

SPICe Briefing

Tribunals (Scotland) Bill: Stage 3

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This briefing looks at Stage 1 and Stage 2 consideration of the Tribunals (Scotland) Bill, which was introduced in the Scottish Parliament on 8 May 2013. The Bill seeks to make a number of changes to the structure of devolved tribunals in Scotland.

Key issues during scrutiny of the Bill so far include:

- The potential need for the legislation to include principles defining the nature of tribunals and the needs of users
- The potential for “judicialisation” of tribunals – i.e. the risk that the new structure could lead to cases being dealt with in line with court-based processes rather than in a more informal way
- The need for a balance between providing a common structure for tribunals whilst retaining individual tribunal processes and expertise

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EXECUTIVE SUMMARY

The [Tribunals \(Scotland\) Bill](#) is a Scottish Government Bill which proposes to make a number of changes to the structure of devolved tribunals in Scotland. It was introduced in the Scottish Parliament on 8 May 2013. The Justice Committee was the lead committee at Stage 1. The [Stage 1 Report](#) was published on 14 October 2013 and the Stage 1 debate took place on [7 November 2013](#).

The main changes proposed by the Bill are:

- A new structure for certain devolved tribunals in Scotland. The initial aim is for certain devolved tribunals (the “listed tribunals” in schedule 1 of the Bill) to be transferred to the new structure, with other tribunals potentially being transferred in at a later point in time
- 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
- The grouping together of tribunal functions which have similar subject matters in separate chambers within the First-tier Tribunal
- The creation of a new system of leadership over all the listed tribunals to be headed by 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 specific statutory duty on various persons to uphold the independence of members of the Scottish Tribunals
- The introduction of a new rule-making framework in which the [Scottish Civil Justice Council](#) will be granted the power to propose procedural rules for the listed tribunals

Key issues during scrutiny of the Bill so far have included:

- Whether the Lands Tribunal for Scotland and the Mental Health Tribunal for Scotland should be treated differently than other tribunals within the new structure
- The potential need for principles defining the nature of tribunals and the needs of users
- The potential for opening up the position of President of the Scottish Tribunals to candidates other than Court of Session judges
- The potential risk that the new structure could lead to cases being dealt with in line with court-based processes rather than in a more informal way (i.e. “judicialisation”)
- Whether giving the Scottish Ministers a transitional rule-making power is appropriate
- Whether judicial officers should have the automatic right to become members of tribunals on authorisation by the Lord President.

INTRODUCTION

The Tribunals (Scotland) Bill is a Scottish Government Bill which proposes to make a number of changes to the structure of devolved tribunals in Scotland.

The current system of tribunals 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. 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. This would 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

The First-tier Tribunal and Upper Tribunal are collectively referred to as “the Scottish Tribunals”. The initial aim is for certain devolved tribunals, (the “listed tribunals” in schedule 1 of the Bill), to be transferred to the new structure, with other tribunals potentially being transferred in at a later point in time. The Bill seeks to delegate powers to the Scottish Ministers to organise the First-tier Tribunal into chambers (i.e. separate organisational groups headed by a Chamber President) and to allocate tribunal functions among those chambers. The aim is to group together tribunal functions which have similar subject matters.

A diagram of the possible chamber structure of the First-tier Tribunal is outlined below at Figure 1.

Figure 1: 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)

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 (President of Tribunals), who will have to be a Court of Session judge.

The Bill also sets out a specific statutory duty for 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; Members of the Scottish Parliament and all other persons with responsibility for matters relating to, “the members of the Scottish Tribunals or the administration of justice”.

The Bill will also introduce a new rule-making framework in which the [Scottish Civil Justice Council](#) (SCJC) will be granted the power to propose procedural rules for the listed tribunals.

As part of the new structure, the Bill also provides for new rules on matters including: membership; appointments; appeals; conducts and complaints; and fees/expenses. The Bill is largely concerned with creating a framework for reform with the result that many of the changes envisaged will take place at a later date through secondary legislation.

PARLIAMENTARY CONSIDERATION

The Bill was introduced in the Scottish Parliament on 8 May 2013. The Justice Committee was designated as lead committee for the purposes of Stage 1 scrutiny of the Bill. The Justice Committee issued a call for written evidence on [5 June 2013](#). It took Stage 1 evidence at its meetings on [3 September](#), [10 September](#) and [17 September](#). On [24 September 2013](#) the Minister for Community Safety and Legal Affairs submitted additional evidence to the Committee by letter.

The Finance Committee issued a call for written evidence on the financial memorandum of the Bill on [5 June 2013](#), receiving [six responses](#), which did not raise any substantial issues. It therefore decided not to undertake further scrutiny of the financial memorandum or to report to the Justice Committee on costs associated with the Bill.

The Delegated Powers and Law Reform Committee published a [report on the delegated powers memorandum on the Bill](#) on 3 September 2013.

The Justice Committee published its [Stage 1 Report](#) on 14 October 2013. Its recommendations, and the Scottish Government's response (letter of [6 November 2013](#)), are discussed in more detail below.

The Stage 1 debate took place on [7 November 2013](#). The Minister explained that the Bill was intended to create a simplified and flexible framework so as to bring coherence to the current devolved tribunals system. She also indicated that it was appropriate that the President of Tribunals was a Court of Session judge given the position's responsibility for the day-to-day running of the Scottish tribunals, and outlined the way in which the Mental Health Tribunal for Scotland and the Lands Tribunal for Scotland will be dealt with in the new structure. Issues raised by MSPs included: the need for a balance between providing a common structure for tribunals whilst retaining individual tribunal processes and expertise, the need to differentiate between tribunals and courts; the needs of tribunal users; the need for tribunals to be independent of government; the potential need for principles defining the nature of tribunals; the potential for opening up the position of President of Tribunals to candidates other than Court of Session judges; whether giving the Scottish Ministers a transitional rule-making power is appropriate; whether the Lands Tribunal for Scotland and the Mental Health Tribunal for Scotland should be treated differently than other tribunals; the rules on fees/expenses; and whether judicial officers should have the automatic right to become members of tribunals on authorisation by the Lord President.

Stage 2 consideration took place on [4 February 2014](#). The Bill as amended at Stage 2 was published on [5 February 2014](#).

KEY ISSUES AT STAGE 1 AND STAGE 2

The table below outlines the Justice Committee’s recommendations on the Bill at Stage 1, the Scottish Government response and how the issue was addressed at Stage 2. It is designed to provide a summary of the main issues associated with the Bill during its passage through the Scottish Parliament so far. It is not a comprehensive discussion of all the issues raised.

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
President of Tribunals		
<p>Although the Lord President is placed at the top of the hierarchy, the Bill also establishes a separate office of “President of Scottish Tribunals” (President of Tribunals) who will be responsible for the general running of the Scottish Tribunals.</p> <p>The President of Tribunals is to be assigned to that post by the Lord President from Court of Session judges (section 4). The Lord President indicated in his written evidence that it was his intention to nominate the Court of Session judge Lady Smith to be the First President of Tribunals.</p> <p>Certain stakeholders expressed concerns that the President of Tribunals must be a Court of Session judge arguing that this unnecessarily rules out members of the current tribunals’ judiciary (e.g. current tribunal presidents), as well as sheriffs, sheriffs principal, other lawyers etc.</p>	<p>The Committee recommended that consideration be given at Stage 2 to extending the pool of eligible candidates to this post.</p> <p>The Scottish Government response emphasised that the person assigned must be a senior person from within the Lord President’s judicial compliment as they will have the responsibility for managing the Upper Tribunal which will be made up of Court of Session judges, sheriffs principal and sheriffs as well as Chamber Presidents from the First-tier Tribunal.</p>	<p>No relevant amendments lodged.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Judicialisation of tribunals		
<p>Section 16 of the Bill allows certain persons holding judicial office (in particular sheriffs and Court of Session judges) to be eligible to act as members of the First-tier and Upper Tribunal if authorised to do so by the President of Tribunals.</p> <p>Various witnesses criticised this provision on the basis that many sheriffs and Court of Session judges would not have sufficient specialised knowledge or experience of tribunals to carry out this role. There was also an argument that giving judicial members automatic eligibility could lead to the judicialisation of tribunals by importing more formal court ways of working into the tribunals system.</p>	<p>The Committee recommended that the Scottish Government give consideration to whether section 16 should be amended to remove the automatic entitlement for appointments of judicial members, and also whether additional safeguards are necessary to avoid the “judicialisation” of tribunals.</p> <p>The Scottish Government’s response indicated that the Bill provides for the use of court judiciary to be restricted by allowing Scottish Ministers to use regulations to specify the composition of the First-tier Tribunal (Section 35(1)) (referred to as “Composition Orders”). According to the Scottish Government, the use of such orders will ensure that court judiciary will only be used in cases where there is a genuine requirement for them to do so.</p>	<p>Amendments 92 to 97 in the name of Margaret Mitchell were broadly aimed at only allowing judicial officers to become members of the First-tier and Upper Tribunal if first appointed by the President of Tribunals after consultation with the Lord President. Appointment would only be possible if the President of Tribunals was satisfied that the person in question was “suitably qualified” These amendments were ultimately withdrawn.</p>
Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Judicial tenure and salaried posts		
<p>The Bill includes no provision for the appointment of full-time, permanent salaried tribunal judges. Certain witnesses, including the Lord President, indicated that it would be useful to have the possibility of permanent salaried posts so as to attract people of sufficient calibre to the positions in question.</p>	<p>The Committee recommended that the Bill be amended to allow for full-time salaried judges and members of staff.</p> <p>The Scottish Government indicated in its response that it intended to make a Stage 2 amendment to allow for the possibility of permanent salaried positions in the future.</p>	<p>Scottish Government amendment 36, which was agreed to, gives the Scottish Ministers the powers, after consulting the President of the Tribunals, to make regulations making certain appointments permanent.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Definition of a tribunal		
<p>Stakeholders argued that it would be beneficial to include provisions in the Bill outlining the general principles which underlie the tribunal system. The aim being to ensure that the unique and distinct nature of tribunals is not compromised. One suggestion was to include general principles similar to those in the UK Tribunals, Courts and Enforcement Act 2007 (2007 Act) in relation to accessibility, fairness and handling proceedings quickly and efficiently (sections 2(3) and 22(4) of the 2007 Act).</p>	<p>The Committee called on the Scottish Government to bring forward an amendment setting out the general character and nature of tribunals on the face of the Bill, for example in the same terms as in the 2007 Act.</p> <p>The Scottish Government explained in its response that there are difficulties in defining exactly what constitutes a tribunal as they come in many different forms, but that it was willing to consider setting out principles in the Bill for tribunals along the lines of the 2007 Act.</p>	<p>Amendments 1, 8 and 68 in the name of Elaine Murray, sought to include a definition of a tribunal in the Bill and to include general principles similar to those in the 2007 Act in relation to accessibility, fairness and handling procedures quickly and efficiently (primarily by requiring the Lord President and the Court of Session when making tribunal rules to adhere to these principles).</p> <p>Scottish Government amendment 11 requires the Scottish Ministers, the Lord President and the President of Tribunals to have regard to the principle that Scottish Tribunal proceedings should be “accessible and fair” and “handled quickly and effectively”. The Scottish Government amendment was agreed to. The amendments in the name of Elaine Murray were either withdrawn, disagreed to or not moved.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Procedural rules		
<p>The Bill gives the Scottish Civil Justice Council (SCJC) the role of proposing procedural rules for the Scottish Tribunals through a specialised tribunals committee. The SCJC has, however, indicated that, as it is newly established and is tasked with first re-writing civil court rules, it will not be able to assume responsibility for tribunal rule-making immediately. Therefore, in the interim transitional period, this role will fall on the Scottish Ministers (schedule 9).</p> <p>Certain stakeholders have argued that it would be undesirable on constitutional grounds for the Scottish Ministers to be responsible for rule re-writing, in particular in relation to the Upper Tribunal where new rules could be of more political significance.</p>	<p>The Committee had concerns regarding the delay in the SCJC being in a position to take on this role and called on the Scottish Government to examine whether there is scope to expedite this transfer of responsibilities, for example by considering whether the resourcing of the SCJC could be reviewed.</p> <p>The Scottish Government response was that the drafting of rules by Scottish Ministers in the interim period would involve expert help as is currently the case.</p>	<p>Amendments 98 and 99 were brought forward in the name of Margaret Mitchell and were aimed at ensuring that: (1) existing procedural rules are to be regarded as if they are new tribunal rules until and if they are amended and; (2) the removal of the transitional rule writing period involving the Scottish Ministers. Both these amendments were disagreed to.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Practice Directions		
<p>Section 68(5)(a) enables the President of the Tribunals, and Chamber Presidents and Vice-Presidents of the Upper Tribunal to issue practice directions including instruction/guidance on “the application or interpretation of the law”.</p> <p>A number of witnesses expressed concerns that this provision could restrict the independence of the judiciary to take their own view on the law. The Lord President indicated that it was inappropriate for a practice direction to give guidance on the interpretation of the law and called for this provision to be removed.</p>	<p>The Committee noted these concerns and recommended such an amendment. The Scottish Government indicated that the provision was unintentional and agreed to introduce a Stage 2 amendment to address this point.</p>	<p>Scottish Government amendment 77, which was agreed to, removes the provision enabling practice directions to be issued which include instruction/guidance on “the application or interpretation of the law”.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Appeals to the Court of Session		
<p>Section 45 of the Bill provides that, where the decision of the Upper Tribunal relates to an appeal from the First-tier Tribunal, permission for a further appeal to the Court of Session (i.e. a so-called “second appeal”) will only be granted if the case raises an important issue of principle or practice or where there are compelling reasons for such an appeal.</p> <p>Some stakeholders expressed concerns that this test could be applied too restrictively and could prevent appeals which have merit from being made to the Court of Session.</p>	<p>The Committee called on the Scottish Government to give further consideration to the wording of this test and whether it is too restrictive.</p> <p>The Scottish Government’s response was that the new tribunal structure is designed, in the main, to keep tribunal business within the tribunals system and that by keeping the appeals process out of courts users will benefit from a speedier and less costly, resolution of their cases. It also indicated that tribunal users will already have had a decision from the First-tier and an appeal to the Upper Tribunal and that the process should not be limitless.</p>	<p>At Stage 2, minor Scottish Government drafting amendments (54 and 55) were made to align the language of the second appeals test with other statutory examples of the test. The language of section 45 of the Bill remained otherwise unchanged.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Expenses and fees		
<p>Section 59 of the Bill gives the First-tier Tribunal and Upper Tribunal the power to award expenses “so far as allowed in accordance with the Tribunal Rules”, but does not set statutory limits on where expenses would be justified. Section 70 allows the Scottish Ministers to make provision by regulation for “reasonable fees [...] payable in respect of any matter that may be dealt with by the Scottish Tribunals.”</p> <p>Certain stakeholders have raised concerns as to the degree of discretion to provide for fees/expenses arguing that for many tribunals they would not be appropriate.</p>	<p>The Committee indicated that it had some concerns regarding the provision to charge expenses and fees and recommend that, where there is a proposal for a tribunal to be given the power to charge expenses and fees where it did not previously, consultation should be carried out with users and stakeholders of the tribunal concerned. The Scottish Government indicated in its response that it would consider this proposal.</p>	<p>The Scottish Government moved an amendment at Stage 2 (Amendment 82) which would place a duty on the Scottish Ministers “to such extent as they consider appropriate” to consult with “persons having an interest in the operation and business of the Scottish Tribunals” before making any regulations with regard to the introduction of fees. The Minister for Community Safety and Legal Affairs also indicated that the Scottish Government does not intend to use the provisions in section 70 to introduce new fees for tribunals.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Lands Tribunal for Scotland		
<p>The Lands Tribunal for Scotland (“Lands Tribunal”) is a body which has various statutory powers to deal with disputes concerning land or property. The Scottish Government’s policy intention is that the Lands Tribunal be transferred to the Upper Tribunal rather than the First-tier Tribunal. According to the Scottish Government, this is the best way to preserve and enhance the specialist qualities of the Lands Tribunal.</p> <p>Various parties, including the Lands Tribunal itself, have argued that it should not be part of the new tribunal structure at all, primarily on the basis that it functions in reality as a court and does not need restructuring.</p>	<p>The Committee noted the case put forward by the Lands Tribunal and urged the Scottish Government to review its position.</p> <p>The Scottish Government indicated that having a separate pillar outside the new structure would be contrary to what the Bill is trying to achieve. It also noted that it had been assured by Lands Tribunal members in advance that positioning the Lands Tribunal in the Upper Tribunal would meet the needs of users and members.</p>	<p>No relevant amendments lodged.</p>

Issue	Stage 1 Report and Scottish Government Response	Action at Stage 2
Mental Health Tribunal for Scotland		
<p>In the Policy Memorandum the Scottish Government indicated that, “initially mental health will be in a chamber on its own.”</p> <p>The Mental Health Tribunal for Scotland (MHTS) and certain other stakeholders have argued that the MHTS has a special role as it can deprive people of their liberty and impose treatments on them; and that in order to protect this, the Bill itself should provide that the MHTS be in a chamber on its own.</p>	<p>The Committee was sympathetic to the MHTS’s concerns that the Scottish Government’s commitment appears to be of a temporary nature and recommend that the Scottish Government bring forward an amendment to preserve the distinctiveness of the MHTS.</p> <p>The Scottish Government argued that having multiple chambers would increase costs and would make management of the system more difficult. It is also argued that the chamber structure has to be flexible so as to allow for changes to be made without primary legislation. According to the Scottish Government, the chamber structure could only be changed after consultation with the Lord President/relevant stakeholders. It also noted that any regulations made would be by affirmative resolution which would allow for Parliamentary scrutiny.</p>	<p>Amendment 2 in the name of Elaine Murray would have required the First-tier Tribunal to include a single chamber to adjudicate exclusively on the subject-matter of mental health. This amendment was not agreed to.</p>

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