



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

41st Report, 2013 (Session 4)

Tribunals (Scotland) Bill

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Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Christian Allard
Nigel Don (Convener)
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

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Tribunals (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 25 June and 3 September 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Tribunals (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF THE BILL

3. The Tribunals (Scotland) Bill was introduced in the Scottish Parliament on 8 May 2013.
4. The Bill creates a new structure for tribunals dealing with devolved matters. At present, a number of individual tribunals exist, each with an individual specialised remit which is conferred by statute. The Bill creates two new tribunals: a First-tier Tribunal for Scotland and an Upper Tribunal for Scotland. These would be collectively known as “the Scottish Tribunals”. It is intended that the functions of the existing devolved tribunals will transfer to these new tribunals. Schedule 1 to the Bill lists the tribunals whose functions may be transferred.
5. The Lord President of the Court of Session would be the Head of the Scottish Tribunals. A new office would also be created, the President of the Scottish Tribunals, responsible for the efficient disposal of business.

¹ Tribunals (Scotland) Bill available here:
[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)

² Tribunals (Scotland) Bill Delegated Powers Memorandum available here:
http://www.scottish.parliament.uk/S4_Bills/Delegated_Powers_Memorandum.pdf

6. In the consideration of the DPM at its meeting on 25 June, the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced at the Annex.

DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill.

8. The Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 9 – Directions on functions

Section 26(2) – Modification of listed tribunals

Section 27(2) – Transfer-in of functions of the listed tribunals

Section 27(4) – Transfer of functions between the Scottish Tribunals

Section 49(1) – Position on transfer-in

Section 50(1) – Time limits for applying for permission to appeal

Section 51(2) – Specifying persons who are to be regarded as a party to a case

Section 52(4) – Specification of categories of petition for judicial review which may be remitted to the Upper Tribunal

Section 54(2) – Additional matters in relation to judicial review

Section 57(1) – Conduct of cases

Section 58(1) – Enforcement of decisions

Section 59 – Award of expenses

Section 60(1) – Additional powers

Section 61(1) – Application of enactments

Sections 62 to 67 – Scottish Tribunal Rules

Section 70(1) – Tribunal fees

Section 77(2) – Commencement

Schedule 2, paragraph 1(1) – Transfer-in of members

Schedule 3, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the First-tier Tribunal

Schedule 3, paragraphs 5(2) and 7 – Further provision about the eligibility of legal members of the First-tier Tribunal

Schedule 5, paragraph 1(2) – Eligibility criteria for appointment of ordinary members of the Upper Tribunal

Schedule 5, paragraphs 5(2) and 7 – Further provision about the eligibility of legal members of the Upper Tribunal

Schedule 8, paragraph 3(1) – Rules for the investigation and determination of any matter concerning the conduct of members of the Scottish Tribunals

Schedule 8, paragraph 14 – Procedure to be followed by a fitness assessment tribunal

Schedule 9, paragraph 2(2) – Continued application of procedural rules of listed tribunals

Schedule 9, paragraph 4(2) – Procedural rules prior to the involvement of the Scottish Civil Justice Council

9. The Committee's comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

Section 19(2) – Chambers in the First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 22(2) – Divisions of the Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provisions

10. Section 19(1) provides that the First-tier Tribunal is to be organised into a number of chambers, having regard to the subject-matters falling within the Tribunal's jurisdiction and any other factors relevant to the exercise of the Tribunal's functions. Section 22(1) makes similar provision with regard to the Upper Tribunal, which is to be organised into a number of divisions. Sections 19(2) and 22(2) confer powers on the Scottish Ministers by regulations to make provision in connection with the organisation of the Tribunals, and the allocation of functions between the chambers or, as the case may be, between the divisions.

11. Before making regulations under either section 19(2) or 22(2), the Ministers must obtain the Lord President's approval and consult such other persons as they consider appropriate. Both powers are subject to the affirmative procedure.

12. Section 10(1) permits regulations under section 19(2) or 22(2) to make provision delegating authority to the Lord President to make arrangements

regarding the organisation of the First-tier or Upper Tribunals, or to rely on the effect of Tribunal Rules to make such provision.

Comment

13. The Committee is content in principle with delegation of the powers to organise the structure of the Tribunals, given the need for flexibility explained in the DPM.

14. The DPM explains that the Scottish Ministers are considered to be the most appropriate persons to make provision regarding the chamber structure of the First-tier and Upper Tribunals and the allocation of functions among those chambers, but that the Scottish Government also recognises that it may be more appropriate for the Lord President or Tribunal Rules, formulated through a process independent of the Scottish Ministers, to determine these matters. It explains that section 10(1) therefore enables the regulations to make provision authorising the Lord President, or relying on Tribunal Rules, to determine certain of these matters.

15. In justifying the choice of parliamentary procedure, the DPM explains that affirmative procedure is considered appropriate as the power has a potentially significant impact on the way in which the First-tier Tribunal will operate and how its functions will be exercised. The Scottish Government considers that this is an area which is likely to be of concern to the members and users of the listed tribunals, and that this is reflected in the requirement for consultation prior to making the regulations.

16. Given the stated importance of the organisation of the Tribunals, the Committee does not consider that it is fully explained in the DPM in what circumstances it might be considered appropriate to delegate the matter to the Lord President, or to rely on provision made in Tribunal Rules, or what sort of provision might be delegated. While the effect of sections 19(2) and 22(2) as read with section 10(1) is that Parliament would have the opportunity to consider any regulations which delegated authority to the Lord President, including the terms of that delegation, the actual provision made by the Lord President would not be subject to parliamentary scrutiny. Similarly, provision made in the Tribunal Rules would require to be laid before parliament but would not be subject to further procedure. There would be no requirement for consultation in either case. The Committee accordingly sought further clarification from the Scottish Government to assist the Committee in considering the scope of the powers.

17. The Scottish Government's response highlights that authority to make arrangements regarding organisation of the Tribunals may only be delegated to the Lord President by way of affirmative regulations. Such authority will therefore be limited to the parameters set out in the regulations. Accordingly no authority may be delegated to the Lord President to deal with those matters without parliamentary approval. Similarly, the parameters regarding the provision which may be made in Tribunal Rules must be clearly set out in the regulations. The Scottish Ministers will not be able to rely on the effect of Tribunal Rules without providing for the extent they wish to do so in the regulations and, thus, without parliamentary approval.

18. The Scottish Government also explains that, as the Head of the Scottish Tribunals, the Lord President will have the responsibility for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals. Once a significant number of functions have been transferred-in from the listed tribunals, the Scottish Government considers it may be that the Lord President is in the best position to identify the best manner for the Tribunals to be organised and their functions allocated among the chambers or divisions.

19. However, the Scottish Government also recognises that the Scottish Ministers and the Scottish Parliament have an overriding interest in the structure of the Scottish Tribunals and may wish to ensure that there are particular chambers which cannot be altered by the Lord President. The Committee notes that such a restriction could be achieved by placing limits on the delegation of authority to the Lord President through the relevant regulations.

20. Tribunal Rules will be made independently of the Scottish Ministers by the Court of Session by act of sederunt under section 62(1) of the Bill, following their preparation by the Scottish Civil Justice Council (“the SCJC”). Under section 2(1)(ba) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (as amended by paragraph 12(2)(a) of schedule 9 to the Bill), the SCJC will have the function of reviewing the practice and procedure used in the Scottish Tribunals. The Scottish Government considers that the SCJC will therefore be in an informed position to consider whether certain functions of a tribunal may be better dealt with by a particular chamber or division rather than the one to which they were originally allocated.

21. The Scottish Government indicates that, at this stage, it does not intend to make regulations under section 19(2) or 22(2) which will include a provision delegating any matter to the Lord President or relying on provision made in Tribunal Rules. However it does consider that it is necessary to allow this to occur in the future, particularly given the responsibilities of the Lord President in relation to the Scottish Tribunals and the role of the SCJC in the formulation of Tribunal Rules.

22. The Committee is content with this response, in light of the explanation regarding the role of the Lord President and SCJC in relation to the Scottish Tribunals, and the fact that the limits of delegation will be contained in subordinate legislation subject to parliamentary approval. The Committee welcomes this clarification and is content with the delegation of the powers in sections 19(2) and 22(2) as read with section 10(1).

Section 35(1) – Composition of First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 37(1) – Composition of Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provisions

23. Section 35(1) confers power on the Scottish Ministers, by regulations, to make provision for determining the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. Section 37(1) confers a similar power on the Scottish Ministers to make provision for determining the composition of the Upper Tribunal.

24. In each case, the regulations may make provision for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess.

25. Section 10(2) permits regulations under section 35(1) or 37(1) to make provision delegating authority to the President of Tribunals to make arrangements regarding the composition of the First-tier and Upper Tribunals, or to rely on the effect of Tribunal Rules to make such provision.

Comment

26. As in relation to the powers to organise the First-tier and Upper Tribunals discussed above (sections 19(2) and 22(2)), the Committee is content in principle with delegation of the powers concerning the composition of those Tribunals.

27. Once again however, the Committee sought further explanation regarding the circumstances in which the Scottish Government considers that it may be more appropriate for the President of Tribunals, or Tribunal Rules, to determine the composition of the Scottish Tribunals, and what limits are likely to be placed on the delegation of that authority.

28. The response given is similar to the one given in relation to the section 19(2) and 22(2) powers to organise the Tribunals. In relation to the powers to determine the composition of the Tribunals, the Scottish Government highlights the role of the President of Tribunals. It explains that, as the senior member of the Scottish Tribunals, the President of Tribunals will have responsibility for the day-to-day running of the Tribunals. The President of Tribunals will therefore be in the most

informed position to identify the most effective and efficient way of convening the Tribunals to exercise their decision-making functions.

29. The Scottish Government also considers that the SCJC, which will be responsible for reviewing the practice and procedure used in the Scottish Tribunals and for preparing Tribunal Rules, will be in a similarly informed position. It is therefore appropriate for there to be a power enabling those matters to be delegated to the President of Tribunals, or relying on Tribunals Rules to make the relevant provision.

30. The Scottish Government's response also stresses that delegation of the functions to the President of Tribunals, or placing reliance on Tribunal Rules, can only be achieved through affirmative regulations. The delegation of authority, and the limits of that delegation, will accordingly be subject to parliamentary approval.

31. The Committee is accordingly content with the delegation of powers in sections 35(1) and 37(1), as read with section 10(2), to determine the composition of the Scottish Tribunals.

Section 38(3)(b) – Review of decisions

Power conferred on:	the Court of Session
Power exercisable by:	act of sederunt
Parliamentary procedure:	laid no procedure

Provision

32. The power in section 38(3)(b) relates to the provisions in the Bill which allow the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. A decision may be reviewed at the Tribunal's own instance or, with the Tribunal's agreement, at the request of a party in the case.

33. Section 38(3) provides that no decision may be the subject of a review if it is an "excluded decision". Sections 46 to 49 set out what is meant by that term. Section 38(3)(b) provides that Tribunal Rules may also make provision excluding other decisions from being reviewed (i.e. decisions other than those set out in sections 46 to 49) or otherwise restricting the powers of the Scottish Tribunals to review their own decisions.

34. Tribunal Rules are rules regulating the practice and procedure to be followed in the Scottish Tribunals, to be made by the Court of Session by act of sederunt under section 62(1) of the Bill.

Comment

35. The DPM explains that Tribunal Rules will relate to technical procedural matters governing the practice and procedure to be followed in Scottish Tribunal cases, and will be detailed, varied and require regular updating. The Committee notes that section 38(3)(b) appears to confer a wide power to specify, by means of Tribunal Rules, decisions of the Scottish Tribunals which are excluded from review, or otherwise to restrict the availability of review. As such, it appears to enable substantive provision to be made as opposed to provision which merely

regulates matters of practice and procedure. The Committee sought clarification regarding the nature of the power conferred by section 38(3)(b).

36. In its response, the Scottish Government refers to the Policy Memorandum and explains that the aim of section 38 is to cut down on the number of appeals generated by administrative mistakes. It is not intended to be an alternative to a formal appeal against a decision of the Scottish Tribunals under section 41 or 43 of the Bill. Excluding further decisions from review or otherwise restricting the availability of the rights of review does not, therefore, have the effect of limiting the rights of a party to a case before one of the Scottish Tribunals. It simply restricts the availability of a mechanism which is designed to reduce the number of appeals generated by administrative mistakes.

37. The Committee notes that the power of review in section 38 is not expressly limited to correcting matters of administrative error. It may also be used to set aside a decision of the Scottish Tribunals. Nonetheless, the Committee accepts that the exercise of the power in section 38(3) to exclude or restrict the availability of review would not affect the availability of a right to appeal against the decision. Accordingly it accepts that the power does not affect the substantive matter of appeal rights,

38. The Committee is content with this explanation and with the delegation of the power in section 38(3)(b) in principle.

39. The Committee also queried why it was considered appropriate for the power to be exercised by way of Tribunal Rules, which are not subject to parliamentary procedure (other than laying), when the principal exclusions are contained on the face of the Bill and may be added to by regulations made by the Scottish Ministers.

40. The Scottish Government explains that, in light of the function of reviewing the practice and procedure of the Scottish Tribunals which is to be conferred on the SCJC by virtue of paragraph 12(2)(a) of schedule 9 to the Bill, it considers that the SCJC will be in the most informed position to determine whether particular types of decision should be excluded from review, or indeed whether the review of particular types of decisions should only be made available on particular grounds. Such matters relate to process more than substance and, given the availability of appeal under section 41 or 43, the Scottish Government does not consider that either the Scottish Ministers or the Scottish Parliament require a role.

41. It also explains that section 49(1) only enables regulations to provide for a decision to be excluded from review and appeal where, prior to the transfer-in of functions to the Scottish Tribunals; the decision made by the listed tribunal was not subject to appeal. Accordingly, section 49(1) enables the position which existed prior to the transfer-in of functions to be preserved. Such provision requires to be made by regulations because it excludes not only the review of the decision but also any appeal of the decision. In the Scottish Government's view, the exclusion of a right of appeal should only be made by provision which is subject to parliamentary procedure.

42. **The Committee is content with that response and considers that it appears to be consistent with the view that the review procedure is intended to be an administrative matter, while the appeal process is a substantive one. It is accordingly content with the level of scrutiny applied to exercise of the power in section 38(3)(b).**

Section 48(2) – Other appeal rights

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

Provision

43. Section 48(1) provides that a decision of the Scottish Tribunals against which there is a right of appeal under another enactment is an excluded decision to which the provisions for review and appeal set out in Part 6 of the Bill do not apply. Section 48(2) confers a power on the Scottish Ministers, by regulations, to make exceptions to this general rule.

Comment

44. The Committee notes that where regulations transferring-in the functions of a listed tribunal are made under section 27(2) of the Bill and those regulations preserve an existing right of appeal in respect of a function, the effect of section 48(1) is that a decision taken by a tribunal in respect of that function is an excluded decision, to which the rights of review and appeal set out in the Bill will not apply. In providing for exceptions to that rule to be made, section 48(2) enables the Scottish Ministers to make regulations which potentially circumvent provision made by virtue of regulations under section 27(2).

45. The Committee sought clarification from the Scottish Government regarding whether that was the intended effect of section 48(2), and further, whether the intention was to enable a choice of appeal rights to be created, as between appeal under the existing legislation and appeal under the provisions of the Bill. The Government responded that it envisaged that regulations under section 48(2) would, for example, make provision so that the review procedure under section 38 of the Bill would be available in respect of decisions against which there is a right of appeal under another enactment. The regulations would not make provision making the right of appeal under section 41 or 43 of the Bill available for those decisions.

46. The Committee notes however that section 48(2) is not limited in this way to providing that a decision, against which there is a right of appeal under another enactment, is subject to the review procedure in the Bill. It may also be used to provide that the appeal rights contained in the Bill apply to such a decision. Accordingly, the provision does not reflect the apparent policy intention.

47. The Committee therefore recommends that the Scottish Government give consideration to tabling an appropriate amendment to section 48(2) at Stage 2, to restrict the purposes for which an exception may be made to the rule in section 48(1).

48. The Government's response also states that the Government does not envisage making provision in regulations under section 48(2) so as to provide for a choice of appeal routes. It will consider whether to propose an amendment to section 48(2) at Stage 2 to clarify this matter.

49. The Committee welcomes this response and looks forward to sight of an amendment to section 48(2) in due course, if appropriate. It notes that such an amendment may not be necessary if an amendment along the lines of that recommended in paragraph 47 above is tabled.

50. The Committee also asked why it is considered appropriate that the power in section 48(2) should be subject to negative procedure when the section 27(2) power to transfer-in the functions of a listed tribunal (including power to make provision about appeal rights) is subject to affirmative procedure.

51. The Scottish Government responded that it considers that the negative procedure is appropriate for section 48(2) as the power cannot be used to remove any existing rights of appeal, but only to make use of the review and appeal mechanisms in the Bill where this can sensibly be done.

52. The Committee notes this explanation. It also notes that section 27(2) confers a wide power to make provision about the transfer-in of functions which goes beyond provision regarding the applicable appeals regime, and which may involve the modification of primary legislation.

53. As such the Committee is content with the level of scrutiny proposed for regulations under section 48(2)

Section 56(2) – Venue for hearings

Power conferred on:	the Court of Session
Power exercisable by:	act of sederunt
Parliamentary procedure:	laid no procedure

Provision

54. Section 56(1) provides that the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear cases, or for any other purpose relating to their functions. Section 56(2) states this is subject to any provision made by Tribunal Rules, as to the question of where in Scotland the Scottish Tribunals are to be convened.

Comment

55. The Committee considers the effect of section 56 appears to be that provision can be made in the Tribunal Rules by the Court of Session which would determine where in Scotland the First-tier Tribunal and Upper Tribunal are to be convened, or possibly how any questions as to that location are to be resolved.

56. The location of the Scottish Tribunals will of course be a significant matter, for all those attending, and for the disposal of business. The DPM does not explain why the Scottish Government has considered it appropriate that this power is

delegated to the Court of Session in the Rules which are not subject to parliamentary procedure. The Committee sought clarification of these matters.

57. The Scottish Government's response explains that the power is intended to be exercised so that Tribunal Rules may make provision to the effect that particular types of cases are heard in particular types of venues. Since the Tribunal Rules may vary in respect of particular types of cases, the Scottish Government considers that the Tribunal Rules are the most appropriate instrument to make any such specification. The type of venue relates to the process for a hearing, which the Scottish Government considers is most suitably decided by Rules formulated by the SCJC rather than the Scottish Ministers.

58. The Committee is of the view that this policy intention is not matched by the terms of the power. Section 56(1) enables the Scottish Tribunals to be convened at "any place in Scotland". Section 56(2) states this is subject to any provision made by Tribunal Rules, as to the question of "where in Scotland" the Scottish Tribunals are to be convened. This clearly appears to be a power enabling the Rules to determine the location in Scotland where the Scottish Tribunals are to be convened, and not merely the types of venue in which they are to be convened.

59. The Committee recommends that the Scottish Government consider the provision made by section 56(2) further in advance of Stage 2, as the explanation of the intended purpose underlying this power does not appear to be reflected in the terms of the power.

Section 68 – Practice directions

Powers conferred on:	the President of Tribunals
Powers exercisable by:	practice direction
Parliamentary procedure:	none

Provision

60. Section 68 enables the President of Tribunals to issue directions as to the practice and procedure to be followed in proceedings in the Scottish Tribunals. These may include instructions or guidance on the application or interpretation of the law, and the manner of making a decision in a case.

61. With approval of the President, (1) a Chamber President in the First-tier Tribunal can issue directions for the proceedings in their own chamber, and (2) a Vice-President of the Upper Tribunal can issue directions for the division over which they preside.

Comment

62. The Committee considers it acceptable for this power to be exercised as a practice direction within the Tribunals system, rather than as a form of subordinate legislation. The power is not discussed in the DPM, as it is a power of direction. However, in relation to Tribunal Rules under section 62 of the Bill, the DPM explains that the Scottish Government considers that matters concerning the practice and procedure of the tribunals should be framed within the courts and

tribunals system and independently of the executive. The Committee assumes that the same considerations would apply in relation to practice directions.

63. However, as regards transparency, the Committee notes that section 68 does not provide for practice directions to be published. The Committee asked the Scottish Government to explain why there was no requirement for publication of the directions, and what the intentions were regarding publication.

64. In its response, the Scottish Government confirmed that the intention is for any practice directions issued under section 68 to be published and stated that it will consider proposing an amendment to the Bill to reflect this at Stage 2.

65. The Committee welcomes the commitment to considering an amendment at Stage 2 to require publication of practice directions.

Section 74 – Ancillary regulations

Powers conferred on:	the Scottish Ministers
Powers exercisable by:	regulations
Parliamentary procedure:	negative, but affirmative where textual amendment of an Act is proposed

66. Section 74(1) confers a power on the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill.

67. The DPM explains that the ancillary powers are considered necessary because, in relation to the transferring-in of functions of the existing tribunals for example, there may be unforeseen consequences giving rise to a need for ancillary modification of existing provisions.

68. The Committee asked the Scottish Government to comment on the particular wording of the powers in section 74(1). The powers may be used “for the purposes of, or *in connection with*” the Bill. This can be contrasted with the wording in other recent Acts of the Scottish Parliament, for example, section 45 of the Regulatory Reform (Scotland) Bill. That section provides that the ancillary powers may be used for “the purposes of, *in consequence of, or for giving full effect to, any provision of this Act*”.

69. The Committee considers that ancillary matters might have a *connection* with the Bill provisions, but not be either in consequence of, or giving full effect to, them. Section 74 appears therefore to propose a broader scope to the ancillary powers than is more usual. The Committee queried why a different formulation of the ancillary powers was proposed in this Bill.

70. In its response, the Scottish Government explains that the formulation of the regulation-making power that has been adopted in section 74(1) follows precedent in certain other Acts of the Scottish Parliament, and gives two examples (section 148(1) of the Legal Services (Scotland) Act 2010 and section 54(1) of the Water Resources (Scotland) Act 2013). It also states that the formulation contained in

section 74(1) was considered to be an appropriate formulation for the Tribunals (Scotland) Bill. However it does not explain why that was thought to be the case.

71. The Government's response adds that standing the wording of section 74(1), it is clear that ancillary regulations may only be made "for the purposes of or in connection with" the Bill. The exercise of the power is therefore strictly confined to the provision made by the Bill and would not permit provision to be made which is too remote from the provision made by it. The Committee agree with that statement, but does not consider that it explains why the wider formulation, which requires only a *connection* with the Bill, is considered appropriate in this particular case.

72. Having regard to the scope and purposes of the Bill, the Committee is content with the delegation of the power in principle and with the choice of parliamentary procedure. It is also content to accept the particular wording of the provision. Given that the exercise of the power is subject to affirmative or negative procedure, Parliament will be afforded the opportunity whenever the power is used to consider whether the ancillary provision made is genuinely in connection with the Bill.

73. Nonetheless, the Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are expressed in different ways, and which presumably have different meanings, without a justification for that having been provided. The Committee would welcome further discussion with the Scottish Government regarding these matters generally.

Schedule 7, paragraph 14 – Determination of other terms and conditions on which a member of the Scottish Tribunals holds the position

Power conferred on:	the Scottish Ministers
Exercisable by:	determination
Parliamentary procedure	none

74. Paragraph 14 of schedule 7 confers power on the Scottish Ministers to determine the terms and conditions on which a member of the Scottish Tribunals holds the position, except as provided for in the Bill.

75. A determination can include provision for remuneration, allowances and expenses, and make different provision for different purposes, or categories of member.

76. As this is a power of determination, there is no explanation of the power in the DPM. The Committee required further information in order to consider whether the power might be more appropriately exercised in a form of subordinate legislation, subject to parliamentary procedure.

77. The Committee also noted that paragraph 2 of schedule 2 to the Bill confers power by regulations to provide for terms and conditions of appointment of non-judicial members of the Scottish Tribunals, other than the terms specified in schedule 7 of the Bill. The Committee therefore sought clarification of why the power of determination was considered necessary or appropriate, and why it was required in addition to the power in paragraph 2 of schedule 2 to make regulations.

78. The Scottish Government explains that paragraph 2 of schedule 2 applies only in respect of the members of a listed tribunal who are being transferred-in to the Scottish Tribunals. Regulations made under paragraph 1(1) of schedule 2 will give effect to the transfer of members and the Scottish Government considers it prudent to make provision in those regulations with regard to the terms and conditions of appointment of the members being transferred-in. To that end, paragraph 2 enables those regulations to make provision preserving or altering those members' terms and conditions, or replacing them with new terms and conditions.

79. The Government's response explains that paragraph 14 of schedule 7 on the other hand is a separate power which allows the Scottish Ministers to determine the terms and conditions on which any person holding a position in the Scottish Tribunals as an ordinary or legal member is to serve. Such terms and conditions may not prevail over any other provision made in the Bill in relation to terms and conditions (for example, the period of appointment provided for in paragraph 2 of schedule 7) but a determination could make provision about other matters such as the remuneration, allowances and expenses payable to, or in respect of, the member.

80. The Committee notes that it would be possible for a determination to make provision about members' terms and conditions which was contrary to provision made in regulations under paragraph 1(1) of schedule 2, as read with paragraph 2. However, it accepts that the purpose of the regulation-making power appears to be to make general provision about the position as regards terms and conditions at the point at which a member transfers-in to the Scottish Tribunals, while schedule 7 (including any determination to be made under paragraph 14 of that schedule) will contain the detail of the applicable terms and conditions for members of the Scottish Tribunals. It therefore accepts that the general power to set terms and conditions under schedule 7 appears to be appropriate in principle.

81. As regards the chosen procedure, the Scottish Government explains that it does not consider that it would be necessary or appropriate for matters regarding the terms and conditions of appointment of tribunal members to be set out in subordinate legislation, as the legislation applying in respect of members of the existing listed tribunals does not generally speaking require this. The Committee is satisfied with this explanation and with the level of scrutiny proposed.

82. The Committee welcomes the clarification provided and is content that the power to set terms and conditions of appointment in paragraph 14 of schedule 7 is appropriate in principle, and that the power is appropriately exercised by determination by the Scottish Ministers.

Correspondence with the Scottish Government

On 25 June 2013, the Delegated Powers and Law Reform Committee wrote to The Scottish Government as follows:

Section 19(2) – Chambers in the First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 22(2) – Divisions of the upper tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

1. Section 19(1) provides that the First-tier Tribunal is to be organised into a number of chambers having regard to the subject-matters falling within the Tribunal's jurisdiction and any other factors relevant to the exercise of the Tribunal's functions. Section 19(2) confers power on the Scottish Ministers by regulations to make provision in connection with this structure.

2. Section 22(1) provides that the Upper Tribunal is to be organised into a number of divisions having regard to the subject-matters falling within the Tribunal's jurisdiction and any other factors relevant to the exercise of the Tribunal's functions. Section 22(2) confers power on the Scottish Ministers to make provision in connection with this structure.

3. The Committee asks the Scottish Government:

- In what circumstances it is considered that it may be more appropriate for the Lord President or Tribunal Rules, rather than the Scottish Ministers, to determine matters relating to the structure of, and allocation of, functions within the First-tier Tribunal or the Upper Tribunal (as the case may be);
- Why it is considered appropriate that provision made by Ministers regarding the structure of, and allocation of, functions within the Tribunal will require consultation and attract a high level of parliamentary scrutiny, but that such provision may be made by the Lord President or by Tribunal Rules under delegated authority, with no consultation or parliamentary procedure required; and
- What limits, if any, are likely to be placed on the delegation of that authority?

Section 35(1) – Composition of First-tier Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Section 37(1) – Composition of Upper Tribunal

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

4. Section 35(1) provides for Scottish Ministers, by regulations, to make provision for determining the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction.

5. Section 37(1) confers power on the Scottish Ministers, by regulations, to make provision for determining the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction.

6. The Committee asks the Scottish Government:

- In which circumstances it is considered that it may be more appropriate for the President of Tribunals or Tribunals Rules, rather than the Scottish Ministers, to determine the composition of the First-tier Tribunal, or the Upper Tribunal (as the case may be).
- Why it is considered appropriate that provision made by Ministers regarding the composition of the Tribunal should attract the affirmative procedure, but that such provision may be made by the President of Tribunals or by Tribunal Rules under delegated authority, with the result that no or limited parliamentary scrutiny will be required; and
- What limits, if any, are likely to be placed on the delegation of that authority?

Section 38(3)(b) – Review of decisions

Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure: laid no procedure

7. The power in section 38(3)(b) relates to the provisions in the Bill which allow the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. A decision may be reviewed at the Tribunal's own instance or, with the Tribunal's agreement, at the request of a party in the case.

8. The Committee asks the Scottish Government:

- Why it is considered that the power in section 38(3)(b) to exclude by Tribunal Rules decisions of the Scottish Tribunals from review, or otherwise to restrict

the availability of review of those decisions, is considered to be a power relating to “technical procedural matters”, and;

- Why it is considered appropriate that exclusions may be contained in Tribunal Rules which are not subject to parliamentary procedure (other than laying), when the principal exclusions are contained on the face of the Bill and may be modified or added to by regulations made by the Scottish Ministers?

Section 48(2) – Other appeal rights

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative procedure

9. Section 48(1) provides that a decision of the Scottish Tribunals against which there is a right of appeal under another enactment is an excluded decision to which the provisions for review and appeal set out in this Part of the Bill do not apply. Section 48(2) confers a power on the Scottish Ministers, by regulations, to make exceptions to this general rule.

10. The Committee asks the Scottish Government:

- Where the transfer-in power under section 27(2) is exercised in a way which leaves any existing appeal rights in relation to a listed tribunal intact, so that section 48(1) applies to exclude decisions subject to those appeal rights from review or appeal under sections 38, 41 or 43 of the Bill, does the power in section 48(2) enable provision to be made to the effect that those decisions are in fact to be subject to review or appeal under sections 38, 41 or 43?
- If so, can the Scottish Government explain why it is considered appropriate that the power in section 48(2) should be subject to negative procedure when the section 27(2) power is subject to affirmative procedure?
- Can the Scottish Government explain whether, in the circumstances described, it is intended that there will be a choice of appeal rights as between appeal under the existing legislation and appeal under the Bill? If not, which power will be used to specify which of the appeal rights is to apply?

Section 56(2) – Venue for hearings

Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure: laid no procedure

11. Section 56(1) provides that the First-tier Tribunal and the Upper Tribunal may be convened at any place in Scotland to hear cases, or for any other purpose

relating to their functions. Section 56(2) states this is subject to any provision made by Tribunal Rules, as to the question of where in Scotland the Scottish Tribunals are to be convened.

12. The Committee asks the Scottish Government:

- Why it has been considered appropriate that the Court of Session may in the Tribunal Rules provide as to the question of where in Scotland the Scottish Tribunals are to be convened, and why it is appropriate that this power is not subject to Parliamentary procedure?

Section 68 – Practice directions

Powers conferred on:	The President of Tribunals
Powers exercisable by:	Practice direction
Parliamentary procedure:	None

13. Section 68 enables the President of Tribunals to issue directions as to the practice and procedure to be followed in proceedings in the Scottish Tribunals. These may include instructions or guidance on the application or interpretation of the law, and the manner of making a decision in a case.

14. The Committee asks the Scottish Government:

- Why section 68 does not provide that practice directions which may be issued under that section require to be published, and what the intentions are in relation to publication?

Section 74 – Ancillary regulations

Powers conferred on:	Scottish Ministers
Powers exercisable by:	Regulations
Parliamentary procedure:	Negative, but affirmative where textual amendment of an Act is proposed

15. Section 74(1) confers a power on the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, the Bill.

16. The section provides that the power to make ancillary regulations can be exercised for the purposes of or in connection with the Bill provisions. This differs from, for example, the ancillary powers provision in section 45 of the Regulatory Reform (Scotland) Bill, which requires the ancillary powers to be “for the purposes of, in consequence of, or for giving full effect to” any provision of the Bill.

17. It seems that ancillary matters might have a connection with the Bill provisions, but not be either in consequence of or giving full effect to them. Section 74 appears, therefore, to propose a broader scope to the ancillary powers than is more usual.

18. The Committee asks the Scottish Government:

- **Why, therefore, is this different formulation of the ancillary powers proposed in this Bill?**

Schedule 7, paragraph 14 – Determination of other terms and conditions on which a member of the Scottish Tribunals holds the position

Power conferred on:	Scottish Ministers
Exercisable by:	Determination
Parliamentary procedure	None

19. Paragraph 14 of schedule 7 provides for a power of Ministers to determine the terms and conditions on which a member of Scottish Tribunals holds the position, except as provided for in the Bill.

20. Paragraph 2 of schedule 2 confers power by regulations to provide for other terms and conditions of appointment of members of the Scottish tribunals other than judicial members (apart from the terms specified in schedule 7).

21. The Committee asks the Scottish Government:

- Why is this power necessary or appropriate; and why is it appropriate to be exercisable in the form of determination and not subject to Parliamentary procedure or a requirement for publication?

The Scottish Government responded on 2 August 2013 as follows:

Sections 19(2) and 22(2) Chambers and Divisions in the Scottish Tribunals

1. Overall responsibility for organising the First-tier Tribunal into chambers and the Upper Tribunal into divisions and the allocation of the Tribunals' functions among those chambers/divisions is vested in and will remain with the Scottish Ministers through the regulation-making powers set out in sections 19(2) and 22(2) which are, of course, subject to parliamentary scrutiny.

2. As highlighted at paragraphs 17 and 24 of the Delegated Powers Memorandum, sections 19(2) and 22(2) (as informed by section 10(1) and (3)) have been drafted in a flexible manner since it is recognised that the Tribunals' functions may vary over time and it is not entirely clear, at this stage, how all those functions will fit together. Functions from tribunals not currently listed in schedule 1 may be transferred-in and future Acts of the Scottish Parliament may confer further functions. The Scottish Government has, therefore, sought to create a flexible structure which is capable of adapting over time as the Tribunals accumulate functions.

3. For those reasons the Scottish Government considered it appropriate that the Scottish Ministers, by regulations, should bear ultimate responsibility for organising the First-tier Tribunal into chambers and the Upper Tribunal into divisions but that, through those regulations, the Scottish Ministers should be able to make provision for certain of these matters to be dealt with by the Lord

President or in Tribunal Rules. Any such delegation would, of course, require to be authorised by the regulations which would also be required to set out the extent to which the delegation is permitted.

4. Section 10(1)(a) permits the regulations made under section 19(2) or 22(2) to make provision delegating authority on the Lord President to make arrangements regarding these matters but such authority will be limited to the parameters set out in the Regulations. The Scottish Ministers will not, therefore, be able to delegate any authority to the Lord President to deal with those matters without parliamentary approval. As the Head of the Scottish Tribunals, the Lord President has the responsibility for making and maintaining appropriate arrangements for securing the efficient disposal of business in the Scottish Tribunals. Once a significant number of functions have been transferred-in from the Listed Tribunals, it may, therefore, be the likely scenario that the Lord President is in the best position to identify the best manner for the Tribunals to be organised and their functions allocated among the chambers/divisions and that it may be beneficial for this to occur on a fluid basis.

5. The Scottish Government recognises, however, that the Scottish Ministers and the Scottish Parliament have an overriding interest in the structure of the Scottish Tribunals and may wish to ensure that there are particular chambers which cannot be altered by the Lord President. In the Policy Memorandum, the Scottish Government went into some detail in this respect, committing itself to having a distinct chamber of the First-tier Tribunal to deal with the functions to be transferred-in from the Mental Health Tribunal for Scotland. (see paragraphs 43 and 44).

6. Similarly, section 10(1)(b) permits the regulations made under section 19(2) or 22(2) to include provision relying on the effect of Tribunal Rules. Again, the parameters as to the provision made in Tribunal Rules must be clearly set out in the Regulations. The Scottish Ministers will not be able to rely on the effect of Tribunal Rules without providing for the extent they wish to do so in the regulations and, thus, without parliamentary approval. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals (referred to in the Bill as “Tribunal Rules”).

7. Tribunal Rules are made independently of the Scottish Ministers by the Court of Session by act of sederunt following their preparation by the Scottish Civil Justice Council. Under section 2(1)(ba) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (as amended by paragraph 12 of schedule 9 to the Bill), the Scottish Civil Justice Council will have the function of reviewing the practice and procedure used in the Scottish Tribunals. The Scottish Civil Justice Council shall, therefore, be in an informed position to consider whether certain functions of a tribunal may be better dealt with by a particular chamber/division rather than to the one to which they were originally allocated.

8. At this stage, the Scottish Government does not intend to make regulations under section 19(2) or 22(2) which will include a provision delegating any matter to the Lord President or relying on provision made in Tribunal Rules. The Scottish Government does, however, consider that it is necessary to allow this to occur in

the future, particularly given the responsibilities of the Lord President in relation to the Scottish Tribunals and the role of the Scottish Civil Justice Council in the formulation of Tribunal Rules.

Sections 35(1) and 37(1) – Composition of the Scottish Tribunals

9. Overall responsibility for determining the composition of the Scottish Tribunals vests in and will remain with the Scottish Ministers through the regulation-making powers set out in sections 35(1) and 37(1) which are, of course, subject to parliamentary scrutiny.

10. As highlighted at paragraphs 43 and 51 of the Delegated Powers Memorandum, sections 35(1) and 37(1) have been drafted in a flexible manner since it is recognised that the Tribunals' functions may vary over time and it is not entirely clear, at this stage, how the Tribunals will be convened to exercise each of their decision-making functions. Functions from tribunals not currently listed in schedule 1 may be transferred-in and future Acts of the Scottish Parliament may confer further functions. The Scottish Government has, therefore, sought to create a flexible structure which is capable of adapting over time as the Tribunals accumulate functions.

11. For those reasons the Scottish Government considered it appropriate that the Scottish Ministers, by regulations, should bear ultimate responsibility for determining the composition of the Tribunals but that, through those regulations, the Scottish Ministers should be able to make provision for certain of these matters to be dealt with by the President of Tribunals or in Tribunal Rules. Any delegation would, of course, require to be authorised by the regulations which would also be required to set out the extent to which the delegation is permitted.

12. Section 10(2)(a) permits the regulations made under section 35(1) or 37(1) to make provision delegating authority on the President of Tribunals to determine these matters but such authority will be limited to the parameters set out in the Regulations. The Scottish Ministers will not, therefore, be in a position to delegate any authority to the President of Tribunals without parliamentary approval. As the senior member of the Scottish Tribunals, the President of Tribunals will have responsibility for the day-to-day running of the Tribunals and will, therefore, be in the most informed position to identify the most effective and efficient way of convening the Tribunals to exercise their decision-making functions. Again, given the likely fact that the Tribunals' functions will grow over time, the Scottish Government considers that it may be beneficial for the composition of Tribunals to be determined on a more fluid basis.

13. Section 10(2)(a) allows for regulations to provide for this to be done. The Scottish Government recognises, however, that the Scottish Ministers and the Scottish Parliament have an overriding interest in certain aspects of the composition of the Tribunals and may wish to ensure, for example, that when exercising a particular function, the First-tier Tribunal is composed of three members one of which is a legal member and one of which is an ordinary member and may wish to confer authority on the President of Tribunals to determine the category of member that the third member should be. Similarly, it may be desirable

in respect of some less controversial functions to give the President of Tribunals more flexibility as to the number and categories of members required to sit on the Tribunal when convened.

14. Section 10(2)(b) permits the regulations made under section 35(1) or 37(1) to include provision relying on the effect of Tribunal Rules. Again, the parameters as to the provision made in Tribunal Rules must be clearly set out in the Regulations. The Scottish Ministers will not be able to rely on the effect of Tribunal Rules without providing for the extent they wish to do so in the Regulations and, thus, without parliamentary approval. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals (referred to in the Bill as “Tribunal Rules”).

15. Tribunal Rules are made independently of the Scottish Ministers by the Court of Session by act of sederunt following their preparation by the Scottish Civil Justice Council. Under section 2(1)(ba) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (as amended by paragraph 12 of schedule 9 to the Bill), the Scottish Civil Justice Council will have the function of reviewing the practice and procedure used in the Scottish Tribunals. The Scottish Civil Justice Council shall, therefore, be in an informed position to consider how the Tribunals should be convened when exercising their decision-making functions.

16. At this stage, the Scottish Government envisages that it is likely that some delegation of authority to determine the composition of the Tribunals when exercising their decision-making functions will be appropriate and that, as noted above, any such delegation will require to be set out in the regulations and approved by the Parliament.

Section 38(3)(b) – Review of decisions

17. The Scottish Government would like to draw the Committee’s attention to the following matters:

- As highlighted in paragraph 177 of the Explanatory Notes, the power in section 38 which enables each of the Scottish Tribunals to review their own decisions is discretionary. The fact that a particular decision is not an excluded decision does not, therefore, mean that it must be reviewed.
- As highlighted in paragraph 180 of the Explanatory Notes, the availability or otherwise of a review in respect of a decision does not affect a party’s right to appeal under section 41 or 43.
- As highlighted in paragraph 57 of the Policy Memorandum, the aim of section 38 is to cut down on the number of appeals generated by administrative mistakes. It is not intended to be an alternative to a formal appeal under section 41 or 43. Excluding further decisions from review or otherwise restricting the availability of the rights of review does not, therefore, have the effect of limiting the rights of a party to a case on which one of the Scottish Tribunals has decided. It simply restricts the availability of a mechanism which is designed to reduce the number of appeals generated by administrative mistakes.

18. Keeping in mind the role of the Scottish Civil Justice Council under section 2(1)(ba) of the 2013 Act whereby the Scottish Civil Justice Council will have the function of reviewing the practice and procedure used in the Scottish Tribunals, the Scottish Government considers that the Scottish Civil Justice Council will be in the most informed position to determine whether particular types of decision should be excluded from review or indeed, whether the review of particular types of decisions should only be made available on particular grounds. Such matters relate to process more than substance and given the availability of appeal under section 41 or 43, the Scottish Government does not consider that either the Scottish Ministers or the Scottish Parliament require a role.

19. The list of excluded decisions (from both review and appeal) in sections 46 to 49 may not be modified or added to by regulations made by the Scottish Ministers. Section 49(1) only enables regulations to provide for a decision to be excluded from review and appeal where, prior to the transfer-in of functions to the Scottish Tribunals, the decision made by the listed tribunal was not subject to appeal (i.e. it preserves the position that existed prior to the transfer-in of functions). Such provision requires to be made by regulations because it excludes not only the review of the decision but also an appeal. The Scottish Government considers that the exclusion of a right of appeal should always only be able to be made by provision which is subject to parliamentary procedure. Section 48(2) is dealt with below.

Section 48(2) – Other appeal rights

20. Where regulations transferring-in the functions of a listed tribunal are made under section 27(2) and those regulations preserve an existing right of appeal in respect of a function, section 48(1) operates so that a decision taken by a tribunal in respect of that function is an excluded decision. By virtue of section 46, the rights of review and appeal set out in the Bill in sections 38, 41 and 43 will not, therefore, apply.

21. Section 48(2) does, however, enable the Scottish Ministers to make regulations circumventing the effect of section 48(1). It is envisaged that such regulations would, for example, make provision so that the right of review under section 38 would apply but not the right of appeal under section 41 or 43.

22. The Scottish Government does not envisage making provision in regulations made under section 48(2) so as to provide for a choice of appeal routes. It will consider whether to propose an amendment to section 48(2) at Stage 2 to clarify this matter.

23. The Scottish Government considers that the negative procedure is appropriate as the power cannot be used to remove any existing rights of appeal but only to make use of the review and appeal mechanisms in the Bill where this can sensibly be done.

Section 56(2) – Venue for hearings

24. The regulation-making power in section 56(2) is intended to be exercised so that Tribunal Rules may make provision so that particular types of cases are heard in particular types of venues. Since the Tribunal Rules may vary in respect of particular types of cases, the Scottish Government considers that the Tribunal Rules are the most appropriate instrument to make any such specification. Again, the type of venue relates to the process for a hearing, which the Scottish Government considers is most suitably decided by Rules formulated by the Scottish Civil Justice Council rather than the Scottish Ministers.

25. Section 56(2) must also operate in light of section 71(2) whereby it is the responsibility of the Scottish Ministers to provide the Scottish Tribunals with such property as the Scottish Ministers consider to be reasonably required for the proper operation of the Tribunals and the discharge of the Lord President's responsibility as to the efficient disposal of business in the Scottish Tribunals.

Section 68 – Practice Directions

26. The Scottish Government intends for any practice directions issued under section 68 to be published and will consider proposing an amendment to the Bill to reflect this at Stage 2. Practice Directions made under section 23 of the Tribunals, Courts and Enforcement Act 2007 in relation to the UK First-tier and Upper Tribunals are currently published without any provision requiring this. The Scottish Government does, however, see the value in making such provision.

Section 74 – Ancillary regulations

27. The formulation that has been adopted in section 74(1) of the Tribunals (Scotland) Bill follows precedent in other Acts of the Scottish Parliament. See, for example section 148(1) of the Legal Services (Scotland) Act 2010 and section 54(1) of the Water Resources (Scotland) Act 2013.

28. The formulation of the regulation-making power contained in section 74(1) was considered to be an appropriate formulation for the Tribunals (Scotland) Bill. The wording of section 74(1) is clear that ancillary regulations may only be made "for the purposes of or in connection with" the Bill. Its exercise, therefore, is strictly confined to the provision made by the Bill and would not permit provision to be made which is too remote from the provision made by it.

Schedule 7, paragraph 14 – Determination of other terms and conditions on which a member of the Scottish Tribunal holds the position

29. Paragraph 2 of schedule 2 informs the regulation-making power contained in paragraph 1(1) of that schedule. Paragraph 1(1) of schedule 2 applies only in respect of the members of a Listed Tribunal for which the functions and members are being transferred-in to the Scottish Tribunals. Regulations made under paragraph 1(1) of schedule 2 will give effect to the transfer of members and the Scottish Government considers it to be prudent to make provision in those

regulations with regard to the effect of the terms and conditions on which the members being transferred-in are currently appointed.

30. Paragraph 14 of schedule 7 is a separate power which allows the Scottish Ministers to determine the terms and conditions on which any person holding a position in the Scottish Tribunals as an ordinary or legal member is to serve. Such terms and conditions may not prevail over any other provision made in the Bill in relation to the terms and conditions on which a legal or ordinary member is to serve (i.e. the period of the appointment provided for in paragraph 2 of schedule 7) but they can make provision about other matters such as the remuneration, allowances and expenses payable to, or in respect of, the member.

31. The Scottish Government does not consider that it would be necessary or appropriate for such matters to be set out in subordinate legislation and the legislation applying in respect of members of the Listed Tribunals does not, generally speaking, require this. See, for example, paragraph 6(1) of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 in relation to members of the Mental Health Tribunal for Scotland.

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