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Tribunals (Scotland) Bill

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The Tribunals (Scotland) Bill (“the Bill”) was introduced to the Scottish Parliament on 8 May 2013. If adopted it will create the framework for a new structure and organisation for devolved tribunals in Scotland.

This briefing outlines the background to the current regime and explains the main changes proposed by the Bill.



The Scottish Parliament
Pàrlamaid na h-Alba

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EXECUTIVE SUMMARY

The tribunals system in Scotland is complex. There are a wide variety of different tribunals, with diverse goals, structures, functions, methods of appointment, appeal rules, procedures etc. A large number of tribunals deal with reserved issues and operate on a UK wide basis in both England & Wales and Scotland. However, there are also a number of tribunals in Scotland operating exclusively or primarily in relation to devolved matters.

The objective of the Bill is to create a new structure for devolved tribunals in Scotland. The new structure will involve the creation of:

- a First-tier Tribunal for first instance decisions (i.e. the initial forum where an action is brought); and
- an Upper Tribunal which will primarily deal with appeals

Both the First-tier Tribunal and the Upper Tribunal will fall under the leadership of the Lord President of the Court of Session, but with day to day management delegated to a new office to be known as the President of the Scottish Tribunals (a Court of Session judge).

The initial aim is for certain devolved tribunals, (the “listed tribunals” listed in schedule 1 of the Bill), to be transferred to the new structure, with the possibility of other tribunals being transferred in at a later point in time.

As part of the new structure, the Bill provides for new rules on a series of matters, including:

- Tribunal independence
- Leadership
- Membership
- Appointments
- Appeals
- Procedural rules
- Fees/expenses

The Bill is largely concerned with creating a framework for tribunal reform. Consequently, many of the actual changes will not occur directly as a result of the Bill, but instead will take place at a later date through secondary legislation.

The Scottish Government has been in discussions with the UK Government regarding the possible transfer of reserved tribunals into the new Scottish structure (i.e. the creation of an integrated system covering both reserved and devolved tribunals). It is, however, not clear whether such a transfer will ultimately take place as the Policy Memorandum notes that, “these

plans have been put on hold due to delays incurred at a UK level” (Policy Memorandum paragraph 82).

INTRODUCTION

The main objective of the Bill is to create the framework for a new structure and organisation for devolved tribunals in Scotland. The Bill will create a two-tier structure - a First-tier Tribunal for first instance decisions (i.e. the initial forum where an action is brought) and an Upper Tribunal which will primarily deal with appeals, both under the leadership of the Lord President of the Court of Session, but with day to day management delegated to a new office to be known as the President of the Scottish Tribunals (a Court of Session judge). The initial aim is for certain devolved tribunals (the “listed tribunals” listed in schedule 1 of the Bill), to be transferred to the new structure, with the possibility of other tribunals being transferred in at a later point in time. The First-tier Tribunal and Upper Tribunal are collectively referred to as “the Scottish Tribunals”.

The Bill, as introduced, and the accompanying documents (including Policy Memorandum, Explanatory Notes/Financial Memorandum and Delegated Powers Memorandum) can be accessed on the Scottish Parliament’s website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62938.aspx>

BACKGROUND/THE CURRENT REGIME

Tribunals in Scotland

Broadly speaking, tribunals are specialised bodies which adjudicate on disputes or claims, often in relation to governmental decisions taken in respect of a specific area of law or policy. In comparison to courts, their processes and procedures are often relatively informal and they are generally less adversarial (there are, however, exceptions).

The tribunals system in Scotland is complex. There are a wide variety of different tribunals, with diverse goals, structures and functions. While this is by no means an exhaustive list, important differences include:

- **subject matter** – the subject matter dealt with by tribunals in Scotland is very varied and covers a wide variety of matters. Issues which tribunals deal with include, for example: crofting law, education, land law, housing law, charity law, the NHS, parking, additional support for learning, mental health, employment law, immigration law etc.
- **function** – many tribunals deal solely with appeals against administrative decisions. Others, such as the Mental Health Tribunal for Scotland, have distinct regulatory and/or quasi-judicial functions
- **parties/legal representation** – most tribunals deal with disputes between individuals and the state (e.g. social security, tax, education, immigration etc.). However, certain tribunals also handle disputes between private individuals and/or businesses (e.g. employment law, land law, housing law etc.). In some tribunals legal representation would be the norm (for example, disputes at the Lands Tribunal for Scotland), whereas in others it would be less likely
- **volume of work** – certain tribunals, such as the Valuation Appeal Panels and Valuation Appeal Committees, which deal with appeals regarding the valuation of properties for council tax/business rates, handle a large volume of cases and sit relatively frequently.

However, others such as the NHS Tribunal, which deals with complaints made against family health service practitioners, often have very few cases and sit infrequently¹

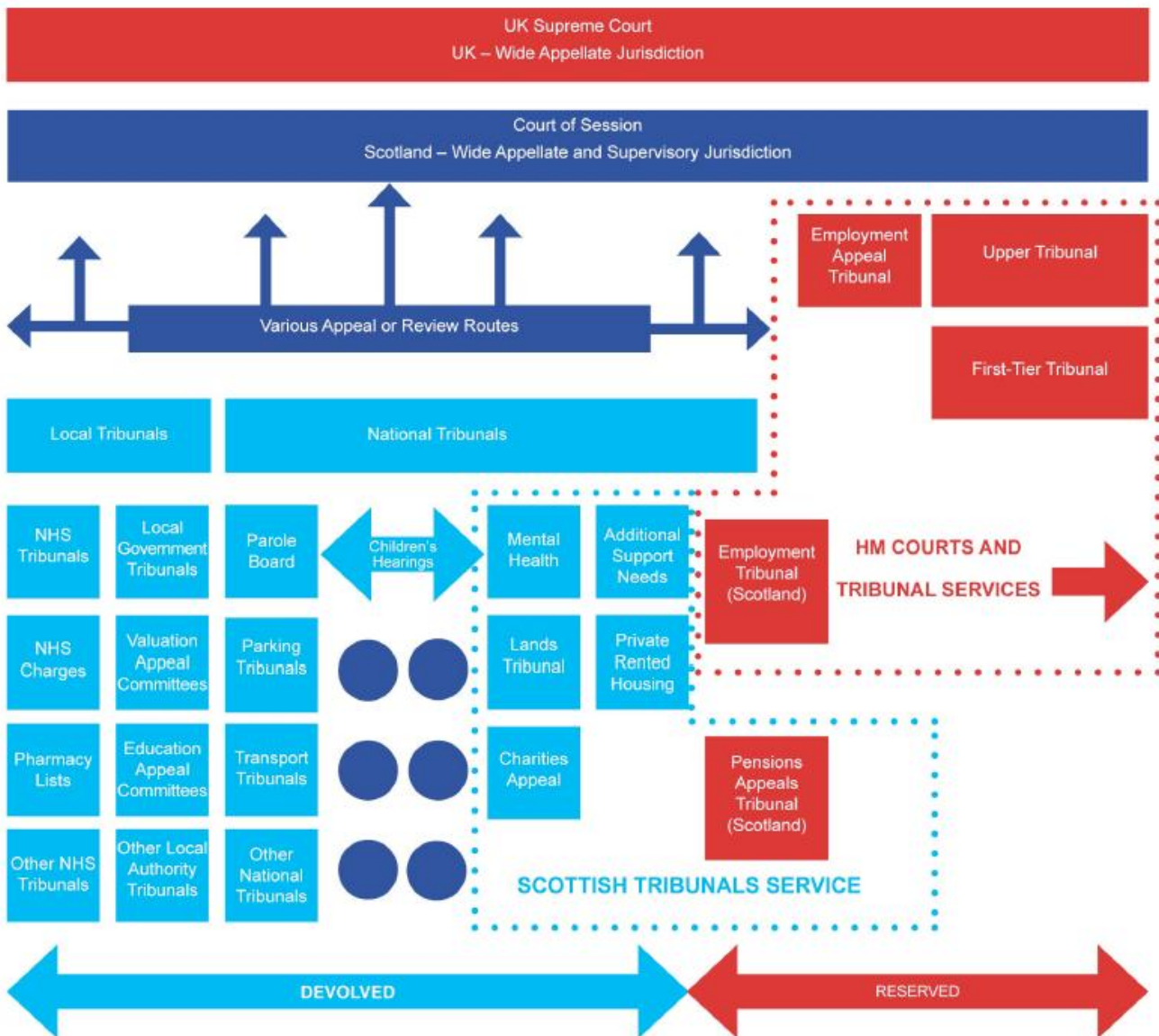
- **appointment process** – appointments to tribunals are generally made by the Scottish Ministers based on the criteria in the legislation setting up the tribunal – in some cases Scottish Ministers have free choice, whilst in others the choice must be made from a list/panel selected by the Lord President (e.g. the Lands Tribunal for Scotland). However other forms of appointment also exist – for example, Valuation Appeal Panel members where appointments are made by Sheriffs Principal
- **reserved/devolved** – a large number of tribunals deal with reserved issues and operate on a UK wide basis in both England & Wales and Scotland. However, there are also a number of tribunals in Scotland operating exclusively or primarily in relation to devolved matters. Some of these, such as the Lands Tribunal for Scotland, existed before devolution in 1999. However, various devolved tribunals have also been created since 1999, including the Additional Support Needs Tribunal for Scotland, the Mental Health Tribunal for Scotland and the Private Rented Housing Panel/Homeowner Housing Panel. In an audit carried out in 2010, the [Scottish Committee of the Administrative Justice and Tribunals Council](#) (“SCAJTC”) found 59 tribunals operating in Scotland, 19 of which operated in a devolved context.²
- **appeals** – appeal processes vary depending on the tribunal in question. In some cases initial appeals can be made to the sheriff court, whilst in other cases appeals are to be made to the Sheriff Principal or the Court of Session, or another court. In some cases, judicial review of the decision is the only option
- **procedures** – the procedures used by tribunals vary widely. In certain tribunals a relatively informal approach is used with the aim of increasing user participation. However, some tribunals are more formal and court-like (for example, employment tribunals and the Lands Tribunal for Scotland)

For an illustrative overview of the overall structure of reserved and devolved tribunals in Scotland see figure 1 below.

Figure 1: Overview of the structure of tribunals in Scotland

¹ For an overview of the caseload of certain tribunals in 2011–2012 see page 7 of the Policy Memorandum

² For a list of these see Annex 4 of [Options for Tribunals Reform in Scotland](#)



Source: [Consultation on the Scottish Government’s Proposals for a New Tribunal System for Scotland](#), page 12

More details on the current structure of the Scottish tribunals system can be found at Diagram 1 of the Policy Memorandum and in the discussion paper published by SCAJTC in 2010 entitled [“Options for Tribunal Reform in Scotland”](#) (pages 21–29).

Reform at UK level

Reform of tribunals has been part of the UK political landscape for many years. In 1957 the Franks Report was published, which investigated the working of tribunals at the time. The key recommendations were that tribunals should act in an open, fair and impartial way. Another key point made was that tribunals were to be viewed as part of the independent adjudicative process rather than as part of the governmental decision-making process. In this respect, the Franks report (paragraph 40) concluded that,

“We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all cases Parliament has deliberately provided for a decision

independent of the department concerned...and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.”

More recently, UK tribunals have been the subject of a series of reforms. In 2001, Sir Andrew Leggatt carried out a review of the delivery of justice by UK tribunals (“the Leggatt Report”), and 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.

Following from the Leggatt Report, 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 subsequently followed by the Tribunals, Courts and Enforcement Act 2007 (“2007 Act”) which implemented many of the recommendations in the Leggatt Report. In particular the 2007 Act:

- set up new structures for tribunals, including a First-tier Tribunal and an Upper Tribunal, into which most tribunal jurisdictions were transferred;
- created a new head of the UK Tribunals Service - the Senior President (a senior UK judge, currently Sir Jeremy Sullivan);
- grouped tribunals into thematically linked “chambers” – for example the social entitlement chamber deals with social security benefits, child support, asylum and criminal injuries compensation;
- allowed for the flexible deployment of judges across jurisdictions;
- provided for a consistent approach to onward appeals;
- created a Tribunal Procedure Committee with the aim of ensuring consistency as regards procedural rules;
- included a statutory guarantee of the independence of the tribunals’ judiciary; and
- set up the Administrative Justice and Tribunals Council (AJTC), with the remit to keep the administrative justice system as a whole under review, including tribunals. The AJTC replaced the previous Council on Tribunals and the SCAJTC similarly replaced the Scottish Committee of the Council on Tribunals. The SCAJTC was responsible for promoting good practice in all tribunals in Scotland, whether reserved or devolved, but has since been abolished as part of the UK Government’s abolition of the AJTC itself.³

The UK Tribunals Service has since been merged with HM Courts and is now part of an integrated agency known as HM Courts & Tribunals Service.

So, in summary, the most recent process of reform at UK level has involved three stages:

1. the creation of a dedicated tribunals service, the UK Tribunals Service, to support UK tribunals
2. the creation of a new structure for UK tribunals through the provisions in the 2007 Act

³ See: <http://ajtc.justice.gov.uk/index.htm>

3. the merging of the UK Tribunals Service with HM Courts to create an integrated courts/tribunals service

Reform in Scotland

The UK reforms stemming from the Leggatt report were not replicated as regards devolved tribunals operating in Scotland. However, in 2008 Lord Philip, a retired senior judge, published a report ("[the Philip report](#)") in conjunction with the Scottish Consumer Council which reviewed devolved tribunals in the light of the Leggatt Report. In this report Lord Philip highlighted a number of problems with the current system, including:

- evidence of a potential lack of independence from the Scottish Government in the operation of some tribunals
- no consistent system of appointment of tribunal members and chairs in Scotland
- the fact that the devolved tribunals work in isolation, using their own internal processes, training and IT systems, potentially leading to: a narrowness of outlook/duplication of effort; a variation of standards and performance; a failure to take advantage of economies of scale and a lack of good value for the tax payer

The report also provided various options for reform, one of which was the establishment of a new Scottish Tribunals Service to support devolved tribunals. This recommendation was followed by the Scottish Government in December 2010 when the Scottish Tribunals Service ("STS") was launched; with tribunals being added to the STS's responsibility in a phased fashion.⁴ In addition to giving administrative support to these tribunals, the STS has also taken on functions in relation to:

- judicial appointments
- judicial remuneration
- budget control
- the setting and monitoring of key performance indicators⁵

Subsequently, SCAJTC carried out a further review of the tribunal system in Scotland, initially in its June 2010 Discussion Paper "[Options for Tribunal Reform in Scotland](#)" and ultimately culminating in a March 2011 report entitled "[Tribunal Reform in Scotland – A Vision for the Future](#)". The 2011 report made the key recommendation that a more coherent and independent tribunals structure should be set up broadly along the lines of the UK system. In addition, the report recommended that:

- overall responsibility for the development of policy for Scottish tribunals should transfer to Scottish Ministers and a single part of the Scottish Government's Justice Directorate

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](#) (see also figure 1 above)

⁵ More details of the structure of the STS can be found at Annex 4 of SCAJTC's March 2011 report entitled "[Tribunal Reform in Scotland – A Vision for the Future](#)."

- all appointments to tribunals in Scotland should be judicial appointments, made on merit and in accordance with procedures that are independent, open and transparent
- a statutory Scottish Tribunal Rules Committee should be established to enable the development of a coherent set of procedural rules for tribunals in Scotland
- all administrative decisions made by public bodies that affect the rights of individuals should be subject to a right of appeal, with the preferred route of appeal to a Scottish Upper Tribunal
- any reform must safeguard:
 - the distinctiveness of the Scottish legal system and its approach to dispute resolution; and
 - the distinctiveness of the approach of tribunals, and the advantages this bestows compared to civil courts

Although many of these recommendations have been taken up by the Bill, the reform of devolved tribunals is currently at stage one of the UK process outlined above, i.e. the creation of a dedicated tribunals service. The Scottish Government's reform programme will, however, largely follow the other stages of the UK reform process, i.e.:

- stage two - the enactment of the Bill creating a new structure for devolved tribunals
- stage three - the merging of the Scottish Tribunals Service with the Scottish Court Service (the [consultation on this process](#) was announced by the Scottish Government in June 2013)

It should be noted that the Scottish Government has been in discussions with the UK Government regarding the possible transfer of reserved tribunals into the new Scottish structure (i.e. the creation of an integrated system covering both reserved and devolved tribunals). According to the Scottish Government, such a transfer would lead to various benefits including:

- economies of scale;
- financial efficiencies (a figure in the region of £5m for cumulative sustainable efficiencies has been mentioned, which apparently represents a 12% reduction in overall running costs);
- a wider network of good quality hearing centres;
- increased opportunities for judicial deployment/improved training; and
- an improvement in the appointments system/ and a review of judicial remuneration

(See [Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland](#); paragraphs 3.24–3.31).

It is, however, not clear whether such a transfer will ultimately take place as the Policy Memorandum notes that, "these plans have been put on hold due to delays incurred at a UK level" (Policy Memorandum paragraph 82).

THE BILL'S PROVISIONS

Coverage of the Bill

The Bill is structured as follows:

- **Part 1** establishes the First-tier Tribunal and the Upper Tribunal and their leadership
- **Part 2** deals with the membership and structure of the Scottish Tribunals
- **Part 3** allows for certain listed tribunals to be transferred to the Scottish Tribunals
- **Part 4** provides for further rules in relation to membership of the Scottish Tribunals
- **Part 5** provides for rules on decision-making and composition of the Scottish Tribunals
- **Part 6** deals with the review or appeal of decisions of the Scottish Tribunals
- **Part 7** deals with procedures, fees, expenses and administrative support
- **Part 8** contains general and ancillary provisions

Objectives of the Bill

The Scottish Government characterises the current tribunals system as one which has developed in an ad hoc fashion and which has, “no common system of leadership, appointment, practice and procedure or review and appeals” (see Policy Memorandum, paragraph 2). The Scottish Government shares the view expressed in the Phillip Report that the ad hoc nature of the current system can lead to a “narrowness of outlook” and a “variation of standards and performance across the tribunals landscape.” Its view (see Policy Memorandum, paragraph 3) is that the Bill will address these issues by creating a structure that will:

- reduce overlap;
- eliminate duplication;
- ensure better deployment;
- allow for the wider sharing of available resources; and
- provide users with the reassurance that tribunal hearings are being heard by people with no links to the body whose decision they are challenging (i.e. providing for greater independence).

The Policy Memorandum concludes that, “by establishing a more coherent framework for tribunals, opportunities will be created for improvement in the quality of services that cannot be achieved by tribunals operating separately.” (Policy Memorandum, paragraph 3)

The main changes proposed for the Scottish Tribunals, which form the focus of this briefing, are in the following areas:

- new structure

- independence
- leadership
- membership
- appointments, tenure and conduct
- review or appeals of decisions
- practice and procedure

Each of these areas is discussed in turn below, followed by a brief discussion of other issues which the Bill deals with.

It is important to note that the Bill is largely concerned with creating a framework for tribunal reform. Consequently, many of the actual changes will not occur directly as a result of the Bill, but instead will take place at a later date through secondary legislation. This means that certain of the details of the changes envisaged are not apparent on the face of the Bill.

Given the wide range of tribunals which will be brought in to the new structure, this briefing will focus on general issues which apply across the board and will not deal in-depth with narrower issues which may be of relevance to specific tribunals alone.

New structure

A key purpose of the Bill is to establish the framework for a new structure for devolved tribunals in Scotland.

The Bill will create a two-tier structure (section 1) including:

- a First-tier Tribunal
- an Upper Tribunal

The functions and membership of the existing devolved tribunals will be transferred into this structure in a phased programme over the next few years. This will take place via regulations subject to the affirmative procedure (i.e. the approval of the Scottish Parliament would be needed to allow the provisions to come into force.) The First-tier Tribunal and Upper Tribunal will collectively be known as “the Scottish Tribunals”.

According to the Policy Memorandum, most business will take place in the First-tier Tribunal which will deal with decisions at first instance (i.e. the initial forum where an action is brought). The Upper Tribunal will hear appeals from the First-tier Tribunal and also some hearings in the first instance.

The Policy Memorandum also states that it is intended that all of the functions of the Lands Tribunal for Scotland will be transferred in to the Upper Tribunal (thus meaning that any appeals from the Lands Tribunal for Scotland will go directly to the courts). This decision appears to be a response to criticism from the Lands Tribunal for Scotland that its appeals normally merit the attention of the Court of Session (the implication being that it would not be appropriate to place

the Lands Tribunal for Scotland in the First-tier Tribunal with appeals solely to the Upper Tribunal). (See [the Lands Tribunal for Scotland's response to the Scottish Government's consultation](#)). It also appears to follow the position in England where the Lands Tribunal is part of the Upper Tribunal with a right of appeal to the Court of Appeal. The Policy Memorandum indicates that where these are complicated, the first instance functions of other tribunals may also be transferred to the Upper Tribunal (paragraph 52).

Schedule 1 of the Bill lists the tribunals whose functions can be transferred into the tribunals' structure by Ministers (referred to as the "listed tribunals"). These are:

- [The Additional Support Needs Tribunal](#)
- [The Scottish Charity Appeals Panel](#)
- [The Crofting Commission](#)
- The Education Appeal Committees
- [The Private Rented Housing Panel](#)
- [The Homeowner Housing Panel](#)
- [The Lands Tribunal for Scotland](#)
- [The Mental Health Tribunal for Scotland](#)
- [The NHS National Appeal Panel](#)
- [The NHS Tribunal](#)
- Parking Adjudicators
- Police Appeals Tribunals
- Valuation Appeal Panels and Committees

Very brief details of the legal basis and activities of the listed tribunals are included in Annexe 1 below.

The Bill also makes provision for Ministers to amend or modify the composition of Schedule 1 by regulations (section 26(2)). This allows for the addition of other tribunals which are not currently listed in the Bill. The potential use of secondary legislation to add additional tribunals has been the subject of criticism, notably from the Scottish Children's Reporter who indicate in [their response to the Justice Committee's call for evidence](#) (page 1) that secondary legislation would be an inadequate vehicle for incorporating the Children's Hearing system as it,

“evidences a lack of understanding of the complexity and sophistication of the Children's Hearings System and what would be required in legislative terms to bring it within the new structure in a way that would not risk undermining its key strengths and principles.”

The Bill will enable Scottish Ministers to organise the First-tier Tribunal into chambers by regulations and to allocate tribunal functions among those chambers (section 19). The professed purpose is to group together tribunal functions which have similar subject matters. Similarly, the Bill will give powers to Scottish Ministers to organise the Upper Tribunal into divisions (section 21).

According to the Policy Memorandum, the exact chamber structure and composition will be made by affirmative resolution following consultation with the Lord President and other interested parties (section 19). The Scottish Government has indicated that this is to allow for “proper parliamentary scrutiny and provide necessary safeguards and future proofing” (Policy Memorandum, paragraph 41). The Policy Memorandum (paragraph 41) also notes that the regulations may delegate authority for the organisation of chambers to the Lord President. The professed aim behind such a provision would be to allow for a degree of flexibility so as to allow changes to be made as and when the devolved tribunals acquire more functions.

A diagram of the possible chamber structure of the First-tier Tribunal is outlined below at Figure 2.

Figure 2: diagram of the possible First-tier chamber structure

FIRST-TIER TRIBUNAL			
Mental Health Chamber	Housing, Land and Property Chamber	Learning Chamber	General Regulatory Chamber
Chamber President	Chamber President (may have a Deputy who could provide expertise in a specific area)	Chamber President (may have a Deputy who could provide expertise in a specific area)	Chamber President (may have a Deputy who could provide expertise in a specific area)
Mental Health	Private Rented Housing/ Home Owner Housing	Additional Support Needs	Charity
	Valuation	Education	Parking
	Crofting		Police

Source: Policy Memorandum (page 11, paragraph 44)

As can be seen, the Mental Health Tribunal for Scotland occupies a single chamber within the new structure and the Scottish Government has indicated that it has made a commitment that, “initially mental health will be in a chamber on its own” (see Policy Memorandum paragraph 43). This decision appears to be a response to concerns expressed during the consultation process that the specialism and specific ethos of the Mental Health Tribunal for Scotland could be damaged if it were to be placed in a mixed chamber (see paragraphs 43 and 44 of the Policy Memorandum). The Scottish Government has also made a series of other specific commitments which it argues will safeguard the special role of the Mental Health Tribunal for Scotland (see Policy Memorandum paragraph 44).

The Bill will also give powers to Scottish Ministers to organise the Upper Tribunal into divisions and to create further divisions over time if necessary (section 22). The Bill’s Explanatory Notes indicate that the divisions are to be organised “according to the subject matter of the Tribunal’s functions” and also other relevant factors, for example whether the tribunal is dealing with a first instance case or an appeal. The Bill does not provide further details as to how such divisions will be organised in practice. However, the Scottish Government has indicated that it is not envisaged there will be multiple divisions as it does not expect the volume of business to warrant this.⁶ It has also indicated that the Lands Tribunal will occupy a division so that its membership and functions can be transferred-in at the appropriate level in the new structure.⁷ The Lord President has criticised this aspect of the Bill, noting [in his response to the Justice Committee’s call for evidence](#) (page 3) that,

“I consider that it is unnecessary and may be restrictive to programming for there to be ‘divisions’ within the UT. It may also be confusing to adopt the nomenclature of the Inner

⁶ Source: personal communication from the Scottish Government

⁷ Source: personal communication from the Scottish Government

House of the Court of Session. I understand a similar feature is part of the system established by the [Tribunals, Courts and Enforcement Act 2007] but I am not aware of any assessment which points to the need for the UT in this jurisdiction to be separated into distinct parts.”

As indicated above, the administrative support to a number of devolved tribunals is currently provided by the Scottish Tribunals Service (part of the Scottish Government) on behalf of Ministers (see figure 1).⁸ This will continue in the new structure. However, the long term aim is for the administrative support for the Scottish Tribunals to be merged with that for the Scottish courts. As outlined above, the consultation on this process was announced by the Scottish Government in June 2013.

Independence

The issue of tribunals’ lack of independence from government (perceived or otherwise) has been a longstanding and key concern in tribunal reform. The issue is also emphasised in Article 6 of the European Convention on Human Rights (“ECHR”), which states that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

From a Scottish perspective, varying levels of independence appear to exist and according to SCAJTC,

“There is a clear argument that many Scottish tribunals are not sufficiently independent of the Scottish Government. Many tribunal members are appointed by Scottish Ministers, and the administration of some devolved tribunals, while provided by an independent secretariat, is funded and sponsored by directorates within the Scottish Government.”⁹

Some of SCAJTC’s most serious concerns have related to Valuation Appeal Committees and Education Appeal Committees. SCAJTC produced a [special report analysing the Valuation Appeal Committees](#) in 2009 which concluded that their independence was compromised by the fact that tribunals were held in local authority premises with members being remunerated by local authorities. It has also been argued in various fora that Education Appeal Committees are not independent since a majority of tribunal members is often appointed by local authority education committees.¹⁰

Various of the proposals outlined in the Bill are aimed, even if only in part, to increase the independence of the Scottish Tribunals, for example the new structure headed by the Lord President and the rules on appointments and security of tenure outlined below.

The Bill also contains a specific statutory duty on various persons to uphold the independence of members of the Scottish Tribunals (section 3(1)). This duty falls on:

- the First Minister
- the Lord Advocate
- the Scottish Ministers

⁸ Other tribunals are provided with administrative support from local authorities, the NHS etc.

⁹ [Options for the Future Administration and Supervision of Tribunals in Scotland](#) (page 5)

¹⁰ For further details see paragraph 7.11 of SCAJTC’s [Options for Tribunal Reform in Scotland](#)

- Members of the Scottish Parliament
- all other persons with responsibility for matters relating to, “the members of the Scottish Tribunals or the administration of justice”

Section 3(2) of the Bill also obliges the First Minister, the Lord Advocate and the Scottish Ministers not to, “seek to influence particular decisions of the members of the Scottish Tribunals through any special access to the members” and to have regard to, “the need for the members to have the support necessary to enable them to carry out their functions”.

Leadership

The current approach to the leadership of tribunals in Scotland is not a uniform one. Certain tribunals have a designated judicial head, often given the title of “President”. For example this is the case for the Additional Support Needs Tribunal, the Mental Health Tribunal for Scotland and the Private Rented Housing Panel/Homeowner Housing Panel, whose Presidents are appointed by the Scottish Ministers, and also for the Lands Tribunal whose President is appointed by the Lord President. However, others have no permanent leadership structure and hearing panels are convened on an ad hoc basis as the need arises.

The Bill changes this approach. The Lord President of the Court of Session, who is Head of the Scottish Judiciary and also chair of the [Scottish Court Service](#), is designated as the Head of the Scottish Tribunals. The Lord President will have overall responsibility for the Scottish Tribunals and the Bill confers on him a number of specific functions in this capacity, including:

- representing the interests of the Scottish Tribunals to the Scottish Ministers/Scottish Parliament (section 6)
- securing the efficient disposal of business (section 7)
- ensuring the welfare of the members of the Scottish Tribunals (section 7)
- making rules on conduct and discipline of tribunal members (schedule 8)
- assignment policy – i.e. the rules for assigning tribunal members to specific tribunals and chambers/divisions (section 30)
- training and review (section 31)

Although the Lord President is placed at the top of the hierarchy, the Bill also establishes a separate office of “President of the Scottish Tribunals” (“President of Tribunals”). The President of Tribunals is to be assigned by the Lord President from the Senators of the College of Justice (i.e. permanent Court of Session judges) (see section 4(5)). In effect this limits the parties which the Lord President can assign and rules out other members of the current tribunals’ judiciary (e.g. current tribunal presidents, as well as sheriffs, sheriffs principal, other lawyers etc).

Various parties have criticised this aspect of the Bill. For example, in its [response to the Scottish Government’s initial consultation](#) (paragraph 10), the Faculty of Advocates argues as follows:

“Why, for example is a judge of the Court of Session necessarily better qualified than a sheriff principal? Tribunal Presidents (and Deputy Tribunal Presidents), who already have administrative and leadership experience, might be better fitted to this role. A Court of Session judge, whilst having undoubted legal experience, would not necessarily have the same skills and leadership experience for this role. Restricting eligibility ... to judges of

the Court of Session would put an unnecessary ceiling on the promotion of members of the new tribunal judiciary... The proposal substantially restricts the pool from which eligible candidates might be drawn. The Faculty cannot see how the restriction can be justified on an objective basis.”¹¹

However, it should be noted that the Lord President in [his response to the Justice Committee's call for evidence](#) (page 1) has indicated that he intends to nominate someone with tribunals experience to the position of President of the Scottish Tribunals, noting that

“I have considered this important nomination carefully and now indicate to you that, should the Scottish Parliament enact this provision, I intend to nominate Lady Smith¹² to be the first President of Scottish Tribunals. I am sure you will agree that she will bring considerable skill, knowledge and experience of tribunal work.”

The President of Tribunals will be the senior member of the Scottish Tribunals and the Bill appears to envisage that he/she will be responsible for the general running of the Scottish Tribunals in a similar manner to the Senior President of the UK reserved tribunals. In this respect, the Policy Memorandum notes that it is anticipated that the Lord President will delegate the efficient disposal of the Scottish Tribunals business to the President of Tribunals (paragraph 17). The Bill also allows the Lord President to delegate the following functions to the President of Tribunals:

- ensuring the welfare of the members of the Scottish Tribunals (section 7)
- assignment policy (section 30)
- training and review (section 31)

Membership

First-tier Tribunal

The Bill provides for new rules on who can be a member of the First-tier Tribunal. Two main types of members are envisaged, namely:

- legal members (i.e. those who are legally qualified)
- ordinary members (i.e. those not legally qualified, but who have relevant qualifications, depending on the tribunal in question, e.g. doctors, surveyors, psychologists, teachers etc.)

People can become legal and ordinary members either through a new appointment under the terms of the Bill (section 29(1) and schedule 3) or by being transferred in by virtue of being a current member of one of the existing listed tribunals (section 28(b) and schedule 2).

In addition, the Bill also provides that sheriffs, Sheriffs Principal and part-time sheriffs (known as “judicial members”) will be eligible to act as a member of the First-tier Tribunal by virtue of their judicial office alone, but only when they agree to do so and where the Lord President provides

¹¹ For similar arguments, see also the [Law Society of Scotland's response to the Justice Committee's call for evidence](#) (page 7)

¹² Lady Smith chairs the Scottish Tribunals Forum and is a former employment tribunal member – see [Just News, Administrative Justice Newsletter](#), Issue 3, June 2011, page 3

authorisation (sections 16 and 18). For the avoidance of doubt, Court of Session judges will not be eligible to sit on the First-tier Tribunal.

The Bill also provides for a system of Chamber Presidents to preside over each First-tier chamber (section 20), as well as the possibility to appoint a Deputy Chamber President to assist the Chamber President (schedule 4, paragraph 1). It will also be possible to appoint two Chamber Presidents to allow for job-sharing. According to the Policy Memorandum, Chamber Presidents and Deputy Chamber Presidents will be expected to have expertise in the jurisdictions over which they will preside. Paragraph 22 of the Policy Memorandum also indicates that the Bill prevents a member of the court judiciary from being appointed Chamber President/Deputy. This provision is contained in section 21(3) of the Bill which indicates that only legal members can be appointed, thus excluding judicial members.

Upper Tribunal

The Bill also envisages a system of legal and ordinary members for the Upper Tribunal. Legal members of the Upper Tribunal will either be appointed under the terms of the Bill (section 29(3) and schedule 5), which in essence limits positions to lawyers who have practised for at least seven years, or will be transferred in from an existing listed tribunal. Ordinary members can also be transferred-in or appointed. However, according to the Policy Memorandum (paragraph 26), it is not anticipated that ordinary members will have a role in the Upper Tribunal's appellate function. Instead their role would be limited to any first instance functions which the Upper Tribunal may exercise.

In line with the First-tier Tribunal, court judiciary ("judicial members") can also be assigned to the Upper Tribunal by virtue of holding judicial office, but only when they agree to do so and where the Lord President provides authorisation. The offices included are: judges of the Court of Session, the Chairman of the Scottish Land Court or sheriffs/Sheriffs Principal (section 16(2)) – i.e. in essence, the majority of the Scottish judiciary.

There is also scope for the Scottish Ministers to permit retired judges or judges of the UK Upper Tribunal to sit and hear appeals in the Scottish Upper Tribunal (section 17). According to the Policy Memorandum (paragraph 28), the option of appointing retired judges/UK Upper Tribunal judges would not be used when existing experience is available in the Scottish Upper Tribunal, but may be necessary "for particularly complex cases or matters that may be in the process of being devolved or are considered for devolution in the future" – i.e. the aim appears to be to tap into a potentially useful existing resource.

Each division within the Upper Tribunal will also have a Vice-President (or two Vice-Presidents for job sharing purposes) who will be responsible for the arrangement of business within that division (section 23).

Judicial members – criticism

The rule that judicial members may be appointed to the First-tier Tribunal/Upper Tribunal by virtue of their judicial office has been criticised on the grounds that the majority of sheriffs, Court of Session judges etc. would not necessarily have sufficient specialised knowledge/experience of tribunal work to carry out this role and that eligibility should not be automatic.¹³ There also appears to be an underlying fear that this rule could result in a degree of judicialisation of the Scottish Tribunals – i.e. that the judiciary would be more likely to handle tribunal matters in line with court-based processes rather than in a more informal way.

¹³ See [the Faculty of Advocates response to the Scottish Government's initial consultation](#) (paragraph 11) and the [Law Society of Scotland's response to the Justice Committee's call for evidence](#) (page 7)

The Bill does not include a statutory requirement that judicial members have tribunal experience to be appointed on this basis. However, there is a suggestion in [the Lord President's response to the Justice Committee's call for evidence](#) (page 2) that tribunal experience would be a factor which he may take into account when considering such an appointment. In his response he notes that,

“I am glad that the Bill gives scope for courts' judiciary to sit in the First-tier Tribunal (“FT”), in the case of sheriffs and part-time sheriffs, and the Upper Tribunal (“UT”) in the case of sheriffs, judges of the Court of Session and the Chairman of the Scottish Land Court. It is useful that, as the Bill provides, although eligible such judges may sit only if authorised to do so by the President of Scottish Tribunals, not least because not all eligible judges will have had prior tribunal experience.”

Assignment

The Bill contains rules on the assignment of tribunal members within the new unified structure and the possibility of members being able to work in other tribunals than the one they were initially appointed to (commonly known as “cross-ticketing”).

The President of Tribunals is given the function of assigning the members of the First-tier Tribunal among its chambers and the members of the Upper Tribunal among its divisions (see schedules 4 and 6, parts 2). According to the Policy Memorandum (paragraph 40), the main elements are as follows:

- Chamber Presidents and Deputy Chamber Presidents will be appointed in respect of particular chambers and will automatically be assigned to those chambers
- Chamber Presidents and Deputy Chamber Presidents may also be assigned to act as legal members in other chambers. However, this is only possible with the agreement of the member concerned and of the Chamber President of the other chamber
- Vice-Presidents in the Upper Tribunal will be appointed or assigned in respect of a particular division and will be automatically assigned to act as a member of that division
- Vice-Presidents may also be assigned to act as members (judicial/legal) of other divisions. However, this is only possible with the agreement of the member concerned and of the Vice-President of the other division

The Bill also provides for similar rules for the assignment of other members (legal, judicial and ordinary) between divisions/chambers (see schedule 4, part 2, paragraphs 8 and 9 and schedule 6, part 2, paragraphs 6 and 7). For an assignment to take place, the agreement of the individual is needed, as is the agreement of the Chamber President of the other chamber/ Vice-President of the other division.

Under section 30 of the Bill, the Lord President is required to publish and keep under review a document setting out the policy to be adopted in relation to the assignment of the ordinary, legal and judicial members of the Scottish Tribunals within each Tribunal. The Bill requires the assignment policy to ensure 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)”.

According to the Policy Memorandum, the Scottish Government anticipates that members transferred-in to the Scottish Tribunals from a listed tribunal will be assigned to the chamber/division to which those functions are allocated. The Policy Memorandum notes,

however, that members may be assigned to additional chambers/divisions if they possess the necessary qualifications (paragraph 40).

Criticism has been made of the Bill's cross-ticketing rules on the basis that they could adversely impact on the degree of specialist expertise available within each tribunal (i.e. if less qualified members were to be assigned to other chambers).¹⁴ The Scottish Government's position would appear to be that the Bill contains sufficient safeguards to prevent negative impacts. In particular, in the Financial Memorandum (paragraph 16) the Scottish Government indicates that:

“Members will be eligible to be assigned to hear a case in another chamber if they can demonstrate they meet the criteria for the jurisdiction and can demonstrate they have the skills, knowledge and experience ... Members who are assigned to another chamber would not need to go through a formal appointment process by way of the Judicial Appointments Board. They would, however, still have to demonstrate that they meet all the criteria and have the necessary skills, knowledge and experience.”

The Financial Memorandum also explains that there could be financial benefits to cross-ticketing arguing that it, “could result in fewer new appointments being necessary with tribunal members who meet the criteria and have the relevant skills, knowledge and experience being drawn from the existing tribunal community.”

Appointments, tenure, conduct and complaints

Appointments and tenure

There is currently no streamlined system for tribunal appointments in Scotland. Those appointed to reserved tribunals in Scotland, operating within the UK Tribunals Service, go through an independent procedure run by the [Judicial Appointments Commission](#). However, most members of devolved tribunals are appointed through the public, as opposed to judicial, appointments system, by Scottish Ministers or local authorities (the criteria for appointments are normally specified in the founding legislation for each individual tribunal). This system is not uniform and could in principle be open to challenge under human rights legislation because of a potential link between the tenure of the post and the favour of Scottish Ministers.

The Bill does away with the current piecemeal approach and provides for a common system of appointments to the Scottish Tribunals. The key elements of this system are as follows:

- the Scottish Ministers will retain the power to make appointments. However, the Judicial Appointments Board for Scotland (“JABS”) will recommend certain members for appointment,¹⁵ bringing the system more into line with the Scottish judicial appointments process. The Judiciary and Courts (Scotland) Act 2008, which set up JABS, will be amended for this purpose (see schedule 9, part 2)
- ordinary members of the First-tier Tribunal and Upper Tribunal will be eligible for appointment if they meet relevant criteria as to qualifications, experience and training. These will be specified by the Scottish Ministers in regulations (see schedule 3, part 1 and schedule 5, part 1 for details)
- legal members of the First-tier Tribunal (other than a Chamber President/Deputy; see below) will be eligible for appointment if:

¹⁴ See for example [Citizens Advice Scotland's response to the Justice Committee's call for evidence](#) (page 8).

¹⁵ The members covered are Vice-Presidents or the Upper Tribunal, Chamber President/Deputy Chamber President of the First Tier Tribunal and ordinary and legal members of the First Tier Tribunal/Upper Tribunal

- they are practising as a solicitor or advocate in Scotland or a solicitor/barrister in England & Wales or Northern Ireland and have practised in that regard for a period of at least five years (schedule 3, part 2, paragraph 5(1)); **or**
 - they have previously practised as a solicitor or advocate in Scotland or as a solicitor/barrister in England & Wales or Northern Ireland **and** fulfil additional eligibility criteria to be set out by the Scottish Ministers in regulations. These additional criteria will relate to legal experience beyond legal practice such as: teaching/research, legal advice, acting as a mediator/arbitrator, legal drafting and dispute resolution (schedule 3, part 2, paragraph 6(4)). The aim here appears to be to allow ex practising lawyers with suitable experience to become members of the Scottish Tribunals
- the rules on the appointment of legal members of the Upper Tribunal broadly follow those for legal members of the First-tier Tribunal with the exception that seven years' experience of legal practise is required. Similar rules also exist which allow members with legal experience beyond legal practice to be appointed (schedule 5)
 - people will be eligible to be appointed as Chamber Presidents if they are either a legal member of the Upper Tribunal or eligible to be appointed as such a member under part 2 of schedule 5 – i.e. seven years legal experience is required for Chamber Presidents
 - appointments of new legal and ordinary members will be on the basis of set terms and conditions of membership (schedule 7), including:
 - **term of office** – appointments will be for a term of five years. It should be noted that the Bill does not currently envisage permanent and/or salaried posts. Section 71(4)(a) does, however, allow Scottish Ministers to make arrangements for the payment of remuneration, which could possibly include salaries (although not on a permanent basis). The Lord President has suggested that it would be useful if the Bill were to allow for permanent salaried posts as this would assist in attracting persons of a high calibre (see [the Lord President's response to the Justice Committee's call for evidence](#), page 1)
 - **reappointment** – members will automatically be reappointed at the end of this period up to the age of 70 unless:
 - they do not wish to continue;
 - they have become ineligible under the initial rules for appointment; or
 - the President of Tribunals has recommended that the person should not be reappointed under the specific provisions in the Bill, i.e.
 - i. failure to comply with the terms of conditions of membership;
 - ii. failure to comply with other requirements in the Bill; or
 - iii. the Tribunal no longer requires the same number of members or members with the qualifications, experience or training of the person in question

According to the Scottish Government, automatic reappointment is designed to, “ensure continuity in the membership of the Scottish Tribunals and security of tenure” (Policy Memorandum, paragraph 35).

➤ **termination** – appointments will be terminated if members:

- become disqualified (due to becoming a civil servant or holding certain political offices);
 - are removed due to misconduct (see below);
 - resign; or
 - retire
- Paragraph 2 of Schedule 2 enables regulations to be made preserving, altering or replacing the terms and conditions on which a person is transferred in to the Scottish Tribunals. However, the Scottish Government has noted that its intention is that members will be transferred in, “on their existing terms and conditions in a phased programme which will take time to progress”. The Scottish Government has also indicated that it is committed to commissioning an independent evaluation of the offices of tribunal members once the new structure has been established and has bedded in (Policy Memorandum, paragraph 31).

According to the Policy Memorandum, the new appointments process will ensure that,

“tribunal members are selected with the relevant skills, knowledge and experience to carry out their particular assignment ... and have the security of tenure to do so independently and impartially.”

Conduct and complaints

Although certain tribunals have their own rules for dealing with complaints, under the current system there is no standardised system for dealing with this issue. There is also no standard route for dealing with misconduct by tribunal members (the [Scottish Public Services Ombudsman](#) does, however, indicate that it can deal with complaints related to the administrative action of the staff of certain tribunals). This is in contrast to the position in reserved tribunals in Scotland where complaints against tribunal members can ultimately be considered by the Office for Judicial Complaints and the Lord Chancellor under the Judicial Complaints (Tribunals) Rules 2008 and Judicial Complaints (Tribunals) (No 2) Rules 2008.

The Bill changes the current system and provides rules which will standardise the complaints/misconduct process. The key principles of the new system (see schedule 8 for details) are as follows:

- the Lord President will have the power to make rules relating to the investigation and determination of any matter relating to the conduct of the members of the Scottish Tribunals (“Conduct Rules”)
- these Conduct Rules will only apply to the legal and ordinary members of the Scottish Tribunals. The conduct and fitness of the judicial members of the Scottish Tribunals will continue to be covered by the existing conduct provisions in the Judiciary and Courts (Scotland) Act 2008 which allow complaints to be made to the Judicial Office for Scotland and thereafter, for review, to the [Judicial Complaints Reviewer](#)
- the Conduct Rules have to be published. The Bill provides a non-exhaustive list of matters which can be covered by the rules (see schedule 8, part 1, paragraph 3(2)), including:

- the circumstances in which an investigation must/may take place;
 - the complaints process and investigation process;
 - time limits; and
 - the obtaining of information, record-keeping and confidentiality
- If an investigation has recommended a disciplinary sanction, there will be three possibilities depending on the severity of the breach, i.e.:
 - formal advice;
 - a formal warning; or
 - a reprimand

The Lord President can also suspend a member of the Scottish Tribunals if he considers that it is necessary for the purpose of maintaining confidence in the Scottish Tribunals.

- the [Judicial Complaints Reviewer](#) will have the power to review the handling of the investigation's procedures (but not the merits of the investigation's findings), and, if necessary to refer the case to the Lord President. This brings this part of the procedure broadly in line with that which already exists for the Scottish judiciary
- so-called fitness assessment tribunals can be set up to investigate whether ordinary or legal members of the Scottish Tribunals are unfit to hold office due to: inability; neglect of duty; or misbehaviour. The core elements of the system will be as follows:
 - the First Minister may set up such a tribunal on his own accord and must do so if requested by the Lord President
 - fitness assessment tribunals will be made up of three people selected by the Lord President: (i) a judge/ex-judge of the Court of Session; or sheriff/ex-sheriff; or a solicitor or advocate who has practised for 10 years; (ii) a legal member of the Scottish Tribunals if the person under investigation is a legal member, or an ordinary member if the person under investigation is an ordinary member; and (iii) another person not falling within the terms of (i) or (ii)
 - any report of a fitness assessment tribunal must be made, in writing, to the First Minister and Lord President. The First Minister must lay such reports before the Scottish Parliament
 - if the fitness assessment tribunal is of the view that a member of the Scottish Tribunals is unfit to hold office it may recommend his/her removal

Review or appeal of decisions

Currently, different devolved tribunals often have different appeal routes (largely based on their founding legislation). Various different appeal routes exist, for instance:

- **appeal to the sheriff court** – certain tribunals provide for appeals to the sheriff court, for example the Private Rented Housing and Home Owner Housing Panels¹⁶
- **appeal to the Sheriff Principal** – with the exception of appeals relating to compulsion orders, restriction orders, hospital directions or transfer for treatment direction, where there is a direct right of appeal to the Court of Session, appeals from the Mental Health Tribunal for Scotland are to the Sheriff Principal¹⁷
- **appeal to the Court of Session** – certain tribunals provide for appeals to be made direct to the Court of Session, for example the Additional Support Needs Tribunal¹⁸ and the NHS Tribunal
- **appeal to a specialised court** – the decisions of certain tribunals may be appealed to specialised courts. For example, appeals against decisions of the Crofting Commission are to the Scottish Land Court, which is a court dealing with disputes relating to agricultural tenancies, including matters relating to crofts.¹⁹ Similarly, appeals from the decisions of Valuation Appeal Committees may be taken directly to the Lands Valuation Appeal Court which consists of three judges of the Court of Session appointed by the Lord President²⁰
- **judicial review** – certain tribunals, for example the Police Appeal Tribunal, do not have a dedicated appeal route and decisions can only be challenged by means of judicial review

In addition, where initial appeals are to be made to the sheriff/ Sheriff Principal, the legislation in question may also allow for a further appeal to the Court of Session. This may also be possible based on the general civil appeal rules.

Appeals in the current system are often only available on the ground of error of law. However, this is not always the case and variations exist between tribunals. For example, appeals against decisions of the Mental Health Tribunal can be made on the following grounds -

1. that the Tribunal's decision was based on an error of law;
2. that there has been a procedural impropriety in the conduct of any hearing;
3. that the Tribunal has acted unreasonably in the exercise of its discretion; or
4. that the Tribunal's decision was not supported by the facts established by the Tribunal²¹

Similarly, the Scottish Land Court has a wider competence and, under section 52A of the Crofters (Scotland) Act 1993 as amended, appeals from the Crofting Commission, "shall lie on any question of fact or law to the Land Court". Although no appeals have yet been made, appeals from the Scottish Charity Appeals Panel to the Court of Session would also appear to be possible on more general grounds than error of law alone.²²

The Bill aims to rationalise the current tribunal appeal system. The key elements of the proposals are as follows:

¹⁶ See <http://hohp.scotland.gov.uk/prhp/2649.325.346.html>

¹⁷ http://www.mhtscotland.gov.uk/mhts/Appeals_against_Tribunal_Decisions/Appeals_against_Tribunal_Decisions

¹⁸ See <http://www.asntscotland.gov.uk/asnts/539.25.250.html>

¹⁹ See <http://www.crofting.scotland.gov.uk/appeals-against-a-commission-decision.asp>

²⁰ See section 7 of the Valuation of Lands (Scotland) Amendment Act 1879

²¹ See section 324 of the Mental Health (Care and Treatment) (Scotland) Act 2003

²² See section 78 of the Charities and Trustee Investment (Scotland) Act 2005

- **review** – the Bill introduces a new provision which will allow the First-tier Tribunal and the Upper Tribunal to review their own decisions, either on their own initiative or on application by any party (sections 38–40). According to the Policy Memorandum, the aim of this provision is to “cut down on the number of appeals generated by administrative mistakes (paragraph 57 of the Policy Memorandum), however the provision is drafted widely and it seems that it could be used on other grounds. According to the Policy Memorandum, it does not restrict the right of appeal (paragraph 56; see also section 38(5))
- **general right of appeal to the Upper Tribunal** – the Bill creates a general right of appeal to the Upper Tribunal from First-tier Tribunal decisions (section 41)
- **appeal from the Upper Tribunal** – decisions from the Upper Tribunal may be appealed to the Court of Session (section 43)
- **Point of law** – appeals from the First-tier Tribunal or the Upper Tribunal shall be on point of law only (sections 41(2) and 43(2))
- **permission/leave to appeal**
 - appeals from the First-tier Tribunal require the permission of this tribunal, or if this is refused, permission from the Upper Tribunal. Permission will only be granted if there are arguable grounds for appeal (sections 41(3) and (4))
 - appeals from the Upper Tribunal also require the permission of the Upper Tribunal or, if this is refused, the Court of Session. In principle, the rules on leave are the same as those for appeals from the First-tier Tribunal (i.e. there must be an arguable ground for appeal). However, where the decision of the Upper Tribunal relates to an appeal from the First-tier Tribunal (this will be most cases), permission will only be granted if the case raises an important issue of principle/practice or where there are compelling reasons for allowing a second appeal (section 45(4)). These provisions appear to mirror those which apply to appeals from the UK Upper Tribunal²³ and, according to the Policy Memorandum, are “designed to limit successive appeals where a reasoned appeal has already been heard” (Policy Memorandum, paragraph 64)
- **exceptions from the default position** - the Policy Memorandum (paragraph 61) indicates that the above rights of review/appeal will be the default position. However, the Bill also provides for certain exceptions from the default position, namely
 - an exclusion for existing rights of appeal when the functions of a listed tribunal are transferred-in (section 48(1)). According to the Explanatory Notes to the Bill (paragraph 200), the effect of this section is to “create a general rule excluding from the rights of review and appeal ... any decision for which another enactment makes express provision for a right of appeal”;²⁴ and
 - the ability of the Scottish Ministers to exclude the rights or review/appeal by regulations to listed tribunals which have been transferred-in from which there

²³ See section 13 of the Tribunals, Courts and Enforcement Act 2007 as amended and Act of Sederunt (Rules of the Court of Session No. 5) (Miscellaneous) 2008 (SSI 2008/349) (rule 41.59) in relation to appeals from the UK Upper Tribunal where the relevant appeal court is the Court of Session

²⁴ The Scottish Government has indicated that this provision is primarily designed to allow mental health compulsion order and restriction order cases to still be heard in the Court of Session. Source: personal communication from the Scottish Government

was previously no statutory right of appeal (section 49). In effect this means that the Bill will not necessarily grant new rights of appeal to tribunals whose decisions are currently not appealable. The Bill does not, therefore, follow the recommendation in SCATJC's report "[Options for Tribunal Reform in Scotland](#)" that all administrative decisions made by public bodies that affect the rights of individuals should be subject to a right of appeal. The Scottish Government has indicated that this provision is aimed at tribunals where there are already various layers of internal review/appeal (for example appeals against parking tickets which would be subject to an internal review process before proceeding to a parking adjudicator).²⁵

In addition, the Policy Memorandum indicates that appeals from the Mental Health Tribunal for Scotland relating to compulsion orders, restriction orders, hospital directions or transfer for treatment direction shall continue to be heard by the Court of Session (paragraph 61).

The underlying rationale behind the provision of a default appeal to the Upper Tribunal (and not the courts) appears to be primarily one of cost, efficiency and user-accessibility (not necessarily in that order). In this respect the Policy Memorandum notes that there is a:

“need for an onward appeal to an Upper Tribunal, keeping onward appeals within the tribunals structure and avoiding the need to go to court, which many users may find more daunting” (paragraphs 58–60).

The Bill also contains provisions regarding judicial review, in particular in relation to remitting judicial review petitions back to the Upper Tribunal for determination. Under section 52 of the Bill, the Court of Session **may** remit a petition for judicial review back to the Upper Tribunal where:

- the petition does not seek anything other than the exercise of the Court's judicial review function; **and**
- the Court of Session considers that it is appropriate to do so in relation to the subject matter of the petition; **and**
- the petition falls within a category specified in an Act of Sederunt made by the Court of Session for this purpose.²⁶

This power is similar to the rules which apply to UK tribunals cases - i.e. when the Court of Session remits judicial review cases stemming from reserved tribunals back to the upper tier of the UK tribunals service. However, a potentially relevant difference is that, in relation to reserved tribunals the Court of Session **must** transfer back cases if they cover certain reserved areas to be specified in an Act of Sederunt (see section 20(1) of the Tribunals, Courts and Enforcement Act 2007). Concerns have been expressed in the past in relation to this obligation on the grounds that removing cases from the jurisdiction of the Court of Session could weaken its role in providing oversight to the justice system and result in contradictory decisions (Mitchell 2008). Based on the current drafting, the Bill does not appear to envisage such a mandatory transfer (the wording is “may remit” not “must remit”) and it seems that the Court of Session may retain an element of discretion.

According to the Scottish Government, this power could be used to transfer a petition to the Upper Tribunal where it concerns a subject matter over which the Upper Tribunal has developed

²⁵ Source: personal communication from the Scottish Government

²⁶ Acts of Sederunt are made by the Court of Session and create the rules of the civil courts in Scotland.

considerable expertise (Policy Memorandum, paragraph 65). It is currently not clear which type of cases would fall within this category and such matters would have to be defined in an Act of Sederunt.

Practice and Procedure

Procedural rules

As indicated above, variations exist between the procedural rules used by tribunals. In addition, there is currently no body with ultimate responsibility for proposing, writing or amending procedural rules. Instead, specific tribunal rules are generally made by Scottish Ministers (following advice from government officials) by means of subordinate legislation.²⁷

The Bill puts in place a framework which will ultimately amend this approach (see sections 62-67 and schedule 9, paragraph 12). The new system will work as follows:

- the [Scottish Civil Justice Council](#) (“SCJC”) will be granted the power to propose procedural rules for the Scottish Tribunals (“Tribunal Rules”)²⁸
- this additional role for the SCJC will be brought into effect by an amendment to the 2013 Act which will allow for the setting up of a so-called “Tribunals Committee” within the SCJC. The Tribunals Committee will be responsible for drafting Tribunal Rules. It will be chaired by the President of Tribunals who will select other members, “who have knowledge of how the Scottish Tribunals exercise their functions”. The Policy Memorandum indicates that this will ensure that the “distinctiveness and ethos of tribunals is protected in the new structure” (paragraph 72)
- the Policy Memorandum suggests that one generic set of rules would not suit all tribunals (paragraph 72). The amendments proposed to the 2013 Act are, however, arguably less clear on this point. They indicate that “practice and procedure should, where appropriate, be similar in both of the Scottish Tribunals (and in different chambers or divisions within them)” (schedule 9, paragraph 12(3))
- although the Tribunals Committee will have responsibility for drafting Tribunal Rules, the rules will ultimately be made by an Act of Sederunt of the Court of Session

The Scottish Government has indicated that, as the SCJC will begin by concentrating on court business, it is unlikely that it will start making Tribunal Rules immediately (Policy Memorandum, paragraph 73; Financial Memorandum, paragraphs 28–30). In this respect, the Bill provides for transitional arrangements which allow the Scottish Ministers to:

1. provide by regulation for a listed tribunal’s existing procedural rules to continue to apply after the tribunal is transferred into the new structure (schedule 9, paragraph 2(2)); and
2. make procedural rules by regulation in the period until the SCJC becomes involved in making tribunal rules (schedule 9, paragraph 4). According to the Financial Memorandum

²⁷ For a recent example see the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 which lay down the specific procedures to be used in cases heard by the Homeowner Housing Panel

²⁸ Amongst other things, the SCJC was set up by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (“2013 Act”) to provide a unified rule-making body for the courts, replacing the existing Sheriff Court and Court of Session Rules Councils. It was formally established on 28 May 2013.

this power will have to be used to make rules for the Upper Tribunal at an early stage (paragraph 29) – in essence because no such body currently exists

Given that the Bill only provides a framework for rule-making, one important question is the degree to which new procedural rules will be formulated by the SCJC for all listed tribunals. In this respect the Scottish Government has indicated in the Policy Memorandum that there are, “no plans to comprehensively rewrite the rules of procedure” for each listed tribunal, noting the fact that the Bill enables existing rules to be maintained. The Policy Memorandum does, however, note that “some modifications will be required to enable the new structure to function correctly” (paragraph 67).

Certain parties have criticised the goal of standardising Tribunal Rules through a single body on the ground that this will be an inefficient process and may not be an improvement to current rule making procedures. For instance the Lands Tribunal for Scotland has noted in its [response to the Justice Committee’s call for evidence](#) (paragraph 5) that,

“Making rules for specialist tribunals requires a specialist knowledge of the working requirements of the particular body. We think that any goal of establishing common rules is likely to prove a massive impediment to efficiency ... While we welcome the idea of guidance from a Council, we have no doubt that the aim should be to maximise the rule making capacity of the clerks and president of each tribunal. It might be added that all discussions of rules among judicial heads have tended to reveal the importance of the specific requirements of each tribunal. It is apparent that current heads are capable, thoughtful people with clear understanding of the workings of their own tribunals. We see no sound basis for the view that a Rules Council could provide a more efficient way of working.”

The position of the Scottish Government is, however, that the Tribunals Committee will contain people of sufficient experience/knowledge of the specific jurisdictions in order to draft the rules. In this respect the Policy Memorandum (paragraph 72) notes that,

“The committee would be composed of persons with tribunal experience in the area for which the rules were being made. The tribunals committee would be chaired and panel members would be selected by the President of Tribunals. This will ensure that the distinctiveness and ethos of tribunals is protected in the new structure and the person with the most knowledge of the tribunals within their charge was responsible for ensuring representation from the right people in each case.”

Practice Directions

The Bill also includes provisions which would allow the President of Tribunals, or Chamber President in the First Tier Tribunal/Vice President in the Upper Tribunal, to issue so-called practice directions covering practice and procedure (section 68). These remain subject to any provision made in the Tribunal Rules (section 69) and may include instruction/guidance on the application/interpretation of the law or the manner of making of a decision in any case (section 68(5)).

Other issues

Training

There is currently no central training resource for tribunal members in Scotland, meaning that training is left to the discretion of individual tribunals. There are also no agreed minimum standards which apply across the board. The Scottish Government has conducted research in the past into the training needs of tribunal members. One of its reports entitled [Tribunal Training in Scotland](#) (2009) found a divergence in experience between reserved tribunals and devolved tribunals and concluded (paragraph 14) that,

“some sharing of effective training methods for devolved tribunals is essential in order to disseminate good practice and, since most training activities are funded by the public purse, to achieve best value.”

The Bill seeks to rationalise the current system by giving the Lord President an overarching responsibility for making and maintaining appropriate arrangements for the training of the members of the Scottish Tribunals (section 31). As indicated above, the Lord President is permitted to delegate this responsibility to the President of Tribunals.

Although the Bill does not specifically mention this, it can be imagined that generic tribunal training could potentially cover general matters such as issues of fairness/human rights, weighing up evidence, good communication, impartiality etc. which would be common to all tribunals. Specific training would however likely also be needed as regards tribunals' specific areas of operation. In this respect, it should be noted that the Policy Memorandum recognizes the special status of the Mental Health Tribunal for Scotland and provides a commitment on behalf of the Scottish Government to retain the specific training currently provided to members of this tribunal (paragraph 44).

Fees and expenses

The issue of tribunal fees/expenses is currently a controversial one at a UK level with user fees/an expenses system having recently been introduced for Employment Tribunals.²⁹

Currently most devolved tribunals do not involve a user fee or award expenses. However, a notable exception is the Lands Tribunal for Scotland³⁰ which has the power to charge fees³⁰ and to award expenses against a party (usually the losing side), meaning that they may have to pay their opponent's legal costs in bringing the case as well as their own.³¹ The Homeowner Housing Panel can also recover costs which it has incurred on the basis of section 26 of the Property Factors (Scotland) Act 2011.

The Bill introduces powers which could be used to charge fees or to award expenses.

Under section 70 of the Bill the Scottish Ministers may by regulation make provision for “reasonable fees ... payable in respect on any matter that may be dealt with by the Scottish Tribunals.” The Policy Memorandum notes that this power is in recognition of the fact that certain of the tribunals which will be transferred into the new structure can charge fees. However, the current power is not limited to these tribunals and, although the Scottish Government has indicated that it only envisages that it would be used in a small number of

²⁹ See [Employment Appeal Tribunal Fees: Stakeholder Factsheet](#)

³⁰ Section 3(6) of the Lands Tribunal Act 1949

³¹ For example section 103 of the Title Conditions (Scotland) Act 2003

cases, if at all³² there does not appear to be a statutory provision which would prevent this power from being applied to other tribunals.

The Bill also gives the First-tier Tribunal and Upper Tribunal the power to award expenses, “so far as allowed in accordance with the Tribunal Rules” (section 59). The power granted appears to be a relatively wide one and it is currently not clear in which circumstances awards of expenses will be made, or to which tribunals this power will apply. The Policy Memorandum (paragraph 75) does suggest, however, that it would not be appropriate for expenses to be awarded in all situations noting that,

“there would be flexibility as part of the creation of the new structure to determine where an expenses system would be appropriate and whether there should be any limits to such a system.”

However, the Bill does not set statutory limits on the situations where expenses would be justified, and it seems that any change to the current rules on expenses will ultimately be part of the process of the drawing up of Tribunal Rules by the SCJC. The provisions on fees/expenses have led to contrasting views from stakeholders. An example of a positive view is that of the Lord President who has argued that:

“In the interests of justice, tribunals, a number of which are ‘party - party’ tribunals, ought not necessarily to be regarded as cost free zones. It is important that tribunals are given a wide measure of discretion, as the Bill seems to envisage. 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.”³³

In contrast, the Faculty of Advocates appears to be less positive arguing that in some jurisdictions the charging of fees would be “unthinkable” and that, given the significance of these provisions, there should be an opportunity in the future to comment on any changes proposed.³⁴

³² Source: personal communication from the Scottish Government

³³ See [the Lord President’s response to the Justice Committee’s call for evidence](#) at page 4

³⁴ See [the Faculty of Advocates response to the Justice Committee’s call for evidence](#) at page 4

ANNEXE 1 – LISTED TRIBUNALS

The Tribunals which would currently fall within the ambit of the Bill (Schedule 1, Part 1) are:

1. The Additional Support Needs Tribunals

The Additional Support Needs Tribunals were set up by the Education (Additional Support for Learning) (Scotland) Act 2004 and consider appeals made by parents and young people against decisions of Education Authorities regarding the provision of educational support and associated placement requests. For more information see:

http://www.asntscotland.gov.uk/asnts/CCC_FirstPage.jsp

2. The Scottish Charity Appeals Panel

The Scottish Charity Appeals Panel was established by the Charities and Trustee Investment (Scotland) Act 2005 and deals with appeals from the Office of the Scottish Charity Regulator (OSCR). For more information see:

<http://www.scap.gov.uk/about/>

3. The Crofting Commission

The Crofting Commission was set up by the Crofting Reform (Scotland) Act 2010 and came into being on 1 April 2012, taking over from the Crofters Commission. The Crofting Commission's principal function is to regulate crofting, to re-organise crofting, to promote the interests of crofting and to keep under review matters relating to crofting. The 2012 Act also places a duty on the Commission to investigate reports of breaches of duty by tenants and owner-occupier crofters. For more information see:

<http://www.crofting.scotland.gov.uk/index.asp>

4. The Education Appeal Committees

Education Appeal Committees are provided for by the Education (Scotland) Act 1980 and hear appeals from parents and older children against decisions to refuse placing requests, or to exclude children from school. They are operated by local authorities.

5. Housing

(a) The Private Rented Housing Committee

The Private Rented Housing Committee is part of the Private Rented Housing Panel. It deals with complaints from tenants under various aspects of housing legislation, in particular the obligation on landlords to meet repairing standards under the the Housing (Scotland) Act 2006. For more information see:

<http://www.prhpscotland.gov.uk/prhp/139.26.34.html>

(b) The Homeowner Housing Committee

The Homeowner Housing Committee is part of the Homeowner Housing Panel which was set up by the Property Factors (Scotland) Act 2011 to deal with applications from homeowners who consider that their property factor has failed to carry out their factoring duties or failed to comply with the Property Factors' Code of Conduct. For more details see: <http://hohp.scotland.gov.uk/prhp/2156.html>

6. The Lands Tribunal for Scotland

The Lands Tribunal for Scotland is a body which has various statutory powers to deal with disputes concerning land or property, including: the discharge or variation of title conditions; tenants' rights to purchase their public sector houses; disputed compensation for compulsory purchase of land or loss in value of land caused by public works; valuations for rating on non-domestic premises; appeals against the Keeper of the Registers of Scotland; appeals about valuation of land on pre-emptive purchase; and voluntary or joint references in which the Tribunal acts as arbiter. For more information see:

<http://www.lands-tribunal-scotland.org.uk/>

7. The Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland was established by the Mental Health (Care and Treatment) (Scotland) Act 2003. It primarily considers applications for compulsory treatment orders and also has an appellate role in considering appeals against compulsory measures made under the 2003 Act. For more information see:

[http://www.mhtscotland.gov.uk/mhts/Home/Welcome to the Mental Health Tribunal](http://www.mhtscotland.gov.uk/mhts/Home/Welcome%20to%20the%20Mental%20Health%20Tribunal)

8. National Health Service

(a) The NHS National Appeal Panel

The NHS National Appeal Panel considers appeals against decisions taken by Pharmacy Practices Committees as regards applications for entry to the Pharmaceutical List (i.e. the right to provide pharmaceutical services in a given area), and also for the relocation of premises from which pharmaceutical services are provided. For more information see:

<http://www.shsc.scot.nhs.uk/shsc/default.asp?p=125b>

(b) The NHS Tribunal

The NHS Tribunal was established by the National Health Service (Scotland) Act 1978. It considers complaints made against family health service practitioners in Scotland (primarily on grounds of fraud or professional misconduct). For more information see:

<http://www.nhstribunal.scot.nhs.uk/about.html>

9. Parking Adjudicators

The Parking Adjudicators have their origin in the Road Traffic Act 1991 which allowed for the decriminalisation of parking related traffic offences and their enforcement by local authorities. Appeals against such parking offences are considered by Parking Adjudicators who are part of the Scottish Parking Appeals Service.

10. Police Appeals Tribunals

The Police Appeals Tribunal is a body set up by the Police and Fire Reform (Scotland) Act 2012 which started operations on 1 April 2013. It deals with appeals by police officers who, as result of disciplinary action, have been demoted or dismissed.

11. Valuation Appeal Committees

Valuation Appeal Committees were set up by the Local Government etc. (Scotland) Act 1984 and deal with appeals regarding the valuation of properties for council tax or business rates. For more information see:

<http://www.saa.gov.uk/valappealcom.html>

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