

Consultation on Draft Regulations that Prescribe Eligibility Criteria for Appointment to the Scottish Tribunals

July 2015

CONSULTATION ON DRAFT REGULATIONS THAT PRESCRIBE ELIGIBILITY CRITERIA FOR APPOINTMENT TO THE SCOTTISH TRIBUNALS

1. This consultation seeks your views on draft regulations that prescribe eligibility criteria for appointment to the Scottish Tribunals (as defined in section 1(2) of the Tribunals (Scotland) Act 2014 (“the Tribunals Act”). Unless otherwise stated, any reference in this paper to a section is to a section of the Tribunals Act.

BACKGROUND

The Scottish Tribunals

2. The Tribunals Act creates a new, simplified structure for tribunals dealing with devolved matters in Scotland. It establishes two new tribunals: the First-tier Tribunal for Scotland (will generally hear first instance cases) and the Upper Tribunal for Scotland (primarily for appeals), known collectively as the Scottish Tribunals. In due course all of the devolved tribunal jurisdictions will transfer-in to the Scottish Tribunals. In the first phase, specified housing and tax cases will transfer.

Membership of the Scottish Tribunals

3. The First-tier Tribunal and the Upper Tribunal will consist of ordinary, legal and judicial members who can either transfer-in or be appointed to the Scottish Tribunals. (Section 17 sets out the circumstances in which the court judiciary can sit and is not further discussed in this paper as those provisions are not relevant to the draft regulations).

The First-tier Tribunal

4. The First-tier Tribunal is to be organised into different chambers of similar subject-matter jurisdiction¹. We have recently consulted on a possible chamber structure.² Each chamber of the First-tier Tribunal will be presided over by a Chamber President who is legally qualified³.
5. A person may only be appointed as an ordinary member if they meet relevant criteria prescribed by the Scottish Ministers in regulations. Relevant criteria includes qualifications, experience and training⁴.
6. A person may only be appointed as a legal member if the person is practising and has practised for a period of not less than 5 years as a solicitor or advocate in Scotland or if the person falls within a description specified by the Scottish Ministers in regulations⁵.

¹ Section 20.

² Consultation ends 28 July 2015, for further details email tribunal.policy@scotland.gsi.gov.uk

³ Section 21. Note the Tribunals Act also provides that a person is a legal member of the First-tier Tribunal if they hold the position of Deputy Chamber President (section 15).

⁴ Section 32, schedule 3, paragraphs 1 and 2.

⁵ Section 32, schedule 3, paragraphs 3 to 7.

7. Note, however, that a person will be eligible for appointment by the Scottish Ministers as a Chamber President only if the person is a legal member of the Upper Tribunal or eligible to be appointed as such⁶.
8. The draft regulations contained within Annex A set out the criteria proposed to be applied by the Scottish Ministers in appointing ordinary and legal members that hear housing and tax cases (as further described below) in the First-tier Tribunal.

The Upper Tribunal

9. The Upper Tribunal is to be organised into a number of different divisions, having regard (amongst other things) to the different subject-matters falling within the Tribunal's jurisdiction⁷. Each division will be presided over by a Vice-President who is legally qualified⁸.
10. More generally, the Upper Tribunal may comprise ordinary, legal and judicial members. A person may only be appointed by the Scottish Ministers as an ordinary member if they meet such relevant criteria as prescribed by Ministers in regulations. Relevant criteria includes criteria as to qualifications, experience and training⁹. A person may only be appointed as a legal member if the person is practising and has practised for a period of not less than 7 years as a solicitor or advocate in Scotland or if the person falls within a description specified by the Scottish Ministers by regulations¹⁰.
11. At this stage, it is envisaged that appeals in the Upper Tribunal will largely be heard by the court judiciary and/or by the relevant Chamber President (a Chamber President of the First-tier, by virtue of holding that position, is also a legal member of the Upper Tribunal¹¹ and can add subject specific experience) The provisions in the Tribunals Act enabling the appointment of ordinary members were primarily included to cater for the fact that the Upper Tribunal would hear first instance Lands Tribunal cases (where a broader panel is used).
12. As already indicated, to be eligible for appointment as a First-tier Tribunal Chamber President, the person must be a legal member of the Upper Tribunal or eligible to be appointed as such a member. For the principal purpose of regulating appointments of Chamber Presidents, the draft regulations set out in the Annex also prescribe eligibility criteria for legal members of the Upper Tribunal. At present we do not anticipate any need to recruit ordinary or legal members of the Upper Tribunal more broadly.

⁶ Section 22.

⁷ Section 23.

⁸ Section 24.

⁹ Section 32, schedule 5, paragraphs 1 and 2.

¹⁰ Section 32, schedule 5, paragraphs 4 to 7.

¹¹ See sections 15 and 16.

Jurisdictions transferring to the Scottish Tribunals

13. Schedule 1 to the Tribunals Act lists the jurisdictions which may be transferred-in to the Scottish Tribunals by regulations. Part 1 lists the tribunals and Part 2 specifies relevant functions exercisable by them which will transfer-in. Regulations made under section 27 of the Tribunals Act can modify the terms of Schedule 1.

Housing Jurisdiction

14. The first jurisdictions to transfer-in will be (a) a private rented housing committee and (b) a homeowner housing committee. Additionally, we have recently consulted on proposals to make regulations¹² to include in Schedule 1 references to the private rented housing panel and the homeowner housing panel¹³. Subject to the outcome of that consultation, we would propose to make regulations to transfer-in these jurisdictions around September 2016.

15. The Housing (Scotland) Act 2014 (“the Housing Act”) also establishes two new tribunals whose functions are conferred directly on the First-tier Tribunal (provisions to be commenced in December 2016). The jurisdiction for civil cases relating to the private rented sector will transfer from the sheriff court¹⁴ – broadly speaking these comprise applications relating to the main types of tenancy and applications regarding local authority land registration decisions. The First-tier Tribunal will also handle cases regarding an alleged failure to comply with the new letting agent code of practice¹⁵ and cases relating to the registration of letting agents.

Tax Jurisdiction

16. The Revenue Scotland and Tax Powers Act 2014 (“RSTPA”) established the First-tier and Upper Tax Tribunals for Scotland which handle appeals on Revenue Scotland decisions in relation to the new Land and Buildings Transaction Tax and Scottish Landfill Tax.

17. The First-tier Tax Tribunal for Scotland comprises of ordinary and legal members. Schedule 2 of RSTPA deals with eligibility for appointment and is supplemented by the Scottish Tax Tribunals (Eligibility for Appointment) Regulations 2014 (2014/355)¹⁶ (“the 2014 Regulations”). Regulation 2 of the 2014 Regulations sets out eligibility criteria for appointment as an ordinary member of the First-tier Tax Tribunal for Scotland; regulations 3 and 4 clarifies that when calculating the 5 or 10 year period of legal practice required for legal members of the First or Upper Tax Tribunal, the period need not be continuous. No regulations have been made under paragraph 4(2) of schedule 2 of RSTPA to extend the criteria for appointment as a legal member.

¹² under section 27 of the Tribunals Act

¹³ Contact tribunals.policy@scotland.gsi.gov.uk for further information on this consultation

¹⁴ section 16 of the Housing Act

¹⁵ section 48 of Housing Act

¹⁶ <http://www.legislation.gov.uk/ssi/2014/355/contents/made>

18. We propose to transfer the First-tier Tax Tribunal for Scotland and the Upper Tax Tribunal for Scotland into the Scottish Tribunals in Spring 2017.¹⁷ As such, the draft regulations also cover tax related ordinary and legal member appointments (accepting that the regulations won't actually bite on new appointments until the existing tax tribunals become part of the Scottish Tribunals).

DRAFT REGULATIONS

19. The draft regulations contained in Annex A prescribe eligibility criteria for ordinary and legal members of the First-tier Tribunal and legal members of the Upper Tribunal¹⁸. As indicated, the criteria for ordinary members have been developed specifically to cover the housing and tax jurisdictions which will initially transfer-in to the Scottish Tribunals structure. It is proposed that the legal criteria will be generic across the Scottish Tribunals.

Eligibility criteria - housing jurisdictions – ordinary members

20. The legislation that regulates the existing housing tribunals does not prescribe the type of member who can sit nor specify eligibility criteria. Eligibility criteria have previously been applied administratively for appointment exercises. Existing members of these jurisdictions can transfer-in and become members of the Scottish Tribunals when these jurisdictions transfer-in to the new structure as long as they are eligible for appointment under these regulations¹⁹. Thereafter, new appointments and reappointments will be regulated by provisions in the Tribunals Act and these draft regulations. Appointments to handle private rented sector and letting agents will also be governed by provisions in the Tribunals Act and these draft regulations.
21. In broad terms, it is proposed that ordinary members required to deal with housing cases will either have substantial relevant housing experience or substantial relevant surveying experience²⁰.

Housing experience: The draft regulations specify that a person will be eligible as an ordinary member if they have substantial relevant housing experience in (i) matters relating to landlord and tenant relationships or (ii) housing matters (including as regards private rented sector, letting agency and factoring matters) or (iii) land management matters.

Surveying experience: They also propose that relevant surveying experience means experience in surveying related to housing and house building as either a current member or fellow of the Royal Institution of Chartered Surveyors (RICS) or a former member or fellow of RICS, and in the case of a former member or fellow, without having incurred any sanction that would disqualify them from continuing their membership.

22. The draft regulations make clear that in all cases the substantial experience may be obtained in a business, trade, charity or not for profit organisation or in

¹⁷ these tribunals are listed at paragraph 10A and B of Part 1 of schedule 1 to the Tribunals Act).

¹⁸ As per paragraphs 1(2) and 5(2) of Schedule 3 and paragraph 5(2) of Schedule 5 of the Tribunals Act.

¹⁹ As per, section 29 and schedule 2, of the Tribunals Act.

²⁰ Regulation 5

a profession or in academia. Also includes experience gained in a local authority or housing association.

23. In considering an applicant's substantial relevant experience we want to take account of how recent it is but, subject to views, we do not think we need to expressly reference 'recent' on the face of the regulations (and indeed what that means in one recruitment round may differ in another one).

Tax jurisdiction – ordinary members

24. Insofar as the draft regulations prescribe criteria for ordinary members of the First-tier Tribunal with tax experience²¹, they largely mirror existing provision set out in the Scottish Tax Tribunals (Eligibility for Appointment) Regulations 2014.²² As such it is proposed that a person will be eligible for appointment if they are a member of the Chartered Institute of Taxation or an accountant who is a member of:

- the Institute of Chartered Accountants of Scotland;
- the Institute of Chartered Accountants in England and Wales;
- the Institute of Chartered Accountants in Ireland;
- the Institute of Certified Public Accountants in Ireland;
- the Association of Chartered Certified Accountants;
- the Chartered Institute of Management Accountants; or
- the Chartered Institute of Public Finance and Accountancy.

25. It is proposed that persons will also be eligible to be an ordinary member if they have substantial experience in tax matters and related tax procedures (whether obtained in a business, trade, charity or not for profit organisation, or in a profession or in academia) (again this mirrors the existing position).

26. The proposed debarment provision is new²³ and the rationale for inclusion is explained in paragraph 32.

Legal members of the First-tier Tribunal

27. For legal members (except a Chamber President), the draft regulations prescribe generic eligibility criteria which will be applicable across the First-tier Tribunal²⁴. The draft regulations propose that a person will be eligible if the person is practising and has practised for a period of not less than 5 years as a solicitor in Scotland, England, Wales or Northern Ireland or if the person is practising and has practised for a period of not less than 5 years as an advocate in Scotland or a barrister in England, Wales or Northern Ireland. A person will also be eligible for appointment on the basis of previous engagement in practice for a period of not less than 5 years provided subsequent engagement (no minimum period is proposed to be specified) in exercising judicial functions in any court or tribunal or practice or employment as a lawyer of any kind. Each of the 5 year periods referred to can be

²¹ Regulation 4

²² <http://www.legislation.gov.uk/ssi/2014/355/contents/made>

²³ Regulation 4(5).

²⁴ Regulation 2.

calculated by adding up different time periods (cumulative) or with reference to one period (continuous).

28. This approach is considered to appropriately broaden the pool of potential applicant. In particular, it would broaden the pool to persons who are no longer practising because they are a tribunal judge. It also captures advocates no longer practising who work, say in an in-house legal team or in a government department.
29. Although it is proposed that the regulations will prescribe generic eligibility criteria for the appointment of legal members, it is envisaged that a particular recruitment exercise will specify the chamber in respect of which the recruitment is being run and the particular legal experience or aptitude considered desirable. Specifying desirable legal experience will ensure that cases are determined by experts in the relevant field. A reference to aptitude (as appropriate for each recruitment round) would recognise that well qualified and experienced lawyers may be able to operate in a particular field (perhaps with appropriate training) notwithstanding a relative lack of experience in that field to date.
30. We invite views on whether the regulations should go further by broadening the eligibility criteria²⁵ or indeed, whether they go too far (in particular whether opening the pool to lawyers not qualified in Scots law is appropriate given the devolved subject matter under consideration).

Legal Members of the Upper Tribunal

31. The proposed eligibility criteria for legal members of the Upper Tribunal mirrors that proposed for the First-tier Tribunal, although for the Upper Tribunal the period of practice required is 7 years. As referred to already, these provisions will also govern the appointment of Chamber Presidents in the First-tier Tribunal and Vice Presidents in the Upper Tribunal²⁶. In practice we anticipate that Upper Tribunal appeal/judicial review cases will be heard by judicial members and so in practice it may be that these provisions will largely regulate Chamber President appointments (although as indicated the criteria apply more broadly to legal member appointments).

General debarment provisions applying to legal and ordinary members of the Scottish Tribunals

32. The draft regulations make clear in various places that insofar as a person is applying on the basis of experience gained in past practice in a professional discipline (i.e. surveyor, solicitor, tax professional), the person must not have been debarred or subject to any sanction which would make them ineligible to belong to their professional body had they not ceased to be a member²⁷. The policy intent is that persons subject to such a serious sanction should not be eligible to apply.

²⁵ With reference to the matters set out in paragraphs 6(3) or 6(4) of schedule 3 to the Tribunals Act.

²⁶ Section 26

²⁷ Regulations 2(7), 3(7), 4(5) and 5(5)

 SCOTTISH STATUTORY INSTRUMENTS

2015 No.

TRIBUNALS AND INQUIRIES

The Scottish Tribunals (Eligibility for Appointment) Regulations 2015

Made - - - - 2015

Laid before the Scottish Parliament 2015

Coming into force - - 1st January 2016

The Scottish Ministers make the following Regulations in exercise of the powers conferred by paragraphs 1(2) and 5(2) of schedule 3 to, and paragraph 4(1) of schedule 5 to, the Tribunals (Scotland) Act 2014.^a

Citation and commencement

1.—(1) These Regulations may be cited as the Scottish Tribunals (Eligibility for Appointment) Regulations 2015.

(2) These Regulations come into force on 1st January 2016.

Eligibility for appointment as a legal member of the First-tier Tribunal for Scotland

2.—(1) A person is eligible for appointment as a legal member of the First-tier Tribunal for Scotland (other than a Chamber President in the Tribunal) if the person qualifies under paragraph (2), (3) or (4).

(2) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 5 years, as a solicitor or advocate in Scotland.

(3) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 5 years, as a solicitor or barrister in England and Wales or Northern Ireland.

(4) Subject to sub-paragraph (7), a person qualifies under this sub-paragraph, if the person has had—

(a) previous engagement in practice for a period of not less than 5 years, as—

(i) a solicitor or advocate in Scotland, or

(ii) a solicitor or barrister in England and Wales or Northern Ireland, and

(b) subsequent engagement in any of the activities listed in sub-paragraph (5).

(5) The activities are—

(a) exercising judicial functions in any court or tribunal,

(b) practice or employment as a lawyer of any kind.

(6) The 5 year period referred to in sub-paragraphs (2), (3) and (4)(a) may be calculated on a cumulative or a continuous basis.

^a 2014 asp 10

(7) Previous engagement in practice does not count for the purposes of sub-paragraph (4)(a), if the person has been debarred from the person's professional body or if the person has been subject to any sanction that would have led to such debarment had the person not ceased to belong to the professional body.

Eligibility for appointment as a legal member (other than through office holding) of the Upper Tribunal for Scotland

3.—(1) A person is eligible for appointment as a legal member of the Upper Tribunal for Scotland (without prejudice to a person being a legal member of the Tribunal by virtue of being Vice-President of the Tribunal or by virtue of being a Chamber President in the First-tier Tribunal) if the person qualifies under paragraph (2), (3) or (4).

(2) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 7 years, as a solicitor or advocate in Scotland.

(3) A person qualifies under this sub-paragraph if the person is practising, and has practised for a period of not less than 7 years, as a solicitor or barrister in England and Wales or Northern Ireland.

(4) Subject to sub-paragraph (7), a person qualifies under this sub-paragraph, if the person has had—

(a) previous engagement in practice for a period of not less than 7 years, as—

(i) a solicitor or advocate in Scotland, or

(ii) a solicitor or barrister in England and Wales or Northern Ireland, and

(b) subsequent engagement in any of the activities listed in sub-paragraph (5).

(5) The activities are—

(a) exercising judicial functions in any court or tribunal,

(b) practice or employment as a lawyer of any kind.

(6) The 7 year period referred to in sub-paragraphs (2), (3) and (4)(a) may be calculated on a cumulative or a continuous basis.

(7) Previous engagement in practice does not count for the purposes of sub-paragraph (4)(a), if the person has been debarred from the person's professional body or if the person has been subject to any sanction that would have led to such debarment had the person not ceased to belong to the professional body.

Eligibility for appointment as an ordinary member of the First-tier Tribunal for Scotland (tax experience)

4. —(1) A person is eligible for appointment as an ordinary member of the First-tier Tribunal for Scotland if paragraph (2), (3) or (4) applies to the person.

(2) This paragraph applies to a person who is a member of the Chartered Institute of Taxation.

(3) This paragraph applies to a person who is an accountant who is a member of—

(a) the Institute of Chartered Accountants of Scotland;

(b) the Institute of Chartered Accountants in England and Wales;

(c) the Institute of Chartered Accountants in Ireland;

(d) the Institute of Certified Public Accountants in Ireland;

(e) the Association of Chartered Certified Accountants;

(f) the Chartered Institute of Management Accountants; or

(g) the Chartered Institute of Public Finance and Accountancy.

(4) This paragraph applies to a person who has substantial experience in tax matters and related tax procedures (whether obtained in a business, trade, charity or not-for-profit organisation, or in a profession or in academia).

(5) Paragraph (4) does not apply where a person is a former member of any of the professional bodies listed in paragraph (3), if the person has been debarred from the person's professional body or if the person has been subject to any sanction that would have led to such debarment had the person not ceased to belong to the professional body.

Eligibility for appointment as an ordinary member of the First-tier Tribunal for Scotland (housing or surveying experience)

5. —(1) A person is eligible for appointment as an ordinary member of the First-tier Tribunal for Scotland if paragraph (2) or (3) applies to the person.

(2) This paragraph applies to a person who has substantial relevant housing experience.

(3) This paragraph applies to a person who has substantial relevant surveying experience..

(4) Paragraph (3) or (4) applies to a person (whether the person has obtained the substantial relevant housing or substantial relevant surveying experience in a business, trade, charity or not-for-profit organisation, or in a profession or in academia).

(5) In this regulation—

“Relevant housing experience” means experience in (i) matters relating to landlord and tenant relationships or (ii) housing matters (including as regards private rented sector, letting agency and factoring matters) or (ii) land management matters; and

“relevant surveying experience “ means experience in surveying related to housing and house building as a member or fellow (or former member or fellow) of the Royal Institution of Chartered Surveyors (“RICS”), but such experience does not count as relevant experience where a person is a former member of RICS, if the person has been debarred from RICS or if the person has been subject to any sanction that would have led to such debarment had the person not ceased to belong to RICS.

A member of the Scottish Government

St Andrew's House,
Edinburgh
2015

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set eligibility criteria for appointments as legal members of the First-tier Tribunal for Scotland and Upper Tribunal for Scotland. They also provide eligibility criteria for appointment of ordinary members of the First-tier Tribunal. In the case of the ordinary members the criteria cover experience in tax matters (regulation 4) and experience in housing and surveying matters (regulation 5).

QUESTIONS

Q1. Please let us have your comments on the draft regulations.

Q2. In particular, are you content with the proposed scope of each of regulations 2 to 5?

Q3. Are there any additional criteria you would wish to see prescribed?

Q4. Are there any proposed criteria that you do not wish to see prescribed?



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