

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



## RESPONDENT INFORMATION FORM

**Please Note** this form **must** be returned with your response to ensure that we handle your response appropriately

### 1. Name/Organisation

#### Organisation Name

Faculty of Advocates

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

#### Surname

#### Forename

### 2. Postal Address

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### 3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes  No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

**Please tick ONE of the following boxes**

**Please tick as appropriate**

Yes  No

Yes, make my response, name and address all available

**or**

Yes, make my response available, but not my name and address

**or**

Yes, make my response and name available, but not my address

- (d)** We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

**Please tick as appropriate**

Yes

## QUESTIONS

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

The Faculty welcomes the opportunity to comment on these draft regulations. We welcome the effort to provide a uniform structure for tribunal membership. Our comments are confined to regulations 2 and 3, dealing with eligibility as legal member to each of the tribunal levels. We do so not out of sectional interest (though members of Faculty do hold part-time appointments to Scottish tribunals, as well as part-time and full-time appointments to UK tribunals), but because we feel that we are able to comment directly on practical issues which may arise under those two regulations.

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

See attached paper apart.

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

See answer 2.

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

See answer 2.

## Question 2

The Faculty agrees with much of what is proposed in draft regulations 2 & 3. In particular, we are supportive of the intention to draw the boundaries of the pool of potential candidates as wide as possible. We do, however, have some concerns about whether that policy aim is unequivocally achieved. We also have concerns about the treatment of professional qualifications and specialist knowledge.

Dealing first with entry criteria. The Faculty welcomes the efforts in draft regulations 2(5) and 3(5) to broaden the generic range of professional experience. We do, however, have concerns about an aspect of that and of draft regulations 2(2) and 3(2). In particular, we consider that it is unclear whether the requirement that a person “is practising” envisages that the person will remain in practice for the duration of the appointment. It seems to us that as this regulation is about eligibility, which presumably is a continuing state, on one view that might be a consequence. Likewise, the reference at regulations 2(5)(a) and 3(5)(a) to exercising judicial functions seems to suggest full-time engagement. We see several potential diversity-related problems.

First, practitioners on maternity or paternity breaks, gardening leave, or career breaks are not unambiguously ‘practising’, yet these are a series of groups who are likely to contain individuals well-qualified for and attracted to part-time tribunal appointments for a variety of reasons. We suspect that this is not the intention of the Scottish Government. We suggest that the wording of these paragraphs be considered further.

Secondly, we are aware of a number of existing legal members of tribunals who hold a number of such appointments part-time, but are not otherwise in professional practice. Such persons make a valuable contribution to the work of the tribunals on which they serve; however, it is not unequivocally clear to us that they fall within regulations 2(5)(a) and 3(5)(a). We consider that would be relatively easily addressed by making it clear that the exercise of judicial functions whether part-time or full-time is envisaged.

In relation to qualifications and specialist knowledge two issues arise. First, whether in principle it is appropriate for practitioners with no qualifications or experience in Scots law to be a tribunal convenor/legal member (this is also identified at paragraph 30 of the consultation document). The formulation of regulations 2(2) & (3) and 3(2) & (3) reflects UK tribunal entry qualifications of course, however those are generally dealing with areas where the law to be applied is common across the UK (eg. immigration, current tax jurisdictions, social security and employment law). However, some of the chambers of the Scottish tribunals will be dealing with areas which are very definitely Scots law based (eg. landlord and tenant, land law and mental health), and where an appreciation of the surrounding legal context would be essential to dealing with the caseload of that chamber. To give an example, in the rented housing context, knowledge of the underlying property law, contract law and judicial remedies is required just as much as knowledge of the statutory schemes in respect of which the current PRHP/HOP jurisdiction operates. The Faculty does not consider that the case has been made to extend eligibility to lawyers who do not have Scots professional qualification, certainly at level of generic qualification.

Secondly, we note what is said at paragraph 29 about subject-specific criteria and experience. We entirely understand and agree with the rationale for specifying particular legal experience and aptitude relating to the chamber for which a recruitment is being carried out. However, what is not clear from the draft regulations or the consultation is how this would be squared with so-called cross-ticketing (i.e. authorising legal members of one chamber to sit in another chamber), which is, we understand, likely to be considered once the process of ‘folding in’ existing tribunals to the new structure is more advanced. The Faculty considers that as the regulations seek to address generic qualification criteria, this should be considered further.