

TRIBUNALS (SCOTLAND) ACT 2014

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.

Training conditions and conduct

Section 34 – Training and review

123. **Section 34(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 18(5)) on the Lord President.
124. **Section 34(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.
125. The Lord President's functions under section 34 may be delegated to the President of Tribunals under section 8.

Section 35 and schedule 7 – Conditions of membership etc.

126. **Section 35** 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).
127. 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 8 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

128. 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.
129. 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).
130. **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.

131. [Paragraph 8](#) 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

132. 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.
133. [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.
134. [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

135. [Paragraphs 9](#) and [10](#) set out the circumstances in which a person ceases to hold a position in the Scottish Tribunals. A member ceases to hold that position by 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.
136. 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 11](#) of schedule 9.

Oaths

137. [Paragraph 11](#) 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.

138. [Paragraph 12](#) 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

139. [Paragraph 13](#) 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 Act including the payment of remuneration, expenses and allowances.

Section 36 and schedule 8 – Conduct and fitness etc.

140. [Section 36](#) introduces schedule 8 which makes provision in connection with the conduct and fitness of the legal and ordinary members of the Scottish Tribunals.

141. [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.
142. The functions of the Lord President under schedule 8 may not be delegated under section 8.

Conduct and discipline

143. [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.
144. [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 subparagraph (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.
145. [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.
146. [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.
147. 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).
148. 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 Act.

Fitness and removal

149. [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.
150. 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

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tribunal in other circumstances if the First Minister thinks fit but only after consultation with the Lord President (paragraph 13(2)).

151. [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.
152. [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.
153. [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.
154. [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.
155. [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.
156. [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.