policy Memorandum explains that this will provide strong judicial leadership across the First-tier and Upper Tribunals “to ensure that—

- there is cohesion and continuity of purpose across both tiers;
- the new tribunal structure has a strong identity within the justice system as a whole;
- the efficient disposal of business is maintained; and
- the views of tribunal members are represented and their welfare respected.”³⁹

85. It also explains that the Lord President’s leadership would ensure that “specialism, ethos and desirable distinctiveness are retained, in addition to supporting coherence across the new structure where this is required.”⁴⁰

86. The majority of witnesses welcomed this provision. Heather Baillie from the Mental Health Tribunal for Scotland welcomed the Lord President’s overarching leadership as it will “improve overall consistency of delivery of service across tribunals”.⁴¹ Richard Henderson from the Law Society of Scotland also noted that “the only way to emphasise that the tribunals are part of a justice system is to put them in the hand of a justice body”.⁴²

³⁸ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3204.

³⁹ Policy Memorandum, paragraph 13.

⁴⁰ Policy Memorandum, paragraph 14.

⁴¹ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3116.

⁴² Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3161.

87. The Committee welcomes the designation of the Lord President of the Court of Session as Head of the Scottish Tribunals.

President of the Scottish Tribunals

88. A new office of President of the Scottish Tribunals is created by the Bill. Under section 4, it is for the Lord President to assign a person to that office, who will be a judge of the Court of Session.

89. Lord Gill, the Lord President of the Court of Session, indicated in written evidence that it was his intention to nominate Lady Smith to be the first President of the Tribunals.

90. While welcoming Lady Smith's appointment and the expertise she will bring to the post, a number of witnesses expressed concerns regarding the restriction that the President must be a Senator of the College of Justice. Jonathan Mitchell QC from the Faculty of Advocates explained that, without the inclusion of reserved tribunals, the system would be "miniscule" and he described having someone so senior appointed to the post as "like having a Rolls-Royce for the job"⁴³ with the consequential costs.

91. He also went on to explain that, should the reserved tribunals be included in the system in the longer term, the restriction to a senator holding the post would also have the unfortunate consequence of very senior people in the wider UK system being barred from the role. For example, he noted that the employment tribunal has approximately five times as many cases as the system currently in the Bill and so "it would be a bit strange to tell them that they were not big enough to run this tiny system".⁴⁴

92. The Employment Tribunals (Scotland) in its written submission also expressed concerns at this restriction. It recognised the need for seniority in the appointment in order to ensure that it was "a person of sufficient standing and authority to ensure that the interests of the system are addressed and protected". However, it was of the view that the restriction on the appointment could potentially have an impact on the diversity of the post-holder as that, by doing so, "one automatically builds in a condition which is likely to have a disparate impact by (for example) gender and race, given the current characteristics of the pool from which a candidate will be selected". It further noted that a high proportion of women can be found from within tribunal judges who are solicitors rather than advocates but would be restricted from the post of President by virtue of the restrictions set out in the Bill.⁴⁵

93. The Lord President indicated that he considered that judicial leadership would be beneficial to the tribunals. It would also be beneficial to judges to extend their experience in that way. He further offered reassurance that necessary experience would not be an issue as it was "highly unlikely that the president of the tribunals would be a person who had no knowledge or experience of how they work".⁴⁶

⁴³ Scottish Parliament Justice Committee, *Official Report, 10 September 2013*, Col 3158.

⁴⁴ Scottish Parliament Justice Committee, *Official Report, 10 September 2013*, Col 3159.

⁴⁵ Employment Tribunals (Scotland). Written submission, paragraph 15.

⁴⁶ Scottish Parliament Justice Committee, *Official Report, 17 September 2013*, Col 3194.

94. The Minister for Community Safety and Legal Affairs indicated that, as well as supporting the Lord President, the role of President will be “to champion tribunals in the wider civil justice system, and to ensure the proper distinction and separation of tribunals from courts.” She concluded that drawing the appointment from the Senators of the College of Justice recognises “the scale of the proposed powers of delegation and the substantial leadership and management responsibilities that will come with the role”.⁴⁷

95. The Committee notes the intended appointment of Lady Smith to the role of President of the Tribunals. However, we are sympathetic to the concerns raised at the restriction of appointment to the post to a Senator of the College of Justice. While recognising the level of leadership that this appointment will bring, particularly in the early days of the Scottish Tribunals, we believe that consideration should be given, by amendment to the Bill at Stage 2, to extending the pool of eligible candidates.

Membership of tribunals

96. Section 12 of the Bill makes provision for membership of tribunals and provides for ordinary, legal and judicial members of the First-tier Tribunal and the Upper Tribunal.

Legal members

97. In his written evidence, the Lord President argued that the legal members of the tribunals should be referred to as judges (in line with the position within reserved tribunals). His view was that there may be an “unfortunate perception that the lawyer members of tribunals are of a lesser status than the courts’ judiciary” if this approach was not adopted.⁴⁸

98. On the other hand, the Law Society for Scotland was opposed to this suggestion as “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”.⁴⁹

99. The Employment Tribunals (Scotland) noted that tribunals could become too “court-like” if the legally qualified members of the tribunal were called “tribunal judges”. However, it did acknowledge that this did not appear to have occurred in England and Wales.⁵⁰

100. It also asserted that “by making it clear through use of the term “judge” that a tribunal is a judicial body one sends out a signal that the system recognises that the type of matters that tribunals deal with are just as important to those affected as the matters dealt with in the civil courts”.⁵¹

101. In following up this point, the Lord President noted the educational value of legislation where “if the primary legislation made it clear that legal members’

⁴⁷ Scottish Parliament Justice Committee, *Official Report, 17 September 2013*, Col 3203.

⁴⁸ Lord President of the Court of Session. Written submission, page 2.

⁴⁹ Law Society of Scotland. Written submission, page 8.

⁵⁰ Employment Tribunals (Scotland). Written submission, paragraph 8.

⁵¹ Employment Tribunals (Scotland). Written submission, paragraph 8.

function is judicial in nature that would be a strong endorsement of the independence of the tribunals as judicial bodies". He did, however, conclude that it would be a matter for the tribunals to decide what to call their legal members.⁵²

102. The Minister for Community Safety and Legal Affairs noted these points but concurred with the concern that, by using terminology such as "judges", a perception could be created that tribunals are seen as courts. "I am concerned that, if we began routinely to use the terminology of the courts in tribunal systems, people would behave as if tribunals were courts, and that is something I want to resist."⁵³

103. The Committee has reservations that adopting the term judge could over-judicialise this process. However, we note the status that using such language would afford and we accept the Lord President's point that the nomenclature used would be for the individual tribunals. We therefore consider that there would be benefit in enabling individual tribunals to use this terminology while leaving it for them to decide whether to do so. We therefore recommend that provision is made in the Bill to give individual tribunals this flexibility.

Judicialisation of tribunals

104. Section 16 of the Bill allows certain judicial members to be eligible to act as a member of the First-tier and Upper Tribunal if authorised to do so by the President of the Tribunals.

105. The Policy Memorandum explains that this provision will allow the First-tier Tribunal to "have access to the court judiciary when it is exercising decision-making functions for which it would be appropriate to use them rather than just the legal and ordinary members".⁵⁴

106. This provision was criticised by a number of witnesses on the grounds that the majority of sheriffs and Court of Session judges would not necessarily have sufficient specialised knowledge and experience of tribunal work to carry out this role. Witnesses therefore considered that their eligibility should not be automatic as this provision could lead to a degree of "judicialisation" of the tribunals.

107. Richard Henderson from the Law Society of Scotland noted that tribunals are generally less formal than courts and are (in the main) established to be "user-friendly and to be a place where justice could be determined without the necessity for lawyers to make an appearance"⁵⁵. Heather Baillie from the Mental Health Tribunal for Scotland also noted that "as a forum for decision making, tribunals have a flexibility that is quite different and distinct from the courts".⁵⁶ A strength of the tribunal system is therefore its relative informality which provides greater accessibility to users.

⁵² Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3197.

⁵³ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3206.

⁵⁴ Policy Memorandum, paragraph 21.

⁵⁵ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3155.

⁵⁶ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3118.

108. In the Law Society of Scotland's written submission, emphasis was placed on the distinct nature of tribunals as opposed to courts. As well as the specialist nature of tribunal judges and jurisdiction and the relative informality of hearings, it also noted that tribunals were less adversarial, more enabling than is typically encountered in the courts, parties do not have to pay to raise actions and, most importantly, the users' central position within the tribunal".⁵⁷

109. Other fears regarding judicial membership related to the consequent impact that it could have on the diversity of appointments to tribunals. The Employment Tribunals (Scotland) pointed out that there was the danger that any current gender or other imbalance within the wider judicial system would just be replicated in the new tribunal structure.⁵⁸

110. The Lord President, on the other hand, welcomed this provision. Furthermore, he suggested that this provision should be extended to cover retired sheriffs and judges in the first tier of reserved tribunals. He also noted that, although judicial members were automatically eligible to act, the power of the President of the Tribunals to authorise would ensure that judges appointed to act would have to have prior tribunal experience.⁵⁹

111. As an additional safeguard, the Law Society of Scotland suggested that the President of the Tribunals should consult with the President of the Chamber within which the judge is to sit before authorising the judge concerned.⁶⁰

112. The Minister for Community Safety and Legal Affairs did not consider the fears to be necessary, noting that it was already the case that judicial members sit on tribunals whose functions will be transferred into the first tier. For example, sheriffs were required to sit on the Mental Health Tribunal for Scotland in forensic cases and so there were "some circumstances where judges, sheriffs or part-time sheriffs were required". She noted therefore that the Bill had to be "flexible in allowing for and covering the variety of practice that already exists in tribunals".⁶¹ Subsequently in correspondence to the Committee, she clarified that the use of court judiciary is restricted as the Scottish Ministers have the power under section 35 to specify the composition of the First-tier Tribunal when convened to decide any matter in a case before it.

113. The Committee is strongly of the view that the particular nature and characteristics of the tribunals should be protected. We are therefore sympathetic to the concern that the provision for judicial members could potentially lead to the "judicialisation" of the process. However, we note that this provision would give tribunals access to the court judiciary which may also be of benefit. We welcome the safeguard that such appointments can only be made with the authority of the President of the Tribunals. Therefore on balance, we agree that this provision should be retained in the Bill with the proviso that the President's discretion is applied in particular to ensure that the judicial members appointed have the necessary experience. We also

⁵⁷ Law Society of Scotland. Written submission, page 4.

⁵⁸ Employment Tribunals (Scotland). Written submission, paragraph 13.

⁵⁹ Lord President of the Court of Session. Written submission, page 2.

⁶⁰ Law Society of Scotland. Written submission, page 10.

⁶¹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3207.

recommend that consideration be given to the suggestion that the President of the Tribunals consults the President of the relevant Chamber before appointing a judicial member to a tribunal. We also ask the Scottish Government to give consideration to whether section 16 should be amended to remove the automatic entitlement for appointments of judicial members and whether additional safeguards are necessary to avoid the “judicialisation” of tribunals.

Judicial tenure and salaried posts

114. The Bill makes no provision for the appointment of full-time salaried judges in any of the tribunals envisaged by the Bill. A number of concerns were therefore raised regarding this perceived gap in the legislation.

115. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal noted that with this omission “even the Upper Tribunal is to be a totally ad hoc tribunal consisting of nominated sheriffs and nominated senators”. Jonathan Mitchell QC from the Faculty of Advocates echoed this, observing that “all that we currently have is people who drop in and out for a day here and week there”.⁶²

116. The Lord President had similar concerns. He therefore indicated that it would be helpful if the Bill could provide for the possibility of permanent salaried posts as “the ability to attract and retain persons of high calibre in key tribunal roles will be vital and would assist in attracting persons of sufficient calibre and experience.”⁶³ Alan Gamble concurred, noting that full-time salaried judges would “enhance the quality of justice for the user”.⁶⁴

117. The Minister for Community Safety and Legal Affairs was not entirely in favour of this suggestion, noting that “it would be difficult to justify the need for full-time permanent judiciary” as “you would be paying salaries to people who would not necessarily be doing an enormous amount.”⁶⁵ She did acknowledge, however, that although this was a continuation of the current situation, it was difficult to predict that further down the line “because, in future, changes might be decided to be appropriate”.⁶⁶

118. While the Committee is sympathetic to the need to be able to justify the costs of the Bill’s provisions, we also note the concerns raised by witnesses regarding the appointment of full-time salaried judges. The Minister for Community Safety and Legal Affairs has acknowledged that it is not clear what the circumstances will be in the future. We therefore believe that the Bill should allow for such posts to be created should the need arise. In doing so, we note the provision in section 71(4)(a) of the Bill which enables the Scottish Ministers to make arrangements as to the payment of remuneration or expenses of members of staff of the Tribunals. While this may address this point in the short-term (at least on the assumption that the term “members of staff” covers members of the Tribunals), it does not make provision for such payments to be made on a permanent basis and we

⁶² Scottish Parliament Justice Committee, *Official Report, 10 September 2013*, Col 3164.

⁶³ Lord President of the Court of Session. Written submission, page 1.

⁶⁴ Scottish Parliament Justice Committee, *Official Report, 10 September 2013*, Col 3167.

⁶⁵ Scottish Parliament Justice Committee, *Official Report, 17 September 2013*, Col 3209.

⁶⁶ Scottish Parliament Justice Committee, *Official Report, 17 September 2013*, Col 3216.

therefore recommend that amendment is made to the Bill to enable this to happen in relation to both members of the Scottish Tribunals and members of staff.

Eligibility of non-Scottish lawyers

119. Schedule 3 to the Bill provides for appointments to the First-tier Tribunal.

120. The Lord President raised a point in his submission about the eligibility of non-Scottish lawyers sitting on Scottish tribunals. He argued that the eligibility requirements in paragraph 5(1) of Schedule 3 were too broad as they include legally qualified parties from England and Wales and Northern Ireland.⁶⁷

121. He noted that in the reserved tribunals there was considerable cross-over between members from Scotland, England, Wales and Northern Ireland. However, devolved tribunals dealt with specifically Scottish matters. His view therefore was, with regard to the business of the devolved tribunals, that at least in the short term “we should recruit people who are qualified in Scots law”.⁶⁸

122. The Committee notes this concern and calls on the Scottish Government to review the appropriateness of this provision and give consideration to tightening up the language to ensure that, in the short-term, only those qualified in Scots law can conduct business in devolved tribunals.

Structure of the Upper Tribunal

123. Section 22 of the Bill makes provision for the organisation of the Upper Tribunal into divisions, with each division presided over by at least one Vice-President.

124. The Lord President in his written submission indicated that he considered it “unnecessary” and could be “restrictive to programming” to create these divisions. He also noted that there could also be potential confusion with the nomenclature of the Court of Session which is also divided into divisions.⁶⁹ John Wright QC from the Lands Tribunal for Scotland concurred, observing that it was not a particularly sensible way of proceeding given that the upper tribunal in Scotland will deal with “a tiny number of appeals”.⁷⁰

125. The Committee notes that this is not a widespread concern but recognises the point that the volume of business through the Upper Tribunal will be small. While noting the need to avoid unnecessary restrictions, we consider that there may be merit in retaining the division structure within the Upper Tribunal for the longer term, particularly if there are future proposals to incorporate the reserved tribunals within the structure.

⁶⁷ Lord President of the Court of Session. Written submission, page 3.

⁶⁸ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3199.

⁶⁹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3195.

⁷⁰ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3113.

Definition of a tribunal

126. As already noted, tribunals are of a unique and distinct nature and a number of concerns raised during the Committee's scrutiny of the Bill related to the potential for the Bill's provisions to compromise this. A number of suggestions were put forward by witnesses in order to safeguard the specific nature of tribunals.

127. May Dunsmuir from the Additional Support Needs Tribunal for Scotland indicated that it would "go some way towards reassuring service users, stakeholders and service user groups if the Bill contained a definition of the function and distinctive nature of a tribunal."⁷¹

128. Lauren Wood from Citizens Advice Scotland suggested that the Bill could contain principles similar to the Tribunals, Court and Enforcement Act 2007 (which established the current tribunal system in England). She considered such principles to be a way of "setting out the focus of what we want tribunals to achieve, so as to be user focus" which would "mitigate the impact and [...] help guarantee openness, fairness and impartiality".⁷² She suggested that these principles "would give a degree of certainty that it should develop in line with those principles that put users at the core, but not necessarily in a rigid way".⁷³

129. Jon Shaw from the Child Poverty Action Group concurred with the proposal of including an overriding objective of putting the user at the centre of the tribunal system and that "planning a principle in the Bill to secure that would be a real improvement."⁷⁴

130. Richard Henderson from the Law Society of Scotland echoed this point. As part of general review of civil justice he noted that "if you are going to make reforms in those different areas, you are sooner or later going to have to ask what a tribunal is."⁷⁵ The Law Society of Scotland in its written evidence also noted that "if there is to be a coherent structure within a civil justice legislative framework, the Bill should identify the characteristics which distinguish tribunals from courts".⁷⁶

131. Alastair Beattie from the Valuation Appeals Committee was not so convinced. He noted that "given the breadth of the issues that [the Valuation Appeals Committees] as a group deal with and the existing procedures, it is very difficult to see how that could be achieved."⁷⁷

132. The Minister for Community Safety and Legal Affairs indicated that she would not be opposed to the suggestion of including underlying principles in the Bill and would consider it in the context of the other recommendations of the Committee. In doing so, she noted however that, "by their very nature, overarching principles

⁷¹ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3118.

⁷² Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3127.

⁷³ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3130.

⁷⁴ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3126.

⁷⁵ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3155.

⁷⁶ Law Society of Scotland. Written submission, page 33.

⁷⁷ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3118.

must be very general, because each tribunal will have its own specific culture and principles”.⁷⁸

133. The Committee sees merit in the suggestion of including a provision in the Bill setting out what a tribunal is. We are very concerned to protect the character and nature of tribunals and so consider that including this in the Bill would be a step towards achieving that. We therefore call on the Scottish Government to bring forward an amendment, for example in the same terms as section 2(3) and 22(4) of the Tribunals, Courts and Enforcement Act 2007, to set this out on the face of the Bill.

Specialism

134. The Bill attempts to strike a balance between setting up a unified tribunals structure and retaining the unique features of the individual tribunals. The Minister for Community Safety and Legal Affairs explained in oral evidence that “the Bill will create a structure that will enable a better service to be provided to those who use it and maintain the specialism and ethos of each individual tribunal that transfers into the system”.⁷⁹

135. Many witnesses stressed the importance of retaining the individual specialism, ethos and culture of the existing tribunals. Richard Henderson from the Law Society noted the need for “a structure that will be able to accommodate that vast spectrum of differences.”⁸⁰ Lauren Wood from Citizens Advice Scotland also noted that “each area should be allowed to retain its individual characteristics as far as possible”.⁸¹

136. Adrian Ward from the Law Society welcomed the provisions, but noted that “we must safeguard what is valuable in what we have already”.⁸² May Dunsmuir from the Additional Support Needs Tribunal for Scotland also emphasised this point, noting that the Additional Support Needs Tribunal was “an incredibly complex jurisdiction” and that the level of specialism developed by caseworkers “would have to be maintained”.⁸³ Heather Baillie from the Mental Health Tribunal for Scotland noted that, although the new structure offered the opportunity for generic training, “there is also a need for specific training, given the diverse users that the tribunals serve”.⁸⁴

137. The Committee therefore sought reassurances that sufficient safeguards were in place to ensure that a degree of protection was afforded to ensure that the specialism of tribunals, such as the Mental Health Tribunal and the Additional Support Needs Tribunal, was not lost in the new system.

⁷⁸ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3205.

⁷⁹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3202.

⁸⁰ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3173.

⁸¹ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3130.

⁸² Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3168.

⁸³ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3123.

⁸⁴ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3116.

138. The Lord President indicated that he did not believe there was a danger that the changes would bring about a loss of experience.⁸⁵ The Minister for Community Safety and Legal Affairs was also keen to note there were benefits to be brought about through the new structure which would provide “opportunities for tribunal members to share best practice and learn from one another’s knowledge and experience”.⁸⁶

139. The Committee notes that, under section 30, the Lord President must produce an assignment policy for the assignment of members within the First-tier and Upper Tribunals. In particular, under subsection (3)(a), “the assignment policy must be designed to secure that appropriate use is made of the knowledge and experience of the members of the Scottish Tribunals (including their expertise in a particular area of law).”⁸⁷

140. The President of the Tribunals is responsible for assigning members to the First-tier and Upper Tribunals and must assign members in accordance with the assignment policy.

141. The Bill also allows the assignment of tribunal members to work in other tribunals to the one they were initially appointed to. This arrangement is known as “cross-ticketing”.

142. Although the Faculty of Advocates was not opposed to the principle of cross-ticketing, it noted that this could prove difficult in practice. It suggested that the Bill should contain specific provision to ensure judicial control over the issue. It also suggested that there may be considerable cost implications of cross-ticketing as it could entail a great deal of training.⁸⁸

143. In terms of retaining specialism within individual tribunals, some concerns were raised that the practice of cross-ticketing could erode the culture and ethos built up within each tribunal. However, the Lord President welcomed this arrangement as it would “give tribunal members who are experienced in tribunal practice the opportunity to develop their career and extend their work into other subject areas.”⁸⁹

144. The Minister for Community Safety and Legal Affairs also offered reassurance that it should not be an issue as “cross-ticketing already happens under the current structure”. However, she did note that some tribunals were so specialised, such as the Mental Health Tribunal, that it was not her expectation that tribunal members with “absolutely no background in the subject would be plucked out of nowhere and plonked down there”.⁹⁰

145. The Committee welcomes the provisions in section 30 that aim to ensure that specialism within tribunals is protected under the new structure.

⁸⁵ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3186.

⁸⁶ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3203.

⁸⁷ Tribunals (Scotland) Bill, section 30.

⁸⁸ Faculty of Advocates. Written submission, page 2.

⁸⁹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3200.

⁹⁰ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3217.

We therefore recommend that careful consideration be given to the provisions within this section to ensure that such protection is ensured.

146. In terms of cross-ticketing, the Committee welcomes the reassurance given by the Minister for Community Safety and Legal Affairs that the system currently in place works effectively and that it is not the expectation that tribunals would be assigned members without the necessary specialism. We also note the Lord President's comments that cross-ticketing allows for career development. Although we welcome these reassurances, we consider that close regard must be paid to whether this works well in practice. We therefore recommend that this is monitored during the early years of the new system being established to ensure that it is working effectively.

Tribunal independence

147. One of the key objectives of tribunal reform is to bring about a greater degree of tribunal independence. The Policy Memorandum states that the new structure will provide "users with the reassurance that tribunal hearings are being heard by people with no links to the body whose decision they are challenging by providing for greater independence for the new tribunals".⁹¹

148. Section 3 of the Bill contains a specific statutory duty on the First Minister, the Lord Advocate, the Scottish Ministers and members of the Scottish Parliament to uphold the independence of members of the Scottish Tribunals.

149. The level of independence varies across tribunals. Two particular cases where concerns have been raised over the level of independence were Valuation Appeals Committees and Education Appeal Committees.

150. Valuation Appeals Committees deal with appeals regarding the valuation of properties for council tax or business rates. The Scottish Committee of the Administrative Justice and Tribunals Council concluded in its report of 2009⁹², in which it analysed Valuation Appeal Committees, that their independence could be compromised by the fact that tribunals were held in local authority premises with members being remunerated by local authorities.

151. Education Appeals Committees hear appeals from parents and older children against decisions to refuse placing requests, or to exclude children from school. Concerns have been expressed that Education Appeals Committees are not independent since a majority of tribunal members is often appointed by local authority education committees.

152. The general view was that the Bill brought forward welcome developments in ensuring the independence of tribunals. Alastair Beattie from the Valuation Appeals Committees noted that the provisions "would improve the perceived independence of valuation appeals committees by transferring responsibility for

⁹¹ Policy Memorandum, paragraph 3.

⁹² Scottish Committee of the Administrative Justice and Tribunals Council. *Valuation Appeals Committees in Scotland: Special Report*. Available at: <http://ajtc.justice.gov.uk/docs/sc-vacs-special-report.pdf>

our funding and training from local authority to central sources.” He also noted that bringing the system under the leadership of the Lord President would help to ensure this.⁹³

153. The Lord President welcomed the statutory commitment to ensuring independence set out in section 3 of the Bill. He also welcomed the Bill as a vehicle to ensure tribunal independence by making a clean break “from the days when tribunals were under the aegis of sponsoring departments”.⁹⁴

154. However, he highlighted in his written evidence that further reform was needed if the independence of tribunals’ judiciary is to be guaranteed.⁹⁵ He developed this view further in oral evidence noting that the inclusion of a similar provision in the Bill as that in the Judiciary and Courts (Scotland) Act 2008 which provides for judicial governance in the courts would provide for overall judicial governance of the tribunals and would “simply consolidate the official recognition of the tribunals as being part of the judiciary.”⁹⁶

155. The Committee welcomes the commitment to ensuring tribunal independence. In particular, we welcome the new structure as a way of ensuring this and the statutory provision placing a duty on key individuals to ensure that independence of tribunals is upheld. We would ask the Scottish Government to give consideration to bring forward an amendment to include provision for judicial governance similar to that contained within the Judiciary and Courts (Scotland) Act 2008.

Procedural rules

156. Sections 62 to 67 of the Bill make provision for tribunals rules. In addition paragraph 12 of schedule 9 to the Bill makes provision for the Scottish Civil Justice Council (SCJC) established under the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013 to propose procedural rules for the Scottish Tribunals through a specialised tribunals committee. The Minister for Community Safety and Legal Affairs indicated that taking such an approach would “ensure a consistency in approach across the tribunal landscape and protect specialism in individual jurisdictions”.⁹⁷

157. The Policy Memorandum indicates that there are no plans to comprehensively rewrite the rules of procedure applying in respect of each listed tribunal and that the Bill enables existing rules of each listed tribunal to be retained until such time as they require to be amended or new rules are to be introduced.⁹⁸

158. It also notes that, as the SCJC is only newly established, it is unlikely that it will be able to assume responsibility for tribunal rule-making immediately. In the

⁹³ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3115.

⁹⁴ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3194.

⁹⁵ Lord President of the Court of Session. Written submission, page 1.

⁹⁶ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3187.

⁹⁷ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3203.

⁹⁸ Policy Memorandum, paragraph 67.

interim, the Bill provides for the Scottish Ministers to make rules for the Scottish Tribunals.⁹⁹

159. The SCJC in its written submission indicated that it considered it appropriate that such functions should be conferred on it. However, as it was unclear from the Bill when the Scottish Ministers intended to commence the SCJC's role, its view was that there did not appear to be any merit in increasing its membership in advance. It therefore concluded that the provision in paragraph 12 of schedule 9 should be commenced in its entirety.¹⁰⁰

160. The Lord President, who chairs the SCJC, confirmed that it would not be producing tribunal rules in the short term as "one of the early priorities of [the SCJC] will be the consideration of a rules rewrite in the civil court" and that it is "simply not geared up at the moment to consider the drafting of a uniform set of rules for tribunals, but in due course that will unquestionably be part of [the SCJC's] work".¹⁰¹

161. Jonathan Mitchell QC emphasised the Faculty of Advocates' concerns regarding the interim arrangements for the rule-making provisions. The Faculty was of the view that it was "undesirable on constitutional grounds" for the Scottish Ministers to be making these rules. It noted that the Scottish Ministers should "have the same rights as other parties to proceedings before the tribunals to comment on proposed rules, but no power to write them."¹⁰²

162. This was of particular concern in relation to the Upper Tribunal as rules still had to be written for it and that it was "a more politically sensitive issue, as the Upper Tribunal tends to deal with cases that are of more significance" and that "it was undesirable that Government should be in a position to run so much".¹⁰³

163. The Faculty of Advocates proposed a possible alternative of the rules being written by ad hoc committees of tribunal judges for rules relating to appeals and to first-tier business. However, the Lord President considered that this could "introduce another element of complexity".¹⁰⁴

164. The Law Society of Scotland raised a separate concern that the Bill did not contain sufficient details as to the composition of the proposed tribunals committee of the SCJC and that there was a risk that rules could be made with little or no user input. It therefore proposed following the same approach as in England where members of the equivalent committee must have experience of tribunals practice or advisory work.

165. The Minister for Community Safety and Legal Affairs noted that the Scottish Ministers already currently write tribunals rules and that this was done with expert input. She cited the example of the Mental Health Tribunal for Scotland (MHTS) where "if we were going to change the rules of the MHTS, it would be for [the

⁹⁹ Policy Memorandum, paragraph 73.

¹⁰⁰ Scottish Civil Justice Council. Written submission, page 1.

¹⁰¹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3190.

¹⁰² Faculty of Advocates. Written submission, page 3.

¹⁰³ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3169.

¹⁰⁴ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3190.

President of the MHTS] to consult the people whom he thought were the most appropriate". She envisaged that this arrangement would continue on an interim basis. She also clarified that any new rules or revisions to existing rules would be brought forward by the relevant minister and would be considered by the Parliament under the negative procedure.¹⁰⁵

166. The Committee notes the concerns of witnesses regarding the interim arrangements for producing rules. However, we welcome the Minister for Community Safety and Legal Affairs' reassurance that this is a continuation of the existing arrangements, in particular, that expert input would be made to the drafting of rules of the individual tribunals.

167. We have more serious concerns regarding the production of rules for the Upper Tribunal and the delay in the Scottish Civil Justice Council being in a position to take on this role. We therefore urge the Scottish Government to examine whether there is scope to expedite this transfer of responsibilities, for example, by considering whether the resourcing of the Scottish Civil Justice Council could be reviewed to enable it to undertake this work.

Practice directions

168. Section 68 of the Bill sets out the process for issuing directions as to the practice and procedure to be followed in the Scottish Tribunals.

169. Serious concern was expressed by a number of witnesses regarding the scope of the rules envisaged by section 68(5)(a) which enables the President of the Tribunals, and Chamber Presidents and Vice-Presidents of the Upper Tribunal to issue practice directions for the purpose of "the application or interpretation of the law".¹⁰⁶

170. The argument made by witnesses was that this provision would restrict the independence of the judiciary to take their own view of the law. Jonathan Mitchell QC from the Faculty of Advocates described this as an "extraordinary provision" that gives power to the President of the Tribunals "to lay down, completely on his or her own decision, what the law is."¹⁰⁷

171. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal emphasised that "the interpretation of the law should be for a tribunal or a court, not for a senior judge acting administratively rather than judicially"¹⁰⁸ and that no equivalent power existed for the Senior President of the Great Britain system of tribunals.¹⁰⁹

172. The Lord President echoed these concerns stating that practice directions were intended to give guidance to judges and tribunals as to the way that certain

¹⁰⁵ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3215.

¹⁰⁶ Tribunals (Scotland) Bill, section 68.

¹⁰⁷ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3156.

¹⁰⁸ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3157.

¹⁰⁹ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3158.

decisions are gone about and that it was “quite inappropriate for a practice direction to give guidance as to the interpretation of the law”.¹¹⁰

173. There was therefore a general call for section 68(5)(a) to be removed from the Bill.

174. The Minister for Community Safety and Legal Affairs indicated that this provision was unintentional and that she agreed to introduce an amendment at Stage 2 to address this point.

175. The Committee notes the concerns raised by witnesses with regard to the provision set out in section 68(5)(a) regarding the issuing of practice directions and welcomes the Minister for Community Safety and Legal Affairs’ commitment to bring forward an amendment at Stage 2 to address these concerns.

Appeals and review

176. Chapter 1 of Part 6 of the Bill deals with tribunal decisions.

Section 38

177. Section 38 of the Bill contains general review provisions. It provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. Under these provisions, it will be for each tribunal to decide whether or not it should review one of its own decisions.

178. The Faculty of Advocates, in its written submission, expressed concern that the provisions in section 38, though welcome, were incomplete.¹¹¹ Jonathan Mitchell QC developed this point, noting that the section did not appear to articulate the circumstances in which there might be a review. He suggested by way of illustration that, under this section, a First-tier Tribunal judge might make a decision and each party involved would then consider the process completed. However, there would be nothing stopping the judge subsequently reviewing that decision. He accepted there was a need for a rule to deal with typographical or arithmetical errors. However, his view was that the provisions in general were currently too open-ended.¹¹²

179. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal concurred with the Faculty’s position, noting that the grounds for review could be clearer.¹¹³

180. However, Richard Henderson from the Law Society could see sense in the provisions noting that tribunals were different from courts. “The idea that you can review a decision might be novel and unwelcome, but it allows for the mistake to be rectified, which is probably quite a valuable thing.”¹¹⁴

¹¹⁰ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3187.

¹¹¹ Faculty of Advocates. Written submission, page 3.

¹¹² Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3171.

¹¹³ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3171.

¹¹⁴ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3171.

181. The Lord President indicated that he was happy with the wording of section 38, noting that “a provision [...] in which a review jurisdiction is conferred [...] should be expressed as generally as possible in order not to narrow the options of the reviewing body”.¹¹⁵

182. The Committee notes the concerns raised regarding section 38, however, on balance we agree that such a provision needs to be cast in a general way in order not to restrict the options available to the reviewing body. We therefore do not have any concerns regarding the drafting of this provision. However, we suggest that it be kept under review to ensure that it is applied appropriately.

Section 39

183. Section 39 sets out the courses of action available to tribunals in determining any review under section 38. These include: taking no action, setting the decision aside, and correcting minor or accidental errors. If the First-tier Tribunal sets aside a decision of its own, it must either re-decide the matter itself or refer it to the Upper Tribunal. Where the Upper Tribunal sets aside a decision of its own, it must re-decide the matter itself.

184. Alan Gamble from the Administrative Appeals Chamber of the Upper Tribunal raised a concern relating to the provisions in section 39(2)(b) which enables the First-tier Tribunal to refer a whole case to the Upper Tribunal which would entail “facts and law.”¹¹⁶ He noted that the power existed in the 2007 Act but that it had not been used in Scotland. His concern was that the Upper Tribunal was not set up to hear from and examine witnesses but to “determine what the law is and, if need be remit the case to the first tier”.¹¹⁷ He therefore considered the provision to be unnecessary and that “retaining the simple right of appeal to the upper tribunal is a better remedy”.¹¹⁸ He therefore proposed that section 39(2)(b) should be removed.

185. Richard Henderson from the Law Society took a slightly different approach noting that the provision should be left in the Bill if it is not going to be used. “If it is going to be used, it is probably going to be used in circumstances that are relevant. If they are not relevant, I should think that the tribunal would see it off”.¹¹⁹

186. Jonathan Mitchell QC from the Faculty of Advocates also considered that there may be merit in cases being referred to the Upper Tribunal by the First-tier Tribunal so that an authoritative view can be made on both fact and law. Difficulties could therefore arise in restricting matters to appeals that can only be made on points of law. “Ultimately, you may end up with a spread of very different first instance facts and decisions when it would have been helpful to everybody to get a general definitive view from above”.¹²⁰

¹¹⁵ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3190.

¹¹⁶ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3170.

¹¹⁷ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3170.

¹¹⁸ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3171.

¹¹⁹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3172.

¹²⁰ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3172.

187. The Lord President noted that “if the Upper Tribunal is to operate as a review body rather than as an appellate body [...] the legislation should leave it a broad measure of discretion to develop its own rules and principles on the scope of its review function.”¹²¹

188. Again, the Committee notes the concerns raised regarding section 39. However, on balance, we recognise the benefits to be made from the Upper Tribunal being able to provide a general view and therefore, note that the provisions need to be drafted in a general way to enable this to happen. We therefore have no concerns regarding the drafting of this section.

Section 45

189. Section 45 makes provision in relation to a ‘second appeal’ which is an appeal to the Court of Session under section 43 against a decision of the Upper Tribunal on an appeal from a decision of the First-tier Tribunal under section 41.

190. In order for permission to appeal from the First-tier Tribunal to the Upper Tribunal to be granted, an arguable case has to be shown. However, where the decision of the Upper Tribunal relates to an appeal from the First-tier Tribunal, permission will only be granted for a further appeal to the Court of Session if the case raises an important issue of principle or practice or where there are compelling reasons for allowing a second appeal.

191. Jonathan Mitchell QC from the Faculty of Advocates raised concerns that this “sift” process was overly restrictive and would unnecessarily limit appeals to the Court of Session. He noted that the wording of the provision in section 45(4) appeared to have been lifted from English legislation where such a restriction, he understood, was necessary to guard against “vexatious and frivolous appeals”. He did not consider that this was necessarily the case in Scotland.

192. In practice his concern was that “the provision means that if I win my case at the first tier and it goes to the Upper Tribunal and that tribunal says, “The first-tier got it wrong,” I cannot appeal to the Court of Session unless there is a point of principle”.¹²²

193. Iain Nisbet from Govan Law Centre echoed this concern noting that he had no concerns regarding cases that were obviously without merit but “there are not a huge number of appellate cases being brought, and it is good for a tribunal system to have a reasonable flow of those”.¹²³ He suggested that this was something that the Parliament may wish to monitor to ensure that the “sift” was not being too vigorously applied.

194. The Lord President, however, did not hold this view. He noted that as this related to a second appeal procedure “the idea that, when you get to that stage, you should widen the appeal’s scope seems to me to be entirely

¹²¹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3200.

¹²² Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3165.

¹²³ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3130.

counterproductive”.¹²⁴ He therefore favoured a stringent test for appeal to the Court of Session.

195. The Committee notes the concerns raised regarding section 45, in particular, whether such a restriction is necessary in Scotland. We agree that further consideration needs to be given to the wording of the test applied and whether this is too restrictive. At a minimum we propose that this be reviewed in the short-term to ensure that the provision works effectively. We therefore call on the Scottish Government to give further consideration to this provision.

Expenses and fees

196. Section 59 of the Bill gives the First-tier Tribunal and the Upper Tribunal the power to award expenses “so far as allowed in accordance with the Tribunal Rules”.¹²⁵

197. Although the Policy Memorandum suggests that it would not be appropriate for expenses to be awarded in all situations¹²⁶, the Bill does not appear to set statutory limits on the situations where expenses would be justified.

198. Section 70 of the Bill introduces powers which could be used to charge fees. Under this section, the Scottish Ministers may by regulation make provision for “reasonable fees [...] payable in respect of any matter that may be dealt with by the Scottish Tribunals.”¹²⁷

199. The Lord President in written evidence welcomed the provisions in relation to expenses. He noted that “in the interest of justice, tribunals, a number of which are ‘party-party’ tribunals, ought not necessarily to be regarded as cost free zones.” He also considered it appropriate that tribunals be given a wide measure of discretion as “the assessment of what is a fair determination of an application for an award of expenses depends, in practice, on the facts and circumstances of the individual case”.¹²⁸

200. He did acknowledge, however, that to avoid deterring people from coming forward, the power would have to be “exercised sparingly” and “only in extreme cases”.¹²⁹

201. With regard to fees, he felt that it was a political matter on which he did not wish to express a view.

202. The Faculty of Advocates was opposed to the proposal that expenses and fees be charged noting that these powers may be familiar in a court context “but are not normal for Tribunals”. It went on to observe that in some jurisdictions (for example, the Mental Health Tribunal) the charging of fees would be “unthinkable”.

¹²⁴ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3189.

¹²⁵ Tribunals (Scotland) Bill, section 59.

¹²⁶ Policy Memorandum, paragraph 76.

¹²⁷ Tribunals (Scotland) Bill, section 70.

¹²⁸ Lord President of the Court of Session. Written submission, page 4.

¹²⁹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3198.

The Faculty considered that these powers raised issues of principle and stated that it would welcome the opportunity in the future to comment on any changes proposed.¹³⁰

203. The Minister for Community Safety and Legal Affairs confirmed that the provisions relating to fees and expenses related to the policy imperatives that set up the individual tribunals. As some tribunals already charged fees, she noted that the Bill had to allow for such scenarios within the new framework. She explained that the provisions relating to fees were contained within the tribunal's parent legislation, for example, the Lands Tribunal for Scotland and the Homeowner Housing Panel both had the power to charge fees.

204. The Scottish Government provided further clarification regarding the powers in section 70 to allow tribunals to charge fees. On the face of it, it appeared that the power was broad enough to allow all tribunals to charge fees and expenses. However, it was clarified that the section 70 would only allow fees to be charged with the approval of the Parliament. Michael Gilmartin from the Scottish Government confirmed that "no fee can be charged on any matter without Parliament's approval, and the provision is completely dependent on the powers being exercised sensibly."¹³¹ It was also confirmed that this included those tribunals with an existing power to charge fees and/or expenses.

205. The Committee has some concerns regarding the provision to charge expenses and fees. We recognise the need to include this provision in the Bill to allow tribunals with the existing power to charge fees to continue to do so. However, we consider the wording of the provision to be drafted very generally and does not set out the circumstances where it would be appropriate for fees to be charged. We therefore recommend that, where there is a proposal for a tribunal to be given the power to charge expenses and fees where it did not previously, consultation should be carried out with users and stakeholders of the tribunal concerned.

Lands Tribunal for Scotland

206. In its written evidence, the Lands Tribunal for Scotland was strongly opposed to the proposal that it be included within the new structure. As well as its strong opposition to the general approach of the Bill, it raised specific concerns regarding its place within the new structure.

207. In its written submission, it set out its concerns in detail. In summary, it generally functions as a court; it is a small tribunal, working with the equivalent of about two and a half members; and the overall objective of ensuring the independence of tribunals from those whose decisions are being challenged did not apply to it. It therefore concluded that the provisions in the Bill did not necessarily apply to it.¹³²

¹³⁰ Faculty of Advocates. Written submission, page 4.

¹³¹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3213.

¹³² Lands Tribunal for Scotland. Written submission, pages 4 and 5.

208. In oral evidence, John Wright QC from the Lands Tribunal noted that “it is difficult to see how all of these matters could be dealt with appropriately in the context of a general overall reform”.¹³³

209. The Lord President concurred with this general concern, observing that the Lands Tribunal “is a court of law in all but name. It does highly specialised work and it deals with important cases involving the law of conveyancing, the law of valuation for rating, and the law of compulsory acquisition and compensation.” He indicated that it “operates superbly well” and that “it is not broken and does not require fixing”.¹³⁴

210. There was therefore a general call for the Lands Tribunal to be left in a pillar on its own, outwith the chamber and division structure proposed by the Bill, but under the leadership of the Lord President as Head of the Scottish Tribunals.

211. In the Policy Memorandum it was noted that the policy intention was for the devolved functions of the Lands Tribunal to transfer-in to the Upper Tribunal rather than the First-tier Tribunal. The Scottish Government’s view was that “it can best preserve and enhance the specialist qualities of the Lands Tribunal within the Upper Tribunal by allocating its functions to a single division.”¹³⁵

212. The Minister for Community Safety and Legal Affairs acknowledged the complexity of the Lands Tribunal’s jurisdiction and stated that it was the Scottish Government’s view that adequate provision was made by this intention to situate it in the Upper Tribunal. She was firmly opposed to the proposal that it be in a pillar on its own noting that “positioning tribunals outwith the structure only complicates the system and is contrary to what we seek to address in the Bill.”¹³⁶

213. The Committee notes the case put forward by the Lands Tribunal for Scotland that it should not be transferred in to the new system. We therefore urge the Scottish Government to review its position in this regard.

Mental Health Tribunal for Scotland

214. The Mental Health Tribunal for Scotland (MHTS) raised concerns regarding being placed within the First-tier Tribunal. The MHTS’s view was that the tribunal was of a different characteristic from other tribunals and that it, therefore, should be retained in a chamber on its own.

215. In its written submission it noted that it was an expert tribunal in the area of mental health, it was therefore concerned that “after its creation by the 2003 Act with the specific intention of removing mental health cases from the jurisdiction of the “generic” public courts in Scotland and transferring them into an expert jurisdiction, the proposal appeared to envisage the return of the mental health jurisdiction to a “generic” First-tier Tribunal.”¹³⁷

¹³³ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3114.

¹³⁴ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3195.

¹³⁵ Policy Memorandum, paragraph 46.

¹³⁶ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3203.

¹³⁷ Mental Health Tribunal for Scotland. Written submission, page 1.

216. Adrian Ward, Convener of the Law Society's mental health and disability sub-committee, developed this point in oral evidence, setting out the various powers of the MHTS, including "depriving people of their liberty, imposing treatments on them that they do not want to accept and imposing conditions as to how they may live if they are not deprived of their liberty completely".¹³⁸

217. Representations have been made by the MHTS to the Scottish Government seeking a commitment that the MHTS would be preserved in a chamber on its own. The Scottish Government in the Policy Memorandum made a commitment to take this forward.¹³⁹

218. However, Heather Baillie from the MHTS noted that the commitment was that the MHTS will only "initially" be in a chamber on its own.¹⁴⁰ The Bill delegates powers to the Scottish Ministers to establish the structure of the Scottish Tribunals which includes a chamber within which the MHTS will be. There was therefore a general call that this should be set out on the face of the Bill to provide certainty for the future.

219. While the Minister for Community Safety and Legal Affairs did reiterate the commitment made in Policy Memorandum, she saw the need for flexibility to be retained and she also committed to "consultation and a high level of parliamentary scrutiny each time the chamber structure is changed. That will ensure that the system is as flexible as possible, while maintaining the committee's oversight."¹⁴¹

220. The Committee welcomes the commitment to retain the Mental Health Tribunal for Scotland in a chamber of its own within the First-tier Tribunal. We consider that taking such a step will ensure that the unique nature of the tribunal will be preserved within the new structure. However, we are sympathetic to the Mental Health Tribunal's concerns that this commitment appears to be made of a temporary nature and so we recommend that the Scottish Government bring forward an amendment to preserve the distinctiveness of the Mental Health Tribunal for Scotland.

Children's Hearings System

221. In its submission, the Scottish Children's Reporter Administration (SCRA) expressed concern at the power of the Scottish Ministers to make additions to schedule 1 of the Bill,¹⁴² which lists the tribunals whose functions can be transferred in to the Scottish Tribunals.

222. The SCRA argued that Children's Hearings should be exempted from this power because of the complexity, size and the fact that the system has recently been reformed.¹⁴³ The SCRA was not in principle opposed to Children's Hearings being included in the Scottish Tribunals at some juncture in the future; however it argued "that if such a move were to be proposed, it would require the time for

¹³⁸ Scottish Parliament Justice Committee, *Official Report*, 10 September 2013, Col 3166.

¹³⁹ Policy Memorandum, paragraph 43.

¹⁴⁰ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3110.

¹⁴¹ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3203.

¹⁴² Tribunals (Scotland) Bill, section 26(2)(b).

¹⁴³ The Children's Hearings (Scotland) Act 2011 came into force in June 2013.

consultation, debate, discussion and detailed parliamentary scrutiny which the primary legislative route guarantees".¹⁴⁴

223. Scotland's Commissioner for Children and Young People echoed the SCRA's view and stated that "Scotland's unique care and justice system for children and young people should be explicitly excluded from the scope of the power in section. 26".¹⁴⁵

224. The Committee recognises the complexity and importance of the Children's Hearing system in Scotland and notes that it has very recently been reformed. We also note that the power given to the Scottish Ministers under section 26(2)(b) require regulations to be laid before the Parliament which will be subject to the affirmative procedure. It would be for the Scottish Ministers at the time to undertake the required consultation and background work before laying any regulations before the Parliament. We consider this to provide sufficient Parliamentary protection which would prevent Children's Hearings being transferred into the Scottish Tribunals inappropriately.

Delegated powers

225. The Bill is an enabling piece of legislation which provides a framework for the new tribunal structure. That being the case, much of the detail will be set out in secondary legislation which will include, amongst other things, detail of the establishment of the new structure and determining which tribunals will be transferred in, as well as the rules of the tribunals and the charging of fees.

226. While witnesses in general accepted that the flexibility provided by the use of delegated powers is sometimes necessary, a number of concerns were expressed at the lack of detail set out on the face of the Bill.

227. Lauren Wood from Citizens Advice Scotland noted that the lack of detail meant that it was impossible to guarantee fairness, openness and impartiality.¹⁴⁶ Katie James from Advocard observed that "from a service user's point of view, accessibility comes from having detail that people can look at, cross-examine and utilise effectively."¹⁴⁷

228. In evidence, the Minister for Community Safety and Legal Affairs noted the difficulties in including all the provisions on the face of the Bill "given the complexity of the various tribunals that are involved"¹⁴⁸

229. The Committee is sympathetic to the concerns caused by the lack of detail on the face of Bill. However, we also understand the need for the flexibility afforded by the use of delegated powers given the complexities of the legislation involved. We will therefore pay very close attention to the secondary legislation which will be brought forward under the Bill.

¹⁴⁴ Scottish Children's Reporter Administration. Written submission, page 2.

¹⁴⁵ Scotland's Commissioner for Children and Young People. Written submission, page 2.

¹⁴⁶ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3127.

¹⁴⁷ Scottish Parliament Justice Committee, *Official Report*, 3 September 2013, Col 3126.

¹⁴⁸ Scottish Parliament Justice Committee, *Official Report*, 17 September 2013, Col 3203.

Delegated Powers and Law Reform Committee

230. As part of the Stage 1 process, the Delegated Powers and Law Reform Committee (DPLR) has produced a report on the delegated powers in the Bill.¹⁴⁹

231. In its report on the Bill, the Committee highlights two points in particular on which it is seeking action from the Scottish Government.

232. The DPLR Committee is seeking amendments to section 48(2) (which relates to excluded decisions in relation to appeal rights) and to section 56(2) (which relates to the venue for tribunal hearings). The details of the DPLR Committee's concerns are set out in paragraphs 43 to 59 of its report on the Bill.

233. The Committee endorses the conclusions drawn by the Delegated Powers and Law Reform Committee on its Stage 1 report on the delegated powers in the Bill and calls on the Scottish Government to give particular consideration to the recommendations in respect of the powers in sections 48(2) and 56(2).

Policy and Financial Memorandums

234. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the policy memorandum which accompanies the Bill. We consider that the memorandum provides sufficient detail on the policy intention behind the Bill and explains why alternative approaches were not favoured.

235. The same rule also requires the lead committee to report on the financial memorandum. The Committee notes that the Finance Committee was satisfied that no substantive issues were raised in the written submissions it received in response to its call for evidence, and did not opt to undertake any further scrutiny or report to this Committee. We are therefore content with the level of detail provided in the financial memorandum.

GENERAL PRINCIPLES

236. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

237. The Committee supports the general principles of the Bill. We consider that the Bill brings forward a much-needed restructuring of the tribunals system. In particular we believe that the provisions will simplify the existing process and will make the tribunals more accessible to users.

¹⁴⁹ Delegated Powers and Law Reform Committee. 41st Report, 2013 (Session 4). *Tribunals (Scotland) Bill* (SP Paper 380).

ANNEXE A: REPORTS FROM OTHER COMMITTEES

Finance Committee consideration

The Finance Committee agreed, at its meeting on Wednesday 5 June 2013, to invite written evidence from a number of organisations, seeking a response to specific questions. The call for evidence and the responses received are available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66001.aspx>

Delegated Powers and Law Reform Committee consideration

The Delegated Powers and Law Reform Committee's report on the Tribunals (Scotland) Bill is available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66797.aspx>

ANNEXE B: EXTRACTS FROM THE MINUTES

17th Meeting, 2013 (Session 4) Tuesday 28 May 2013

Tribunals (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed to further consider its approach at its next meeting.

18th Meeting, 2013 (Session 4) Tuesday 4 June 2013

Tribunals (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

22nd Meeting, 2013 (Session 4) Tuesday 3 September 2013

Tribunals (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

May Dunsmuir, Convener, Additional Support Needs Tribunal for Scotland
Heather Baillie, In-house Convener, Mental Health Tribunal for Scotland
John Wright QC, Member, Lands Tribunal for Scotland
Alastair Beattie, Convener, Scottish Valuation Appeal Committee Forum
Katie James, Advocard
Jon Shaw, Welfare Rights Worker, Child Poverty Action Group in Scotland
Lauren Wood, Policy Officer, Citizens Advice Scotland
Iain Nisbet, Head of Education Law, Govan Law Centre

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

23rd Meeting, 2013 (Session 4) Tuesday 10 September 2013

Tribunals (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Adrian Ward, and Richard Henderson, Law Society of Scotland
Jonathan Mitchell QC, Faculty of Advocates
Alan Gamble, Judge, Upper Tribunal, Administrative Appeals Chamber,
sitting in Scotland

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

24th Meeting, 2013 (Session 4) Tuesday 17 September 2013

Tribunals (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Rt Hon Lord Gill, Lord President of the Court of Session
Roseanna Cunningham, Minister for Community Safety and Legal Affairs
Michael Gilmartin, Solicitor, Scottish Government

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

26th Meeting, 2013 (Session 4) Tuesday 1 October 2013

Tribunals (Scotland) Bill (in private): The Committee agreed to defer consideration of its draft Stage 1 report to its next meeting.

27th Meeting, 2013 (Session 4) Tuesday 8 October 2013

Tribunals (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.

ANNEXE C: INDEX OF ORAL EVIDENCE

[22nd Meeting, 2013 \(Session 4\) Tuesday 3 September 2013](#)

May Dunsmuir, Convener, Additional Support Needs Tribunal for Scotland
Heather Baillie, In-house Convener, Mental Health Tribunal for Scotland
John Wright QC, Member, Lands Tribunal for Scotland
Alastair Beattie, Convener, Scottish Valuation Appeal Committee Forum
Katie James, Advocard
Jon Shaw, Welfare Rights Worker, Child Poverty Action Group in Scotland
Lauren Wood, Policy Officer, Citizens Advice Scotland
Iain Nisbet, Head of Education Law, Govan Law Centre

[23rd Meeting, 2013 \(Session 4\) Tuesday 10 September 2013](#)

Adrian Ward, and Richard Henderson, Law Society of Scotland
Jonathan Mitchell QC, Faculty of Advocates
Alan Gamble, Judge, Upper Tribunal, Administrative Appeals Chamber, sitting in
Scotland

[24th Meeting, 2013 \(Session 4\) Tuesday 17 September 2013](#)

Rt Hon Lord Gill, Lord President of the Court of Session
Roseanna Cunningham, Minister for Community Safety and Legal Affairs
Michael Gilmartin, Solicitor, Scottish Government

ANNEXE D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

[Additional Support Needs Tribunals for Scotland \(94KB pdf\)](#)
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