Scottish Government’s Proposals for a New Tribunal System for Scotland

Consultation Report
MINISTERIAL FOREWORD

I am grateful to all those who commented on our proposals for reforming Scotland’s tribunals system, whether by responding to the public consultation or attending one of the consultation events. I hope this report has captured the wide range of views expressed. I think most people would agree that tribunal reform is long overdue and the proposals outlined in the consultation document and the further detail given in this report explain how we can create an improved system for everyone.

It is important to highlight again that these proposals create a framework within which individual jurisdictions will sit. They do not propose fundamental changes to the substantive legislation affecting tribunals or compromise the principle of putting users at the centre of the system.

I want to ensure that the expertise, flexibility, sensitivity, specialism and the ethos of individual tribunals will all be maintained in the new system. It is in everyone’s interest that the aspects of the current system which are valued are maintained and strengthened.

All the comments received will be taken into consideration as the new system is developed and we look forward to listening and working with stakeholders as we progress.

Roseanna Cunningham MSP
Minister for Community Safety and Legal Affairs
### Scottish Government's Proposals for a New Tribunal System for Scotland

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Acknowledgements

1. The Scottish Government would like to thank all individuals and organisations who took the time to consider and respond to the proposals contained in the consultation paper for reform of Scotland’s tribunal system.

Introduction

2. The consultation paper was published on 23 March 2012 and asked six questions on which views were specifically sought. Although the 12 week consultation period ended on 15 June, late responses were accepted. Around 600 copies of the paper were distributed and 86 responses received in total, 59 from organisations and 27 from individuals. Responses were received from a range of stakeholders with varying backgrounds including, the judiciary, the legal sector, local government, voluntary organisations and the medical profession.

3. Not all respondents completed the consultation questionnaire. Some respondents preferred to provide a written statement. The nature of the submissions varied with some providing responses to one question and others more detailed discussion on sections of the proposals that were of interest to them.

4. Consultation exercises like this are not numerically representative, but aim to elicit the views and experiences of a wide range of stakeholders. Any interpretation of the proportion of responses in agreement or disagreement must be undertaken with caution. Due to the quantity of submissions, it would not be generally appropriate to present the results in percentage form. The small number of responses is thought to be indicative of the specialised nature of the consultation.

5. Throughout this report we have attempted to provide further explanation about the proposals where we felt respondents needed more information.

Responses

6. Where respondents gave permission, their responses have been published on the Scottish Government website at www.scotland.gov.uk/publications.

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1 Not all organisations/individuals agreed to have their responses published, the 75 who did can be found at: http://www.scotland.gov.uk/Publications/2012/07/4481/downloads
7. Those who agreed to their response being published are listed in Annex B (75). Respondents (86) broadly came from those with an interest in the:

- Mental Health Tribunal for Scotland (30)
- Additional Support Needs Tribunals for Scotland (5)
- Children’s Hearings (3)
- Other individual tribunals (6)
- the system generally (32)

**Discussions with stakeholders**

8. There was extensive engagement with stakeholders during the consultation period. Four meetings were held across Scotland in Dumfries, Edinburgh, Glasgow and Inverness during the consultation process. These were attended by a range of people with an interest in tribunal reform including tribunal judiciary, health care professionals, user representatives, support groups and local government services.

9. The Scottish Government also hosted a specific event facilitated by the Mental Welfare Commission for stakeholders with an interest in the Mental Health Tribunal for Scotland.

10. A summary of the main points from the events can be found at Annex A.

**Findings**

11. This report provides an analysis of all the responses to the Scottish Government Consultation on Proposals for a New Tribunal System for Scotland. Individual responses are not repeated verbatim in the report. Rather, the report is in two parts: part one sets out the questions posed in the consultation questionnaire and provides a summary of comments from respondents and part two is a discussion of the key issues raised which were not specific to the questions asked. However, as noted above, the completion of the consultation questionnaire was uneven and therefore the number of responses for each question varies.

12. Overall the respondents welcomed the overarching proposal to reform the Scottish tribunal system. The points raised in response to the consultation paper and at consultation events were considered at length and observations from them are made in this report. The responses received will inform the development of our legislative proposals.

13. All non-confidential responses are available in hard copy at the Scottish Government Library, K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD. Charges for photocopies are made on a cost recovery basis. To request copies by post, enquire about charges or make an appointment to view responses, please telephone the Library on 0131 244 4552.
Involvement in the development of our proposals

14. Our Consultation Paper, the responses to it and this report are only the start of the process of involving those with an interest in our proposals and their continued development. We will want to make sure that there will be opportunities to engage further with users, practitioners and judiciary as we prepare the draft legislation. Of course the Scottish Parliament’s consideration of our Bill will be accompanied by thorough scrutiny including drawing on the expertise of those already involved in the system. Furthermore, once the Bill has completed its passage through the Scottish Parliament there will be other opportunities for involvement in implementing its provisions.

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PART 1: CONSULTATION QUESTIONS

Question 1: Should the distinctive tribunals system be capable of reconsidering decisions and hearing appeals and, if so, what grounds of appeal from the First-tier Tribunal to the Upper-tier should be allowed?

15. There were 56 responses to this question. The majority of respondents agreed to both the reconsideration of decisions and that the new system should be capable of hearing appeals. Most were in favour of appeals on a point of law although there was also interest from a small minority on appeals on a point of evidence.

16. Some respondents were unsure what was meant by reconsideration and in particular what was meant by reconsiderations only being allowed in cases that do not require a full hearing.

17. The consultation proposes that there should be the power to overturn decisions by tribunals and send them back for consideration rather than it being necessary for an appeal on a point of law for example, where there are simple mistakes such as clerical errors.

18. We expect that most appeals will be heard in the Upper-tier Tribunal but it is our intention to provide for appeals to the Court of Session on any point of law with permission either from the Upper-tier Tribunal or the relevant appellate court.

Question 2: Which functions of judicial leadership in the tribunals system should be exercised by the Lord President, the President of Scottish Tribunals and the Chamber Presidents, respectively?

19. There were 49 responses to this question. The majority of respondents were in favour of the Lord President being the head of the tribunal’s judiciary.

20. There were a small number who were not in favour of the proposal and either preferred the ‘Board model’ as set out in the Administrative Justice and Tribunals Council’s report; ‘Tribunal Reform in Scotland: A Vision for the Future’ or would prefer the President of Scottish Tribunals (PST) to be the leader of the tribunal judiciary.

21. We believe that the new tribunal system should be allowed to function and develop in a way that reflects the distinctive nature and wide variety of tribunals and their specialised role in providing access to and delivery of justice. Strong judicial leadership will be required across both the First-tier and the Upper-tier Tribunal to ensure that:

- the specific needs of the judiciary in different jurisdictions are met;

judicial independence is guaranteed throughout the system;
there is cohesion and continuity of purpose across both tiers;
the unified tribunal system has a strong distinctive identity within the justice system as a whole; and
the efficient disposal of business is maintained.

22. The different leadership roles of judicial office holders in the new tribunal system (Lord President, PST and Chamber Presidents) will provide an important mechanism to safeguard the particular and distinctive operations of individual jurisdictions against any unintended drift towards more generalised arrangements or dilution of specialism in the new unified system. At the same time we would expect the judicial leadership to work together across jurisdictions to bring coherence to the system where this will benefit the delivery of a high quality service to users.

23. Some respondents felt that the PST should not be a Senator of the College of Justice and should be selected by open competition. It is our view that as this post will have significant leadership responsibilities within a judicial hierarchy it is vital that it is filled by a senior member of the judiciary.

24. A Senator of the College of Justice will give the office the appropriate status both in relation to delegation from the Lord President and in relation to dealings with other members of the judiciary in both the first and upper tiers, including on matters of guidance and conduct. It will also bring to the tribunal leadership a wide range of judicial skills and experience.

25. A number of the respondents thought that Chamber Presidents should have responsibility for the day to day running of jurisdiction(s) for which they are responsible, including appraisal of the judiciary within their chamber.

26. We agree that this should be possible. The Lord President should be given a suitably wide power of delegation to allow him to delegate to the most appropriate level. For example, he is likely to want the responsibilities currently conferred on the judicial heads / presidents to be delegated to the new office of Chamber President ultimately giving them the responsibility for the day to day operation of the distinct jurisdictions within their chamber.

27. There were some concerns expressed that non-legal members would not fall under the judicial leadership of the Lord President and would be treated differently in terms of matters including welfare, training, guidance etc.

28. We agree that all members should come under the Lord President’s leadership and be treated in the same way whether they have a legal or non-legal background.
Question 3: Should any restrictions be placed on the ability of an appointed member to sit and hear cases in a chamber other than the chamber of their primary assignment? If so, what restrictions?

29. There were 59 responses to this question. This was the most commented on question; and it is clear that respondents were concerned about what is meant by individuals being able to hear cases in other chambers and what will happen to jurisdictions and their members if placed in a multi-jurisdiction chamber. Respondents with an interest in mental health were by far the most concerned although the vast majority of respondents were in favour of there being restrictions. The majority of concerns were about individuals having the necessary qualifications, knowledge, skills and experience to hear a case in another jurisdiction.

30. It was apparent from the responses received that the proposal did not make it clear how a chamber structure might operate. For example concerns were raised about who would be able to hear cases in particular jurisdictions with one respondent suggesting that people would be 'parachuted in' on an ad hoc basis and others feeling that jurisdictions would somehow be 'amalgamated'. It is not our intention to amalgamate jurisdictions, quite the reverse, and it is therefore appropriate that we outline what the suggested approach is. Our proposal is that:

- **Primary Assignment** - this will be the chamber where the individual is expected to hear either all or most of their cases. Individuals who currently hold more than one appointment will still be able to hear cases for the appointments they hold but will have one primary assignment – based on the specific criteria for their particular jurisdiction including having the necessary qualifications, knowledge, skills and experience for handling the specialised matters dealt with by their tribunal.

- **Ticketing within a chamber** – in a chamber where there is more than one jurisdiction we are absolutely clear that neither the individual jurisdictions nor the members of those jurisdictions will be amalgamated. Tribunal judiciary will continue to be assigned to the jurisdictions they are currently appointed to. No individual will be able to hear a case in another jurisdiction within the same chamber unless they already hold an appointment to the other jurisdiction(s) or are able to satisfy the Chamber President that they meet the criteria and have suitable skills and experience to be able to hear the case.

- **Cross-ticketing across chambers** – there will be no automatic assignment to hear cases in another chamber unless members currently hold an appointment in a jurisdiction in a chamber other than their chambers of primary assignment. Members will be eligible to hear a case in another chamber if they can demonstrate they meet the criteria for the jurisdiction and can demonstrate they have the skills and knowledge, as well as the agreement of both the Chamber President of
their primary assignment and the Chamber President of the chamber where they would be hearing the case. Individuals can hear cases in more than one jurisdiction at the moment (where they have multiple appointments). The only difference with what is being proposed is that they would not need to go through a formal appointment process by way of the Judicial Appointments Board. They would however, still have to demonstrate that they meet all the criteria and have the necessary skills, knowledge and experience.

31. We believe this approach would provide a more flexible and efficient way of deploying the judicial resource. The appointment system will ensure, as it does now, that members (and Chamber Presidents) are selected with the relevant skills, knowledge and experience to carry out their particular assignment within an individual jurisdiction.

32. We are very aware of the strong preference in the responses from those in the mental health field and at the consultation events for MHTS to have its own chamber. We very much appreciate the deep commitment held by those in this field to securing and building on the real advances made by this relatively young jurisdiction and accept that these gains need to be consolidated and reinforced in any new structure. We concur with those stakeholders who felt that the Mental Health Tribunal for Scotland (MHTS) has developed into a body which is working well in the best interest of its users. On this basis we want to ensure that our proposed reforms further strengthen the things users value most about this tribunal.

33. Throughout this report we have attempted to highlight where specialism, knowledge and experience will all be retained within the new system and how individual elements of the proposals would work. There is nothing in our proposals that suggests there could not be a single chamber for some jurisdictions, however, the actual structure is not covered by them. Whatever the chamber structure individual jurisdictions would remain separate with the intent purpose of only dealing with matters that concerned them and their specialism. We are especially keen to make sure that there will be no cross-contamination of jurisdictions.

34. The chamber structure has yet to be determined and will be a matter for the Scottish Ministers to decide, in agreement with the Lord President. The chamber into which a jurisdiction will be placed will be made by order following commencement of any legislation and will be decided on a case by case basis. We appreciate that there are very strong arguments for some jurisdictions, including the MHTS, to have their own single chamber and we want to ensure that these will be given proper consideration as deliberations on structures are carried out. To this end we want there to be further opportunities to involve stakeholders during this process. Further consideration is given to chamber structure at paragraphs 48 – 53.
**Question 4:** Is this the most appropriate option for judicial remuneration and if not, what other options are there to remunerate fairly the judicial members of the Scottish tribunal system?

35. There were 41 responses to this question. The majority of people were in favour of the proposal to have an evaluation exercise but some people were unclear who would undertake the work. As stated in the consultation document we expect to enter discussions with the Senior Salaries Review Body about this.

36. There were a few comments in relation to tribunals where members are not, and would not wish to be, remunerated e.g. Valuation Committees. This is a valid comment and we agree that the tribunal system needs to be flexible enough to reflect the distinctive nature of individual jurisdictions.

**Question 5:** How should procedural rules for the new tribunal system be made?

37. There were 50 responses to this question. There were a number of views on how rules should be made in the new system ranging from status quo, agreement with the proposal that the new Civil Justice Council should propose new rules, to the establishment of a Tribunal Procedure Committee akin to the approach in the UK reserved tribunals which was introduced by virtue of the Tribunals, Courts and Enforcement Act 2007 (TCE Act).

38. The vast majority of respondents felt that Chamber Presidents, stakeholders and tribunal users should have a role in the rule making process. We agree that this should be the case. We would want to ensure that any new body would have within its remit the direction to enlist the appropriate parties with expertise in the jurisdiction involved in drawing up proposals for any new or amended rules of procedure.

39. The intention of the UK Government to abolish the Administrative Justice and Tribunals Council (AJTC) and its Scottish Committee, caused concern for a few respondents. There was some interest in the role the AJTC played in relation to the statutory duty to consult them before procedural rules are made for any of the tribunals listed by the Scottish Ministers, including the six tribunals where administrative support is currently provided by the Scottish Tribunals Service. The concerns of those responding to this consultation question centred around the gap that might be left between the AJTC’s abolition and the new Scottish Civil Justice Council potentially taking on the

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3 The Scottish Government consultation on the proposals for a Scottish Civil Justice Council (which concluded on 22 December 2011), sought stakeholders views on whether the proposed Council should have a role in relation to administrative justice and tribunals. Early analysis found that the majority of respondents to that consultation agreed that, in light of the proposed abolition of the AJTC, it would be appropriate for the new Council to take on some of its functions. However, some respondents raised concerns about prematurely conferring this additional responsibility on a body which will initially concentrate on civil rules revision. The consultation report is available on the Scottish Government’s website at www.scotland.gov.uk/publications.
role for proposing rules (the legislation establishing the proposed Council is currently before Parliament and subject to Parliament’s consideration, is not expected to be established until Spring 2013). There were also concerns raised about there being no independent body to advise on rules or the fairness of procedures to ensure that adopted procedures remained simple, fair and accessible to users.

40. The Scottish Government is currently considering what if anything needs to replace the Scottish Committee of the AJTC in the interim and are looking at various options open to Ministers.

41. Some respondents, particularly those with an interest in the MHTS, expressed concerns about how the creation of generic rules may dilute the specialism of tribunals.

42. It is not our intention to undertake a complete re-write of existing tribunal rules although there would have to be some amendments to take account of the new Upper-tier Tribunal and new appeals processes. Moreover, each tribunal would still be governed by its own set of rules which are, and will continue to be, tailored to their own specialism.

43. A number of respondents were not persuaded by the proposal that the Scottish Ministers should retain rule making powers in a new system and were of the view that this should pass to the Lord President to be consistent with him being given judicial leadership of Scottish Tribunals. This is a matter that we will be giving careful consideration to. However, respondents also highlighted the need to ensure that the Scottish Ministers views and concerns are adequately represented for the period where they are still responsible for the tribunal’s administration and therefore the costs of running the system.

Question 6: What issues/opportunities do the proposed changes raise for people with protected characteristics (e.g. age, disability, gender reassignment, race, religion or belief, sex and sexual orientation) and what action could be taken to mitigate the impact of any negative issues or to capitalise upon opportunities?

44. There were 54 responses to this question. In the main they are a reiteration of concerns that have been expressed earlier in this paper such as the dilution of specialism and the facility to cross-ticket. These concerns have been addressed in the responses to previous questions.

45. A number of respondents with an interest in the MHTS felt that our commitment to retain the Millan principles would be enough to safeguard people with protected characteristics. Other respondents commented on the need for improvement with regards to how users were communicated with, the need for legal aid, advocacy services, representation etc. Some felt the creation of a new system would be an opportunity to consider how support and assistance is given to users and would provide an opportunity to develop best practice across jurisdictions for the benefit of the user.
46. Our intention is to develop an even better tribunals system which puts
the user at the centre; builds on existing good practice, enables the sharing of
best practice across all jurisdictions, and ensures that all users experience the
same high quality of service.
PART 2: DISCUSSION OF THE KEY ISSUES

47. There were a number of related issues brought out in the consultation responses which are highlighted in this part of the report along with further commentary on the detail of the proposals. It is hoped this will help to clarify and allay concerns raised by some respondents.

Chamber structure

48. The majority of respondents sought clarification on the chamber structure. Respondents with an interest in the MHTS were particularly concerned about it being included in a chamber with other jurisdictions. This was also an issue raised at the consultation events.

49. This commentary builds on that given on question three of our consultation paper (paragraphs 29-34) and provides more detail on how a chamber structure could work. It is likely that the structure would include both single and multi-jurisdiction chambers as appropriate and in the case of the latter where there was clear benefit in subject jurisdictions being grouped together.

50. There may be very strong arguments why certain jurisdictions, such as MHTS, should be placed in a single jurisdiction chamber of their own. They may be so specialised and/or the volumes of cases they deal with may be sufficiently high that it is not appropriate to group them with others in a multi-jurisdiction chamber. It can be expected that those charged with configuring the chamber structure will take these factors and others into account when preparing advice to the Scottish Ministers on the required statutory instruments.

51. However, it is important to highlight that a structure where more than one jurisdiction is in a chamber would not mean that the distinctive nature, specialism and expertise of the individual jurisdiction would be lost or diluted. Measures, such as a robust appointment system, would be put in place to ensure that did not happen and members would still be recruited using appointment criteria that ensured they had the knowledge, experience and expertise required to hear particular cases. As currently happens, nobody would be able to hear cases where they did not meet these specific criteria. In addition, there would be separate and distinctive rules in each jurisdiction. The existing jurisdictional rules would largely be retained as currently drafted with some minor changes to reflect new appeal routes to the Upper-tier etc., where necessary. There are no plans in our proposals to re-write rules from scratch.

52. It is important to highlight that being part of a multi-jurisdiction chamber would not mean that members of one jurisdiction had an automatic right to hear cases of other jurisdictions within the same chamber. It also does not mean that jurisdictions will be amalgamated, combined or joined together, rather they will continue to focus on their own specialist area and operate under their own set of distinctive rules and principles. Jurisdictions within a
chamber will remain separate jurisdictions whether they are in a single jurisdiction chamber or a multi-jurisdiction chamber.

53. During the drafting of our proposal we have taken into account the UK tribunal structure, created by the TCE Act, which already has a multi-jurisdiction chamber structure and some single jurisdiction chambers in operation. We also consulted with stakeholders involved in that system and we are keen to use the lessons learnt in our own structure. We found no evidence to suggest that the distinctiveness of the UK reserved tribunals involved had in any way diminished by being in a multi-jurisdiction chamber.

Ex-Officio Membership of the First-tier and Upper-tier Tribunals

54. Several respondents raised the issue of how ex-officio members of the First-tier and Upper-tier Tribunals would be deployed.

First-tier Tribunal

55. There was some concern about there being ex-officio members of the First-tier Tribunal and whether they would be assigned to hear cases without the necessary expertise.

56. Although deployment is a matter for the judiciary there are some tribunals such as the MHTS, that currently have a statutory obligation to use sheriffs as convenors for particular cases. The new system needs to allow for these situations. There may also be provision made for an assignment protocol which would ensure that appropriate use is made of the knowledge, skills and experience of members.

Upper-tier Tribunal

57. There was a difference of opinion regarding the membership of the Upper-tier amongst respondents. Some think having ex-officio members only in the Upper-tier is the right way forward due to the small number of appeals it is likely to hear (at least initially). It was also thought by some that the use of ex-officio members would allow for specialism and expertise to be developed by those members of the judiciary assigned to sit in this tier.

58. Other respondents felt that the Upper-tier should be made up only of salaried members with the appropriate expertise in jurisdictions.

59. The creation of an Upper-tier Tribunal allows, in the main, for tribunal business to be kept within the tribunals system.

60. Respondents were concerned that the members of the Upper-tier would not have the necessary expertise to hear cases. Currently as there is no Upper-tier Tribunal in the Scottish system those tribunals with appeal routes to the courts have their cases heard by the same ex-officio members who would make up the new Upper-tier. In other words, it will be the same individuals who hear the appeal cases now. The only difference is they will be
sitting as the Upper-tier Tribunal rather than the Sheriff Court or the Court of Session or whatever it may be.

61. We envisage that the office of PST will have the responsibility for the day to day operation of the tribunal system. This would further safeguard the way judicial members are deployed to ensure the efficient disposal of business.

Appointments

62. There was some concern on the proposal for new arrangements being introduced for appointing members of the tribunals in the new system. Whilst in favour of appointments being recommended by the Judicial Appointments Board for Scotland (JABS), there was concern that tribunals will be unable to recruit specialist members in the future if appointments across the tribunal system become more generic.

63. Whilst it is true that some tribunals have well defined criteria for appointing members, others do not. What we are seeking to introduce is a standard minimum criteria. For example, there is merit in legal appointments to all tribunals in the new system having the same standard criteria, for example, that they have been qualified for 5 years to sit in the First-tier and 7 years for the Upper-tier (or whatever the appropriate qualification was felt to be). Likewise medical appointments should have the same minimum criteria. However there will be flexibility in the appointment process to allow for any additional specialist criteria required for a particular jurisdiction. It is fully accepted that there cannot be a standard minimum criteria for general/lay members as the individual jurisdictions will all have very different requirements.

64. We are not seeking to dilute the specialist nature of individual jurisdictions, quite the opposite. What we are seeking is to provide criteria where there are none at present and to create standard minimum criteria where appropriate to ensure all appointments to the new tribunal system are made to the same high standards.

65. It is also our intention to provide for security of tenure by placing appointments on a renewable basis, provided the criteria for re-appointment is met and by providing a statutory process for removal from office.

Civil Courts Reform

66. A point was raised during the consultation events around the relationship between the proposals in this consultation and the Scottish Civil Courts Review, which had some recommendations with links to tribunal reform. The Scottish Government is looking to develop legislative proposals for civil courts reform, with a view to issuing a public consultation towards the end of this year. The Making Justice Work programme, under which civil courts and tribunals reform is being taken forward, provides a forum to ensure
that the distinctive nature of each sector is taken into account during the
development of these proposals.

Inquisitorial v Adversarial

67. Whilst most respondents were in favour of reinforcing the inquisitorial
approach to tribunal hearings it was mentioned in a few responses that in
some cases the hearings have to be taken in a more adversarial way due to
the nature of the tribunal and the need to test evidence.

68. It is our intention to have a system that is focussed on the user and
part of that is to have an inquisitorial system while acknowledging at the same
time there will be some hearings that, due to their nature, require to be more
adversarial. It is important that any new system is designed to be flexible and
able to support the needs of all the jurisdictions within it.

Expert Advisers

69. Several responses raised queries about the purpose of expert
advisors. Respondents were unsure about what value these advisers would
add to the system, how they would operate, how the appointments would be
undertaken and how they should be remunerated.

70. The inclusion of this provision was intended to allow for the
appointment of expert witnesses in rare cases where the tribunal required
special expertise that the tribunal would not otherwise have available to it.
There is a provision in the TCE Act that allows for this but we understand that
this provision has never been used. On this basis and in response to
comments from respondents we have decided not to provide for expert
advisers in legislation.

Mediation

71. A few respondents highlighted the need for mediation within the new
system.

72. Mediation and other forms of dispute resolution are used increasingly
in the justice system to provide earlier, more efficient and effective remedies
to disputes, at a lower cost and with less pressure on users.

73. The Private Rented Housing Panel occasionally uses mediation, as a
practice for resolving a dispute prior to conducting a full hearing. A case
before the Panel can be referred to an in-house mediation service, but only if
both parties agree to this. If mediation is not chosen or does not succeed, the
matter will then be referred to a committee.

74. We intend that where mediation or other forms of dispute resolution are
currently used then that practice should continue to be available and that it
should be extended, where appropriate, to other jurisdictions within the
system.
Venues

75. There was some concern (particularly from those with an interest in MHTS) about the use of venues for hearings. Those responding from an MHTS viewpoint were particularly concerned that they would lose the ability to have hearings in hospitals and other venues convenient to the patient.

76. We can assure respondents that while having a cohesive system will allow for venue sharing where appropriate, our stated aim is to put users at the centre of the tribunal system. This means that MHTS hearings will continue to be held in venues that best meets the needs of their users.

77. For other tribunals there is likely to be an increase in choice of venue by sharing tribunal estates between jurisdictions across Scotland. We believe increasing access to venues also increases access to justice.

78. Respondents also highlighted the use of video and telephony conferencing facilities, whilst these are not appropriate for all tribunal hearings some tribunals and users do find them beneficial. This is not a one size fits all solution and each case would be considered on its own particular circumstances.

Scottish Tribunals Service Administration

79. A minority of the respondents raised concerns about STS staff being centralised and the possibility of tribunals losing their dedicated specialist support. One respondent also queried whether the STS administration would become a ‘centralised call centre’.

80. STS staff will continue to provide specialist support to individual jurisdictions and there are no plans to bring all of the staff together into one building. STS will continue to be located geographically to meet the needs of individual jurisdictions and their users.

80. Operating within a wider pool of staff enhances the ability of STS to train individuals to cover periods of annual leave and sick absence and build resilience. It benefits staff to have a stronger support network and structure in terms of their own development both in increasing their skills and knowledge and in providing career opportunities. We believe that if staff are better supported and more resilient then tribunals and their users will ultimately be the end beneficiaries of such an approach.

81. A few respondents raised the issue of the status of STS, as a delivery arm of the Scottish Government, in relation to judicial independence. We acknowledge that this raises significant issues which will inform the development of our thinking as we consider options for reviewing the status of STS in the future.
Hearing cases in both the First-tier Tribunal and Upper-tier Tribunal

82. Some respondents were concerned that the proposals would allow for individuals to hear the same case in both the First and Upper-tier.

83. We can assure respondents that in no circumstance will this happen. We have proposed that Chamber Presidents could also have membership to the Upper-tier. The reasoning here is that Chamber Presidents will, in general, not hear cases at the First-tier but will provide the subject specialism should the case be appealed to the Upper-tier. However, if they have heard a case at first instance they would be unable to hear the appeal. It is a basic principle of justice that the same members of the judiciary would not hear a case at both levels.

Legal Representation

84. Several respondents raised concerns about self-representation.

85. Although the intention is to create a system that encourages and supports self-representation where that is appropriate, we are not proposing to remove the right to representation from those who need it; we are not proposing a one-size fits all system. The system should be flexible enough to support the needs of all its users.

Statutory Provision

86. There were a few concerns amongst respondents about the loss of statutory provision within the new system. There was a particular concern that the Mental Welfare Commission for Scotland (MWC) would not be able to discharge its statutory functions under the Mental Health (Care and Treatment) (Scotland) Act 2003.

87. These proposals make no fundamental changes to statutory law and therefore the statutory provision that currently exists, e.g. in respect of the MWC, would continue under the new system. There would of course have to be some minor amendments to reflect changes in judicial leadership and in some cases, appeal routes.
SUMMARY AND OBSERVATIONS FROM CONSULTATION EVENTS

1. This annex provides a brief summary of the main issues raised at the consultation events and observations made on them. Where the issues have been raised and covered earlier in this paper they are not repeated and there is not a detailed response.

Dumfries Event – 23 April 2012

2. Those who attended this event mainly had an interest in the Mental Health Tribunal for Scotland (MHTS).

Two tier system

3. There was some confusion about the two tier system and the type of case the Upper-tier would hear.

4. The basic premise for the new tribunal structure is to create two new tribunals – one tribunal to deal, primarily, with cases in the first instance (the First-tier Tribunal) and one tribunal with a primary function of hearing appeals from the former (the Upper Tribunal).

User Involvement

5. MHTS was singled out as an example of good practice in terms of user involvement. There was a slight concern that bringing tribunals together might not achieve this and may have the opposite effect.

6. Looking at the spectrum of tribunals across Scotland, MHTS is at the top end for service user good practice. The Scottish Tribunals Service (STS) is already making significant improvements to share best practice throughout the jurisdictions it already has administrative responsibility for. STS are looking to continuously improve the service provided to tribunal users and have already introduced processes to eliminate wasteful procedures.

Mental Health Law

7. One participant asked what safeguards there were to the application of mental health law by the tribunal.

8. Our proposals do not suggest fundamental changes to the law relating to mental health or how that law will be applied by the tribunal. Policy responsibility for the law surrounding mental health issues in Scotland will remain with the Reshaping Care and Mental Health Division within the Scottish Government.
Roles and complaints

9. **A question was raised about the evaluation of senior judiciary within the system and how complaints would be handled.**

10. The Lord President has processes in place for dealing with complaints about the judiciary, we would expect that these would be adopted for tribunals moving into the new system. Complaints, appraisal and welfare of the tribunal’s judiciary will all be under the remit of the Lord President within the proposed structure.

Changes to the MHTS ‘experience’

11. **Concerns were raised about how people’s experience of MHTS will change under the proposals and what the benefits would be.**

12. Users will still appear before members selected for their specialist knowledge in the field. The tribunal will still continue to make decisions in accordance with the law governing mental health and the current rules of procedure, which protects the distinctive nature and ethos of the MHTS, will continue to be in place and the tribunal will continue to uphold the Millan principles as set out in the Mental Health (Care and Treatment) Scotland Act 2003.

Edinburgh Event – 27 April 2012

13. **There was a mixture of interests covered at the Edinburgh event. These varied from those with an interest in administrative justice, the reserved Upper Tribunal, Valuation Appeals, War Pensions, the judiciary, mental health and the voluntary sector. Some of the questions have already been covered earlier in this paper such as those around appointments, chamber structure and rules. These have not been repeated in this commentary.**

Reserved Tribunals

14. **The intention was noted of the long-term aim to include reserved tribunals in the new structure (should the UK Government allow).**

15. The Scottish Government has no powers to make changes to reserved tribunals that are the responsibility of the UK Government. We expect that the UK Government will consult separately on proposals surrounding a possible transfer of administrative and judicial leadership functions to Scottish Ministers and the Lord President respectively. Our aim is that our proposed structure is flexible enough to support integration with reserved tribunals should that be agreed in the future.
Valuation Appeals

16. **The number of appeals made to the Valuation Appeals Panel was mentioned along with the fact that around 98% of them are negotiated between parties and settled before the need for a hearing.**

17. There is a vast range of levels of service between tribunals throughout the tribunals system in Scotland. For example, case handling differs very widely from jurisdiction to jurisdiction. We currently have jurisdictions who, upon receipt of an application write out to advise only of the date and location of the hearing. Other jurisdictions hold case management discussions, mediation etc. and hold hearings across Scotland.

18. It is our intention that all jurisdictions that fall into the new system with common judicial leadership will be able to learn from each other and over time will ‘level-up’ to a better standard overall.

Future Transferring in of Tribunals

19. **The process for bringing other tribunals into the system was queried?**

20. We acknowledge that the landscape of tribunals in Scotland is wide and varied and we could not move all tribunals into the new structure at the same time. We will consider each jurisdiction on a case by case basis and analyse the benefits, issues and possible drawbacks of bringing them into the new system before taking the necessary steps. This will allow for further scrutiny by the Scottish Parliament of the incorporation of jurisdictions into the new system. We expect there to be extensive discussions with the relevant stakeholders, user groups and policy makers as part of the process.

Glasgow Event – 3 May 2012

21. The Glasgow event was attended by those with an interest in administrative justice, the MHTS, the voluntary sector, local authorities, legal and medical practitioners, and the UK Upper Tribunal.

User and Advocacy Worker Feedback

22. **A voluntary sector representative asked how the changes would be monitored from a user and advocacy worker perspective and how feedback would be obtained.**

23. We will be seeking to retain user group forums already established in some jurisdictions and plan to set new user groups up, where appropriate, in jurisdictions where they do not currently exist.

24. Looking at all the tribunals in operation across Scotland, the amount of user and stakeholder engagement differs widely, we will be seeking to bring all tribunals up to the best standard.
Regional Structure

25. A question was raised about the possibility of creating a regional structure to prevent users being asked to travel many miles for hearings.

26. We want to increase access to justice across all jurisdictions. Some tribunals currently only hold hearings in a single geographical location and others encourage the need for earlier resolution through case management discussions, mediation etc. If there is a need for a hearing it could be done at a venue nearer to the user or could be done on paper, domiciliary visits etc. Some tribunals are using video-conferencing for hearings. We believe that the proposed structure allows individual tribunals to increase access to justice in their area by learning from each other and sharing resources.

27. It is important to note that we acknowledge that one-size does not fit all.

28. Over recent months, the STS has expanded the use of different venues and expanded the use of video conferencing across Scotland. This is an indication of the sort of things that can be done when tribunals work together.

Changes to substantive law

29. There were concerns about how the system would deal with changes being proposed to legislation, particularly in relation to children.

30. If changes are proposed to the substantive law which has created the tribunal then the tribunal judiciary and administration expect to be included in discussions about these changes. They will both want to know how the changes might affect caseloads for instance. The jurisdiction will still need to apply the law and there are no plans to change this.

STS and Scottish Courts Service

31. A question was raised about the possibility of STS administration merging with the Scottish Courts Service (SCS).

32. At the moment the STS is a delivery arm of the Scottish Government’s Justice Directorate. SCS is a non-ministerial body which is judicially led.

33. We have had conversations with SCS about the feasibility of joining the administrative arms of the organisations together but any such changes are a matter for the Scottish Ministers and the Lord President to decide and are likely to require legislation to put them into effect.
Inverness Event – 20 April 2012

34. The Inverness event was attended by those with an interest in Valuation Appeals, crofting and mental health.

Valuation Appeal Panels/Committees

35. There were a few questions about where Valuation Appeal Panels and Committees would fit into the new system and when that was likely to happen.

36. This is a matter for discussion with the relevant parties involved to decide the place and timing of any transfer.

37. As indicated in the consultation paper we intend that four jurisdictions will transfer into the new structure initially. The structure is intended to be created so that others will be brought in later. We will look at other tribunals on a case by case basis.

38. It is a complex undertaking to consider all the pieces of legislation that need to be looked at to transfer a tribunal into the new structure. This is not something we can do quickly for all tribunals in Scotland so we will adopt an evolutionary approach.

Standardising dispute resolution processes

39. The question was raised whether the proposals looked to standardise dispute resolution processes across jurisdictions.

40. Each tribunal jurisdiction operates in its own specialist field and we do not want to change this. However we believe that jurisdictions can learn from each other about how to approach matters such as resolving disputes e.g. introduction of alternative dispute resolution such as case management discussions and mediation. We intend that best practice is encouraged by common leadership. We are not however, trying to develop a ‘one size fits all’ system.

Training

41. One participant asked if STS had considered tribunal training for tribunals that are not transferring into the new system immediately.

42. Tribunal member training may be divided into two categories, subject/jurisdiction specific training and judge craft/generic training.

43. We propose that tribunal member training will become the responsibility of the Lord President under the new system. We see no reason why judge craft training could not be extended to tribunals who have not transferred into the new structure. It would however, be a matter for the Lord President and individual tribunals to come to an arrangement.
MHTS Consultation Event – 15 May 2012

44. This jurisdictional specific event was facilitated by the Mental Welfare Commission and took the form of round table discussions followed by a question and answer session to a panel comprised of the Chief Executive and Head of Policy of the Scottish Tribunals Service and a member of the Legal Services Agency. The groups were asked to identify key benefits and key concerns about tribunal reform.

Round table discussions - Benefits identified

45. The session began by asking each table to outline a key benefit of the consultation proposals that they had identified during the discussion period. These were summarised as:

- A more efficient system.
- Best practices of MHTS easier to transfer to other tribunals.
- Streamlining management structures and related financial efficiencies
- Taking appeals away from Sheriff Principals
- The continuation of knowledge and expertise in how MHTS cases are handled.

Panel response:

46. The issue of how expertise/knowledge/skills will be retained in the new system was raised.

47. There is nothing in the consultation proposals which will affect the specialist nature of individual tribunals moving into the new structure. The Chamber President will have specialist knowledge of the jurisdictions in his/her chamber and will protect the specialist nature of each. Deputy Chamber Presidents could be appointed where there is a need to reflect the specialism in more than one jurisdiction within a chamber.

48. We are not proposing ‘chamber-wide’ rules of procedure; the chamber dealing with mental health will largely use the same rules of procedure that currently exist in that jurisdiction until such time as they need to be amended.

49. The end user should see no difference in how their case is dealt with as there will be no change in the way cases are handled as a result of this proposal.

Key concerns from the table discussions

- Many felt that there should be a separate mental health chamber. There was a concern, for instance, that there might be a loss of skills amongst tribunal judges who would be unable to ask questions about the quality of care plans. There was also a concern about the potential shift away from the recovery-based ethos of MHTS. However, some felt that if mental health was joined up with other jurisdictions in a
chamber then it should be joined up with other ‘Human Rights’ based tribunals, if any exist.

- It was felt that MHTS was a relatively new jurisdiction that needed longer to establish itself.

- Participants thought that the consultation paper was not clear enough about how things would work in practice so people were unsure about what the end result would be. There was also a concern that it would be up to the Lord President to decide how a variety of matters would work in practice.

- There was further concern about the Lord President nominating a senator for the President of Scottish Tribunals role. It was felt this would mean that the decision would not be transparent.

- Concerns were also raised about the potential loss of a mental health focussed administration.

Panel response:

50. There is no proposal to alter the ethos or specialised nature of individual tribunals transferring into the new structure, rather the proposal seeks to strengthen and guarantee them.

51. Mental health cases will still be based on the Millan principles and will abide by the 2003 Act. None of this will change, there will be the same panels and rules. With regards to how panels deal with care plans, there will be no change into how these are dealt with and there will be no change to the recovery-based ethos.

52. MHTS has established some good practices which will be of benefit to other jurisdictions. MHTS has set high standards which other tribunals will be encouraged to reach.

53. There was good feedback about the MHTS administration. It was emphasised that none of the learning and the good work that has been done in building a relationship with stakeholders of the jurisdiction will be lost.

Comments from Legal Services Agency

54. MHTS has been on a journey to get to the place it is today, we need to be assured that nothing will be lost after transferring to the proposed structure.

55. Mental health should have its own chamber to ensure that the specialist nature of the jurisdiction is not lost; this will give a better assurance to users that before/during and after their hearing that their cases will be dealt with by a tribunal tailored to mental health.
56. Millan favoured a specialist tribunal for mental health cases and we would like to retain this in case something is lost.

Comments from Scottish Tribunals Service

57. As to what extent the chamber dealing with mental health cases would keep specialist nature - judicial recruitment, judicial training, stakeholder engagement and rules are all component parts of specialism – these are all being retained. MHTS will continue to be a specialist, distinct and unique jurisdiction.

58. Members will not be ‘parachuted in’ to sit on cases in areas where they have not had the training or do not have the qualifications/experience to hear them. Members will only be able to sit in hearings if they have the necessary qualifications, experience and jurisdiction specific training.

59. There are significant differences in the way Scottish tribunals currently operate. For instance with regards to case handling, some tribunals only contact with an applicant prior to a hearing will be to write to them to invite them to a hearing in Edinburgh (because that’s the only place the tribunal sits). At the other end of the scale there are tribunals that offer mediation, hearings across Scotland, case management conferences, dedicated venues etc. We acknowledge that MHTS operates at the upper end of this spectrum. We seek to improve the overall experience and quality of service to all tribunal users in Scotland.
ANNEX B

LIST OF CONSULTATION RESPONDENTS

The following agreed to the publication of their response:

Accountability Scotland
Additional Support Needs Tribunals for Scotland
Alzheimer Scotland
Anonymous x6
ASN Mediation Service Providers Scotland
Association of Directors of Social Work
Auchie, Derek
Baldock, Ben
British Psychological Society
Burns, Jessica
Capability Scotland
Chamber Presidents of the Upper Tribunal
Children in Scotland
Children’s Hearings Scotland
Citizens Advice Scotland
City of Edinburgh Council
Clark, Moira
Commission for Ethical Standards in Public Life in Scotland
Consumer Focus Scotland
Craig, Robert James
Dyer, Dr. James A T
ENABLE Scotland
Equality And Human Rights Commission
Erskine, Jeannie
Faculty of Advocates
Falkirk Council Education Services – Additional Support for Learning Team
Fife Council
Friends of the Earth Scotland
HUG (Action for Mental Health)
Johnstone, Leslie M. S.
Judicial Appointments Board for Scotland
Lady Anne Smith
Lands Tribunal for Scotland
Law Society of Scotland
Lord Hamilton
McFarlane, Arthur
Mental Health Tribunal for Scotland
Mental Welfare Commission for Scotland
Miller, Amanda
Miller, John A L
Moultrie, Patricia
Muir, Andrew
NHS Ayrshire and Arran
NHS National Services Scotland
Patients’ Advocacy Service
Pension Appeal Tribunal Scotland
Private Rented Housing Panel
Reid, Colin
Royal British Legion Scotland
Scottish Assessors Association
Scottish Association for Mental Health
Scottish Children’s Reporter Administration (SCRA)
Scottish Committee of the Administrative Justice and Tribunals Council
Scottish Consortium for Learning Disability
Scottish Council on Deafness
Scottish Court Service
Scottish Independent Advocacy Alliance
Scottish Legal Action Group
Scottish Trades Union Congress
Scottish Valuation Appeal Panel Forum
Sheriffs Principal
Stirling Council
Support in Mind Scotland
The National Additional Support Needs Tribunal Lay Advocacy Service
The State Hospitals Board for Scotland
Tribunal Procedure Committee
UNISON SCRA Branch
Upper Tribunal Administrative Appeals Chamber Sitting in Scotland
Watt, Linda J
Wright, John

Responses were also received from the following organisations:

Falkirk Council Social Services
Mental Health Nursing Forum Scotland
Part-time Sheriffs Association
Royal College of Physicians of Edinburgh
Royal College of Psychiatrists in Scotland
Scotland’s Commissioner for Children and Young People