

TRIBUNALS (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Organisational Arrangements

Membership types

Section 13 – Overview of membership

21. **Section 13** 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 17), 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).
22. 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 14 – Capacity of members

23. The effect of section 14 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 17) and extra judges (see section 18).

Section 15 – First-tier members

24. **Section 15** makes provision as to the membership of the First-tier Tribunal.
25. 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 29(b) or appointed as ordinary members by virtue of section 32(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 29(b) or are appointed as legal members by virtue of section 32(1).
26. **Section 29(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.

27. [Section 32\(1\)](#) 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.
28. Subsections (2)(b) and (3) of section 15 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 16 – Upper members

29. [Section 16](#) makes provision as to the membership of the Upper Tribunal.
30. Under subsection (1), persons will become ordinary members of the Upper Tribunal if they are transferred-in as ordinary members by virtue of section 29(b) or appointed as ordinary members by virtue of section 32(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 29(b) or are appointed as legal members by virtue of section 32(3).
31. [Section 29\(b\)](#) 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.
32. [Section 32\(3\)](#) 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.
33. The effect of subsection (2)(b) of section 16 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.
34. Subsections (2)(c) and (3) of section 16 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 17 – Sheriffs and judges

35. [Section 17](#) 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 19).
36. 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)).

37. 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.
38. 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.
39. 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 18 – Authorisation of others

40. **Section 18** 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.
41. 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 18.
42. Subsection (8) 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.
43. Subsection (9) 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.
44. Subsection (10) 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 19– Judicial membership

45. **Section 19** 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 18.

Structure of the First-tier Tribunal

Section 20 – Chambers in the Tribunal

46. **Section 20** 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.
47. 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 68), 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 20(2).
48. **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 21 – Chamber Presidents

49. **Section 21** 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 22 – Appointment to post

50. 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)).
51. By virtue of section 16(2)(b), a Chamber President of the First-tier Tribunal is also a legal member of the Upper Tribunal. Section 22(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.
52. 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 23 – Divisions of the Tribunal

53. **Section 23** 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).
54. 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 68), 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 23(2).

55. 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 24 – Vice-Presidents

56. Section 24(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.
57. Section 24 is subject to section 25(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.
58. Section 25 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 25 – Assignment to post

59. Section 25 provides for the assignment of a judicial member of the Upper Tribunal as a Vice-President.
60. 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.
61. 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 26 – Appointment to post

62. Section 26(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)).
63. By virtue of section 16(2)(c) and (3) a person appointed as a Vice-President is a legal member of the Upper Tribunal. Section 26(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.
64. The eligibility criteria for appointment as a legal member of the Upper Tribunal are set out in Part 2 of schedule 5.