

TRIBUNALS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these Revised Explanatory Notes are published to accompany the Tribunals (Scotland) Bill (introduced in the Scottish Parliament on 8 May 2013) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill creates a new structure for tribunals dealing with devolved matters under the judicial leadership of the Lord President of the Court of Session as Head of the Scottish Tribunals.

5. The main features covered by the Bill are:

- The creation of a First-tier Tribunal and an Upper Tribunal. The First-tier Tribunal will be divided into chambers, and the Upper Tribunal into divisions. The Bill creates a simplified framework to provide coherence across the tribunals system. The Bill allows the new structure to be capable of taking on new jurisdictions over time.
- The First-tier Tribunal will deal with cases in the first instance to which a general right of appeal will lie to the Upper Tribunal. The Bill does, however, allow for the functions of a listed tribunal to be transferred to either or both Tribunals and it is envisaged that the Upper Tribunal may receive first-instance functions which are particularly complicated or controversial. The Upper Tribunal also has an express function, which is set out in section 41 of the Bill, to hear appeals from the First-tier

Tribunal. It may also decide on petitions for judicial review which are transferred to it from the Court of Session under section 52.

- The creation of a new office, the President of the Scottish Tribunals (“President of Tribunals”). The Lord President will be able to delegate some of the Lord President’s functions as Head of the Scottish Tribunals to the President of Tribunals.
- The Bill enables the First-tier Tribunal and the Upper Tribunal to review their own decisions where, for example, simple administrative errors have occurred. This does not affect the rights of appeal available.
- The Bill amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, to provide the Scottish Civil Justice Council (“SCJC”) with the power to propose rules of procedure for devolved Scottish tribunals.
- Each tribunal is to be composed of its members and the Bill provides a common system for appointing both legally qualified and lay members. The Bill also allows for the transfer-in of members of a listed tribunal at the point when its functions are transferred-in to the Scottish Tribunals. Members of the judiciary are also enabled to be assigned to act as tribunal members. Reflecting the primary functions of both tribunals, a sheriff will be eligible to act as a member of both the First-tier Tribunal and the Upper Tribunal while a judge of the Court of Session will be eligible to act as a member of the Upper Tribunal.

OVERVIEW OF THE STRUCTURE OF THE BILL

6. The Bill has 78 sections and 10 schedules. Section 76 contains definitions used in the Bill and schedule 10 is an index of expressions used in the Bill. The Bill is organised into 8 Parts and these explanatory notes are organised likewise. A brief overview of the structure of the Bill is set out below which is followed by a detailed description of the provisions of the Bill in the commentary on the sections. Terms are defined when first used but not otherwise. An explanation to accompany each schedule is contained within the section that introduces that schedule.

7. Part 1 makes provision for the establishment and leadership of the Scottish Tribunals.

8. Part 2 makes provision for the composition of the Scottish Tribunals and their internal structure.

9. Part 3 makes provision so that the functions and members of a tribunal listed in schedule 1 can be transferred-in to the Scottish Tribunals.

10. Part 4 contains more detail in relation to membership of the Scottish Tribunals. Schedules 3 to 6 deal with the appointment and assignment of members. Schedule 7 sets out the terms and conditions of membership including period in office, re-appointment, termination of appointment, disqualification from office, pensions and remuneration. Schedule 8 makes provision as to the training and fitness of members including the process for removing a member from office.

11. Part 5 makes provision as to the composition of the Scottish Tribunals when exercising their decision-making functions.

12. Part 6 enables both the First-tier Tribunal and Upper Tribunal to review their own decisions and to correct or set-aside those decisions. It also provides for a general right to appeal against a decision of the First-tier Tribunal to the Upper Tribunal and against a decision of the Upper Tribunal to the Court of Session. Chapter 2 of Part 6 also enables the Court of Session to remit an application for judicial review to the Upper Tribunal for determination.

13. Chapters 1 and 2 of Part 7 make provision in respect of the practice and procedure to be followed in proceedings before the Scottish Tribunals. Chapter 3 of Part 7 makes provision for the charging of fees by the Scottish Tribunals as well as the duty of the Scottish Ministers to ensure that the Scottish Tribunals are provided with the necessary property, services and personnel which are required for their proper operation, and reporting.

14. Part 8 contains general and ancillary provisions.

COMMENTARY ON SECTIONS

PART 1 – THE SCOTTISH TRIBUNALS

Establishment and Leadership

Section 1 – Establishment of the Tribunals

15. Section 1 establishes two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland.

Section 2 – Head of the Tribunals

16. Section 2 designates the Lord President as the Head of the Scottish Tribunals. The Bill confers a number of functions on the Lord President in this capacity. See, for example, section 4(2) (assigning a person to the office of the President of the Scottish Tribunals), section 6 (representation of interests), section 7 (business arrangements), section 30 (assignment policy) and section 31 (training and review).

Section 3 – Upholding independence

17. Section 3 places a duty on the First Minister, the Lord Advocate, the Scottish Ministers, members of the Scottish Parliament and any other person having responsibility for matters relating to the Scottish Tribunals or the administration of justice to uphold the independence of the members of the Scottish Tribunals. It also imposes two particular duties on the First Minister, the Lord Advocate and the Scottish Ministers for the purpose of upholding that independence.

18. The first is a duty not to seek to influence the decisions of the Scottish Tribunals through special access to its members which would not be afforded to the general public.

19. The second is a duty to have regard to the need for members of the Scottish Tribunals to have the support necessary to enable them to carry out their functions.

Sections 4 and 5 – President of the Tribunals

20. Section 4 establishes the office of the President of the Scottish Tribunals. It is the responsibility of the Lord President to assign a judge of the Court of Session (other than a temporary judge) to the office who will be the senior member of the Scottish Tribunals. Once assigned to office, the President of Tribunals continues in that office for such time as the Lord President considers appropriate.

21. Where no person is assigned to act or the person assigned to act as the President of Tribunals is unable to act in that capacity, the Lord President may nominate a Vice-President of the Upper Tribunal to act temporarily as the President of Tribunals provided that that person is also a judge of the Court of Session (other than a temporary judge).

22. The Bill confers a number of functions directly on the President of Tribunals (see, for example, section 24(2) by which the President of Tribunals may assign a judicial member of the Upper Tribunal as a Vice-President of that Tribunal) and also enables the Lord President to delegate a number of his or her functions to the President of Tribunals (see sections 8 and 9).

Overarching Responsibilities

Section 6 – Representation of interests

23. Under this section, the Lord President is responsible for representing the views of the members of the Scottish Tribunals to the Scottish Parliament and to the Scottish Ministers and for laying written representations before Parliament on matters of importance relating to the Scottish Tribunals. The Lord President is not authorised to delegate these specific duties under section 8.

Section 7 – Business arrangements

24. Under section 7, the Lord President is responsible for making and maintaining appropriate arrangements to ensure the efficient disposal of business by the Scottish Tribunals and the welfare of their members. The Lord President may delegate the discharge of these responsibilities to the President of Tribunals (see section 8).

Section 8 – Delegation of functions

25. Section 8 authorises the Lord President to delegate to the President of Tribunals the exercise of any of the functions listed in section 7(1) or (2) (business arrangements), section 30(1) and (2) (assignment policy) or section 31(1) or (2) (training and review). Section 8 should be read with section 9 which enables the Lord President to issue directions as to the exercise of any functions which are delegated under section 8.

Section 9 – Directions on functions

26. This section enables the Lord President to issue directions as to the exercise of the functions of the President of Tribunals in relation to the Scottish Tribunals. This would include any functions conferred directly on the President of Tribunals by the Bill or any functions which are delegated to the President of Tribunals by the Lord President under section 8.

Section 10 – Authority under regulations

27. Section 10 makes provision as to the exercise of the regulation-making powers contained in section 19(2) (chambers in the First-tier Tribunal), section 22(2) (divisions of the Upper Tribunal), section 35(1) (composition of the First-tier Tribunal), section 37(1) (composition of the Upper Tribunal) and 37A(1) (voting for decisions) by the Scottish Ministers. These are more fully explained in the explanatory notes relating to those sections.

Section 11 – Consultation on regulations

28. This section imposes a consultation requirement on the Scottish Ministers before the exercise of the regulation-making powers contained in sections 19(2), 22(2), 35(1), 37(1) and 37A(1). These are more fully explained in the explanatory notes relating to those sections.

Section 11A – Principle to be observed

29. This Section provides an overarching guiding principle for the Scottish Tribunals. Subsection (1) places a duty on the Scottish Ministers to have regard to this principle when exercising their regulation making functions. Subsection (2) places a duty on the Lord President and President of Scottish Tribunals that in exercising their leadership functions they must have regard to this principle. Subsection (3) contains the principle.

PART 2 – ORGANISATIONAL ARRANGEMENTS

Membership types

Section 12 – Overview of membership

30. Section 12 specifies the categories of member of the First-tier and Upper Tribunals. These are defined as ordinary members, legal members and judicial members. As can be seen from the more detailed provisions, judicial members will be those members of the courts judiciary who are authorised to act as members of the Scottish Tribunals (see section 16), legal members will be solicitors, advocates or persons possessing some other form of legal qualification (see Part 2 of schedule 3 and Part 2 of schedule 5) and ordinary members will comprise persons with such other qualifications, experience or training as are necessary for the Tribunals to exercise their functions (for example, doctors, surveyors, teachers or other lay persons) (see Part 1 of schedule 3 and Part 1 of schedule 5).

31. Subsection (2) provides that a member of one of the Scottish Tribunals (by virtue of being a member of that Tribunal) is not prevented from being a member of the other.

Section 13 – Capacity of members

32. The effect of section 13 is to clarify that all members of the Scottish Tribunals, when exercising the decision-making functions of the Tribunals are doing so with judicial status and capacity, regardless of the category of membership which they possess. Subsection (1) makes provision with respect to ordinary and legal members and subsection (2) clarifies that this does not affect the general status of judicial members (see section 16) and extra judges (see section 17).

Section 14 – First-tier members

33. Section 14 makes provision as to the membership of the First-tier Tribunal.

34. Under subsection (1), persons will become ordinary members of the First-tier Tribunal if they are transferred-in as ordinary members by virtue of section 28(b) or appointed as ordinary members by virtue of section 29(1). Similarly, subsection (2)(a) provides that persons will become legal members of the First-tier Tribunal if they are transferred-in as legal members by virtue of section 28(b) or are appointed as legal members by virtue of section 29(1).

35. Section 28(b) gives effect to paragraph 1 of schedule 2 which enables the Scottish Ministers, by regulations, to provide for a transferable person of a listed tribunal to transfer-in to the First-tier Tribunal as an ordinary or legal member. Further details are provided in the commentary on that section.

36. Section 29(1) gives effect to schedule 3 which enables the Scottish Ministers to appoint a person as an ordinary or legal member of the First-tier Tribunal. Further details are provided in the commentary on that section.

37. Subsections (2)(b) and (3) of section 14 provide that a person is also a legal member of the First-tier Tribunal if that person holds the position of Chamber President or Deputy Chamber President. Where a legal member of the First-tier Tribunal is assigned as a Temporary Chamber President under paragraph 4 of schedule 4, that Temporary Chamber President will also be regarded as a legal member of the First-tier Tribunal but where a judicial member of the First-tier Tribunal is assigned as a Temporary Chamber President, that person will continue to be a judicial member.

Section 15 – Upper members

38. Section 15 makes provision as to the membership of the Upper Tribunal.

39. Under subsection (1), persons will become ordinary members of the Upper Tribunal if they are transferred-in as ordinary members by virtue of section 28(b) or appointed as ordinary members by virtue of section 29(3). Similarly, subsection (2)(a) provides that persons will become legal members of the Upper Tribunal if they are transferred-in as legal members by virtue of section 28(b) or are appointed as legal members by virtue of section 29(3).

40. Section 28(b) gives effect to paragraph 1 of schedule 2 which enables the Scottish Ministers, by regulations, to provide for a transferable person of a listed tribunal to transfer-in to the Upper Tribunal as an ordinary or legal member. Further details are provided in the commentary on that section.

41. Section 29(3) gives effect to schedule 5 which enables the Scottish Ministers to appoint a person as an ordinary or legal member of the Upper Tribunal. Further details are provided in the commentary on that section.

42. The effect of subsection (2)(b) of section 15 is that a Chamber President of the First-tier Tribunal, by virtue of holding that position, will also be a legal member of the Upper Tribunal

(without the requirement to be separately appointed as a legal member of the Upper Tribunal). This provision does not have the effect of making Deputy Chamber Presidents or Temporary Chamber Presidents of the First-tier Tribunal legal members of the Upper Tribunal.

43. Subsections (2)(c) and (3) of section 15 provide that a person is also a legal member of the Upper Tribunal if that person is transferred-in or appointed as a Vice-President of the Upper Tribunal. Where a member of the courts judiciary is assigned as a Vice-President or a Temporary Vice-President of the Upper Tribunal that person remains a judicial member of the Upper Tribunal rather than becoming a legal member.

Judiciary eligible to sit

Section 16 – Sheriffs and judges

44. Section 16 provides for the circumstances in which members of the courts judiciary can be assigned to act as members of the Scottish Tribunals. Such persons make up the judicial members of the Scottish Tribunals (see section 18).

45. By virtue of subsection (1), sheriffs principal, sheriffs and part-time sheriffs are eligible to act as members of the First-tier Tribunal. Such persons may only act as members of the First-tier Tribunal with the authorisation of the President of Tribunals (subsection (3)). Such authorisation can only be given with the Lord President's approval and the agreement of the sheriff concerned (and, if that person is not a sheriff principal, the sheriff principal of the sheriffdom to which that sheriff is appointed) (subsection (6)).

46. By virtue of subsection (2), judges of the Court of Session (including temporary judges) together with the Chairman of the Scottish Land Court, sheriffs principal and sheriffs (but not part-time sheriffs) are eligible to act as members of the Upper Tribunal. Such persons may only act as members of the Upper Tribunal with the authorisation of the President of Tribunals (subsections (3) and (4)). Such authorisation can only be given with the Lord President's approval and the agreement of that person (subsection (6)). Where the person is a sheriff (but not a sheriff principal), the authorisation of the President of Tribunals can only be given with the agreement of the sheriff principal of the sheriffdom to which that sheriff is appointed.

47. Subsection (2) does not apply to the Lord President and the President of Tribunals. Subsection (5) makes express provision for both the Lord President and President of Tribunals to act as members of the Upper Tribunal without any requirement for authorisation.

48. Any authorisation given by the President of Tribunals for a member of the courts judiciary to act as a member of the Scottish Tribunals remains in effect until such time as the President of Tribunals determines (which again requires the consent of the Lord President and the agreement of the person acting as a member (subsection (6))). Where the person is a sheriff (but not a sheriff principal), the determination of the President of Tribunals can also only be made with the agreement of the sheriff principal of the sheriffdom to which that sheriff is appointed.

Section 17 – Authorisation of others

49. Section 17 enables the Scottish Ministers, on receiving a request from the President of Tribunals, to authorise a former judge of the Court of Session, Chairman of the Land Court, sheriff (excluding part-time sheriff) or a judge of a court or tribunal in a country or territory outwith Scotland to assist in the disposal of the business of the Upper Tribunal by temporarily acting as a judicial member of the Upper Tribunal. It does not enable such a person to act as a member of the First-tier Tribunal.

50. The President of Tribunals cannot make a request for such an authorisation without the approval of the Lord President and the agreement of the person concerned (subsection (3)). Subsection (7) enables the Scottish Ministers to make payments in respect of any person authorised to act under section 17.

51. Subsection (7A) provides that former judicial office holders cannot be authorised if they have reached the age of 75 or if they have been removed from judicial office. The relevant grounds for removal from office are listed in the provision.

52. Subsection (7B) enables the Scottish Ministers to make further provision as necessary when authorising judges of a court or tribunal in a country or territory outwith Scotland to sit in the Upper Tribunal. It also places a duty such judges to take the judicial oath if they have not already done so.

53. Subsection (8) provides that the requirement to uphold the independence of the Scottish Tribunals in section 3 applies to any persons authorised to act under section 17 as it does in relation to the other members of the Scottish Tribunals. It also makes provision so that any previous oath taken by such a person will continue to apply in the person's role in the Scottish Tribunals.

Section 18 – Judicial membership

54. Section 18 clarifies the people who are to be regarded as judicial members of the Scottish Tribunals. Any reference to a judicial member of the Upper Tribunal does not include a reference to a judge authorised to act as such under section 17.

Structure of the First-tier Tribunal

Section 19 – Chambers in the Tribunal

55. Section 19 provides for the organisation of the First-tier Tribunal into chambers and the allocation of the Tribunal's functions among those chambers. The chambers are to be organised according to the subject-matter of the Tribunal's functions as well as any other factors which are relevant to the exercise of the Tribunal's functions.

56. The organisation into chambers and the allocation of the Tribunal's functions are to be effected by regulations made by the Scottish Ministers (subsection (2)). By virtue of section 10(1), those regulations may make provision authorising the Lord President, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section

11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 19(2).

57. Paragraph 7(1) of schedule 9 makes transitional provision so that the First-tier Tribunal need not be organised into chambers or may have only one chamber for such period until it has acquired sufficient functions so as to merit this.

Section 20 – Chamber Presidents

58. Section 20 provides that each chamber of the First-tier Tribunal must have one or two Chamber Presidents to preside over it. Subsection (2) prohibits a Chamber President from presiding over more than one chamber at the same time.

Section 21 – Appointment to post

59. This section provides that the Scottish Ministers, after consultation with the Lord President, are to appoint a Chamber President to preside over a particular chamber (subsections (1), (2) and (4)).

60. By virtue of section 15(2)(b), a Chamber President of the First-tier Tribunal is also a legal member of the Upper Tribunal. Section 21(3), therefore, makes provision so as to ensure that any person appointed to the position of Chamber President also meets the eligibility criteria which would be required of a person to be appointed as a legal member of the Upper Tribunal. The effect of subsection (3) is to provide that a person will only be eligible to be appointed as a Chamber President if he or she is, or meets the eligibility criteria for being appointed as, a legal member of the Upper Tribunal.

61. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.

Structure of the Upper Tribunal

Section 22 – Divisions of the Tribunal

62. Section 22 provides for the organisation of the Upper Tribunal into divisions and the allocation of the Tribunal's functions among those divisions. The divisions are to be organised according to the subject-matter of the Tribunal's functions as well as any other factors which are relevant to the exercise of the Tribunal's functions (for example, whether or not the function relates to a decision at first instance or an appeal from a decision of the First-tier Tribunal).

63. The organisation into divisions and the allocation of the Tribunal's functions are to be effected by regulations made by the Scottish Ministers (subsection (2)). By virtue of section 10(1), those regulations may make provision authorising the Lord President, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(1), the Scottish Ministers must consult the Lord President and such other persons as they consider appropriate before making regulations under section 22(2).

64. Paragraph 7(2) of schedule 9 makes transitional provision so that the Upper Tribunal need not be organised into divisions or may have only one division for such period until it has acquired sufficient functions so as to merit this.

Section 23 – Vice-Presidents

65. Section 23(1) and (2) provides that each division of the Upper Tribunal must have one or two Vice-Presidents to preside over it. Subsection (2) prohibits a Vice-President from presiding over more than one division at the same time.

66. Section 23 is subject to section 24(1)(b) which enables the President of Tribunals to assign himself or herself as a Vice-President of one or more divisions of the Upper Tribunal.

67. Section 24 sets out the procedure where the President of Tribunals or another judicial member of the Upper Tribunal may be assigned to act as a Vice-President. Section 25 sets out the procedure by which a person who is not a judicial member of the Upper Tribunal may be appointed to that position.

Section 24 – Assignment to post

68. Section 24 provides for the assignment of a judicial member of the Upper Tribunal as a Vice-President.

69. Subsection (1) enables the President of Tribunals to assign himself or herself as a Vice-President. As a Vice-President, the President of Tribunals may preside over more than one division of the Upper Tribunal.

70. Subsection (2) enables the President of Tribunals to assign any other judicial member of the Upper Tribunal (other than the Lord President) as a Vice-President to preside over a particular division. Such an assignment can only be made with the Lord President's approval and the assignee's agreement (subsection (4)).

Section 25 – Appointment to post

71. Section 25(1) enables the Scottish Ministers, following a request by the President of Tribunals and after consultation with the Lord President, to appoint a person as a Vice-President to preside over a particular division of the Upper Tribunal (subsections (1), (2) and (4)).

72. By virtue of section 15(2)(c) and (3) a person appointed as a Vice-President is a legal member of the Upper Tribunal. Section 25(3), therefore, makes provision so as to ensure that any person appointed to the position of Vice-President meets the eligibility criteria which would be required of a person to be appointed as a legal member of the Upper Tribunal. The effect of subsection (3) is to provide that a person will only be eligible to be appointed as a Vice-President if he or she is, or meets the eligibility criteria to be appointed as, a legal member of the Upper Tribunal. It excludes a person who is already appointed as Vice-President of the Upper Tribunal.

73. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.

PART 3 – TRANSFER-IN FROM LISTED TRIBUNALS

Section 26 and schedule 1 – Listed tribunals

74. Section 26(1) gives effect to schedule 1 which sets out a list of tribunals from which the functions and members can be transferred-in to the Scottish Tribunals by virtue of regulations made under sections 27 and 28.

75. Part 1 of schedule 1 contains the list of tribunals. Part 2 of that schedule contains further elaboration to assist in identifying the tribunal and the functions which may be the subject of transfer. For example, in relation to the entry for a Scottish Charity Appeals Panel, paragraph 12(2) of schedule 1 provides that it is only the functions exercisable by virtue of section 75(1) of the Charities and Trustee Investment (Scotland) Act 2005 which may be transferred-in to the Scottish Tribunals. Similarly, the Crofting Commission exercises a number of executive functions under the Crofters (Scotland) Act 1993 which it is not intended to transfer-in to the Scottish Tribunals. In relation to the entry for the Crofting Commission, paragraph 12(3) of schedule 1 provides that it is only the Commission's functions in relation to the resolution of disputes which are exercisable in the manner of a tribunal that may be transferred-in to the Scottish Tribunals.

76. Subsection (2) allows the Scottish Ministers to modify the listed tribunals and further details of those tribunals as set out in schedule 1.

77. Subsection (3) provides that regulations can only add a tribunal to the list in Part 1 of schedule 1 if it is established by or under an enactment. Subsection (4) makes provision in order to clarify what is meant by the term tribunal for this purpose and to clarify that a body may be listed if, and to the extent that, it has decision-making functions which are exercisable in the manner of a tribunal. The effect of this is that a body can only be added to the list in schedule 1 if, and to the extent that, it has functions for the independent resolution of disputes in a similar fashion to those traditionally exercised by tribunals.

78. Subsection (5)(a) and (b) makes express provision to make it clear that the Scottish Land Court or any other Scottish court cannot be added to the list in schedule 1. Accordingly, the Bill does not enable any functions of the Scottish Land Court or the other Scottish courts to be transferred-in to the Scottish Tribunals. Subsection (5)(c) also prevents the functions of the tribunals mentioned in that subsection from being transferred-in to the Scottish Tribunals.

Section 27 – Transfer-in of functions

79. Section 27(2) enables the Scottish Ministers, by regulations, to provide for some or all of the functions of a listed tribunal to be transferred to the Scottish Tribunals. The regulations may provide for the functions to be transferred to the First-tier Tribunal, the Upper Tribunal or both Tribunals.

80. Where regulations made under subsection (2) provide for the functions of a listed tribunal to be transferred to both of the Scottish Tribunals, the regulations may make provision transferring certain functions to one Tribunal and certain functions to the other. They can also provide for a particular function to be transferred to both Tribunals but, where they do so, subsections (3) and (5) require the regulations to make provision so that it can be ascertained

when the function is exercisable by the First-tier Tribunal and when it is exercisable by the Upper Tribunal. In doing this, the regulations can provide for this to be determined in Tribunal Rules (see commentary on section 62) or by the President of Tribunals.

81. Subsection (4) enables the Scottish Ministers, by regulations, to provide for a redistribution of any functions which have been transferred-in to the Scottish Tribunals between those Tribunals.

82. Subsection (6) provides that any regulations made under subsection (2) or (4) may make further provision in order to give full effect to the transfer or redistribution of functions. This includes the modification of any enactment which makes provision in relation to a listed tribunal (subsection (7)).

83. Regulations made under subsection (2) may only relate to one of the listed tribunals (subsection (8)). This will require separate regulations to be made in respect of each listed tribunal.

Section 28 and schedule 2 – Transfer-in of members

84. Section 28 introduces schedule 2 which makes provision enabling the transfer of members of the listed tribunals to the Scottish Tribunals where some or all of their functions are, similarly, transferred.

85. Paragraph 1 of schedule 2 enables the Scottish Ministers, by regulations, to make provision to transfer some or all of the transferable persons to a position or positions in the Scottish Tribunals.

86. In relation to a listed tribunal, a transferable person is a member (of the tribunal or any panel or other body from which the tribunal members are selected) or an authorised decision-maker of that tribunal, or a person who constitutes the tribunal (paragraph 1(2) of schedule 2).

87. Paragraph 1(3) of schedule 2 excludes from transfer, a sheriff or judge of the Court of Session or the President of the Lands Tribunal for Scotland (if he or she holds another judicial office) who may, otherwise, fall within the definition of transferable persons. Rather than transferring-in as a legal or ordinary member of the Scottish Tribunals, it is anticipated that such persons will be authorised to act as judicial members in accordance with sections 16 and 18.

88. Paragraph 2 of schedule 2 enables regulations made under paragraph 1(1) of schedule 2 to make provision preserving, altering or replacing the terms and conditions on which a transferable person is transferred to the Scottish Tribunals.

89. Paragraph 3 of schedule 2 sets out limitations on the regulation-making power contained in paragraph 1(1) of schedule 2. Such regulations may only be made where some or all of the functions of a listed tribunal have been or are to be transferred to the Scottish Tribunals (paragraph 3(1)). The regulations may not transfer a person to a position in the Scottish Tribunals for which he or she would not be eligible to be appointed (paragraph 3(2)). The regulations may also make provision in relation to members of only one listed tribunal at a time (paragraph 3(3)).

Paragraph 4 of schedule 2 sets out the positions in the Scottish Tribunals to which a transferable person may be transferred.

Section 28A - Accommodation of functions

90. Section 28A(2) enables the Scottish Ministers, by regulations, to modify the Tribunals Act so that it specifies the relevant provisions of the Act conferring functions on the Scottish Tribunals. Subsection (3) allows the Scottish Ministers, by regulations, to modify the Tribunals Act or the Act conferring functions on the Scottish Tribunals to ensure that the jurisdiction can operate effectively in the tribunals structure.

Section 28B – Redistribution of functions

91. Section 28B enables the Scottish Ministers, by regulations, to redistribute functions which have been conferred directly on the Scottish Tribunals by another Act. Subsection (1) provides that regulations can redistribute functions conferred directly on the Scottish Tribunals between tribunals or can make provision that the functions will be exercised by both tribunals. Subsection (2) allows the question of which tribunal is to exercise particular functions in a particular case or in a specified circumstance to be determined by tribunal rules or by the President of Tribunals (whether or not by reference to Tribunal Rules).

PART 4 – MORE ABOUT MEMBERSHIP ETC.

Section 29 – Scheduled provisions

92. Section 29 introduces schedules 3 to 6.

Schedule 3 – Appointment to First-tier Tribunal

Schedule Part 1 – Ordinary members

93. Section 29(1) introduces schedule 3 which makes provision as to the eligibility and appointment of ordinary and legal members of the First-tier Tribunal.

94. Paragraphs 1 and 2 of schedule 3 provide that it is for the Scottish Ministers to appoint a person as an ordinary member of the First-tier Tribunal. A person may only be appointed as such, if the person has the qualifications, experience and training which are prescribed by the Scottish Ministers in regulations made under paragraph 1(2). The effect of this provision will be to allow the Scottish Ministers to prescribe a wide range of criteria by which a person will qualify to be appointed as an ordinary member. Regulations made under section 35(1) providing for the composition of the First-tier Tribunal when convened to exercise its decision-making functions may also make reference to these criteria. See the commentary on that section.

Schedule Part 2 – Legal members

95. Paragraphs 3 to 7 of schedule 3 make provision as to the eligibility and appointment of legal members of the First-tier Tribunal other than Chamber Presidents (about whom section 20 makes provision) and Deputy Chamber Presidents (about whom paragraphs 1 to 3 of schedule 4 make provision).

96. It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal (paragraph 4(1)).

97. A person may be appointed as a legal member if he or she is practising as a solicitor or advocate in Scotland and has been practising for a period of not less than 5 years (paragraphs 4(2) and 5(1)).

98. A person may also be appointed as a legal member if he or she falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 3 (paragraphs 4(2) and 5(2)).

99. Paragraph 6(2) enables regulations made under paragraph 5(2) of schedule 3 to make provision in relation to persons who previously practised as solicitors, advocates or barristers and who have engaged in another law-related activity. Paragraph 6(3) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(4) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(4) include the exercise of judicial functions, practice as a lawyer, teaching or researching law at an educational institution and certain other legal activities such as advising on the application of the law, drafting legal documents and assisting in the resolution of disputes.

100. Paragraph 7 also enables the Scottish Ministers to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the First-tier Tribunal including the calculation of the 5 year qualification period and modifying the list of activities set out in paragraph 6(4).

Schedule 4 – Positions in the First-tier Tribunal

101. Section 29(2) introduces schedule 4 which makes provision as to the appointment and assignment of Deputy Chamber Presidents and Temporary Chamber Presidents as well as the assignment of the members among chambers.

Schedule Part 1 – Deputy or Temporary President

Deputy President

102. Paragraph 1 provides that the Scottish Ministers may appoint a person as a Deputy Chamber President of a particular chamber if they are requested to make such an appointment by the President of Tribunals.

103. A person is eligible for appointment as a Deputy Chamber President if the person is already a legal member of the First-tier Tribunal (other than a Chamber or Deputy Chamber President) or if the person is not already a legal member of the First-tier Tribunal but is eligible to be appointed as a legal member in accordance with paragraph 4(2) of schedule 3 (paragraph 2(1)).

104. The President of Tribunals may only request the Scottish Ministers to appoint a person as a Deputy Chamber President after consultation with the Chamber President of the chamber to which the appointment is to be made (paragraph 2(2)).

105. Paragraph 2(3) places a duty on the Scottish Ministers to give written reasons to the President of Tribunals where they do not make an appointment of a Deputy Chamber President following such a request.

106. Paragraph 3 makes provision so that a Deputy Chamber President can assist with the exercise of the functions of the Chamber President.

Temporary President

107. Paragraphs 4 and 5 enable the President of Tribunals to assign a legal or judicial member of the First-tier Tribunal as a Temporary Chamber President in the event of a temporary vacancy in the presidency of a chamber. A Chamber President cannot be assigned as a Temporary Chamber President of another chamber.

Schedule Part 2 – Assignment internally

108. Schedule Part 2 makes provision for assigning the various members of the First-tier Tribunal among the chambers.

109. The function of assigning the members of the First-tier Tribunal vests in the President of Tribunals (paragraph 6(1)) but is subject to the provision made in paragraphs 7 to 9 (paragraph 6(2)).

110. A Chamber President is to be assigned to the chamber to which he or she is appointed to preside over and may also be assigned to act as a legal member in another chamber (but cannot be assigned to another chamber to act as a Chamber President or Deputy Chamber President) (paragraph 7(1)). Any assignment of a Chamber President to act as a legal member of another chamber requires the concurrence of the Chamber President of that chamber as well as the agreement of the member being assigned.

111. A Deputy Chamber President is to be assigned to the chamber to which he or she is appointed and may also be assigned to act as a legal member in another chamber (but cannot be assigned to another chamber to act as a Chamber President or Deputy Chamber President) (paragraph 7(2)). Any assignment of a Deputy Chamber President to act as a legal member of another chamber requires the concurrence of the Chamber President of that chamber as well as the agreement of the member being assigned.

112. All other legal members of the First-tier Tribunal and its ordinary members are to be assigned to at least one chamber but may be assigned to more than one chamber (paragraph 8(2)). Any assignment to a chamber under paragraph 8 requires the concurrence of the Chamber President and the agreement of the member to be assigned (paragraph 8(3)).

113. Judicial members of the First-tier Tribunal are to be assigned to at least one chamber but may be assigned to more than one chamber (paragraph 9(1)). Any assignment to a chamber under paragraph 9 requires the concurrence of the Chamber President and the agreement of the member being assigned (paragraph 9(2)).

Schedule 5 – Appointment to Upper Tribunal

Schedule Part 1 – Ordinary members

114. Section 29(3) introduces schedule 5 which makes provision as to the eligibility and appointment of ordinary and legal members of the Upper Tribunal.

115. Paragraphs 1 and 2 of schedule 5 provide that it is for the Scottish Ministers to appoint a person as an ordinary member of the Upper Tribunal. A person may only be appointed as such, if the person has the qualifications, experience and training which are prescribed by the Scottish Ministers in regulations made under paragraph 1(2). The effect of this provision will be to allow the Scottish Ministers to prescribe a wide range of criteria by which a person will qualify to be appointed as an ordinary member. Regulations made under section 37(1) providing for the composition of the Upper Tribunal when convened to exercise its decision-making functions may also make reference to these criteria. See the commentary on that section.

Schedule Part 2 – Legal members

116. Paragraphs 3 to 7 of schedule 5 make provision as to the eligibility and appointment of legal members of the Upper Tribunal other than Vice-Presidents (about whom section 23 makes provision) or a person who is a legal member of the Upper Tribunal by virtue of being a Chamber President in the First-tier Tribunal by virtue of section 15(2)(b).

117. It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal (paragraph 4(1)).

118. A person may be appointed as a legal member if he or she is practising as a solicitor or advocate in Scotland and has been practising for a period of not less than 7 years (paragraphs 4(2) and 5(1)).

119. A person may also be appointed as a legal member if he or she falls within a description specified by the Scottish Ministers in regulations made under paragraph 5(2) of schedule 5 (paragraphs 4(2) and 5(2)).

120. Paragraph 6(2) enables regulations made under paragraph 5(2) of schedule 5 to make provision in relation to persons previously practising as solicitors, advocates or barristers who have engaged in another law-related activity. Paragraph 6(3) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(4) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(4) include the exercise of judicial functions, practice as a lawyer, teaching or researching law at an educational institution and certain other legal activities such as advising on the application of the law, drafting legal documents and assisting in the resolution of disputes.

121. Paragraph 7 also enables the Scottish Ministers to make more particular provision as regards the eligibility criteria to be appointed as a legal member of the Upper Tribunal including the calculation of the 7 year qualification period and modifying the list of activities set out in paragraph 6(4).

Schedule 6 – Positions in Upper Tribunal

122. Section 29(4) introduces schedule 6 which makes provision for assigning a Temporary Vice-President and the assignment of the members of the Upper Tribunal among the divisions.

Schedule Part 1 – Temporary Vice-President

123. Paragraphs 1 and 2 enable the President of Tribunals to assign a legal member of the Upper Tribunal as a Temporary Vice-President in the event of a temporary shortage in the number of Vice-Presidents or a temporary vacancy in a position. A Vice-President cannot be assigned as a Temporary Vice-President of another division.

Schedule Part 2 – Assignment internally

124. Schedule Part 2 makes provision for assigning the various members of the Upper Tribunal among the divisions.

125. The function of assigning the members of the Upper Tribunal vests in the President of Tribunals (paragraph 3(1)) but is subject to the provision made in paragraphs 4 to 7 (paragraph 3(2)).

126. A Vice-President is to be assigned to the division to which he or she is appointed or assigned to preside over. A judicial member who is assigned to act as a Vice-President under section 24(2) may also be assigned to act as a judicial member in another division (but cannot be assigned to another division to act as a Vice-President) while a legal member who is appointed to act as a Vice-President under section 25(1) may also be assigned to act as a legal member in another division (but cannot be assigned to act as a Vice-President of that Division) (paragraph 4). This requires the concurrence of the Vice-President of the division to which the member is being assigned.

127. All other legal members of the Upper Tribunal (including a person who is a legal member of the Upper Tribunal by virtue of being a Chamber President in the First-tier Tribunal) and its ordinary members are to be assigned to at least one division but may be assigned to more than one division (paragraphs 5 and 6). Any assignment to a division under paragraphs 5 and 6 requires the concurrence of the Vice-President and the agreement of the member to be assigned (paragraph 5(3) or 6(3)).

128. All other judicial members of the Upper Tribunal are to be assigned to at least one division but may be assigned to more than one division (paragraph 7(1)). A person who is authorised to act as a judicial member of the Upper Tribunal under section 17(5) is also to be assigned to at least one division but may be assigned to more than one division (paragraph 7(2)). Any assignment to a division under paragraph 7 requires the concurrence of the Vice-President and the agreement of the member being assigned (paragraph 7(3)).

Section 30 – Assignment Policy

129. This section places a duty on the Lord President to publish, and keep under review, a document setting out the policy to be adopted in relation to the assignment of the members of the Scottish Tribunals within each Tribunal.

130. Subsection (3) requires the policy to be designed to ensure that appropriate use is made of the knowledge and experience of the members.

131. The Lord President's functions under section 30(1) and (2) may be delegated to the President of Tribunals under section 8.

Section 31 – Training and review

132. Section 31(1) confers the responsibility for making and maintaining arrangements for the training and guidance of the members of the Scottish Tribunals (including any extra judges authorised to act under section 17(5)) on the Lord President.

133. Section 31(2) also enables the Lord President to make arrangements for the review of the competence and development of the ordinary and legal members of the Scottish Tribunals. The review of the competence and development of the judicial members is to continue to be assessed in their capacity as members of the courts judiciary in accordance with arrangements made under the Judiciary and Courts (Scotland) Act 2008.

134. The Lord President's functions under section 31 may be delegated to the President of Tribunals under section 8.

Section 32 and schedule 7 – Conditions of membership etc.

135. Section 32 introduces schedule 7 which makes provision as to the terms and conditions on which the ordinary and legal members of the Scottish Tribunals hold office as such. The terms of schedule 7 do not apply to judicial members (paragraph 1(1) of schedule 7).

136. Subsection (2) enables the Scottish Ministers, by regulations, to disapply certain provisions in schedule 7 to certain tribunal members, with the effect that those members become permanent members within the tribunals structure. Subsection (3) places a duty on the Scottish Ministers to consult the Lord President before making regulations under subsection (2). Subsection (4) specifies that the operation of paragraphs 2 to 7A of schedule 7 is subject to provision made by regulations under subsection (2) to the effect that the provisions which automatically re-appoint tribunal members on five-yearly terms of appointment can be dis-applied.

Initial period of office

137. Where a person is appointed as a member of the Scottish Tribunals, paragraph 2(1) of schedule 7 provides for that person to hold that position for an initial period of 5 years.

138. Where a person is transferred-in as a member of the Scottish Tribunals, paragraph 2(2) and (3) of schedule 7 provides for that person to hold that position either until the end of the unexpired period of the appointment to the listed tribunal or the period of 5 years from the date of transfer (whichever comes first).

139. Paragraph 3 of schedule 7 provides that where a person holds a position in the Scottish Tribunals and is appointed to hold an additional position then the initial period of appointment

for the additional appointment is to expire on the same date as the period of the earlier appointment.

140. Paragraph 7A of schedule 7 provides that where a person holds a position in the Scottish Tribunals and is appointed to hold a more senior position with the Scottish Tribunals (for example a legal member appointed to Chamber President) their 5-year term begin with the date of the later appointment.

Reappointment

141. Where a member's period of appointment expires (or, in the case of a member who is transferred-in, the initial period of office expires), paragraph 4 provides for that person to be reappointed for a period of 5 years unless the member declines to be reappointed, is no longer eligible for reappointment or the President of Tribunals has recommended to the Scottish Ministers that the member should not be reappointed. Paragraph 5 also requires the member to meet the eligibility criteria set out in schedule 3 or 5 as if that person was being appointed to the position for the first time.

142. Paragraph 6 sets out the bases on which the President of Tribunals can recommend to the Scottish Ministers that a member should not be reappointed.

143. Paragraph 7 clarifies that the re-appointment of a member is not subject to the same process as the initial appointment as set out in section 10(2A) of the Judiciary and Courts (Scotland) Act 2008. The act of re-appointing a member is, therefore, for the Scottish Ministers alone.

Termination of appointment

144. Paragraphs 8 and 9 set out the circumstances in which a person ceases to hold a position in the Scottish Tribunals. A member ceases to hold that position upon becoming disqualified from acting as a member of the Scottish Tribunals (see paragraph 11 of schedule 7); being removed from the position by the First Minister under paragraph 23 of schedule 8 following a conclusion by a fitness assessment tribunal that the member is unfit to hold that position; or resigning or retiring.

145. Section 26 of the Judicial Pensions and Retirement Act 1993 applies to the legal and ordinary members of the Scottish Tribunals which requires such a member to retire at the age of 70 subject to continuing in office in accordance with the provisions of subsections (4) (to) (6) of that section. See the commentary on paragraph 10 of schedule 9.

Disqualification from office

146. Paragraph 11 sets out those persons who are disqualified from being a member of the Scottish Tribunals.

Oaths

147. Paragraph 13 sets out a requirement for all legal and ordinary members of the Scottish Tribunals to take the oath of allegiance and the judicial oath as set out in the Promissory Oaths

Act 1868. It also makes provision regarding the person before whom the oaths are to be taken and for oaths which have been previously taken to continue to apply.

Pensions etc.

148. Paragraph 13A enables the Scottish Ministers to make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, members or former members of the Scottish Tribunals.

Other conditions

149. Paragraph 14 is a general provision that enables the Scottish Ministers to determine the terms and conditions of a member of the Scottish Tribunals which are not provided for in the Bill including the payment of remuneration, expenses and allowances.

Section 33 and schedule 8 – Conduct and fitness etc.

150. Section 33 introduces schedule 8 which makes provision in connection with the conduct and fitness of the legal and ordinary members of the Scottish Tribunals.

151. Schedule 8 only applies to the legal and ordinary members of the Scottish Tribunals and not to the judicial members (paragraphs 1(1) and 11(1)). The conduct and fitness of the judicial members of the Scottish Tribunals will continue to be covered by the provision made in the Judiciary and Courts (Scotland) Act 2008.

152. The functions of the Lord President under schedule 8 may not be delegated under section 8.

Conduct and discipline

153. Paragraph 2 confers responsibility for making and maintaining appropriate arrangements for the investigation and determination of any matter concerning the conduct of the members of the Scottish Tribunals and the review of any such determination on the Lord President. The Lord President may make provision to this effect through Conduct Rules (paragraph 3). Paragraph 3(2) sets out a non-exhaustive list of the matters that may be covered by the Conduct Rules, which are required to be published under paragraph 4.

154. Paragraph 5 enables the Lord President to administer one of three types of disciplinary sanction where an investigation has been carried out and the investigator has recommended a disciplinary sanction. The disciplinary sanctions are set out in sub-paragraph (1) and are, in ascending order of severity: formal advice, a formal warning and a reprimand. This is a discretionary power and paragraph 6 makes it clear that this does not restrict what the Lord President may do informally.

155. Paragraph 7 provides for the suspension of a member of the Scottish Tribunals where the Lord President considers it necessary for the purpose of maintaining public confidence in the Scottish Tribunals. Such suspension does not affect any remuneration payable to, or in respect of the suspended member. An example of a situation where this might be used is when an allegation of a serious nature is made against a member of the Scottish Tribunals. This power is

separate from the suspension provisions in paragraph 19 of schedule 8 which applies during an investigation by a fitness assessment tribunal.

156. Paragraph 9 confers the following functions on the Judicial Complaints Reviewer (established under section 30 of the Judiciary and Courts (Scotland) Act 2008): on the request of the person who had made the complaint which was the subject of an investigation or the member whose conduct has been investigated, to review the handling of an investigation in terms of procedure; where the procedure has not been followed, to refer such a case to the Lord President; to prepare and publish reports on investigations; and to make written representations to the Lord President about such procedures (to which the Lord President must have regard). The functions of the Judicial Complaints Reviewer only relate to the procedure adopted in an investigation and not the merits of the findings of the investigation.

157. Where the Reviewer refers a case to the Lord President under paragraph 9(2)(b), the Lord President may vary or revoke the determination (or part of it); cause a fresh investigation to be carried out; confirm the determination; or deal with the referral in such other way as the Lord President considers to be appropriate (paragraph 10).

158. Section 32 of the 2008 Act requires the Reviewer to comply with any guidance issued by the Scottish Ministers on the functions of the Reviewer set out in the Bill.

Fitness and removal

159. Paragraphs 11 to 22 provide for fitness assessment tribunals to be set up to investigate and report on whether a member of the Scottish Tribunals is unfit to hold the position by reason of inability, neglect of duty or misbehaviour.

160. The First Minister must constitute a tribunal when requested to do so by the Lord President (paragraph 13(1)). The First Minister may (but is not required to) constitute a tribunal in other circumstances if the First Minister thinks fit but only after consultation with the Lord President (paragraph 13(2)).

161. Paragraph 14 enables the Court of Session to make provision, by act of sederunt, with regard to the procedure to be adopted by a tribunal.

162. Paragraphs 15 and 16 provide for the composition and voting, and remuneration and expenses of the tribunal. Paragraph 15(2) provides for the members of a fitness assessment tribunal to be selected by the First Minister with the agreement of the Lord President. In selecting the members, the First Minister must ensure that the composition of the tribunal reflects the requirements set out in paragraph 15(1). Paragraph 16 enables the Scottish Ministers to pay remuneration and expenses to the members of a fitness assessment tribunal. Remuneration cannot, however, be paid to those members of a fitness assessment tribunal who are sheriffs or judges of the Court of Session.

163. Paragraphs 17 and 18 make provision with regard to the conduct of proceedings of a tribunal. Paragraph 17 enables a fitness assessment tribunal to require the attendance of persons to give evidence and the production of documents in the same fashion as a court of law in Scotland. Where these requirements are not fulfilled, paragraph 18 provides for the tribunal to

make an application to the Court of Session. The Court of Session may make such order as it thinks fit to ensure compliance with the requirements of the tribunal or deal with the matter as if it were a contempt of the Court.

164. Paragraphs 19 to 21 set out the circumstances in which a member of the Scottish Tribunals can be suspended pending a decision of a tribunal. Paragraph 19 enables the Lord President to suspend a member of the Scottish Tribunals if the Lord President has made a request to the First Minister to constitute a fitness assessment tribunal to investigate whether that member is unfit to hold the position of member of the Scottish Tribunals. The Lord President may suspend the member at any time prior to the point that the fitness assessment tribunal submits its report to the First Minister and the Lord President under paragraph 22(2). Such a suspension will terminate on being revoked by the Lord President or, if not revoked, when the report is laid in the Scottish Parliament. Paragraph 20 enables the First Minister to suspend the member of the Scottish Tribunals where the fitness assessment tribunal has recommended that the member is suspended. The First Minister may suspend the member at any time prior to the tribunal's report being laid in the Parliament. Such a suspension will terminate on being revoked by the First Minister or, if not revoked, when the report is laid in the Parliament. Paragraph 21 provides that any suspension under paragraph 19 or 20 does not affect any remuneration payable to the suspended member.

165. Paragraph 22 makes provision for the form and content of a tribunal's report. The First Minister must lay the report before the Scottish Parliament.

166. Paragraph 23 provides that the First Minister may remove a member of the Scottish Tribunals from his or her position if a fitness assessment tribunal has submitted a report concluding that the member is unfit to hold office by reason of inability, neglect of duty or misbehaviour.

PART 5 – DECISION-MAKING AND COMPOSITION

Decisions in First-tier Tribunal

Section 34 – Decisions in the Tribunal

167. Section 34 makes provision as to the exercise of the First-tier Tribunal's function of deciding any matter in a case within its jurisdiction. This function is to be exercised by one or two or more members of the chamber to which the case is allocated. It is for regulations made under section 19(2)(b) (chambers in the Tribunal) to make provision for the allocation of the First-tier Tribunal's functions among the chambers.

168. The Chamber President has the responsibility for selecting the members but, in so doing, must comply with any relevant provision made by regulations under section 35 (composition of the Tribunal).

169. If the First-tier Tribunal is exercising a function in a case which has been remitted to it by the Upper Tribunal under section 42(2)(b) (disposal of an appeal by the Upper Tribunal), the Chamber President must also comply with any directions given by the Upper Tribunal under section 42(5)(b) as to the members to be chosen to reconsider the case.

Section 35 – Composition of the Tribunal

170. This section provides for the Scottish Ministers to make regulations providing for the composition of the First-tier Tribunal when convened to decide a case falling within its jurisdiction. Such regulations may provide for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members must be.

171. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (4)).

172. By virtue of section 10(2), regulations made under section 35 may make provision authorising the President of Tribunals, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(2), the Scottish Ministers must consult the President of Tribunals before making regulations under section 35.

Decisions in Upper Tribunal

Section 36 – Decisions in the Tribunal

173. Section 36 makes provision as to the exercise of the Upper Tribunal's function of deciding any matter in a case falling within its jurisdiction. This function is to be exercised by one or two or more members of the division to which the case is allocated. It is for regulations made under section 22(2)(b) (Divisions of the Tribunal) to make provision for the allocation of the Upper Tribunal's functions among the divisions.

174. The Vice-President has the responsibility for selecting the members but, in so doing, the Vice-President must comply with any relevant provision made by regulations under section 37(1) (composition of the Tribunal).

175. The Vice-President must also comply with subsection (4) which enables the Lord President and the Tribunals President to exercise a right to be selected (provided that this complies with the provisions of any regulations made under section 37(1) (composition of the Tribunal)).

176. If the Upper Tribunal is exercising a function in a case which has been remitted to it by the Court of Session under section 44(2)(b) (disposal of an appeal by the Court of Session), the Vice-President must also comply with any directions given by the Court of Session under section 44(5)(b) as to the members to be chosen to reconsider the case.

Section 37 – Composition of the Tribunal

177. This section provides for the Scottish Ministers to make regulations providing for the composition of the Upper Tribunal when convened to decide a case falling within its jurisdiction. Such regulations may provide for the determination of the number of members who are to hear a particular matter as well as the types of member (whether ordinary, legal or judicial) that those members should be.

178. Such regulations may also make separate provision depending on whether the Upper Tribunal is exercising functions at first instance or on review or appeal (subsection (2)).

179. Where the regulations provide for a judicial member to be part of the convened Tribunal, the regulations may also make provision requiring the judicial member to be of a particular type (whether a sheriff, sheriff principal or judge of the Court of Session) as well as for the involvement of any extra judge who is authorised to act under section 17(5) (subsection (5)).

180. Where the regulations provide for an ordinary member to be part of the convened Tribunal, the regulations may also make provision for determining the qualifications, experience and training that that member should possess (subsection (6)).

181. By virtue of section 10(2), regulations made under section 37 may make provision authorising the President of Tribunals, or relying on Tribunal Rules (see commentary on section 62), to determine these matters. By virtue of section 11(2), the Scottish Ministers must consult the President of Tribunals before making regulations under section 37.

Section 37A – Voting for Decisions

182. Section 37A makes provision for voting for decisions. Subsection (1) allows the Scottish Ministers, by regulations, to make provision regarding how decisions are voted for in panels of two or more members and how ties are resolved.

Section 37B – Chairing Members

183. Section 37B makes provision for chairing members where a decision is being taken by two or more members. Subsection (1) specifies that Tribunal Rules may make provision for determining who will be the chairing member in a case before the First-tier or Upper Tribunal. Subsection (2) makes further provision for what can be specified in Tribunal Rules in relation to chairing members.

PART 6 – REVIEW OR APPEAL OF DECISIONS

Internal review

Section 38 – Review of decisions

184. Section 38 provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. The power is discretionary and it will be for each Tribunal to decide whether or not it should review one of its own decisions.

185. Under section 38(2), a decision may be reviewed at the Tribunal's own instance or, with the Tribunal's agreement, at the request of a party in the case.

186. Under section 38(3), no decision may be the subject of a review if it is an excluded decision (see sections 46 to 49 on excluded decisions). Tribunal Rules (see commentary on section 62) made under section 38(3)(b) may also make provision excluding other decisions from being reviewed or otherwise restricting the powers of the Scottish Tribunals to review their own decisions.

187. A decision to review or not to review a prior decision of the Tribunal may not, itself, be reviewed or appealed (section 38(4)) and the fact that a decision has been reviewed does not affect a party's rights of appeal under the Bill (section 38(5)).

Section 39 – Actions on review

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

Section 40 – Review only once

189. Section 40 provides that no decision of the First-tier or Upper Tribunal may be reviewed on more than one occasion. A decision on review to set aside an earlier decision and a re-made decision are, however, to be regarded as separate decisions from the earlier decision which was subjected to review and can, therefore, be the subject of a further review. Subsection (3) provides that the power of the Scottish Tribunals to review their own decisions does not affect their powers to correct minor or accidental errors in a decision administratively.

Appeal from First-tier Tribunal

Section 41 – Appeal from the Tribunal

190. Section 41 makes provision for a general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal. Such an appeal can only be made by a party in the case on a point of law and with the permission of the First-tier Tribunal or (if refused by the First-tier Tribunal) the Upper Tribunal.

191. The general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal under section 41 is not universal and does not apply to excluded decisions (see sections 46 to 49) or a decision of the First-tier Tribunal to review or not to review one of its own decisions (see section 38(4)). Section 50 (process for permission) also prevents a decision of the First-tier Tribunal to refuse permission to appeal to the Upper Tribunal from being appealed to the Upper Tribunal (a separate application can, however, be made to the Upper Tribunal under section 41(3)(b) should the First-tier Tribunal refuse permission to appeal).

192. Permission to appeal to the Upper Tribunal under section 41 is only to be granted if the Tribunal whose permission is sought is satisfied that there are arguable grounds for the appeal (section 41(4)).

Section 42 – Disposal of an appeal

193. Section 42 provides that, in determining an appeal made under section 41, the Upper Tribunal may uphold or quash the decision of the First-tier Tribunal on a point of law. Where the Upper Tribunal quashes the decision of the First-tier Tribunal it may re-make the decision, remit the case back to the First-tier Tribunal to be re-decided or make such other order as the Court considers is appropriate.

194. Where the Upper Tribunal elects to re-make a decision, subsection (3) enables the Upper Tribunal to make findings in fact and, otherwise, to do anything that could have been done by the First-tier Tribunal if it was re-making the decision.

195. Where the Upper Tribunal elects to remit the case to the First-tier Tribunal, it may direct the First-tier Tribunal as to issues of fact, law and procedure (subsections (4) and (5)).

Appeal from Upper Tribunal

Section 43 – Appeal from the Tribunal

196. Section 43 makes provision for a general right to appeal a decision of the Upper Tribunal to the Court of Session. Such an appeal can only be made by a party in the case on a point of law and with the permission of the Upper Tribunal or (if refused by the Upper Tribunal) the Court of Session.

197. The general right to appeal a decision of the Upper Tribunal to the Court of Session under section 43 is not universal and does not apply to excluded decisions (see sections 46 to 49) or a decision of the Upper Tribunal to review or not to review one of its own decisions (see section 38(4)). Section 50 (process for permission) also prevents a decision of the Upper Tribunal to refuse permission to appeal to the Court of Session from being appealed to the Court of Session (a separate application can, however, be made to the Court of Session under section 43(3)(b) should the Upper Tribunal refuse permission to appeal).

198. Permission to appeal to the Court of Session under section 43 is only to be granted if the Upper Tribunal or Court of Session is satisfied that there are arguable grounds for the appeal (section 43(4)) except in relation to permission to make a second appeal (see commentary on section 45).

Section 44 – Disposal of an appeal

199. Section 44 provides that, in determining an appeal made under section 43, the Court of Session may uphold or quash the decision of the Upper Tribunal in question on a point of law. Where the Court of Session quashes the decision of the Upper Tribunal it may re-make the decision, remit the case back to the Upper Tribunal to be re-decided or make such other order as the Court considers appropriate.

200. Where the Court of Session elects to re-make a decision, subsection (3) enables the Court of Session to make findings in fact and, otherwise, to do anything that could have been done by the Upper Tribunal if it was re-making the decision.

201. Where the Court of Session elects to remit the case to the Upper Tribunal, it may direct the Upper Tribunal as to issues of fact, law and procedure (subsection (4) and (5)).

Section 45 – Procedure on second appeal

202. Section 45 makes provision in relation to a ‘second appeal’ which is an appeal to the Court of Session under section 43 against a decision of the Upper Tribunal on an appeal from a decision of the First-tier Tribunal under section 41 (see the definition in subsection (7)).

203. The effect of subsections (1), (3) and (4) is to prevent the Upper Tribunal and the Court of Session from giving permission to make a second appeal unless the Tribunal or Court (as appropriate) is satisfied that the appeal would raise an important issue of principle or practice or there is another compelling reason for allowing the appeal to proceed.

204. The effect of subsections (2), (5) and (6) is to enable the Court of Session, where it quashes the decision of the Upper Tribunal in relation to a second appeal, to do anything in re-making the decision that could have been done by the First-tier Tribunal or the Upper Tribunal if either of them was re-making the decision. It also enables the Court of Session to remit the case back to either the Upper Tribunal or the First-tier Tribunal with directions as to issues of fact, law and procedure. In addition, if the Court of Session remits the case to the Upper Tribunal, the Upper Tribunal itself may remit the case to the First-tier Tribunal with the directions from the Court of Session.

Excluded decisions

Section 46 – Excluded decisions

205. Sections 46 to 49 make provision with respect to decisions of the Scottish Tribunals which may not be the subject of a review under section 38 or the subject of the general right of appeal contained in sections 41 and 43. By virtue of section 46, such decisions are known as “excluded decisions”.

Section 47 – Decisions on review

206. Section 47 provides that certain decisions and determinations in a review under section 38 are excluded decisions. The effect of section 47 is to exclude decisions which have already been set aside under a review under section 38 as well as any decision or determination made as part of such a review (other than any matter which has been re-decided) from being appealed or further reviewed.

Section 48 – Other appeal rights

207. Section 48 provides that any decision against which there is a right of appeal under any enactment other than the right to review contained in section 38 or the rights of appeal in sections 41 and 43 is an excluded decision. The effect of section 48 is to create a general rule excluding from the rights of review and appeal established by the Bill, any decision for which another enactment makes express provision for a right of appeal. Subsection (2) enables the Scottish Ministers, by regulations, to make exceptions to that general rule.

Section 49 – Position on transfer-in

208. Section 49 provides that any decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal which is specified by the Scottish Ministers in regulations made under subsection (1) is an excluded decision. Subsection (2) provides that a decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal may only be specified in regulations if the functions were transferred-in from a listed tribunal by regulations made under subsection 27(2) and, immediately prior to the transfer of those functions, there was no statutory right of appeal against the decision.

209. The effect of section 49 is to enable the Scottish Ministers, by regulations, to exclude the rights of review and appeal established by the Bill in relation to decision-making functions which have been transferred-in to the Scottish Tribunals from a listed tribunal from which there was previously no statutory right of appeal.

Miscellaneous procedure

Section 50 – Process for permission

210. Section 50(1) enables the Scottish Ministers, by regulations, to specify time limits within which permission to appeal must be sought.

211. Section 50(2) provides that a decision of the First-tier Tribunal or the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal to the Upper Tribunal cannot be the subject of review or appeal under the Bill. Similarly, a decision of the Upper Tribunal to refuse permission to appeal a decision of the Upper Tribunal to the Court of Session cannot be reviewed or appealed under the Bill.

Section 51 – Participation of non-parties

212. It is only a party in a case who can apply for a review of a Tribunal decision under section 38 or appeal a Tribunal decision under section 41 or 43. Section 51(2) enables the Scottish Ministers, by regulations, to make provision so that persons falling within a specified description can be regarded as a party to a case for the purposes of sections 38, 41 and 43.

Special jurisdiction

Section 52 – Judicial review cases

213. Section 52 makes provision so that the Court of Session may, by order of the Court, remit a petition for judicial review to the Upper Tribunal for determination. The Court may only remit a petition for judicial review to the Upper Tribunal where the petition does not seek anything other than the exercise of the Court's judicial review function (section 52(3)) and it falls within a category specified by an act of sederunt made by the Court for the purposes of section 52(4). The effect of subsection (4) is that no petition for judicial review will be able to be transferred unless an act of sederunt has been made specifying the categories of petitions which may be transferred and the petition falls within one of those categories.

214. In addition, the Court may only remit a petition to the Upper Tribunal if it considers it appropriate to do so having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition (subsection (2)(b)).

Section 53 – Decision on remittal

215. Section 53 provides that the Upper Tribunal has the same powers and should apply the same principles as the Court of Session when determining a petition for judicial review. Subsection (4) makes it clear that a determination of a petition for judicial review remitted to the Upper Tribunal under section 52 is not an excluded decision and can be appealed to the Court of Session in accordance with section 43.

Section 54 – Additional matters

216. Section 54 makes further provision so that where a petition for judicial review is remitted to the Upper Tribunal, any order made or steps taken by the Court of Session are to be treated as if made or taken by the Tribunal. Subsection (2) enables the procedural rules of the Upper Tribunal to make further provision as to the exercise of the Upper Tribunal's functions in relation to a petition for judicial review.

Section 55 – Meaning of judicial review

217. Section 55 provides that references in sections 52 to 54 to judicial review are to the supervisory jurisdiction of the Court of Session.

PART 7 – POWERS, PROCEDURE AND ADMINISTRATION

Powers and enforcement

Section 56 – Venue for hearings

218. Section 56 enables the Scottish Tribunals to be convened at any time and place in Scotland. Tribunal Rules may make further provision in this respect.

Section 57 – Conduct of cases

219. Section 57 enables Tribunal Rules to make further provision in respect of the conduct of cases before the Scottish Tribunals. The Tribunal Rules may make provision so as to ensure that the Scottish Tribunals have the necessary powers, rights, privileges and authority regarding the citation attendance or examination of witnesses, the production of evidence, the preparation of reports and other matters relating to the conduct of a case.

220. Subsection (2) enables the Tribunal Rules to make provision by reference to the authority which is exercisable by a sheriff or the Court of Session.

Section 58 – Enforcement of decisions

221. This section enables Tribunal Rules to provide for the means by which an order of the Scottish Tribunals giving effect to a decision of the Tribunals is to be enforced.

222. Subsection (3) makes provision so that an order made by the Upper Tribunal under section 53 (judicial review cases) continues to have the same effect as an order made by the Court of Session on a petition for judicial review. Subsection (4), otherwise, enables the Tribunal Rules to make provision by reference to the means by which an order of a sheriff or the Court of Session is enforced.

Section 59 – Award of expenses

223. Section 59 enables the Scottish Tribunals to award expenses only where this is provided for in Tribunal Rules. Where Tribunal Rules make provision for the award of expenses these may include provision as to the scales or rates of the expenses that are to be awarded; for the Tribunals to set-off the expenses against specified other sums; for interest to be paid at a rate to be specified in Tribunal Rules in the event of the expenses remaining unpaid; for wasted

expenses to be disregarded (and to specify what constitutes wasted expenses); as well as such other factors that the Tribunals may take into account (subsections (3) and (4)).

Section 60 – Additional powers

224. This section enables the Scottish Ministers, by regulations, to confer such additional powers on the Scottish Tribunals as are necessary or expedient for the proper exercise of their functions. Such regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules (see section 62(4)). The Lord President's approval is required before making any such regulations.

Section 61 – Application of enactments

225. The effect of this section is to enable the Scottish Ministers, by regulations, to modify the application of any enactment so far as they consider is necessary or expedient for the purposes of making or giving effect to Tribunal Rules. Such regulations may provide for the application of rules of court made by the Court of Session by act of sederunt in relation to the Scottish Tribunals. In so doing, the regulations may make provision so that the process for making the act of sederunt should follow the procedure for making Tribunal Rules (see section 62(4)). The Lord President's approval is required before making any such regulations.

Section 61A – Offences in relation to proceedings

226. Section 61A allows the Scottish Ministers, by regulations, to create certain types of offences in relation to proceedings before the First-tier and Upper Tribunals. This allows offences to be created in connection with tribunals, for things like making false statements and concealing or destroying evidence. Section 61A(1)(b) allows regulations to be made specifying circumstances in which a person cannot be compelled to give or produce evidence.

Practice and procedure

Section 62 – Tribunal rules

227. Sections 62 to 67 make provision for the making of rules to regulate the practice and procedures to be adopted by the Scottish Tribunals which are to be known as Scottish Tribunal Rules (but are referred to in the Bill as Tribunal Rules).

228. Subsections (3) and (4) of section 62 set out the process for making Tribunal Rules. Tribunal Rules are to be made by the Court of Session by act of sederunt and in accordance with Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

229. Paragraph 12 of schedule 9 amends Part 1 of the 2013 Act so that the SCJC has the function of reviewing the practice and procedure used in the Scottish Tribunals (section 2(1)(ba) of the 2013 Act) and the function of preparing and submitting draft Tribunal Rules to the Court of Session (section 2(1)(c)(ii) of the 2013 Act). Section 4(1) and (2) of the 2013 Act also sets out the role of the Court of Session in approving, approving with modification, or rejecting the rules proposed by the SCJC.

230. Sub-paragraphs (6) to (10) of paragraph 12 of schedule 9 amend the 2013 Act with the effect of increasing the membership of the SCJC so as to include members representing the Scottish Tribunals and providing for the SCJC to establish a committee in pursuance of its functions in relation to the Scottish Tribunals under section 13A of the 2013 Act. The Committee is to be chaired by one of the members of the SCJC representing the Scottish Tribunals, and its members are to be selected by the President of Tribunals.

Section 63 – Exercise of functions

231. Section 63 allows Tribunal Rules to make provision about how a function of the Tribunals is to be exercised and by whom, or allow a specified person to make a decision about those matters. It also allows Tribunal Rules to confer functions on the persons named in subsection (4). Such Rules may provide for something to require further authorisation, allow something to be done on a person's behalf, or allow a specified person to make a decision about those matters. They may rely on the effect of practice directions issued under section 68.

Section 64 – Extent of rule-making

232. The extent of the provision which may be made by Tribunal Rules is set out in section 64. In particular, the generality of the power to make provision regulating the practice and procedure followed in the Scottish Tribunals is not limited by any other more specific provisions in the Bill regarding the content of Tribunal Rules (subsection (4)). Tribunal Rules may also make equal or different provision in respect of the First-tier Tribunal and the Upper Tribunal (subsection (1)), particular provision for different chambers or divisions or different types of proceedings (subsection (2)) and, more generally, different provision for different purposes (subsection (3)).

Section 65 – Proceedings and steps

233. Sections 65 to 67 set out specific matters on which Tribunal Rules may make provision.

234. Section 65 allows Tribunal Rules to make provision for the purpose of proceedings in a case before the Tribunals, including as to the form and manner in which a case is to be brought before them, withdrawal of a case, whether or not two or more applications can be conjoined, time limits for making a referral of a matter to the Scottish Tribunals for decision or for taking steps as part of the proceedings, and circumstances in which the Tribunals may act of their own initiative.

Section 66 – Hearings in cases

235. Section 66 allows Tribunal Rules to make provision about hearings, including as to when matters can be dealt with without one, whether a hearing is to be held in private or public, appearance and representation at hearings, notice of hearings, whether two or more sets of proceedings can be taken concurrently, adjournment with a view to resolution, and the imposition of reporting restrictions.

Section 67 – Evidence and decisions

236. Section 67 allows Tribunals Rules to make provision about evidence given before the Scottish Tribunals, including as to the administering of oaths and presumptions to apply, and about their decisions (for example, how they are recorded and published).

237. Sections 10(1)(b) and (2)(b) (authority under regulations), 27(3) (transfer-in of functions), 38(3) (review of decisions), 54(2) (additional matters), 56(2) (venue for hearings), 57(1) (conduct of cases), 58(1) (enforcement of decisions) and 59(1) and (3) (award of expenses) also deal with matters on which Tribunal Rules may make provision.

Section 68 – Practice directions

238. This section sets out the process for issuing directions as to the practice and procedure to be followed in the Scottish Tribunals. Directions by the President of Tribunals may make provision with regard to both the First-tier Tribunal and the Upper Tribunal (subsection (1)).

239. Directions by a Chamber President may only make provision in respect of the chamber over which the Chamber President presides (subsection (2)) and can only be issued with the approval of the President of Tribunals (subsection (4)).

240. Directions by a Vice-President may only make provision in respect of the division over which the Vice-President presides (subsection (3)) and can only be issued with the approval of the President of Tribunals (subsection (4)).

Section 69 – Reconciling differences

241. Section 69 makes provision that the President of Scottish Tribunals must arrange for directions under section 68(1), (2) or (3) to be published in a manner they consider appropriate. Subsection (B1) specifies that directions may make different provision for different purposes as well as vary and revoke earlier directions.

242. In the event of any conflict arising between Tribunal Rules and directions issued by the Lord President under section 9 or by the President of Tribunals, a Chamber President or a Vice-President under section 68. The effect of section 69 is, in the event of any conflict, to provide for Tribunal Rules to prevail over any directions, directions of the Lord President to prevail over directions of the President of Tribunals, a Chamber President or Vice-President and directions of the President of Tribunals to prevail over directions of a Chamber President or Vice-President.

Fees and administration

Section 70 – Tribunal fees

243. This section allows the Scottish Ministers by regulations to make provision for the Scottish Tribunals to charge reasonable fees in respect of any matter dealt with by the Scottish Tribunals. The Scottish Ministers are required to consult the Lord President and, to such an extent as they consider appropriate, persons having an interest in the operation of the business of the Scottish Tribunals before exercising this power.

Section 71 – Administrative support

244. Section 71 places a duty on the Scottish Ministers to provide property, services and personnel to the Scottish Tribunals so as to ensure their proper operation and the discharge of the Lord President's responsibility for the efficient disposal of business in the Tribunals. The Scottish Ministers are obliged to have regard to any representations made to them by the Lord President in this respect (subsection (2)).

Section 72 – Annual reporting

245. Section 72 places a duty on the President of Tribunals to prepare an annual report for the Lord President on the operation and business of the Scottish Tribunals which must explain how the Tribunals have exercised their functions during the financial year (and may contain other information). The report is to be sent to the Scottish Ministers as well as published.

PART 8 – FINAL PROVISIONS

Section 73– Regulation-making

246. Section 73 makes further provision with regard to the various regulation-making powers set out in the Bill including details as to the parliamentary procedure to be adopted.

Section 74 – Ancillary regulations

247. Section 74 allows the Scottish Ministers, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider is necessary or expedient for the purposes or in connection with the Bill.

Section 75 and schedule 9 – Transitional and consequential

248. Section 75 introduces schedule 9 which makes transitional arrangements and consequential modifications to other enactments.

Transitional and other matters

249. Part 1 of schedule 9 sets out the transitional arrangements for the transfer of functions from existing tribunals to the Scottish Tribunals. Where the functions of a listed tribunal are transferred to the Scottish Tribunals by regulations made under section 27(2), paragraph 2 enables the Scottish Ministers to make provision, by regulations, for the procedural rules of the listed tribunal to continue to apply (with such modification as the Scottish Ministers consider to be necessary or expedient) to the exercise of those functions by the Scottish Tribunals.

250. The effect of paragraph 4 is to enable the Scottish Ministers, by regulations, to make Tribunal Rules until such time as the provisions conferring responsibility on the SCJC and the Court of Session for the making of Tribunal Rules are commenced. The Scottish Ministers are to consult the Lord President, the President of Tribunals and such other persons as they consider appropriate before making any such regulations.

251. Once the provisions conferring responsibility on the SCJC and the Court of Session for the making of Tribunal Rules are commenced, paragraph 6 has effect so that all rules applying by virtue of regulations made under paragraphs 2 and 4 are to be regarded as Tribunal Rules.

252. Paragraphs 7 to 9 of schedule 9 make provision so as to enable the First-tier Tribunal not to be organised into chambers and the Upper Tribunal not to be organised into divisions until such time as they have acquired sufficient functions from the listed tribunals.

253. Paragraph 9A allows any President, or equivalent of one, of the listed tribunals to sit as a Board member of the Judicial Appointments Board for Scotland (JABS) during the transfer-in

stage. It also allows for a member of any listed tribunal to sit on a recruitment panel where they would hold the relevant expertise in the subject matter.

Consequential modifications

254. Paragraph 10 of schedule 9 amends the Judicial Pensions and Retirement Act 1993 so that the ordinary and legal members of the Scottish Tribunals are added to the list of offices set out in Schedule 5 to that Act. By virtue of the operation of section 26 of that Act, those members of the Scottish Tribunals are required to retire from office on reaching the age of 70. Subsections (4) to (6) of that provision, however, enable those members to continue in office on an annual rolling basis up until the age of 75 if the Scottish Ministers, after consultation with the President of Tribunals, consider it is desirable in the public interest to allow those persons to continue in office.

255. Paragraph 11 amends the Judiciary and Courts (Scotland) Act 2008 to bring the ordinary and legal members of the Scottish Tribunals within the remit of JABS and to exclude them from holding office as the Judicial Complaints Reviewer.

256. Sub-paragraph (2) amends section 10 of that Act so that any persons appointed to the positions of Vice-President or ordinary or other legal member of the Upper Tribunal, or Chamber President, Deputy Chamber President or ordinary or other legal member of the First-tier Tribunal fall within the remit of JABS. By virtue of section 11 of the 2008 Act, an individual cannot be appointed to one of these positions unless recommended for appointment by JABS.

257. Sub-paragraph (3) amends section 30 of the 2008 Act so that the ordinary and legal members of the Scottish Tribunals are disqualified from being appointed as the Judicial Complaints Reviewer.

258. Sub-paragraph (4) amends the composition of JABS so as to include representation from the Scottish Tribunals and sub-paragraph (5) sets out the proceedings that are to apply in respect of an appointment to the Scottish Tribunals.

259. Paragraph 12 amends the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. These amendments are explained in the commentary on Tribunal Rules (section 62).

Section 76 and schedule 10 – List of expressions

260. Section 76 defines “Lord President” for the purposes of the Bill, and introduces a list of expressions used in the Bill in schedule 10.

Section 77 – Commencement

261. Section 77 makes provision as to the commencement of the Bill. Sections 76 to 78 come into force on the day after Royal Assent. All other provisions are to come into force on such day as the Scottish Ministers may, by order, appoint. Any such order may include transitional, transitory or saving provision.

This document relates to the Tribunals (Scotland) Bill as amended at Stage 2 (SP Bill 30A)

TRIBUNALS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.uk

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
Group Scotland.

ISBN 978-1-78392-920-7