

# TRIBUNALS (SCOTLAND) ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4 – More About Membership Etc.**

##### **Appointment and assignment**

##### *Section 32 – Scheduled provisions*

83. *Section 32* introduces schedules 3 to 6.

##### *Schedule 3 – Appointment to First-tier Tribunal*

##### **Schedule Part 1 – Ordinary members**

84. *Section 32(1)* introduces schedule 3 which makes provision as to the eligibility and appointment of ordinary and legal members of the First-tier Tribunal.
85. *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 38(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**

86. *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 21 makes provision) and Deputy Chamber Presidents (about whom paragraphs 1 to 3 of schedule 4 make provision).
87. It is for the Scottish Ministers to appoint a person as a legal member of the First-tier Tribunal (paragraph 4(1)).
88. 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)).
89. 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)).
90. *Paragraph 6(3)* 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(4) enables

regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(5) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(5) 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.

91. [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(5).

#### ***Schedule 4 – Positions in the First-tier Tribunal***

92. [Section 32\(2\)](#) 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**

93. [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.
94. 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)).
95. 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)).
96. [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.
97. [Paragraph 3](#) makes provision so that a Deputy Chamber President can assist with the exercise of the functions of the Chamber President.

##### **Temporary President**

98. [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**

99. Schedule [Part 2](#) makes provision for assigning the various members of the First-tier Tribunal among the chambers.
100. 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)).
101. 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.

102. 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.
103. 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)).
104. 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**

105. [Section 32\(3\)](#) introduces schedule 5 which makes provision as to the eligibility and appointment of ordinary and legal members of the Upper Tribunal.
106. [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 40(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**

107. [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 24 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 16(2) (b).
108. It is for the Scottish Ministers to appoint a person as a legal member of the Upper Tribunal (paragraph 4(1)).
109. 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)).
110. 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)).
111. [Paragraph 6\(3\)](#) 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(4) enables regulations to make provision in relation to persons engaged in the activities listed in paragraph 6(5) through which they have acquired a suitable experience in law. The activities listed in paragraph 6(5) 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.

112. 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(5).

### **Schedule 6 – Positions in Upper Tribunal**

113. Section 32(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**

114. 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**

115. Schedule Part 2 makes provision for assigning the various members of the Upper Tribunal among the divisions.
116. 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)).
117. 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 26(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.
118. 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)).
119. 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 18(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 33 – Assignment Policy**

120. 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.
121. Subsection (3) requires the policy to be designed to ensure that appropriate use is made of the knowledge and experience of the members.
122. The Lord President's functions under section 33(1) and (2) may be delegated to the President of Tribunals under section 8.