EXPLANATORY MEMORANDUM TO

THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007 (COMMENCEMENT NO.6 AND TRANSITIONAL PROVISIONS) ORDER 2008

2008 No. 2696 (C.117)

THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007 (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) ORDER 2008

2008 No. 2683

THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (CHAMBERS) ORDER 2008

2008 No. 2684

THE APPEALS (EXCLUDED DECISIONS) ORDER 2008

2008 No. 2707

THE QUALIFICATIONS FOR APPOINTMENT OF MEMBERS TO THE FIRST-TIER AND UPPER TRIBUNAL ORDER 2008

2008 No. 2692

THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007 (TRANSITIONAL JUDICIAL PENSIONS PROVISIONS) REGULATIONS 2008

2008 No. 2697

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These orders are made under, and supplement the provisions of, Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), which establishes the First-tier Tribunal and the Upper Tribunal and allows for the transfer of various existing tribunals into the new tribunals.

2.2 **The Tribunals, Courts and Enforcement Act 2007 (Commencement No. 6 and Transitional Provisions) Order ('the Commencement Order')** brings into force on 3rd November 2008 the majority of Part 1 of the Act establishing the First-tier Tribunal and the Upper Tribunal and its functions. It also brings into force provisions in relation to the transfer of the functions of the tax

tribunals into the First-tier Tribunal and Upper Tribunal, and the recovery of sums payable in pursuance of decisions of Tribunals or the Advisory, Conciliation and Arbitration Service (ACAS), on 1st April 2009. The First-tier Tribunal and the Upper Tribunal ("the new tribunals") are established under section 3 of the 2007 Act.

2.3 **The Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 ('the Consequential Amendments Order')** contains various minor, consequential and transitional provisions, in respect of the transfer of functions.

2.4 Schedule 1 to the Order makes consequential amendments to secondary legislation in respect of the functions of the tribunals which we anticipate will be transferring on 3 November 2008 (see the draft Transfer of Tribunal Functions Order 2008 which was laid in Parliament on 4 June 2008), the commencement of provisions abolishing the Council of Tribunals and changes to the names of chairmen of employment tribunals. Schedule 2 to the Order makes revocations.

2.5 **The First-tier Tribunal and Upper Tribunal (Chambers) Order ('the Chambers Order')** organises the First-tier Tribunal and Upper Tribunal into Chambers. Article 2 of the Order establishes the Social Entitlement Chamber, the War Pensions and Armed Forces Compensation Chamber, and the Health, Education and Social Care Chamber in the First-tier Tribunal. Article 6 establishes the Administrative Appeals Chamber in the Upper Tribunal. Articles 3 to 5 and 7 set out the functions assigned to each chamber.

2.6 **The Appeals (Excluded Decisions) Order 2008 ('the Appeals Order')** provides that any decision on an appeal under section 102 of the Immigration and Asylum Act 1999 (decisions formerly made by Asylum Support Adjudicators), section 63(6) if the Tax Credits Act 2002 and section 24(2) of the Child Trust Funds Act 2004 (appeals against penalties formerly heard by the Appeal Tribunal) are added to the decisions prohibited from a right of appeal to the Upper Tribunal under section 11(5) of the Act.

2.7 **The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order ('the Qualification Order')** sets out the qualifications or experience that a person must have in order to be eligible for appointment as a member of the First-tier Tribunal or Upper Tribunal who is not a judge of the tribunal.

2.8 **The Tribunals, Courts and Enforcement Act 2007 (Transitional Judicial Pensions Provisions) Regulations 2008 ('the Judicial Pensions Regulations')** provides that Part 2 of the Judicial Pensions (Miscellaneous) Regulations 1995, which sets out the circumstances, timing and manner in which an election for Part 1 of the Judicial Pensions and Retirement Act 1993 Act to apply is made, applies to persons who become a transferred-in judge or other member of the First-tier Tribunal or Upper Tribunal.

2.9 The orders and regulation come into force on 3rd November 2008 and are subject to negative resolution.

2.10 The instruments mentioned in paragraphs 2.2 and 2.3 above could have been combined into one order, and similarly those mentioned in paragraphs 2.6 and 2.7 could have been combined into one order. However, the Department considered that it would be easier for the user if they were separated in the way they have been.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These instruments have been laid within 21 days of their commencement date. They are part of a larger package of instruments, including several subject to affirmative resolution, needed to implement the first stage of tribunals reform. The new provisions cannot operate without all the statutory instruments in place. Ministers judged that there was a serious risk of Parliament not approving the affirmative statutory instruments if the all the concerns of some key interest groups had not been met. They also judged that laying the negative instruments before the discussions with stakeholders had reached fruition could jeopardise the parliamentary process and lead to a considerable waste of parliamentary resources if such a large number of instruments had to be withdrawn.

3.2 The Minister and Department regret and apologise for the breach of the 21 day rule. However, these instruments have to take effect on 3 November as the draft Transfer of Tribunals Functions Order 2008 (laid in Parliament on 4 June 2008) provides that it is to commence on that date. As the Transfer of Tribunals Order and these instruments are interactive and interdependent it would be necessary to withdraw the Transfer of Tribunals Order and lay a new order in Parliament if the commencement dates on these instruments could not be 3 November. This would create significant confusion for tribunal users and the Tribunal Service and delay implementation of the tribunal reform programme by at least three months.

4. Legislative Background

4.1 The 2007 Act received Royal Assent in July 2007. Part 1 of the 2007 Act creates a two-tier tribunal (effectively an empty shell) and provides the provisions necessary for those tribunals to operate. Chapter 3 of Part 1 provides a number of order making powers to effect the transfer of existing tribunals into this system.

4.2 Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal. Section 7 of the Act provides that the Lord Chancellor may, with the concurrence of the Senior President of Tribunals organise the two Tribunals into Chambers and specify the allocation of functions within each Chamber.

4.3 Section 11 of the Act provides for the right to appeal to the Upper Tribunal from the First-tier Tribunal. This right of appeal is confined to points of law.

4.4 Sections 30(4) 31(9), 38, 145, and paragraph 30 of Schedule 5, of the 2007 Act provide for order making powers to give effect to the transfers. Section 148(5) of the Act provides for the Lord Chancellor to commence specified provisions of the Act by Order.

5. Extent

5.1 The Commencement Order, the Consequential Amendments Order, the Chambers Order, the Appeals Order, the Qualification Order, and the Judicial Pensions Regulations apply to the United Kingdom.

6. European Convention on Human Rights

6.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation no statement is required.

7. Policy background

7.1 Until now, tribunals have been created by individual pieces of primary legislation without any overarching framework. Many have been administered by the government departments responsible for the policy area in which that tribunal has jurisdiction. Those departments are often responsible for the decisions, which are appealable to the tribunal.

7.2 In the report of his Review of Tribunals, *Tribunals for Users – One System, One Service*, published in August 2001, Sir Andrew Leggatt recommended extensive reform to the tribunals system. He recommended that tribunals should be brought together in a single system and that they should become separate from their current sponsoring departments. He recommended that such a system be administered instead by a single Tribunals Service, in what was then the Lord Chancellor's Department.

7.3 The Government's response to Sir Andrew Leggatt's recommended single tribunal system was to enact the 2007 Act which creates two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal ('the new tribunals'), into which existing tribunal jurisdictions can be transferred. The Upper Tribunal is primarily, but not exclusively, an appellate tribunal from the First-tier Tribunal. The Act also provides for a senior judge to be Senior President of Tribunals and maintain judicial oversight of the system.

7.4 The Tribunals Service, launched in April 2006 as an executive agency of the then Department for Constitutional Affairs, provides common administrative support to the main central government tribunals. It provides support to a range of tribunals and most tribunals, which are the responsibility of central government, are now administered by the Tribunals Service, or will join the

Service over the next few years. The Service provides the administrative support for the new tribunals.

Consultation

7.5 The Government published a consultation document *Transforming Tribunals – Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007* (CP30/07) on 28 November 2007. The consultation ended on 22 February 2008. 140 responses were received including those received after the end of the consultation period.

7.6 140 responses were received. Only one respondent provided answers to all thirty questions. The other respondents tended to limit their comments to the jurisdiction they were familiar with. However, there was clear support for most proposals among the responses received on each specific question. This was particularly so for major proposals regarding the very framework of the new tribunal system such as creating chambers on a broad enough bases to group similar or related subject matter together. Of 77 responses to this question 56 (72.7%) supported the approach, 19 were opposed (24.7%) and 2 (2.6%) expressed no opinion.

7.7 A summary of the responses received was published in the Government's Response paper which can be found at http://www.justice.gov.uk/publications/cp3007.htm The response paper confirmed that, in light of the responses to the consultation, the Government intended to implement its proposals as set out in the Transforming Tribunals paper.

Commencement Order

7.8 The implementation of the new tribunal system is being phased. The primary purpose of the Commencement Order is to facilitate the first phase of implementation by commencing those provisions of the 2007 Act necessary to transfer functions of existing tribunals and allocate new appeal rights to the new tribunals on 3 November 2008. It also commences provisions on 1 April 2009 necessary for the second phase of implementation – the transfer of tax appeals.

7.9 The transitional provision in article 3 of the Commencement Order provides for existing staff to be treated as if appointed under section 40 of the Act for the purposes of delegation of duties and functions in other enactments.

7.10 The savings provision in article 4 keeps alive General Commissioners' offices for the purposes of processing case stated appeals from determinations made by the Commissioners before the abolition of their office.

7.11 Enforcement provisions intended to simplify the current procedure by the removal of the need to register the award with the Court prior to enforcement will commence on 1 April 2009. The inclusion on the Register of Judgments, Orders and Fines may make it more difficult for defaulters to obtain credit thus providing an incentive to pay the sum due. The Register, which is already

in existence for County Court judgments, effectively names and shames individuals and/or corporate bodies into compliance.

7.12 Section 27 of the 2007 Act provides for the sum awarded by the First-tier or Upper Tribunal to be recoverable as if it were payable under an order of the County Court or High Court within England and Wales.

7.13 Section 142 of the 2007 Act provides for a sum payable under the terms of a compromise involving ACAS to be recoverable in the County Court or High court as if the sum were payable under an order of that Court within England and Wales.

7.14 Paragraph 43 of Schedule 8 to the 2007 Act removes the requirement to register the Employment Tribunal award with the County Court before pursing a particular method of enforcement in the Court

7.15 Paragraph 55 of Schedule 8 to the 2007 Act amends section 98 of the Courts Act 2003 so as to include awards from the Upper and First-tier Tribunals, Employment Tribunal and Employment Appeal Tribunals on the Register of Judgments, Orders and Fines

Consequential amendments

7.16 The Consequential Amendments Order makes consequential amendments to, and revocations of, secondary legislation in respect of the functions of tribunals transferring to the First-tier Tribunal and Upper Tribunal on 3 November 2008. It should be read alongside the consequential amendments made to primary legislation contained in the draft Transfer of Tribunal Functions Order to effect the transfer of various tribunals to the First-tier and Upper Tribunals.

7.17 The provisions in articles 3 and 4 of the Consequential Amendments Order preserve the current position in Scotland for appeals to the Social Security and Child Support Appeals Tribunal (and onward appeals to the Social Security Commissioners) in relation to appeals under section 157 and 159 of the Health and Social Care (Community Health and Standards) Act 2003. These functions will not be transferred under the Transfer of Tribunal Functions Order 2008.

7.18 The transitional provision at article 5 redirects potential appeals from the Social Security and Child Support Appeals Tribunal in respect of appeals under section 8 of the Road Traffic Act 1999 from the High Court to the Upper Tribunal where a decision was made prior to the transfer of the tribunal where the appeal right has not been initiated.

Creation of chambers

7.19 The 2007 Act provides for the establishment of "chambers" within the new tribunals so that the many jurisdictions that will be transferred into the

tribunals can be grouped together appropriately. Each chamber will be headed by a Chamber President.

7.20 The Chambers Order establishes three chambers in the First-tier Tribunal - the Social Entitlement Chamber, the War Pensions and Armed Forces Compensation Chamber and the Health, Education and Social Care Chamber - and the Administrative Appeals Chamber in the Upper Tribunal. The draft Transfer of Tribunal Functions Order transfers the tribunals that will populate those chambers into the First-tier and Upper Tribunal. The functions of the following tribunals will (subject to some exceptions) be transferred into the relevant chamber of the First-tier Tribunal on the 3rd November 2008:

Health, Education and Social Care Chamber,

- Care Standards Tribunal
- Mental Health Review Tribunal
- Special Educational Needs and Disability Tribunal.

Social Entitlement Chamber

- Asylum Support Tribunal
- Criminal Injuries Compensation Appeals Panel
- Social Security and Child Support Appeals

War Pensions and Armed Forces Compensation Chamber

- Pensions Appeal Tribunal in England and Wales

From 3 November 2008 the Administrative Appeals Chamber of the Upper Tribunal will hear appeals from the First-tier Tribunal, appeals under section of the Safeguarding Vulnerable Groups Act 2006, appeals under section 5 of the Pensions Appeal Tribunals Act 1943 in respect of an assessment decision of the Pensions Appeal Tribunal in Northern Ireland and all appeals of the Pensions Appeal Tribunal in Scotland, appeals against decisions of the Mental Health Review Tribunal for Wales, appeals against decisions of the Special Educational Needs Tribunal Wales and judicial review matters.

7.21 Pensions Appeal Tribunals in Scotland and Northern Ireland are not being transferred into the First-tier Tribunal and will retain their functions. A consequence of the transfer of the Pensions Appeal Tribunals (England and Wales) is that an additional onward appeal right will be created under section 5 of the Pensions Appeal Act 1943. To ensure equitable appeal routes across the United Kingdom onward appeals for section 5 of the 1943 Act for Pensions Appeal Tribunals in Scotland and Northern Ireland were created to the Upper Tribunal. Existing onward appeal rights from the Pensions Appeal Tribunal for Scotland (to the Social Security Commissioners) are also being transferred to the Upper Tribunal.

7.22 The Mental Health Review Tribunal for Wales, and Special Educational Needs Tribunal for Wales will remain outside of the First-tier Tribunals as they are not administered through the Tribunals Service. Powers within section 32 of the Act have been used to provide for appeals from the tribunals in Wales to the Upper Tribunal in order to provide equal access to justice in

England and Wales by ensuring the new onward appeal right introduced from the Tribunal in England is also available in Wales.

7.23 Chapter 7 and 8 of the consultation paper set out the proposals for transfers of existing Tribunals into Chambers within the new Tribunals. Question 3 of the Consultation paper asked whether the allocation of Tribunals to Chambers was the right one. Of the 140 responses received, 67 answered this question. 48 thought the approach was right.

7.24 The consultation proposed that the Pensions Appeal Tribunal would be included in the Social Entitlement Chamber. In responses to the consultation members of ex-service organisations referred to the RIA for the Act which stated that in bringing tribunals together into one organisation a small number of individual specialist tribunals would be allowed to retain their own procedures where this was in the interests of the user, and that the legislation would allow for incremental changes to tribunals over time. Following further consultation, and in recognition of concerns expressed by members of the Armed Forces community, the special relationship between service personnel and the Government as characterised by Command Paper [CM 7424 -The Nation's Commitment: Cross Government Support to our Armed Forces, their Families and Veterans', there is be a separate War Pensions and Armed Forces Compensation Chamber which recognises the unique nature of this jurisdiction.

Exclusion of appeals under section 11 of the 2007 Act

7.25 Currently there is no single mechanism for appealing against a tribunal decision. The 2007 Act provides a unified appeal structure. Under the Act, in most cases, a decision of the First-tier Tribunal may be appealed to the Upper Tribunal on a point of law under section 11 of the 2007 Act unless it is classed as an excluded decision on the face of the Act or in any order made by the Lord Chancellor.

7.26 In the Consultation paper, the Government sought views on proposed changes to, and exclusions from, appeals. For the most part the Government proposed that the default position – ie an appeal on a point of law with permission to the Upper Tribunal – should apply to tribunals without an existing onward appeal or limited appeal right. However, it was stated in the Consultation paper that the current exclusion of onward appeal rights from the Asylum Support Tribunal would remain after the functions of the Tribunal transferred to the First-tier Tribunal. This is effected by paragraph (a) of article 2 of the Appeals Order. The Government favours continued exclusion of an appeal right in these cases because of the need for their rapid resolution and the risk of tactical appeals.

7.27 Currently appeals against penalties imposed in tax credit and child trust fund cases are heard in the transferring appeal tribunal. An appeal against the imposition of these penalties to the Upper Tribunal has been retained in the relevant tax legislation (section 63 of the Tax Credits Act 2002 and section 24 of the Child Trust Funds Act 2004). As these appeals include appeal against

the amount of the penalty imposed, which may be an issue of fact only, they would not fall within the criteria for an appeal on a point of law under section 11 of the 2007 Act. Therefore, they are being excluded from the section 11 onward appeal right under paragraphs (b) and (c) of Article 2 of the Appeal Order so that the current broader appeal right will be retained.

Qualifications for the appointment of members

7.28 The Qualifications Order generally reflects the intentions set out in the Consultation Paper, by retaining existing qualifications required for non legal members of Tribunals with some additional flexibility introduced to reflect widening areas of expertise suitable in some jurisdictions. The Senior President has a statutory responsibility to have regard to the need for members of all tribunals to be experts in the subject matter of, or the law to be applied in, cases in which they decide matters. He will assign members of the First-tier Tribunal or Upper Tribunal to one or more of the chambers of that tribunal, pursuant to paragraph 9 of Schedule 4 to the Act, having regard to their knowledge and experience.

7.29 In its response to the consultation paper the Government stated it intended to make an order setting out the qualifications and experience requirements for members covering 'health care', 'professionals', 'disability and 'other qualifications' as four separate categories. 74 of the 140 respondents who addressed this issue supported the categorisation of members in this way. However, following further consideration the Government now believes it is not necessary or appropriate to explicitly categorise members. Explicit categorisation may create the misconception that the services of experts should be confined to specific categories of cases or that all experts within a certain category are qualified to participate in a matter. The type of qualifications and expertise included in the Qualifications Order still reflect the four categories identified in the response but the Order does not make a distinction between them.

7.30 Some responses to the Consultation Paper, expressed concern that the role of the Service Member must be preserved in War Pensions and Armed Forces Compensation cases. Whilst this cannot be provided for specifically within this Order, The Senior President of Tribunals has produced a draft Practice Statement on composition of tribunals. The President and Deputy President of the PAT have been consulted on the draft and are in agreement with it. The Practice Statement requires the continued use of Service members on hearing panels within the War Pensions and Armed Forces Compensation Chamber and maintains their present role without diminution or alteration. The 'Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order' as laid before Parliament requires that service members have substantial experience of service in Her Majesty's naval, military or air forces.

8. Impact

8.1 A Regulatory Impact Assessment (RIA) was prepared for the Tribunals, Courts and Enforcement Act. This can be found at: http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm In terms of these statutory instruments, the RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals bringing tribunals together in one organisation.

8.2 In assessing the costs and benefits of the legislation, which is the subject of this SI, the RIA stated that the new system will have greater flexibility in adsorbing new work or responding to fluctuations, and would allow the introduction of a more coherent appellate system from tribunals.

8.3 A further RIA for these statutory instruments has not been produced.

9. Contact

9.1 Andrew Moseley at the Ministry of Justice Tel: 020 7340 6553 or e-mail Andrew.Moseley@tribunals.gsi.gov.uk.