

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

EXPLANATORY NOTES

PART 1: TRIBUNALS AND INQUIRIES

Commentary on Sections: Part 1

Section 1: Independence of tribunal judiciary

37. **Section 1** ensures that the duty imposed on the Lord Chancellor and other Ministers of the Crown under the Constitutional Reform Act 2005 (the CRA 2005), to uphold the continued independence of the judiciary, extends to all of the tribunal judges where a tribunal is administered by the Lord Chancellor. To do this, the definition of “the judiciary” in section 3 of the CRA 2005 is amended to make it clear that, so far as they are not already included within that definition, all office-holders listed in Schedule 14 to that Act, and certain additional tribunal office-holders are within that definition.

Section 2 and Schedule 1: Senior President of Tribunals

Section 2

38. **Section 2** creates a new statutory judicial post - that of Senior President of Tribunals. The post is intended to provide unified leadership to the tribunals judiciary. The creation of the post was recommended by Sir Andrew Leggatt in his review.
39. Subsection (1) stipulates that the Senior President is to be appointed by HM the Queen on the recommendation of the Lord Chancellor.
40. The Act creates a number of specific powers and duties for the Senior President, including:
- his concurrence in relation to the chambers structure for the First-tier Tribunal and the Upper Tribunal (and any change in it) (section 7(1));
 - that he may, with the concurrence of the Lord Chancellor, make provision for the allocation of functions between chambers (section 7(9));
 - his duty to report to the Lord Chancellor on matters which the Senior President wishes to bring to the attention of the Lord Chancellor and matters which the Lord Chancellor has asked the Senior President to cover (section 43);
 - his power to make practice directions (section 23);
 - the right to be consulted on the making of fees orders (section 42(5));
 - his concurrence in relation to the making of orders prescribing the qualifications required for appointment of members of the First-tier Tribunal (Schedule 2, paragraph 2(2)) and the Upper Tribunal (Schedule 3, paragraph 2(2));

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- the power to request a judge of the First-tier Tribunal or the Upper Tribunal to act as a judge of those tribunals (Schedule 2 paragraph 6(2); Schedule 3 paragraph 6(2));
 - the duty to maintain appropriate arrangements for training, welfare and guidance of judges and other members (Schedule 2 paragraph 8; Schedule 3 paragraph 9);
 - the duty to co-operate with the Lord Chief Justices of England and Wales and Northern Ireland, and the Lord President in relation to the training, welfare and guidance of the tribunals judiciary (section 47);
 - the power to take oaths of allegiance and judicial oaths (or to nominate someone to do so) from judges and other members of the First-tier and Upper Tribunal (Schedule 2 paragraph 9, and Schedule 3 paragraph 10) and Chamber Presidents, Deputy Chamber Presidents and Acting Chamber presidents (Schedule 4, paragraph 8). Employment tribunal presidents and panel members, and their counterparts in the EAT are covered in Schedule 8 (paragraphs 40 and 44), as are Criminal Injuries Compensation Appeals Panel (CICAP) adjudicators (at paragraph 34);
 - the right to be consulted before the Lord Chancellor appoints a Chamber President from among the ranks of the judiciary (Schedule 4, paragraph 2(1));
 - the power to assign judges and other members to chambers (Schedule 4, paragraph 9);
 - being or nominating a member of the Tribunal Procedure Committee (it is expected that the Senior President or his nominee will chair the Committee) (Schedule 5 paragraph 20);
 - the power to request the appointment of additional members of the Tribunal Procedure Committee (Schedule 5 paragraph 24).
41. Subsection (3) sets out principles that the Senior President has to have regard to when exercising the powers of the office. These criteria are based on the long-standing principles underlying the jurisdiction of tribunals, as originally articulated by the Report of the Committee on Administrative Tribunals and Inquiries in 1957 (the Franks Report).

Schedule 1

42. **Schedule 1** sets out the process for appointing a Senior President and the terms of his office. This is a judicial appointment. The appointment is made by Her Majesty the Queen (section 2(1)), in line with the practice for senior judicial appointments generally. Her Majesty acts on the recommendation of the Lord Chancellor.
43. **Paragraph 1** provides that if there is a vacancy, the Lord Chancellor must recommend a person for appointment to the office unless the Lord Chief Justice agrees that it may remain unfilled.
44. **Paragraph 2** provides that there are two alternative routes for the Lord Chancellor to make a recommendation in relation to the appointment of the Senior President. The first is where the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland agree on the nomination of a Lord or Lady Justice of Appeal or a member of the Inner House of the Court of Session as a suitable candidate for appointment. In such circumstances the Lord Chancellor must recommend the person for appointment unless that person refuses the recommendation or does not agree to the recommendation within a specified time or is otherwise not available to be recommended within a certain time. The second route applies when there is no such agreement. In those circumstances the Lord Chancellor must ask the Judicial Appointments Commission to select someone for recommendation for appointment.

45. **Paragraphs 3 to 5** set out the process for selection by the Judicial Appointments Commission. It follows as closely as is appropriate the criteria and process for appointment of Heads of Division of the High Court under sections 67 to 75 of the CRA 2005.
46. **Paragraph 3** provides that the eligibility requirement for the Senior President is the same as the eligibility requirement for a Lord or Lady Justice of Appeal, once amended by paragraph 13(2) of Schedule 10 to the Act.
47. **Paragraph 4** inserts seven new sections into the CRA 2005. These sections create a process for the selection of the Senior President by the Judicial Appointments Commission which is the same as the process for appointment of a Head of Division of the High Court, except that the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland are consulted, because the Senior President has United Kingdom-wide responsibilities. The selection panel for the appointment of the Senior President consists of the Lord Chief Justice, or his nominee, a person designated by the Lord Chief Justice, the Chairman of the Commission or his nominee and a lay member of the Commission designated by the third member. The person designated by the Lord Chief Justice is intended to be a present or former office holder in tribunals to bring to the selection panel direct knowledge or experience of the distinctive nature of tribunals in the justice system.
48. **Paragraphs 6 to 10** set out the terms of office for the Senior President. The Senior President may be appointed either for a fixed term or for an indefinite period subject only to the retirement provisions of the Judicial Pensions and Retirement Act 1993. The Senior President may only be removed from office by Her Majesty on an address presented to Her by both Houses of Parliament.
49. The Senior President may resign at any time. If the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland agree that the holder of the office is disabled by permanent infirmity and is incapacitated from resigning, the Lord Chancellor may instead declare the holder to have vacated the office.
50. **Paragraph 11** provides that on appointment, the Senior President must take the oath of allegiance and the judicial oath (as set out in the Promissory Oaths Act 1868), in the presence of the Lord Chief Justice of England and Wales or another holder of high judicial office nominated by the Lord Chief Justice.
51. **Paragraphs 12 to 14** describe the powers and responsibilities of the Senior President in relation to making representations to Parliament and Ministers about matters he considers to be of importance to tribunal judiciary and other members and matters relating to the administration of justice by tribunals. Paragraph 14 makes it clear that responsibility for representing the views of tribunal judiciary and other members to Parliament, and to the Lord Chancellor and Ministers of the Crown generally, rests with the Senior President of Tribunals.

Section 3: The First-tier Tribunal and the Upper Tribunal

52. **Section 3** provides for the creation of a First-tier Tribunal and an Upper Tribunal, each consisting of judges (i.e. legally qualified members) and other members, and presided over by the Senior President of Tribunals. It is intended that the Upper Tribunal will primarily, but not exclusively, be an appellate tribunal from the First-tier Tribunal. The new tribunals are intended to be adaptable institutions, able to take on any existing or new tribunal jurisdictions. So in the future, when Parliament decides to create a new appeal right or jurisdiction, it will not have to create a new tribunal to administer it. The Upper Tribunal is a superior court of record, like the High Court and the Employment Appeal Tribunal.

Section 4 and Schedule 2: Judges and other members of the First-tier Tribunal

53. **Section 4** and Schedule 2 set out provisions relating to judges and other members of the First-tier Tribunal.

Section 4

54. **Section 4** lists those persons who are to be the judges and other members of the First-tier Tribunal.
55. At present most tribunals include legally qualified members and members without a legal qualification. The qualification requirements which apply to the lawyers, who often chair the tribunal hearing a case, are varied. The range of non-legal members is very wide and includes members such as medical practitioners, accountants, people with experience of disability issues, people with experience of the armed services and so-called “lay” members. This structure will continue in the new tribunals, with the legally qualified members of the First-tier Tribunal being called judges of the First-tier Tribunal.
56. Judges and other members of the new tribunals will either be transferred in from existing tribunals, be appointed as such (“appointed judges/members”), or hold their office in the First-tier Tribunal by virtue of another office which they hold. So, for example, a circuit judge will automatically be a member of each of the First-tier Tribunal or the Upper Tribunal (by virtue of sections 4(1)(c), 5(1)(g) and 6). This will enable judges who have the appropriate expertise and experience, from holding judicial office in courts or other tribunals, to be brought into the new tribunals to help to deal with the tribunals’ work. Similarly, some members of other tribunals without legal qualifications will automatically be members of the new tribunals. The same principle will apply within the structure of the new tribunals, so that, for example, a judge of the Upper Tribunal will automatically be a judge of the First-tier Tribunal (section 4(1)(c)).

Schedule 2

57. **Paragraph 1(2)** provides that a person is eligible for appointment as a judge of the First-tier Tribunal if he has a legal qualification and 5 years’ legal experience since qualifying.
58. But in addition, persons may be appointed if, in the Lord Chancellor’s opinion, they have legal experience which would make them as suitable for appointment as if they had the relevant legal qualifications. This provision, which is based on current eligibility requirements in relation to the Asylum and Immigration Tribunal and the Mental Health Review Tribunal, recognises that in the specialised fields in which tribunals operate, the necessary skills and knowledge may have been acquired by someone who does not have a professional qualification in the United Kingdom, such as a legal academic or someone qualified in a European or Commonwealth jurisdiction.
59. **Paragraph 1(1)** and **2(1)** state that appointed judges and members of the First-tier Tribunal are appointed by the Lord Chancellor. Except where a member of an existing tribunal is transferred into the new tribunals under section 31(2), appointment takes place after selection by the Judicial Appointments Commission.
60. **Paragraph 3** provides that appointed and transferred-in judges and other members of the First-tier Tribunal are protected by a prohibition on removal without the concurrence of the Lord Chief Justice of England and Wales, or if appropriate, the Lord President of the Court of Session or Lord Chief Justice of Northern Ireland.
61. **Paragraph 4** ensures that appointed and transferred-in judges and other members of the First-tier Tribunal who are appointed on a salaried as opposed to a fee paid basis have the further protection of a provision that they may be only removed by the Lord Chancellor on the ground of inability or misbehaviour.

62. Both paragraphs 3 and 4 are intended to safeguard the independence of the tribunals.
63. Paragraphs 6 and 7 provide for ex-officio judges and members of the First-tier Tribunal. As mentioned above, the judges and members of the First-tier Tribunal will be made up partly of ex officio judges and members, i.e. those who hold office in the new tribunals by virtue of other offices they hold in the courts or tribunals. The deployment of those ex officio judges and members is to be under the control of the Senior President of Tribunals, in conjunction, in the case of judges from the courts, with the Lord Chief Justice of England and Wales, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland. Part 2 of Schedule 4 deals with the assignment of these judges and members to chambers.
64. Paragraph 8 ensures that the Senior President of Tribunals has responsibility for maintaining arrangements for the training, welfare and guidance of judges and other members of the First-tier Tribunal.
65. Paragraph 9 makes provision for judges and members of the First-tier Tribunal to take the oath of allegiance and the judicial oath before the Senior President of Tribunals, or before an eligible person nominated by the Senior President. The requirement under paragraph 9 does not apply, however, in the case of transferred-in judges or transferred-in other members who have already taken the required oaths after accepting another office. Judges and members who carry out functions mainly or wholly in Northern Ireland may be required to take instead the oath, or the affirmation and declaration, set out in section 19 of the Justice (Northern Ireland) Act 2002.

Section 5 and Schedule 3: Judges and other members of the Upper Tribunal

66. Section 5 and Schedule 3 set out provisions relating to the membership of the Upper Tribunal.

Section 5

67. Section 5 lists those persons who are to be the judges and other members of the Upper Tribunal. Judges and members of an existing tribunal transferred into the Upper Tribunal under section 31(2) will automatically become judges and members of the Upper Tribunal (and of the First-Tier Tribunal) without further appointment.

Schedule 3

68. Paragraph 1(2) provides that a person is eligible for appointment as a judge of the Upper Tribunal if he has 7 years of post-qualification experience (this is a standard qualification for judicial office). In addition, a person may be appointed to the Upper Tribunal if, in the Lord Chancellor's opinion, he has gained experience in law which makes him as suitable for appointment as if he satisfied the 7-year qualification. Appointed judges of the Upper Tribunal are appointed by the Queen, on the recommendation of the Lord Chancellor. Appointment takes place after selection by the Judicial Appointments Commission.
69. Paragraph 3 ensures that appointed and transferred-in judges and other members of the Upper Tribunal are protected by a prohibition on removal unless there is first concurrence of the Lord Chief Justice of England and Wales, or if appropriate, the Lord President of the Court of Session or Lord Chief Justice of Northern Ireland.
70. Paragraph 4 provides that appointed and transferred-in judges and other members of the Upper Tribunal appointed on a salaried basis have the further protection that they may be removed only by the Lord Chancellor on the ground of inability or misbehaviour.
71. Both paragraphs 3 and 4 ensure that the independence of the tribunals is safeguarded.
72. Paragraph 6 allows for judges of the Upper Tribunal to be made up partly of judges by request of the Senior President of Tribunals. Their deployment is to be under the

control of the Senior President of Tribunals in conjunction with the Lord Chief Justice of England and Wales, or if appropriate, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland.

73. **Paragraph 7** provides the Lord Chancellor with the power to appoint deputy judges of the Upper Tribunal. A person must have the same legal qualifications for appointment as a deputy judge as for appointment as a judge of the Upper Tribunal. The provision will enable the appointment to the Upper Tribunal of members with particular areas of expertise.
74. **Paragraph 9** ensures that the Senior President of Tribunals has responsibility for maintaining arrangements for the training, welfare and guidance of judges and other members of the Upper Tribunal.
75. **Paragraph 10** makes provision for judges and members of the Upper Tribunal to take the oath of allegiance and the judicial oath before the Senior President of Tribunals, or before an eligible person nominated by the Senior President. The requirement under paragraph 10 does not apply, however, in the case of transferred-in judges or transferred-in other members who have already taken the required oaths after accepting another office. Judges and members who carry out functions mainly or wholly in Northern Ireland may be required to take instead the oath, or the affirmation and declaration, set out in section 19 of the Justice (Northern Ireland) Act 2002.

Section 6: Certain Judges who are also judges of First-tier Tribunal and Upper Tribunal

76. **Section 6** lists which judges are to be considered as members of both the First-tier Tribunal and the Upper Tribunal within England, Wales, Scotland and Northern Ireland by virtue of their judicial office in the courts. Temporary office holders or deputies are not included within the list.

Section 7: Chambers: Jurisdiction and Presidents and Schedule 4: Chambers and Chamber Presidents: further provision

77. **Section 7** and **Schedule 4** make provision for the organisation of the First-tier and Upper Tribunal into Chambers.

Section 7

78. Currently, many separate tribunals deal with different jurisdictions. When these tribunals are replaced by just two tribunals, it will be necessary for the jurisdictions in the new tribunals to have an organisational structure. Section 7 provides for the establishment of boundaries for the jurisdictions within the First-tier and Upper Tribunal through the creation of chambers. The tribunals will bring together a wide range of specialist jurisdictions. It would dilute expertise and damage the service provided to the public if they were organised on the basis that all judges and members can deal with all kinds of case. Instead, jurisdictions will be grouped so that similar work is dealt with by judges and members with the relevant skills to deal with it. The chambers system is intended to be flexible so that changes can be made easily to those boundaries as the workload of the tribunals changes.
79. Subsection (1) provides that the Lord Chancellor, with the concurrence of the Senior President, will have the power to make provision for the organisation of each of the First-tier and Upper Tribunal into a number of Chambers. It makes provision for the structure of the tribunals to change over time: chambers may be merged and new chambers may be created
80. Jurisdictions within the First-tier and Upper Tribunals will be organised into chambers so that jurisdictions which are similar in nature are grouped together. The chamber structure is intended to facilitate judicial deployment (as judiciary with expertise across

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the chamber can be deployed on more than one type of case). The chamber structure is also intended to facilitate judicial development and the preservation of expertise where appropriate.

81. Subsection (2) states that for each chamber within the First-tier Tribunal and Upper Tribunal there must be a person, or two persons, to preside over that chamber. A person cannot preside over more than one chamber within the First-tier Tribunal at the same time. Likewise, a person cannot preside over more than one chamber within the Upper Tribunal at the same time, although they can preside over one chamber of the First-tier Tribunal and over one chamber of the Upper Tribunal at the same time (section 7(3)).
82. Subsection (4) confers the title Chamber President on someone appointed to preside over a chamber.
83. Subsection (9) provides for the Senior President and the Lord Chancellor, each with the concurrence of the other, to be able to vary by order the distribution of functions between the chambers in either the First-tier Tribunal or the Upper Tribunal. Chambers may be constructed on either a functional or a geographical basis, or a combination of the two.
84. It seems likely that Chambers will evolve over time, in response to:
 - the transfer of functions of other tribunals to the First-tier or Upper Tribunals;
 - changes in original decisions (for example as the social security benefit system evolves);
 - the creation of new areas of appeal (for example as has recently occurred in connection with the regulation of licensed gambling);or in relation to the prevalence of a particular jurisdiction at a point in time, and other business and user needs. This may involve any or all of the following:
 - Establishment of new chambers;
 - Addition of jurisdictions to existing chambers;
 - Transfer of functions and/or jurisdictions between chambers.

Schedule 4

85. Schedule 4 makes further provision about chambers and Chamber Presidents.
86. Paragraphs 1 and 5 provide for the eligibility requirements to be a Chamber President or a Deputy Chamber President to be the same as those for appointment as a judge of the Upper Tribunal under Schedule 3.
87. Paragraphs 2 and 3 deal with the appointment of Chamber Presidents. This is a judicial leadership role involving particular skills and experience and as such it is a separate appointment under the Act. A Chamber President may (although need not) be drawn from the judiciary of the High Court or the Court of Session in Scotland or Court of Appeal in Northern Ireland. Before making an appointment from amongst the judges of those courts, the Lord Chancellor must first consult the Senior President of Tribunals. If the Lord Chancellor decides that the appointee should be from the senior judiciary, he must seek a nomination from the Lord Chief Justice of England and Wales or Northern Ireland, or the Lord President of the Court of Session. If a suitable candidate is not forthcoming, selection will be made by the JAC. The office of Chamber President will be added to Part 3 of Schedule 14 to the CRA 2005 for this purpose (Schedule 8 paragraph 66).
88. Paragraph 4 permits a Chamber President to delegate functions of his office to any judge or other member of the First-Tier or Upper Tribunal, or to a member of staff.

89. [Paragraph 5](#) provides for the appointment of Deputy Chamber Presidents. Deputy Presidents are appointed by the Lord Chancellor after consultation with the Senior President of Tribunals and are intended to be available to take on functions delegated to them by the Senior President or the Chamber President. The appointment process for Deputy Chamber Presidents mirrors that for Chamber Presidents.
90. [Paragraph 6](#) allows for the Senior President of Tribunals to appoint Acting Chamber Presidents to cover a temporary vacancy in the office of Chamber President.
91. [Paragraph 7](#) places a duty on a Chamber President to make arrangements for the issuing of guidance (to for example judges, members and users) on changes to the law and practice relating to the jurisdictions assigned to his chamber.
92. [Paragraph 8](#) provides for persons appointed as Chamber Presidents, or Deputy or Acting Chamber Presidents, to take the oath of allegiance and the judicial oath before the Senior President of Tribunals, or before an eligible person nominated by the Senior President
93. [Paragraph 9](#) makes it clear that the assigning of judges and other members to chambers of the Tribunals is a function of the Senior President.
94. [Paragraphs 10 to 12](#) provide that Chamber Presidents and Deputy Chamber Presidents are deemed to be assigned to the chamber(s) over which they hold office. Every other judge or member who is appointed under Schedule 2 or 3, or transferred in under section 31(2), must be assigned to at least one chamber. The process of assignment is intended to be flexible, informal and transparent. It is intended to be based upon the principle of deploying judges and members who have, or are able to acquire, the necessary skills and experience to meet identified business needs of the tribunal.
95. [Paragraph 13](#) obliges the Senior President to publish his policy on assignments of tribunal judges and members to chambers. This is intended to ensure openness and transparency of the system of assignment. The policy must ensure that appropriate use is made of the knowledge and experience of the judges and other members of the new tribunals. The policy must also ensure that a chamber which involves the application of the law of Scotland or Northern Ireland has enough members with knowledge and experience of those jurisdictions.
96. To ensure appropriate executive accountability to Parliament for the process of assigning members, and to take into account any resource implications, the concurrence of the Lord Chancellor will be required before the policy can be adopted.
97. [Paragraph 14](#) provides for the allocation of members to hear individual cases. This is a judicial leadership function and therefore a matter for the Senior President. However, this is subject to the panel composition requirements set by the Lord Chancellor in an order under paragraph 15.
98. [Paragraph 15](#) requires the Lord Chancellor to set requirements, on a jurisdiction by jurisdiction basis, for the number of judges and other members to decide particular appeals. This order is made by the Lord Chancellor to enable him to take account of resource implications, and to provide parliamentary scrutiny.

Section 8: Senior President of Tribunals: power to delegate

99. [Section 8](#) enables the Senior President to delegate any of his functions to any judge or member of the First-tier or Upper Tribunal or any member of staff, with the exception of his function under section 7(9) of allocating tribunal functions between the chambers of the First-tier and Upper Tribunals by order made with the concurrence of the Lord Chancellor.

Sections 9 and 10: Review of decisions of First-tier and Upper Tribunals

100. Sections 9 and 10 provide powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter. This is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal. The power has been provided in the form of a discretionary power for the Tribunal so that only appropriate decisions are reviewed. This contrasts with cases where an appeal on a point of law is made, because, for instance, it is important to have an authoritative ruling.
101. Under section 9, the First-tier Tribunal may review a decision made within the tribunal, either of its own initiative or on application by any party who has a right of appeal in respect of the decision. The tribunal has the power to correct accidental errors in the decision or in a record of the decision, amend the reasons given for the decision or set aside the decision. If a decision of the First-tier Tribunal is set aside by the First-tier Tribunal, it must either re-decide the matter concerned, or refer the matter to the Upper Tribunal. If the latter option is taken, the Upper Tribunal will then be responsible for re-deciding the matter.
102. No decision of the First-tier Tribunal may be reviewed more than once, and a decision of the tribunal not to review a decision is not reviewable or appealable. Further challenge of a decision beyond the single review may only be made by appeal on a point of law.
103. Section 10 provides corresponding review powers for the Upper Tribunal - the only difference being that if the decision is set aside by the Upper Tribunal, it must then re-decide the matter concerned (subsection (5)).
104. Sections 9(3) and 10(3) enable these wide review powers to be limited by making them subject to Tribunal Procedure Rules. They allow Rules to:
 - exclude from review decisions of a description specified in the rules, whether by the tribunal of its own initiative, or on application by the parties;
 - for decisions of a description specified in the rules, only allow review by the tribunal of its own initiative;
 - specify in the rules the grounds on which an application for review may be brought and the grounds on which the tribunal can review of its own initiative. These could be the same or different grounds (e.g. there may be no specified grounds for the tribunal to review of its own initiative, but specified grounds upon which a party could make an application).
105. In summary, an exclusion or ground specified in the Rules may apply only to applications from parties or also to the tribunal acting of its own initiative (e.g. rules may state that parties in social security cases are excluded from applying for review but the tribunal may review of its own initiative in such cases).

Section 11: Right to appeal to Upper Tribunal

106. A party to a case generally has a right of appeal on a point of law from the First-tier Tribunal to the Upper Tribunal. The right of appeal is subject to permission being given, following application by the party, by either the First-tier Tribunal or the Upper Tribunal. But there is no right of appeal against a decision which is “excluded”. Excluded decisions are listed in subsection (5). The Lord Chancellor has a limited power to add to the list by order under subsection (5)(f).
107. The basic pattern of appeal rights will for the most part remain as they are now when jurisdictions transfer to the new tribunal. Where there is currently a right of appeal, it will also exist after transfer. Where decisions currently carry no appeal rights, the transfer of the jurisdiction to the First-tier Tribunal will give rise to new onward-appeal

rights unless an order excluding such rights is made under section 11(5)(f) in reliance on section 11(6)(b).

108. In some jurisdictions it is not possible to appeal from the decision of a tribunal, even on a point of law. Equally, in some jurisdictions, tribunals hear appeals on a range of grounds which are not restricted to a point of law. Where there are currently no appeal rights in transferring jurisdictions the continuation of that exclusion will fall to be reviewed in deciding whether to exercise the power under section 11(5)(f) and (6)(b).
109. Subsection (6) limits the Lord Chancellor's power to add to the list of excluded decisions. As a result, the power can be used for two purposes only. The first purpose is the preservation of existing appeal rights where those rights are, or include, something other than a right to appeal on a point of law. The second purpose is the preservation, in cases where there is currently no appeal right, of the existing position.
110. Subsection (8) empowers the Lord Chancellor to specify who may or may not be treated as being a party to a case for the purposes of making an appeal from the First-tier Tribunal to the Upper Tribunal. In some cases it will be appropriate for a person who was neither the person making the original appeal to the First-tier Tribunal, nor the respondent to the original appeal, to make an onward appeal to the Upper Tribunal. At present, for instance, some rights of appeal under social security legislation to the Social Security and Child Support Commissioners are not limited to the claimant and the Secretary of State, but may include trades unions and claimants' spouses.
111. Existing provisions in respect of who may be a party to a case for the purposes of making an appeal from the First-tier to the Upper Tribunal are expected to be preserved at the point of transfer. The power under subsection (8) may also be used in the future as new appeal rights are introduced.
112. This power is subject to affirmative resolution procedure (see section 49).

Section 12: Proceedings on appeal to Upper Tribunal

113. **Section 12** provides for the Upper Tribunal's powers when it determines that an error has been made on a point of law by the First-tier Tribunal. The Upper Tribunal may set aside the decision of the First-tier Tribunal; if it does it must either remit the case back to the First-tier Tribunal with directions for its reconsideration, or make the decision which it considers should have been made. If it takes the latter option it can make findings of fact. If the Upper Tribunal sends the case back to the First-tier Tribunal it may direct that a different panel reconsiders the case. The Upper Tribunal may also give procedural directions in relation to the case. If the Upper Tribunal decides that the error of law does not invalidate the decision of the First-tier Tribunal it can let that decision stand.

Section 13: Right to appeal to Court of Appeal etc

114. **Section 13** provides the basis on which appeals can be made to the Court of Appeal in England and Wales or Northern Ireland or the Court of Session in Scotland. Appeals may be made on any point of law with permission either from the Upper Tribunal or the relevant appellate court (see subsection (11)). Certain decisions are excluded and the Lord Chancellor can under subsection (8)(f) add to the list, but subject to the same constraints as in section 11.
115. Those constraints are set out in subsection (9). As a result, the power to add to the list of excluded decisions can be used for two purposes only. The first purpose is the preservation of existing appeal rights where those rights are, or include, something other than a right of appeal on a point of law. The second purpose is the preservation, in cases where there is currently no appeal right, of the existing position.
116. Under subsection (6) the Lord Chancellor may by order restrict appeals to the Court of Appeal to cases where the court or the Upper Tribunal considers that the proposed appeal would raise some important point of principle or practice or that there is some

other compelling reason for the appeal to be heard. The intention is to restrict second appeals on the same point unless there is wider public interest, i.e. where a prospective appellant has had their case considered by both the First-tier Tribunal and the Upper Tribunal. The criteria set out in this subsection are the same as the criteria applied by the Court of Appeal in considering second appeals from the High Court or county court (see the Access to Justice Act 1999, section 55(1)).

117. The exercise of the power under the subsection is subject to the affirmative resolution procedure (see section 49). Subsection (6) does not apply to appeals to the Court of Session.
118. Subsections (11) to (13) require the Upper Tribunal to specify the relevant appellate court (see subsection (11)). This provision is intended to deal with situations where it is not obvious which is the appropriate appellate court, e.g. where an appellant has moved from Scotland to England or vice versa, or in order that linked cases can be dealt with in the same court.
119. Subsection (14) empowers the Lord Chancellor to specify who may or may not be treated as being a party to a case for the purposes of making an appeal from the First-tier Tribunal to the Upper Tribunal (see the note above on section 11(8)).
120. Subsection (15) enables rules of court to specify the time within which an application for permission (or leave) may be made for a proposed appeal from the Upper Tribunal to the relevant appeal court. Any such rules for England and Wales will be made by the Civil Procedure Rules Committee.

Section 14: Proceedings on appeal to Court of Appeal etc

121. Where the appellate court determines that the Upper Tribunal has made an error of law, it has power to set aside the decision and either send the case back to the Upper Tribunal to be redecided (or, where the decision of the Upper Tribunal was on an appeal or reference from another tribunal or some other person, to that other tribunal or person, with direction for its reconsideration), or to make the decision which it considers the Upper Tribunal (or the other tribunal or person) should have made. Under subsection (3), the appellate court may direct that the persons chosen to reconsider the case are not those who made the decision which gave rise to the appeal. It may also give procedural directions in connection with the reconsideration of the case.

“Judicial Review” Sections 15 to 21

122. Tribunals currently have no powers of judicial review. Sections 15 to 21 create a statutory regime which enables the Upper Tribunal to exercise judicial review powers in appropriate cases. This will allow the parties to have the benefit of the specialist expertise of the Upper Tribunal in cases similar to those with which the Upper Tribunal routinely deals in the exercise of its statutory appellate jurisdiction. These provisions do not alter the inherent or statutory jurisdiction of the High Court (as amended by section 141), except as a result of the amendments made by section 19.
123. There will be two situations in which the Upper Tribunal will be able to use these powers in cases arising under the law of England and Wales or of Northern Ireland. The first is where a direction has been made by the Lord Chief Justice or his delegate with the agreement of the Lord Chancellor, specifying a class of case to be dealt with by the Upper Tribunal rather than the High Court. The second is where the High Court orders the transfer of an individual case because it considers it just and convenient to do so in cases arising under the law of England and Wales or of Northern Ireland (but it will not be possible for cases to be transferred to the Upper Tribunal if they involve immigration or nationality matters).

Section 15: Upper Tribunal's "judicial review" jurisdiction

124. **Section 15** confers power on the Upper Tribunal to grant certain forms of relief in the same way as the High Court on an application for judicial review. This section needs to be read alongside sections 16 and 18, which set out the circumstances in which the Upper Tribunal has jurisdiction.
125. Where it has jurisdiction, the Upper Tribunal may grant a mandatory order (an order that the respondent does something); a prohibiting order (an order that the respondent stops doing something); a quashing order (an order setting aside a decision); a declaration; or an injunction. These remedies have the same effect as if made by the High Court. In determining whether to grant a remedy, the Tribunal must have regard to the principles of judicial review that would apply in the court from which jurisdiction has been delegated. Therefore the Upper Tribunal's powers are similar to those of the High Court.

Section 16: Application for relief under section 15(1)

126. Because the Upper Tribunal's powers are similar to those of the High Court in judicial review cases, the Upper Tribunal's powers are subject to similar conditions. Therefore it is necessary to have permission to apply to the Upper Tribunal to exercise its judicial review jurisdiction. This may not be granted if the applicant has insufficient interest in the disputed matter. The Upper Tribunal may also refuse permission, or refuse a remedy, if there has been delay in making an application.
127. Awards made by the Upper Tribunal in exercising its judicial review jurisdiction may be enforced as if they were an award of the High Court.

Section 17: Quashing orders under section 15(1): supplementary provision

128. **Section 17** makes further provision as to the powers of the Upper Tribunal if it decides to grant a quashing order. If it quashes a decision it may also remit the matter for further consideration or substitute its own decision. The Upper Tribunal's powers are similar to the High Court's (see section 141).

Section 18: Limits of jurisdiction under section 15(1)

129. **Section 18** sets out the conditions that need to be met for the Upper Tribunal to have power to deal with an application under section 15 for relief, or an application for permission to apply for relief.
130. Subsection (2) stipulates that four conditions must be met before the tribunal may decide the application. These are set out in subsections (4) to (8). If these conditions are not met, the tribunal must by order transfer the application to the High Court (subsection (3)).
131. The first condition (subsection (4)) is that the applicant in question is only seeking a remedy that the Upper Tribunal is able to grant.
132. The second condition (subsection (5)) is that the application does not call into question anything done by the Crown Court. This is because it would be anomalous to give a tribunal, a superior court of record, supervisory powers over another superior court of record.
133. The third condition (subsection (6)) is that the application falls within a specified class of case. The class is designated by a direction made by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor. By virtue of subsection (7), the power to give such directions includes the power to vary or revoke directions that are made, and the power to make different provision for different circumstances.
134. The fourth condition (subsection (8)) is that the judge presiding at the hearing of the application is either a judge listed in paragraph (a) of that subsection or a person within paragraph (b) of that subsection.

135. Subsection (9) stipulates that where an application is transferred to the High Court under subsection (3) above, it must be treated as if it had been made to the High Court in the first place. Under subsection (10), Rules of Court may be made to enable applications, permission or leave to be treated as if they had been made by the High Court. Any such rules for England and Wales will be made by the Civil Procedure Rules Committee.

Section 19: Transfer of judicial review applications from High Court

136. **Section 19** amends the Supreme Court Act 1981 and the Judicature (Northern Ireland) Act 1978 to complement sections 15 to 18. As a result, certain applications for judicial review will have to be transferred to the Upper Tribunal where that class of case has been designated by a direction. In addition, the High Court may transfer to the Upper Tribunal individual cases that do not fall within a class specified under section 18(6). However, cases relating to immigration and nationality matters cannot be transferred in exercise of this discretionary transfer power.

Section 20: Transfer of judicial review applications from the Court of Session

137. **Section 20** makes provision for the Court of Session to transfer applications for judicial review to the Upper Tribunal. Applications cannot be transferred if they relate to immigration or nationality matters, or if they relate to devolved matters. Also, an application can only be transferred if it does not seek anything other than an exercise of the supervisory jurisdiction of the Court of Session. Subject to those three points, an application will have to be transferred if it falls within a class specified by act of sederunt made with the consent of the Lord Chancellor, and may be transferred even if it does not fall within such a class.

Section 21: Upper Tribunal's "judicial review" jurisdiction: Scotland

138. **Section 21** confirms that the Upper Tribunal will decide applications transferred to it from the Court of Session under section 20 and that the Upper Tribunal has the same powers of judicial review in such cases as the Court of Session.

Section 22 and Schedule 5: Tribunal Procedure Rules

Section 22

139. At present, each tribunal has its own rules, and in many tribunals there are multiple sets of rules. Rule-making powers usually rest with the Lord Chancellor or the Secretary of State. They are usually subject to parliamentary procedure, and the Council on Tribunals must be consulted, but there is no standard form or approach, and no statutory requirement to consult stakeholders. In the courts, rules are made by rule committees with judicial and practitioner membership under a unified set of powers, allowing for consistency in the development of procedure. The intention is to replicate this arrangement for the new tribunals.
140. **Section 22** provides for the power to make procedural rules for the new tribunals. Subsection (4) states the overriding objective to be followed by the Tribunal Procedure Committee when it makes Tribunal Procedure Rules. This is similar to the overriding objective governing the Civil Procedure Rules. The purpose of the overriding objective is to ensure that the Tribunal Procedural Committee observes certain fundamental principles when exercising its powers to make procedural rules, such as, securing that justice is done in proceedings before a tribunal and that the tribunal system is accessible and fair.

Schedule 5

141. **Schedule 5** makes provision for (Part 1) what the tribunal procedural rules may contain, (Part 2) the creation of a Tribunal Procedure Committee with responsibility for making such rules, (Part 3) the process for making them and (Part 4) the power to amend primary

legislation in pursuance of a rule change. It is expected that the Committee will develop a wide-ranging programme of work.

142. [Part 1](#) of Schedule 5 sets out matters which may be covered by Tribunal Procedure Rules. It empowers the Tribunal Procedure Committee to make tribunal procedure rules which include provisions in respect of:
- The exercise of concurrent functions (paragraph 2)
 - Delegation to staff (paragraph 3)
 - Time limits (paragraph 4)
 - Repeat applications (paragraph 5)
 - The tribunal acting of its own initiative (paragraph 6)
 - The extent to which matters may be decided without a hearing and whether a hearing may be public or private (paragraph 7)
 - Proceedings without prior notice (paragraph 8)
 - Representation (paragraph 9)
 - Evidence and witnesses, including provisions relating to the payment of expenses for those attending hearings (paragraph 10)
 - Use of information (paragraph 11)
 - Costs and expenses (paragraph 12)
 - Set-off and interest (paragraph 13)
 - Arbitration (paragraph 14)
 - Correction of decisions and setting aside of decisions on procedural grounds (paragraph 15)
143. This is not an exhaustive list and does not limit the broad power in section 22(1) to make procedural rules. Rather, the Tribunal Procedure Committee will exercise its judgement, within the process set out in Part 3 of Schedule 5, to determine which rules are needed in each jurisdiction. It is not intended that each jurisdiction will have rules that cover every aspect listed. Rather the list in Part 1 includes matters which could be considered an extension of the general provisions in section 22.
144. [Paragraph 15](#), which deals with the correction of decisions and the setting aside of decisions on procedural grounds, does not enable rules to restrict the review powers in sections 9 and 10. Rather, this paragraph allows for rules to allow certain matters to be reviewed otherwise than by a tribunal under sections 9 and 10. For example rules made in reliance on paragraph 15 could provide for a member of staff to correct an accidental error.
145. [Part 2](#) of Schedule 5 provides for the membership of the Tribunal Procedure Committee. The provisions governing the membership and responsibility for appointing members of the Tribunal Procedure Committee are loosely modelled on those for the rule committees making rules of court but are more flexible because of the diverse nature of tribunals. The Committee is intended to consist of core members and additional members appointed as and when required to provide jurisdiction-specific knowledge.
146. The core membership consists of the Senior President or a person nominated by him, three people with experience of practice in tribunals or giving advice to persons involved in tribunal proceedings, a person nominated by the Administrative Justice and Tribunals Council, a judge from each of the tribunals, a tribunal member and a person with experience in and knowledge of the Scottish legal system. The Lord

Chancellor's role is limited to selecting persons with experience of tribunal proceedings or practice and appointing the member selected by the Administrative Justice and Tribunals Council. Consistent with the Concordat, the selection of judicial members falls to either the Lord Chief Justice or the Lord President.

147. [Paragraph 24](#) provides that any additional members are appointed (at the request of the Senior President of Tribunals) by the Lord Chief Justice of England and Wales, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland. It is expected that additional members will usually be members of the judiciary. The additional members are intended to bring specialist knowledge to the Committee when discussing particular matters.
148. Under paragraph 25, the Lord Chancellor may make changes to the composition of the Committee, but only with the concurrence of the Lord Chief Justice of England and Wales. The concurrence of the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland is necessary where such a change would affect a member appointed to the committee by them. The composition of the Tribunal Procedure Committee may need to vary depending on the jurisdiction for which it is making rules and as jurisdictions transfer in.
149. [Part 3](#) of Schedule 5 details the process by which Tribunal Procedure Rules are to be made. This is consistent with the process for making Civil, Family and Criminal Procedure Rules. The Committee is required to consult before rules are made. In order for the rules to be submitted to the Lord Chancellor they must be approved by the Committee. The Lord Chancellor's powers once rules are submitted to him are limited to powers to allow or disallow. However, the Lord Chancellor does have the power to specify a purpose which must be achieved by rules. This is to ensure that, although the Tribunal Procedure Committee is independent, the Lord Chancellor is able to set objectives for the rules.
150. Once allowed by the Lord Chancellor, rules made under this process are subject to negative resolution procedure.
151. [Part 4](#) of Schedule 5 gives the Lord Chancellor power to amend, repeal or revoke any Act in pursuance of a rule change. This power is based upon the provisions in the Civil Procedure Act 1997. An order exercising this power is subject to affirmative resolution procedure. The aim of this provision is to ensure that tribunals operate smoothly and without conflicting with legislation on the statute book.

Section 23: Practice directions

152. [Section 23](#) provides the Senior President with the statutory authority to supplement Tribunal Procedure Rules by means of practice directions. These directions may (for example) take the form of guidance, interpretation of the law, matters of precedent or the delegation of judicial functions to senior members. The giving of practice directions is one of the functions that the Senior President may choose to delegate to Chamber Presidents under section 8. Following the Concordat, practice directions made either by the Senior President or a Chamber President will usually require the Lord Chancellor's approval. There are two exceptions. The first is where practice directions consist of guidance about the application and interpretation of law or the making of decisions. The second exception is where practice directions consist of criteria for determining which members of the tribunals may be chosen to decide particular categories of matter. Practice directions given by a Chamber President in his own right (i.e. as opposed to directions given by him when exercising, under a delegation, the Senior President's power to give practice directions) will always require the Senior President's approval, whether or not they also require the Lord Chancellor's approval.

Section 24: Mediation

153. Mediation and other forms of alternative dispute resolution are used increasingly in the justice system. They can provide more efficient and effective remedies, at lower cost and with less pressure on users. Section 24 has been designed to provide the statutory basis for mediation. The use of mediation in tribunal proceedings can be governed both by Tribunal Procedure Rules and by practice directions. It is neither intended nor envisaged that mediation will take place in all jurisdictions, although the term mediation can encompass a broad spectrum of activity. The section will enable staff appointed for the employment tribunals, EAT and AIT, as well as staff appointed for the First-tier and Upper Tribunals, to act as mediators in relation to disputed matters in proceedings before the First-tier or Upper Tribunal.

Section 25: Supplementary powers of Upper Tribunal

154. **Section 25** provides the Upper Tribunal with the powers of the High Court or Court of Session to require the attendance and examination of witnesses and the production and inspection of documents, and all other matters incidental to the Upper Tribunal's functions. These are similar powers to the Employment Appeal Tribunal's powers under section 29 of the Employment Tribunals Act 1996.

Section 26: First-tier Tribunal and Upper Tribunal: sitting places

155. **Section 26** provides for the First-tier Tribunal or the Upper Tribunal to sit anywhere in the United Kingdom irrespective of the law under which a case arises. This will allow the flexible listing of cases for hearing in accordance with the needs of tribunal users. It does not, however, allow a tribunal to decide which law it wants to apply.

Section 27: Enforcement

156. Subsections (1) to (3) ensure that monetary awards made by the First-tier and Upper Tribunals are enforceable through the courts. These provisions do not alter the methods of enforcement by the courts.
157. Many tribunal awards in England and Wales are currently enforced through the county court, but there are some where enforcement is currently through the High Court (e.g. the Lands Tribunal where enforcement may be through either court, and the Transport Tribunal where enforcement is in the High Court). Subsection (1) states that a sum payable following a decision of either the First-tier or Upper Tribunal will be recoverable as if it were payable either under an order of a county court in England and Wales or an order of the High Court in England and Wales.
158. Subsection (2) makes corresponding provision for Scotland. An order for payment made as a result of a decision of either the First-tier or Upper Tribunal made in Scotland (or a copy of such an order certified in accordance with Tribunal Procedure Rules) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland (i.e. without the intermediate step of registering the decision with the sheriff court).
159. Subsection (3) makes corresponding provision for Northern Ireland. An order for payment made as a result of a decision of either the First-tier or Upper Tribunal in Northern Ireland will be recoverable as if it were payable under either an order of a county court or the High Court in Northern Ireland.
160. Subsection (4) provides that the enforcement provisions in the preceding subsections do not apply to awards of damages, restitution or the recovery of a sum due made to an applicant by the Upper Tribunal exercising its judicial review powers under sections 16(6) or 21(1), because enforcement of such awards is dealt with in sections 16(7) and 21(4).

161. Subsection (5) empowers the Lord Chancellor to make an order (applying to England and Wales or to Northern Ireland) stipulating that a sum of a description specified in the order (payable in pursuance of a decision of the First-tier or Upper Tribunal) may be recoverable as if it were payable either under an order of a county court, or under an order of the High Court, but not both.
162. Subsection (6) allows for Tribunal Procedure Rules to be made which spell out where for the purposes of the enforcement provisions a decision is to be taken to have been made. This is necessary due to the different enforcement methods that apply to Scotland compared with England and Wales. Rules might, for example, provide that where a tribunal is sitting in Scotland to hear a case arising under the law of England and Wales, any sum payable in pursuance of a decision of the tribunal is recoverable as if the decision had been made in England and Wales. Subsection (6) also allows Rules to provide for some sums not to be recoverable under the provisions of the section. This might be appropriate where the particular legislation under which a tribunal is acting contains its own procedures for enforcing awards.

Section 28: Assessors

163. An assessor is an expert who is appointed by a court or tribunal to assist it in dealing with issues within the assessor's area of expertise. Some tribunals already have a power to appoint assessors and this section will allow this practice to continue within the new tribunals. This section provides the First-tier Tribunal or the Upper Tribunal with the power to appoint an assessor to assist where it is dealing with matters that require a special expertise that the tribunal would otherwise not have available to it. This provision will not require an assessor to be used where it is inappropriate to the jurisdiction.

Section 29: Costs or expenses

164. The powers of many tribunals to award costs are currently limited, either because they have no such powers, or because the scope of any power they have is limited. This section grants the tribunals the discretion to order costs and expenses in the same way as courts. It is not intended that these provisions will apply in all jurisdictions, rather that there will be flexibility as part of the creation of the new system to determine where a costs regime would be appropriate and whether there should be any limits to such a regime (for example, that costs should be awarded only against a party who has acted vexatiously or unreasonably). Subsection (1) is subject to provision made under the Tribunal Procedure Rules so as to allow for such flexibility.

Section 30: Transfer of functions of certain tribunals

165. The transfer of jurisdictions to the new tribunals is a central feature of the Act. This section provides the Lord Chancellor with the power to transfer jurisdictions from those tribunals listed in the relevant Parts of Schedule 6 to either of the two new tribunals or the employment tribunals or the Employment Appeal Tribunal. In this way adjudicative functions which are currently spread across a wide range of tribunals can be consolidated into the new tribunals and the employment tribunals and Employment Appeal Tribunal.
166. Subsection (1) empowers the Lord Chancellor to provide for the functions of a tribunal to be transferred to the First-tier Tribunal, Upper Tribunal or the First-tier and Upper Tribunals, with the question as to which of them is to exercise the function in a particular case being determined by a person under provisions of the order or by, or under, Tribunal Procedure Rules. It also provides for the transfer of a function to the First-tier Tribunal to the extent specified in the order, and to the Upper Tribunal to the extent so specified. It provides similarly for transfers to an employment tribunal, or the Employment Appeal Tribunal.

167. Subsection (3) provides that the Lord Chancellor may further transfer functions in accordance with the provisions of subsection (1).
168. The general policy of subsections (5) to (8) is to restrict devolved functions from being transferred to the new tribunals.
169. Under subsection (5), the general rule is that functions of tribunals which are within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly (i.e. devolved) may not be transferred to the First-tier Tribunal or Upper Tribunal under section 30.
170. Subsections (6) and (7) set out some exceptions. Functions in relation to appeals relating to estate agents and consumer credit, and criminal injury compensation appeals, may be transferred. But transfer of functions relating to criminal injury compensation appeals in Scotland will require the consent of Scottish Ministers.
171. Subsection (8) provides that if any functions relating to the operation of a tribunal, or expenses for attending the tribunal, are exercisable by the Welsh Ministers, functions of that tribunal may be transferred under section 30 only with the consent of the Welsh Ministers.

Section 31: Transfers under section 30: supplementary powers

172. Where functions are transferred under section 30, supplementary powers are needed to give the transfer full effect. Subsection (1) confers power on the Lord Chancellor to provide by order for the abolition of a tribunal whose functions have been transferred under section 30.
173. Orders abolishing tribunals will be brought into force at the point of transfer of their functions (or should the functions of a tribunal be transferred in stages, at the point of transfer of the last of their functions), thereby removing redundant organisations from statute.
174. Subsection (2) enables the Lord Chancellor, in transferring functions of a tribunal listed in Schedule 6, to provide for members of the tribunal who are judicial office holders to have a new office within either the First-tier Tribunal or the Upper Tribunal.
175. Subsection (5) provides that the power under subsection (2) to transfer office-holders into the new tribunals is not available as respects any person whose existing office is that of Commissioner for the General Purposes of Income Tax. That office is abolished by paragraph 1(1) of Schedule 8 to the Act. The offices of General Commissioner of Income Tax and of Clerk to the General Commissioners are expected to be abolished at the point that the functions of the General Commissioners are transferred.
176. Subsections (7) and (8) allow the Lord Chancellor to provide by order for the continuation of procedural rules following a transfer of functions, if necessary by modification of those rules.
177. At the point of transfer, orders can be brought into force transferring the existing sets of rules that govern procedure for the tribunals. Minor modifications may be made to the sets of rules where functions are to be transferred to a new tribunal so that they align with the provisions of the Act.
178. Subsection (9) enables the Lord Chancellor to make, by order, incidental, supplemental, transitional or consequential provision, or provision for savings, to facilitate: a transfer under section 30 of functions of tribunals; the appointment of tribunal judiciary to offices created by the Act; and the transfer of procedural rules.
179. To facilitate the smooth continuation of tribunal business at and beyond the point of transfer, orders will need to make provision for completion of all work underway in the tribunals at the point of transfer of their functions. The orders will also be able to ensure that references to tribunals that have been abolished are removed from statute.

Section 32: Power to provide for appeal to Upper Tribunal from tribunals in Wales

180. Where a jurisdiction is exercised by separate tribunals for England and Wales, difficulties could arise if there were different routes of onward appeal for the English and Welsh tribunals.
181. **Section 32** therefore provides for an appeal to the Upper Tribunal from tribunals in Wales in two circumstances. Subsections (1) and (2) deal with a situation where the functions of a tribunal covering both England and Wales are transferred to the First-tier Tribunal in respect of England only. Subsection (3) deals with appeals from tribunals which already have a separate existence in Wales, and which are listed in Part 7 of Schedule 6.
182. Subsection (2) empowers the Lord Chancellor to provide for appeals from a decision of a tribunal in a Welsh case to be made to the Upper Tribunal instead of to a court. An example of how the power could be used is as follows. An existing tribunal operates in Wales under legislation that is the same as, or corresponds to, the legislation under which the tribunal operates in England. An appeal can be made to a court against decision made by the existing tribunal. The existing tribunal's functions in England are transferred to the First-tier Tribunal under section 30. When the First-tier Tribunal makes a decision in England under the transferred function, any appeal has to be made not to that court but to the Upper Tribunal. Subsection (2) could be used to provide that when the existing tribunal makes a decision in Wales, an appeal against that decision has to be made not to that court but to the Upper Tribunal.
183. Subsection (3) empowers the Lord Chancellor to provide for an appeal against a decision of a scheduled tribunal to be made to the Upper Tribunal, where the decision is made by the tribunal in exercising a function in relation to Wales. The power enables an existing right to appeal from the tribunal to a court to be converted into a right to appeal from the tribunal to the Upper Tribunal.

Section 33: Power to provide for appeal to Upper Tribunal from tribunals in Scotland

184. Where a tribunal jurisdiction is transferred to the new tribunals under section 30, and such a jurisdiction is not transferred in relation to Scotland, section 33 creates a power for the Lord Chancellor to provide (by order) for an appeal to the Upper Tribunal against a corresponding decision made in exercising the untransferred Scottish jurisdiction.
185. An order under the section provides for the situation where the functions of a tribunal are to be transferred in respect of England, or England and Wales, but not in respect of Scotland; and where there is a right of appeal to the Upper Tribunal from decisions made in exercising the transferred jurisdiction in England, but no right of appeal from the decisions made in exercising the untransferred Scottish jurisdiction.

Section 34: Power to provide for appeal to Upper Tribunal from tribunals in Northern Ireland

186. **Section 34** provides a power (analogous to that provided in section 33 in respect of Scotland) for a new appeal right to the Upper Tribunal from tribunals in Northern Ireland where the equivalent tribunal jurisdiction in England has been transferred (most likely) to the First-tier Tribunal and there is a new appeal right in England to the Upper Tribunal.

Section 35: Transfer of Ministerial responsibilities for certain tribunals

187. **Section 35** makes it possible to transfer to the Lord Chancellor administrative functions of other ministers (and functions of the Commissioners for Her Majesty's Revenue and Customs) in relation to tribunals listed in Schedule 6. The power is similar to the

power under section 1 of the Ministers of the Crown Act 1975 which enables transfer of functions between ministers.

188. Subsections (8) and (9) taken together prevent functions transferred to the Lord Chancellor from being transferred to another Minister of the Crown under subsection (1) or under the Ministers of the Crown Act 1975. This will replicate the effect of section 19 of, and Schedule 7 to, the Constitutional Reform Act 2005, entrenching judiciary-related functions in the office of the Lord Chancellor, and so helping to secure the independence of tribunals from the departments formerly responsible for them.

Section 36: Transfer of powers to make procedural rules for certain tribunals

189. **Section 36** enables the Lord Chancellor by order to transfer power to make procedural rules for certain tribunals to himself or to the Tribunal Procedure Committee.
190. Most of the powers that may be transferred under this section are currently exercisable by the Secretary of State. This power will allow the Lord Chancellor to:
- standardise the process for making rules for those tribunals whose functions are not scheduled to transfer into the new tribunal structure; or
 - cater for the possibility that tribunal rules need to be made before the Tribunal Procedure Committee is operational; or
 - transfer the responsibility for making rules for particular tribunals to the Tribunal Procedure Committee before their functions are transferred to the First-tier Tribunal or Upper Tribunal.
191. The Act as enacted does not confer power to transfer the Secretary of State's power to make procedural rules for the employment tribunals.

Section 37: Power to amend lists of tribunals in Schedule 6

192. **Section 37** gives the Lord Chancellor the power to amend the lists of tribunals in Schedule 6 to the Act by: addition to a list; removal from a list; removing a list from the Schedule; or adding a list of tribunals to the Schedule.
193. The power is constrained by subsections (2), (3) and (4):
- Under subsection (2)(a), a tribunal created otherwise than by or under an enactment (e.g. a private tribunal of some kind) cannot be brought within the new structure.
 - Under subsection (2)(b), tribunals created after the last day of the Session in which the Act is passed (likely to be a day in October/November 2007) may not be added to any of the lists of tribunals in Schedule 6. If the First-tier Tribunal or Upper Tribunal is to have jurisdiction created by later legislation then it will need to be conferred by that later legislation rather than transferred using the machinery of section 30. As the First-tier and Upper Tribunals are all-purpose in nature it is not expected that there will be a need to create any new tribunals.
 - Subsections (2)(c) and (3) preserve the position of the Welsh Ministers by requiring the consent of the Welsh Ministers where they have a power in relation to a tribunal.
 - Subsection (4) prevents the power being used to bring any of the ordinary courts of law into the new tribunal structure. The terms "tribunal" and "ordinary court of law" are not defined but follow the terminology used in the Tribunals and Inquiries Act 1992.

Schedule 6

194. **Schedule 6** has to be read alongside sections 30 to 36 of the Act. Schedule 6 describes which of sections 30 to 36 apply to the various tribunals listed in the Schedule. There are

three main powers that the Lord Chancellor can exercise in relation to the tribunals listed in the Schedule: section 30 deals with the transfer of tribunals' functions, including adjudicative functions; section 35 deals with the transfer of executive functions in relation to tribunals to the Lord Chancellor; and section 36 deals with the transfer of rule making powers to the Lord Chancellor and the Tribunal Procedure Committee.

195. Because of the number of permutations, Schedule 6 as enacted contains seven lists:
- Part 1: tribunals where all three types of function can be transferred.
 - Part 2: tribunals where only the adjudicative and executive functions can be transferred. There are no rule-making powers to transfer.
 - Part 3: tribunals where only the adjudicative and rule-making powers can be transferred because all executive functions are already with the Lord Chancellor.
 - Part 4: tribunals where only the tribunal's functions can be transferred.
 - Part 5: tribunals where executive functions can be transferred to the Lord Chancellor and rule-making functions to the Tribunal Procedure Committee or Lord Chancellor but there can be no transfer of the tribunal's functions.
 - Part 6: tribunals where only executive functions can be transferred. No change is intended to the tribunal's functions, and rule-making powers are to remain with the Secretary of State, as indicated in *Transforming Public Services*.
 - Part 7: tribunals in Wales where onward appeals can be to the Upper Tribunal instead of the courts.

Section 38: Orders under sections 30-36: supplementary

196. This section provides for power to amend, repeal or revoke enactments in connection with orders under sections 30 to 36 (i.e. covering the transfer of functions of tribunals; abolition of tribunals; mapping of tribunal judicial office holders to the offices established by the Act; continuation of tribunal procedural rules after transfer of functions; incidental, supplemental, transitional and consequential provisions; appeal routes for tribunals in Wales; appeal routes for tribunals in Scotland; appeal routes for tribunals in Northern Ireland; transfer of ministerial responsibilities for tribunals; transfer of power to make tribunal procedural rules).

Section 39: Administrative support for certain tribunals: The general duty

197. **Section 39** places the Lord Chancellor under a statutory obligation to ensure there is an efficient and effective system of tribunal administration. The duty is framed in respect of the First-tier Tribunal, the Upper Tribunal, the employment tribunals, the Employment Appeal Tribunal and the Asylum and Immigration Tribunal. It mirrors section 1 of the Courts Act 2003, which sets out the Lord Chancellor's duty in respect of the courts in England and Wales. It is intended to show that tribunals are to be treated no less favourably than the courts.

Section 40: Tribunal staff and services and Section 41: Provision of accommodation

198. **Sections 40** and **41** are modelled on sections 2 and 3 of the Courts Act 2003 and grant the Lord Chancellor similar powers to provide staff, services and accommodation for tribunals. Section 40 allows the Lord Chancellor to employ civil servants as tribunal staff, so that he can discharge his duty of administering the tribunals and providing support services.
199. Subsection (2) enables the Lord Chancellor to contract out certain functions. However, subsection (3) (like section 2 of the Courts Act 2003), prohibits the Lord Chancellor

from contracting out functions which involve making judicial decisions or exercising any judicial discretion.

200. A small number of tribunals listed in Schedule 6 have contracted out some staff functions. Examples include the Lands Tribunal, where some staff functions relating to the maintenance of the Tribunal's library are contracted out; and the AIT, where typing services are contracted out.
201. Where it is decided that administrative functions are best delivered by contracting out, an order will be made under subsection (4) enabling contracts to be signed. Orders will be made only after consultation with the Senior President under subsection (5).
202. [Section 41](#) gives the Lord Chancellor power to provide, equip, maintain and manage tribunal accommodation.

Section 42: Fees

203. [Section 42](#) has been designed to cover in part those tribunals which currently charge a fee for their services and in part the possibility that at some point in the future it may be appropriate to charge fees in other or new jurisdictions.
204. Under subsection (1) the Lord Chancellor will have a power to prescribe, by order, fees to be paid for anything done in the new tribunals, in the Asylum and Immigration Tribunal and in any other statutory tribunal added to the list by order (under subsection (3)), subject to the affirmative resolution procedure. The corresponding power in respect of court fees under section 92 of the Courts Act 2003 can be used to recover running costs of the courts. Similarly, it is considered that the power under section 42 could be used to set fees at a level designed to recover from users of tribunals some or all of the running costs of (or of a part of) the tribunals concerned.
205. Subsection (5) stipulates that before making an order under section 42, the Lord Chancellor must consult the Senior President and the AJTC.
206. Treasury consent will not be required for changes to existing fee levels (subsection (6)). Where a fee is introduced in an area where a fee has not previously been payable, section 49(6)(c) requires that the order is subject to the affirmative resolution procedure. Section 42 also confers power to set fees for the conduct of mediation by tribunals staff appointed under section 40(1) but, since this section establishes the principle of fees being set for this, the negative resolution procedure will be used when setting them.

Section 43: Report by Senior President of Tribunals

207. [Section 43](#) requires the Senior President to give the Lord Chancellor a report on the cases that have come before the First-tier Tribunal and the Upper Tribunal in each year. The report will also cover cases coming before the employment tribunals and the Employment Appeal Tribunal. This provision is intended to support improvement both in the workings of the tribunals and the standard of decision-making and review in cases which come before the tribunals. Section 43 gives the Senior President some flexibility in deciding which matters should be covered in the report, and the Lord Chancellor some flexibility in deciding which matters are a priority for the report.

Sections 44 and 45: The Administrative Justice and Tribunals Council

208. The existing Council on Tribunals will be replaced by an Administrative Justice and Tribunals Council (AJTC), which is established by section 44 and Schedule 7. The AJTC, like the Council on Tribunals, will be a non-departmental public body, but will have a wider remit.
209. When the AJTC comes into existence, the Council on Tribunals (and its Scottish Committee) will be abolished. This will be effected by section 45. Section 45 enables the Lord Chancellor to make an order transferring any property, rights or liabilities the

Council on Tribunals may have at the time when it is abolished to the new AJTC. The order is to be subject to negative resolution procedure.

Schedule 7: Administrative Justice and Tribunals Council

210. **Schedule 7** makes provision for the AJTC. It is divided into 4 parts.
211. **Part 1** (paragraphs 1 to 11) deals with the membership of the AJTC and for the Committees of the AJTC.
212. **Paragraph 1** provides that the AJTC is to consist of a minimum of 10 and a maximum of 15 members and the Parliamentary Commissioner for Administration. Those members, other than the Parliamentary Commissioner for Administration (who is appointed on an ex-officio basis), are to be appointed by the Scottish Ministers, the Welsh Ministers and the Lord Chancellor, each with the concurrence of the others.
213. **Paragraph 2** makes provision for the nomination of the Chairman of the AJTC. The nomination is of a member of the AJTC and is made by the Lord Chancellor after consulting the Scottish and Welsh Ministers. Paragraph 2 also provides for the terms of office of the Chairman.
214. **Paragraph 3** makes provision for the terms of office for members appointed under paragraph 1. Such members are to hold and leave their office in accordance with the terms on which they have been appointed. The Lord Chancellor may remove an appointed member on the grounds of inability or misbehaviour but this power can only be exercised with the concurrence of the Scottish or Welsh Ministers where the power is being exercised in relation to a person appointed by one of them. Members may resign by writing to the Lord Chancellor or in the case of persons appointed by the Scottish or Welsh Ministers, by writing to those Ministers.
215. **Paragraphs 4 and 7** establish the Scottish and Welsh Committees of the AJTC. Paragraphs 4(2) and 7(2) provide that each Committee is to consist of the Parliamentary Commissioner for Administration, the Public Services Ombudsman for each jurisdiction, the members of the AJTC appointed under paragraph 1(2) by the Scottish or Welsh Ministers as the case may be and a specified number of other persons who are not members of the AJTC appointed by the Scottish or Welsh Ministers under paragraphs 4 and 7 as appropriate.
216. **Paragraphs 6 and 9** provide for the term of office for those members of the Scottish or Welsh Committees who are not members of the AJTC and have been appointed by the Scottish or Welsh Ministers to their respective Committees as described above. Such members are to hold and leave their office in accordance with the terms on which they were appointed and can be removed by the Scottish or Welsh Ministers as appropriate on the ground of inability or misbehaviour. Resignation can be effected by writing to the Scottish or Welsh Ministers as appropriate.
217. **Paragraphs 5 and 8** provide for the nomination of the Chairman of the Scottish and Welsh Committees. The relevant Ministers are responsible for nominating a member of the AJTC who is appointed by them to become the Chairman. The terms of office of those Chairmen are provided in paragraphs 5 and 8.
218. **Paragraph 10** makes the Lord Chancellor responsible for the remuneration of the members of the AJTC and the Scottish and Welsh Committees.
219. **Part 2** of Schedule 7 explains the functions of the AJTC. In summary, the AJTC has functions in relation to the administrative justice system, tribunals and statutory inquiries.
220. **Paragraph 13** makes it clear that the AJTC is responsible for keeping the administrative justice system under review. This function extends to the overall system by which decisions of an administrative or executive nature are made in respect of a particular

person. The AJTC can advise the Lord Chancellor, the Scottish and Welsh Ministers and the Senior President on the development of the administrative justice system and make such reports as it thinks are necessary in relation to its areas of responsibility under paragraph 13(1).

221. [Paragraph 14](#) explains the AJTC's general functions with respect to tribunals. The AJTC's responsibility is in relation to "listed tribunals" as defined in Part 4 of Schedule 7. Listed tribunals include the First-tier Tribunal, the Upper Tribunal and also any other tribunal that an authority who has responsibility for a tribunal provides is to be a listed tribunal for the purpose of Schedule 7. So the AJTC's responsibility for tribunals may extend to tribunals other than the First-tier and Upper Tribunals. By virtue of paragraph 14 the AJTC is to keep listed tribunals under review and report on those tribunals and also on any matter that the AJTC thinks is of special importance. The AJTC is also to consider and report on any matter referred to it jointly by the Lord Chancellor, Scottish Ministers and Welsh Ministers under paragraph 16. The AJTC may also scrutinise and comment on legislation that is extant or proposed, including procedural rules, relating to tribunals.
222. [Paragraph 15](#) documents the AJTC's duties in respect of statutory inquiries. The AJTC's duties involve keeping statutory inquiries under review, reporting on them and reporting on other matters it determines to be of particular importance. As with tribunals it must also consider and report on any matter referred to it by the Lord Chancellor, the Welsh Ministers and the Scottish Ministers jointly under paragraph 16.
223. [Paragraph 17](#) makes provision for the procedure to be followed when the AJTC makes a report in relation to its functions in respect of tribunals under paragraph 14 and statutory inquiries under paragraph 15.
224. [Paragraphs 18 and 19](#) ensure that the Scottish and Welsh Committees are consulted on any matter that relates solely to their jurisdiction before the Council is authorised to report on it. These paragraphs also provide that the Scottish and Welsh Committees can make reports to the AJTC on their own motion in relation to matters specified in paragraphs 18 and 19. If the AJTC does not make a report on a matter dealt with in a report made to it by the Scottish or Welsh Committee or in making a report the AJTC does not adopt the Committee's reports without modification, the Committee can submit its report to the Scottish or Welsh Ministers as the case may be. The Scottish and Welsh Ministers must lay reports submitted to them in these circumstances before the Scottish Parliament or the National Assembly for Wales as appropriate.
225. [Paragraph 21](#) sets out the AJTC's duty to make an annual report on its proceedings and the corresponding duty on the Scottish Committee and Welsh Committee. The AJTC's report must be laid before Parliament and also before the Scottish Parliament and National Assembly for Wales. The reports of the Scottish and Welsh Committees under this paragraph must be laid before the Scottish Parliament and National Assembly for Wales respectively.
226. [Paragraph 22](#) makes provision for members of the AJTC, the Scottish Committee and the Welsh Committee to attend proceedings of a listed tribunal (as defined in Part 4 of Schedule 7) or statutory inquiry as observers even when those proceedings are held in private or do not take the form of a hearing. This right is subject to any statutory provision that expressly excludes these members from proceedings.
227. [Paragraph 23](#) provides for the application of certain provisions in Schedule 7 to Northern Ireland.
228. [Part 3](#) of Schedule 7 provides for the AJTC to be consulted on procedural rules for a listed tribunal (as defined in Part 4 of Schedule 7).
229. [Paragraph 24\(2\)](#) excludes rules made or to be made by the Tribunal Procedural Committee in relation to a listed tribunal from the general duty in paragraph 24(1). The duty in paragraph 24(1) is for a Minister of the Crown, a Scottish Minister or a Welsh

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Minister to consult the AJTC before it takes any action outlined in that paragraph in relation to procedural rules for a listed tribunal (as defined in Part 4 of Schedule 7). This is not necessary in the excluded cases since a member of the AJTC will sit on the Tribunal Procedural Committee.

230. **Part 4** contains definitions of terms that apply to Schedule 7, including the definition of “listed tribunal” which means the First-tier Tribunal, the Upper Tribunal or any tribunal that the Lord Chancellor, Scottish Ministers or Welsh ministers requests to be listed for the purpose of Schedule 7 in accordance with paragraph 25(2) of Schedule 7.
231. The power in paragraph 25(2) will enable the oversight responsibilities of the Council to cover tribunals inside and outside the new tribunal system.

Section 46: Delegation of Functions by the Lord Chief Justice etc

232. **Section 46** enables the Lord Chief Justice to nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise any of the listed functions given to him under the Act. These are:
- Concurrence with the removal of a judge or other member of the First-tier Tribunal from office (Schedule 2 paragraph 3(4)).
 - Concurrence with a request for a court judge to sit in the First-tier Tribunal (Schedule 2 paragraph 6(3)(a)).
 - Concurrence in the removal of a judge or other member of the Upper Tribunal from office (Schedule 3 paragraph 3(4)).
 - Concurrence with a request for a court judge to sit in the Upper Tribunal (Schedule 3 paragraph 6(3)(a)).
 - Power to nominate an ordinary judge of the Court of Appeal or a puisne judge of the High Court to preside over a chamber (Schedule 4 paragraph 2(2)).
 - Power to nominate an ordinary judge of the Court of Appeal or a puisne judge of the High Court to act as a deputy chamber president (Schedule 4 paragraph 5(5)).
 - Consultation on the Lord Chancellor’s appointees to the Tribunal Procedure Committee (Schedule 5, paragraph 21(2)).
 - Power to appoint members to the Tribunal Procedure Committee (Schedule 5 paragraphs 22 and 24).
 - Concurrence in an order changing the composition of the Tribunal Procedure Committee (Schedule 5 paragraph 25).
233. This section also makes similar provision for the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland.

Section 47: Co-operation in relation to judicial training, guidance and welfare

234. **Section 47** establishes a duty of co-operation between the offices of the Senior President of Tribunals, the Lord Chief Justices and the Lord President in relation to judicial guidance, training and welfare. The Senior President has responsibility for the maintenance of appropriate arrangements for the welfare, training and guidance of tribunal judiciary and members of the First-tier and Upper Tribunals (paragraph 8 of Schedule 2 and paragraph 9 of Schedule 3) and for judiciary and members of the employment tribunals, the EAT and the AIT (paragraphs 40, 44 and 54 of Schedule 8). The Lord Chief Justices of England and Wales and Northern Ireland have the same responsibility for the court judiciary.
235. In carrying out these responsibilities it is desirable for there to be a duty of co-operation between the Senior President and the Lord Chief Justices (and including the Lord

President even though he has no statutory responsibility for such provision at the time of Royal Assent to this Act). In practical terms, this means the use by tribunals of institutions which report to the Lord Chief Justice of England and Wales (e.g. the Judicial Studies Board for training, the Judicial Communications Office for advice on media and handling, and arrangements for counselling and supporting judges under the contract that was set up by MoJ and are now the responsibility of the Judicial Office).

Section 48: Consequential and other amendments, and transitional provisions

236. [Section 48](#) gives effect to Schedule 8 (consequential and other amendments) and to Schedule 9 (transitional provisions).

Schedule 8

237. [Paragraph 1](#) abolishes the office of General Commissioner (styled in legislation as “Commissioner for the general purposes of income tax”) and the offices of clerk, and assistant clerk, to any General Commissioner. The General Commissioners hear appeals brought under the Taxes Management Act 1970. The General Commissioners must appoint a clerk and if necessary an assistant clerk to provide administrative functions and legal advice to the General Commissioners. Provision is made for the General Commissioners by section 2 of the Taxes Management Act 1970 and the clerks by section 3. This paragraph is expected to be brought into force when the functions of the General Commissioners are transferred to the new Tribunals. It is not intended to use the power under section 31(2) so as to cause a person holding the office of General Commissioner to become a transferred-in judge of the new Tribunals.
238. [Paragraphs 2, 8, 15, 17 to 19, 24, 28, 30, 32, 33, 53, 56 to 58, 60 and 61](#) amend references or provisions concerning the “Council on Tribunals”. These amendments reflect the provisions in section 44 and Schedule 7 establishing the Administrative Justice and Tribunals Council and section 45 abolishing the Council on Tribunals.
239. [Paragraphs 3, 9 to 12, 22, 49 to 52 and 59](#) enable certain hearings or inquiries to constitute a statutory inquiry for the purposes of the Administrative Justice and Tribunals Council’s functions with respect to statutory inquiries under paragraph 15 of Schedule 7.
240. [Paragraphs 4 and 5](#) will ensure that members of bodies established by the Act are disqualified from sitting in the House of Commons or the Northern Ireland Assembly.
241. [Paragraph 6](#) enables litigants in person to obtain costs and expenses under the 1975 Act in proceedings before the First-tier Tribunal or Upper Tribunal where costs are awarded. Paragraph 6 also amends section 1(4) of the 1975 Act to provide that the definition of “rules of court” in that section, in relation to the First-tier and Upper Tribunal, means Tribunal Procedural Rules.
242. [Paragraph 7](#) makes the Administrative Justice and Tribunals Council (“AJTC”) and the Scottish and Welsh Committees of the AJTC subject to the statutory duty under section 71 of the Race Relations Act 1976 so when carrying out their functions they have to have regard to the need to eliminate unlawful discrimination and to promote equal opportunity and good relations.
243. [Paragraph 13](#) amends sections 26(2)(e) and 37(2) of the Food Safety Act 1990. The amendments to section 26(2)(e) allow regulations to be made to provide for appeals to the First-tier Tribunal or Upper Tribunal. Amendments to section 37(2) ensure that section 37(1)(c) (appeals to the magistrates or sheriff court) does not apply when regulations provide for an appeal to a Tribunal constituted in accordance with the regulations or to the First-tier or Upper Tribunal.
244. [Paragraph 16](#) ensures that judges and other members of the First-tier and Upper Tribunal are banned under section 75 of the Courts and Legal Services Act 1990 from practising as lawyers.

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245. [Paragraph 25](#) removes the requirement for the chairman of certain tribunals to be selected by the appropriate authority from a panel appointed by the Lord Chancellor.
246. [Paragraphs 26 and 27](#) will not be commenced at the same time. Paragraph 26 allows for an interim period where there will be some rules being made by Ministers etc and some by the Tribunal Procedure Committee. When all rules are being made by the Tribunal Procedure Committee paragraph 27 can be commenced to remove section 8 of the 1992 Act as that provision will no longer be necessary.
247. [Paragraph 29](#) amends section 14(1) of the 1992 Act so the definition is only applicable to decisions. This is consequential on the repeal by the Act of the provisions of the 1992 Act (sections 1, 4 and 8) that contain references to the working of tribunals or their procedural rules.
248. [Paragraph 31](#) allows for judicial offices created under the Act to become qualifying and relevant offices for the respective purposes of pension and retirement provisions under the Judicial Pensions and Retirement Act 1993 ('the 1993 Act'). This paragraph therefore has to be read in conjunction with the provisions of the 1993 Act. Part 1 of the 1993 Act provides that a person who retires from a qualifying judicial office is entitled, subject to certain conditions, to a judicial pension under the 1993 Act. A "qualifying judicial office" is defined in section 1(6) of the 1993 Act as being that of a person who holds, on a salaried basis, any one or more of the offices specified in Schedule 1 to the 1993 Act. Any reference in the 1993 Act to a "qualifying judicial office" is a reference to any office so specified if it is held on a salaried basis. So, the entitlement of any judge or other member of the First-tier Tribunal or the Upper Tribunal to a judicial pension under the 1993 Act depends on whether or not they hold their office on a salaried as opposed to fee paid basis. This should be borne in mind when considering the application of the provisions of paragraph 31 in relation to the entitlement of judges and other members of the new Tribunals to a judicial pension.
249. [Paragraph 34](#) makes provision for oaths to be taken by Criminal Injuries Compensation Panel adjudicators (to mirror provisions for the First-tier and Upper tribunal judges). CICAP adjudicators are not included in the general oath taking provisions of Schedule 2.
250. [Paragraphs 35 to 48](#), in addition to amending existing provisions of the Employment Tribunals Act 1996, insert a number of new sections to ensure that certain provisions of the Act relating to the judges and other members of the First-tier and Upper Tribunal are replicated in the legislation applying to employment tribunals and the Employment Appeal Tribunal (paragraph 54 makes similar amendments to the Nationality, Immigration and Asylum Act 1992 for Asylum and Immigration Tribunal office holders). The changes are required as, while the employment tribunals and the Employment Appeal Tribunal are not part of the First-tier and Upper Tribunals, they are intended to benefit from being administratively a part of the Tribunals Service.
251. [Paragraph 36](#) confers the title of Employment Judge on members of a panel of chairmen of employment tribunals.
252. [Paragraph 38](#) requires the Secretary of State to act jointly with the Lord Chancellor when exercising certain powers to amend provisions in that Act.
253. [Paragraphs 40 and 44](#) make the Senior President of Tribunals responsible for the training, welfare and guidance of members of employment tribunals and members of the Employment Appeal Tribunal, in the same way that he is for members of the First-tier Tribunal and Upper Tribunal (under paragraph 8 of Schedule 2 and paragraph 9 of Schedule 3).
254. [Paragraph 41](#) confers power to make practice directions in relation to employment tribunals on the Senior President and requires the consent of the Senior President and the Lord Chancellor for practice directions made by Presidents of Employment Tribunals.

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255. [Paragraph 42](#) makes provision for mediation in employment tribunals on a similar basis to section 24 (mediation); the major difference being that ACAS must be consulted before making a practice direction for mediation in employment tribunals.
256. [Paragraph 43](#) amends section 15(1) of the Employment Tribunals Act 1996 (enforcement in England and Wales as an order of a county court) so that an unpaid employment tribunal award does not need to be registered in the county court before enforcement can take place. This mirrors provisions in relation to the First-tier Tribunal and the Upper Tribunal in section 27 (enforcement).
257. [Paragraph 47](#) makes additional provision for practice directions about the procedure of the Employment Appeal Tribunal to be given by the Senior President of Tribunals or the President of the Employment Appeals Tribunal.
258. [Paragraph 54](#), in addition to amending existing provisions of the Nationality, Immigration and Asylum Act 2002, inserts a number of new sections to ensure that certain provisions of that Act relating to the judges and other members of the First-tier and Upper Tribunal are replicated in the legislation applying for the Asylum and Immigration Tribunal and that certain responsibilities of the Lord Chancellor and the Senior President extend to its members. These amendments ensure that certain judicial leadership powers in the Act that apply to the First-tier and Upper Tribunal are replicated for the Asylum and Immigration Tribunal. This reflects the intention of the Act to provide coherent judicial leadership and administrative support to all tribunals that form part of the Tribunal Service even though they may not be within the First-tier and Upper Tribunals.
259. Section 107 of the 2002 Act has been amended to ensure that the Senior President of Tribunals may give practice directions to the Asylum and Immigration Tribunal after having obtained the approval of the Lord Chancellor. Also for any directions given by the President of the Asylum and Immigration Tribunal to be given with the approval of the Senior President of Tribunals and the Lord Chancellor. The requirements for approval in both instances are subject to qualifications (in the same way as are parallel provisions for the First-tier and Upper Tribunals and employment tribunals and Employment Appeal Tribunal).
260. Schedule 4 to the 2002 Act, which provides for the membership of the Asylum and Immigration Tribunal and related matters, is amended to make provision for: the concurrence of the relevant Lord Chief Justice on removal as a member of the Asylum and Immigration Tribunal; in assignment of members of other tribunals by the Senior President with consent of the President of the Asylum and Immigration Tribunal; the Senior President to be responsible for the training, guidance and welfare of members of the Asylum and Immigration Tribunal; and the taking of oaths of persons appointed under Schedule 4 who have not previously taken the required oaths after accepting another office.
261. [Paragraph 55](#) amends section 98 of the Courts Act 2003 (register of judgments and orders etc) so that monetary decisions or awards of the First-tier Tribunal, the Upper Tribunal, an Employment Tribunal, or the Employment Appeal Tribunal may be included on the Register of Judgments and Orders established under the 2003 Act. Inclusion on the Register, which is often consulted by banks, building societies, credit companies etc when considering applications for credit, may make it more difficult for defaulters to obtain credit (and thus provides an incentive to pay the sum due).
262. [Paragraphs 62 to 66](#) amend the Constitutional Reform Act 2005. Section 109(5) is amended to ensure that the Senior President of Tribunals is included as a senior judge for the purpose of the disciplinary powers of the Lord Chief Justice in section 108 of that Act. Schedule 7 is amended so that references to the Tribunals and Inquiries Act 1992 are removed. In Schedule 12, a new sub-paragraph (2A) is inserted into paragraph 2 to allow certain office holders belonging to the new Tribunals to join the list of those who may be members of the Judicial Appointments Commission. Finally, Schedule 14

is amended so that judges and other members who are to be appointed under the Act by the Lord Chancellor (or, in the case of judges of the Upper Tribunal, by Her Majesty on recommendation of the Lord Chancellor) are selected by the Judicial Appointments Commission. Such selection will not apply to the transfer in of members of existing tribunals under section 31(2) or to appointments that fall to be made by a senior judge.

Schedule 9

263. **Schedule 9** sets out a number of transitional provisions, including provisions relating to the retirement dates and pensions for judges and other members of the First-tier Tribunal and Upper Tribunal. Much of Schedule 9 therefore has to be read in conjunction with the specific provisions of the Judicial Pensions and Retirement Act 1993 ('the 1993 Act') and in particular Part 1 of that Act. Part 1 of the 1993 Act provides that a person who holds qualifying judicial office is entitled to a judicial pension under the 1993 Act. A "qualifying judicial office" is defined in section 1(6) of the 1993 Act as being that of a person who holds, on a salaried basis, any one or more of the offices specified in Schedule 1 to the 1993 Act. Any reference in the 1993 Act to a "qualifying judicial office" is a reference to any office so specified if it is held on a salaried basis. So, the entitlement of any judge or other member of the First-tier Tribunal or the Upper Tribunal to a judicial pension under the 1993 Act depends on whether or not they hold their office on a salaried as opposed to fee paid basis. This should be borne in mind when considering the application of the provisions of Schedule 9 in relation to the entitlement of judges and other members of the new Tribunals to a judicial pension. Schedule 9 is divided into 4 Parts.

Part 1 (General and Miscellaneous)

264. **Paragraph 1** explains that the specific provisions in Schedule 9 are not to be taken to prejudice:
- the power of the Lord Chancellor under section 31(9), in connection with the provisions of section 30 (transfer of functions of certain Tribunals) and the preceding parts of section 31 (transfers under section 30: supplementary powers), to make transitional (and other) provision; or
 - the power of the Lord Chancellor (or Secretary of State in relation to Chapter 3 of Part 5) to make such transitional etc. provision by order as he considers necessary or expedient to give full effect to any provision of the Act.
265. **Paragraph 2** makes provision for the Lord Chancellor to make an order which allows a member of a tribunal listed in any of Parts 1 to 4 of Schedule 6 to the Act to be treated as a person whom the Lord Chief Justice can appoint to the Tribunal Procedure Committee.
266. This will allow the Lord Chief Justice to appoint to that Committee a person belonging to a particular tribunal before that tribunal has been fully transferred into the new system. These provisions will allow the formation of a Committee from existing tribunals in anticipation of their transfer, and before they can be formally part of the Tribunal Procedure Committee so that preparatory work can be undertaken.
267. **Part 2** (Judges and other members of First-tier and Upper Tribunals: Retirement dates)
268. **Part 2** of Schedule 9 provides for the retirement age of judges and other members who are to transfer into or are appointed to the First-tier or Upper Tribunal and who have a pre-existing right to retire at an age other than that provided by section 26(1) of the 1993 Act.
269. **Paragraph 5** makes provision for the retirement date that is to apply to judges and other members of the First -tier and Upper Tribunal who, in relation to an existing office, either have personal retirement dates that are later than 70, or do not have to retire at any specified time. Paragraph 5 provides that such persons are subject to the provisions of

section 26(1) of the 1993 Act as if it provided in the former case above for that person to vacate his office on his personal retirement date and in the latter case above for that person to vacate his office on the date provided for at paragraph 7 of the Schedule rather than at the age otherwise provided by that section. Section 26(1) of the 1993 Act provides that a person holding any of the offices for the time being specified in Schedule 5 to that Act (a “relevant office”) shall vacate that office on the day on which he attains the age of 70 or such lower age as may for the time being be specified for the purpose. So, paragraph 5 protects the position of judges or other members who before becoming judges or other members of the First-tier or Upper Tribunal hold offices allowing them to retire later than age 70. Paragraph 5 applies to the situations defined in paragraphs 6 and 7 respectively - where a person has a compulsory retirement age later than 70 or, in the defined circumstances, no retirement age at all. Paragraph 5 is however subject to the provisions of paragraph 8 described below.

270. **Paragraph 8** makes special provision for a judge or other member of the First-tier or Upper Tribunal who would be covered by the provisions in paragraph 5 due to having held an office with a retirement date other than that provided in section 26(1) of the 1993 Act but who also by virtue of having held a judicial office on the 30th March 1995 falls under Schedule 7 of the 1993 Act (retirement dates: transitional provisions). Schedule 7 allows such persons to retire at a “potential retirement date” rather than the date otherwise stipulated in section 26(1). Paragraph 8 deals with the interaction of both paragraph 5 of this Schedule and Schedule 7 to the 1993 Act, so that a person otherwise falling within both paragraph 5 and Schedule 7 can only benefit from the provision under paragraph 5 if, by virtue of the office in question, he has a protected retirement date under that paragraph which is later than his potential retirement date under Schedule 7.

271. **Paragraph 9** makes provision for a person holding an office in a tribunal listed in Schedule 6 to the Act who has a retirement date for that office that is later than the age of 70. Paragraph 9 provides that the fact that the person has attained the age of 70 will not make him ineligible for appointment or re-appointment to the relevant judicial office as defined in paragraph 3 of Schedule 9 provided he has not yet reached the date on which he is required to vacate the office in the listed tribunal.

Part 3 (judges and other members of First-tier and Upper Tribunals: Pensions where office acquired under section 31(2))

272. **Part 3** of Schedule 9 makes transitional provision about the right of transferred-in judges and other members of the First-tier and Upper Tribunal either to remain in their pre-existing pension schemes or to opt-in to Part 1 of the Judicial Pensions and Retirement Act 1993 (‘the 1993 Act’). Part 1 of the 1993 Act deals with entitlement to pension benefits under the 1993 Act in respect of persons holding a qualifying judicial office listed in Schedule 1 to that Act.

273. **Paragraph 11** provides that, in the prescribed circumstances, and subject to paragraph 12, a judge can choose that the provisions affording a judicial pension under Part 1 of the 1993 Act apply. The provisions of Part 1 of the 1993 Act which would otherwise cause the person automatically to fall within that Part are disapplied. But, paragraph 11 makes provision for transferred-in judges and other members of the new Tribunals to opt-into the scheme of the 1993 Act and thus not to remain outside of that scheme in their pre-existing pension scheme.

274. **Paragraph 12** has to be read alongside the provisions of paragraph 11. Paragraph 12 provides for the Lord Chancellor to make regulations prescribing the circumstances under which an opt-in election under paragraph 11 (for Part 1 of the 1993 Act to apply) may be made.

275. **Paragraph 13** allows that in default of an option under paragraph 11, a person’s service in their new office under the Act will be subject to the public service pension scheme

they belonged to before transferring to the new office, in the same way as before they had transferred.

Part 4 (amendments to the Judicial Pensions and Retirement Act 1993)

276. **Paragraph 15** amends section 1 of the 1993 Act by inserting a new paragraph (e) into subsection (1) so that section 1 now applies Part 1 (arrangements for judicial pensions) to transferred-in judges and other members of the First-tier and Upper Tribunal who are subsequently appointed to a different judicial office.
277. **Paragraphs 16, 17 and 18** ensure that transferred-in judges and other members of the First-tier and the Upper Tribunal to whom Part 1 of the 1993 Act becomes applicable are subject to the rights and requirements of the 1993 Act scheme rather than any previous pension scheme they belonged to.
278. **Paragraph 16** makes provision for section 9(4) of the 1993 Act (contribution towards costs of surviving spouse's, surviving civil partner's and surviving children's pension) to apply.
279. **Paragraph 17** makes provision in section 12(1) of the 1993 Act for transferred-in judges and other members who opt for Part 1 of the 1993 Act to apply to them, or to whom the 1993 Act comes to apply automatically, to have accrued rights to benefit under a judicial pension scheme other than that in the 1993 Act transferred to the scheme under Part 1 of the 1993 Act.
280. **Paragraph 18** inserts a new section into the 1993 Act (section 12A) which makes provision for transferred-in judges and other members who opt to have Part 1 of the Act apply to them (or to whom it comes to apply automatically) to have any accrued rights under a civil service pension scheme transferred to the scheme under Part 1 of the Act. When the rights under the civil service pension scheme are transferred it will no longer have effect in relation to the transferred-in judge or other member and no pension benefits will be paid to that person under that scheme. The provisions of section 12A added by this paragraph also enable regulations to be made for calculating and prescribing the manner in which the transferred rights are to be given effect under Part 1 of the 1993 Act. Paragraph 18 also inserts a new section 12B, which provides for the determination of entitlement to, and the rate or amount of benefits under the 1993 Act scheme, where accrued pension rights have been transferred under section 12 or 12A of the 1993 Act. Paragraph 19 ensures that Schedule 2 (transfer of accrued benefits) to the 1993 Act does not apply to transfers under section 12A, in the same way as it does not apply to transfers under section 12 of that Act.

Section 49: Orders and regulations under Part 1: supplemental and procedural provisions

281. **Section 49** sets out the procedure to be followed in respect of the various types of order which can be made under Part 1. These powers are mostly exercisable by the Lord Chancellor. The Scottish Ministers and the Welsh Ministers can make orders adding tribunals administered by them to the listed tribunals which the AJTC reviews and reports on (Schedule 7, paragraph 25(2)). Under section 7(9) the Senior President can make an order relating to the jurisdictions assigned to chambers, and section 49(2) provides that this order is to be treated as if it had been made by a Minister of the Crown.

Under subsection (6) orders under the following provisions are subject to affirmative resolution:

- Section 11(8): power to determine who is to be treated as a party to a case for the purposes of a right of appeal to the Upper Tribunal;
- Section 13(6): restrictions on right of appeal to the Court of Appeal;

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- Section 13(14): power to determine who is to be treated as a party to a case for the purposes of a right of appeal to the Court of Appeal;
 - Section 30: power to transfer functions of a tribunal into the new tribunal structure;
 - Section 31(1): power to abolish tribunals when their functions have been transferred;
 - Section 31(2), (7) and (9) and paragraph 30(1) of Schedule 5: but only if the order amends primary legislation;
 - Section 32: power to provide for appeals to the Upper Tribunal from tribunals in Wales;
 - Section 33: power to provide for appeals to the Upper Tribunal from tribunals in Scotland;
 - Section 34: power to provide for appeals to the Upper Tribunal from tribunals in Northern Ireland;
 - Section 35: transfer of Ministerial responsibilities to the Lord Chancellor;
 - Section 36: transfer of powers to make procedural rules;
 - Section 37: power to amend the lists of tribunals in Schedule 6;
 - Section 42(1)(a) to (d): fee orders, if no fee has previously been payable (except in the case of fees for mediation by tribunal staff);
 - Section 42(3): power to add a tribunal to the list of tribunals to which fees may be prescribed;
 - Paragraph 15 of Schedule 4: power to determine composition of tribunals.
282. All other orders under Part 1 of the Act are to be made by the negative resolution procedure.