EXPLANATORY MEMORANDUM TO

THE TRANSFER OF FUNCTIONS OF THE ASYLUM AND IMMIGRATION TRIBUNAL ORDER 2009

2009 No. [XXXX]

AND

THE AMENDMENT TO SCHEDULE 6 TO THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007 ORDER 2009

2009 No. [XXXX]

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

2. Purpose of the instruments

2.1 The Amendment to Schedule 6 to the Tribunals, Courts and Enforcement Act 2007 Order 2009 (the Amendment Order) amends, Part 4 of Schedule 6 to the Tribunals, Courts and Enforcement Act (the 2007 Act), using section 37 of the 2007 Act, by adding the Asylum and Immigration Tribunal to the list of tribunals that are tribunals for the purposes of section 30 of the 2007 Act and therefore transferable into the unified structure as created by the 2007 Act.

2.2 The Transfer of the Asylum and Immigration Tribunal Order 2009 (the Order) transfers the jurisdiction of the Asylum and Immigration Tribunal into the First-tier Tribunal and Upper Tribunal under the tribunal structure created by the Tribunals, Courts and Enforcement Act 2007 (c. 15). The Order also abolishes the Asylum and Immigration Tribunal.

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

3.1 None

4. Legislative Context

4.1 The jurisdiction of the Asylum and Immigration Tribunal is being transferred into the unified tribunal structure created by the 2007 Act**.**

4.2 Part 1 of the 2007 Act creates a two tier tribunal system into which existing tribunals can be transferred or new appeal rights directed. Chapter 3 of Part 1 provides a number of order-making powers to effect the transfer of existing tribunals into this system. Section 3 establishes the First-tier Tribunal and the Upper Tribunal. Section 30 allows the Lord Chancellor to transfer functions of tribunals listed in Schedule 6 of the 2007 Act to either or both of these two Tribunals. The Amendment Order therefore amends Schedule 6 of the 2007 Act to include the Asylum and Immigration Tribunal and so makes it transferable.

4.3 The first tribunals transferred into the unified structure in November 2008 and there were further transfers in April, June and September 2009. The orders that came into force to implement these transfers can be found at http://www.tribunals.gov.uk/Tribunals/Rules/rules.htm

5. Territorial Extent and Application

5.1 This Order applies to the UK.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary has made the following statement regarding Human Rights:

In my view the provisions of the Transfer of Tribunal Functions Order 2009 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7. 1 The need for reform of the tribunals system was set out in Sir Andrew Leggatt's Review 'Tribunals for Users – One System One Service' http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm which found that tribunals had grown in an almost entirely haphazard way and were not organised for the benefit of users. The 2007 Act was enacted to implement Sir Andrew Leggatt's recommendation of a single tribunal system. This Order is made as part of the Government's ongoing commitment to implement the provisions of the 2007 Act and provide a tribunals structure designed to meet the needs of users.

7.2 The amendment order adds the Asylum and Immigration Tribunal to the table in Part 4 of Schedule 6 to the Tribunals, Courts and Enforcement Act 2007, bringing it within the scope of the Lord Chancellor's power to transfer tribunal functions to the First-tier Tribunal or the Upper Tribunal. The Order transfers the entire jurisdiction of the Asylum and Immigration Tribunal into the First-tier Tribunal and the Upper Tribunal. The Order also abolishes the Asylum and Immigration Tribunal.

7.3 An amendment to the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 (the Chambers Order) will provide for the establishment of the Immigration and Asylum Chamber of the First-tier Tribunal which will deal with the former jurisdiction of the Asylum and Immigration Tribunal. The amendment to the Chambers Order will also provide for the establishment of the Immigration and Asylum Chamber of the Upper Tribunal, which will hear onward appeals from the Immigration and Asylum Chamber of the First-tier Tribunal.

- ***Consolidation***

7.4 No consolidation is necessary; the instruments remove the references to the current Tribunal and replace them with First-tier Tribunal or Upper Tribunal as appropriate, ensuring existing appeal rights remain.

8. Consultation outcome

8.1 The consultation paper "Immigration Appeals - Fair decisions; faster justice" (the transfer consultation) was published by the UK Borders Agency of the Home Office on 21 August 2008 with the response jointly published by the Home Office and the Ministry of Justice on 8 May 2009. The consultation ended on 31 October 2008 with 47 responses received. The consultation and response are available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/.

8.2 The Government set out in the transfer consultation its intention to transfer the Asylum and Immigration Tribunal into the unified tribunal structure created by the

2007 Act. Not all respondents to the transfer consultation expressed an opinion on the proposal to transfer the Asylum and Immigration Tribunal into the unified structure; however 22 of the respondents who did respond to this question expressed general support.

8.3 The consultation asked for comments on whether a separate chamber should be created for immigration and asylum cases (see paragraphs 20 and 21 of the transfer consultation). Responses were mixed but the majority were in favour of a separate chamber. Concurrence has been sought from the Senior President of Tribunals in accordance with section 7 of the 2007 Act and a separate chamber will be created for immigration and asylum casework. At paragraph 24 the transfer consultation also asked for comments on whether it would be appropriate to bring forward legislation to ensure that the Immigration and Asylum Chamber of the Upper Tribunal should not be routinely subject to judicial review. The majority of respondents who expressed an opinion were in opposition of this proposal and as such the Government stated in its response that it will not legislate to ensure that Upper Tribunal decisions are not routinely subject to judicial review but would however keep the matter under review.

8.4 The consultation also asked for comments on whether it would be appropriate to shorten the onward appeal route from the First-tier Tribunal by proposing that permission to appeal to the Upper Tribunal should only be sought from the Upper Tribunal itself, as opposed to primarily from the First-Tier Tribunal and then directly from the Upper Tribunal if refused by the First-tier Tribunal. Respondents who addressed this proposal gave mixed responses with the majority expressing support. After careful consideration, the Government has decided not to take forward the proposal at this time.

8.5 The consultation asked for comments on the rule-making powers for the Immigration and Asylum Chamber of the First-tier Tribunal Procedure Rules. The power for making and amending procedure rules for the First-tier Tribunal and Upper Tribunal lies with the Tribunal Procedure Committee. The Government suggested in the transfer consultation (see paragraphs 34 – 36) that it wished to exempt rules for immigration and asylum from the committee's remit and retain the Lord Chancellor's power to make and amend Procedure Rules in this area. The majority of those who responded to this section of the consultation opposed this. The Government has noted this opposition and have confirmed that rule making powers will pass to the Tribunal Procedure Committee. The Order amends the existing Asylum and Immigration Tribunal (Procedure) Rules 2005 and the Asylum and Immigration Tribunal (Fast-track Procedure) Rules 2005, using the Lord Chancellor's powers under section 31(7) of the 2007 Act, to allow for them to become Procedure Rules for the Immigration and Asylum Chamber of the First-tier Tribunal. The Tribunal Procedure Committee have consulted separately on rule amendments for Immigration and Asylum Chamber of the Upper Tribunal. The consultation commenced on 1 July 2009 and ended on 29 September 2009. Events were held in Manchester, Glasgow and London as part of the consultation. There were 84 attendees at these events in total. Five responses were received by the date the consultation closed.

8.6 The Senior President of Tribunals, the Deputy Presidents of the Asylum and Immigration Tribunal and the Administrative Justice and Tribunals Council have been consulted on the content of these Orders during their development. Other Government Departments have been consulted and agreed to the proposed amendments to the legislation for which they have responsibility.

8.7 The Chief Executive of the Tribunals Service, Kevin Sadler, sent a letter explaining the changes to key stakeholders, professional bodies and relevant Government Departments in July 2009. The Parliamentary Under Secretary of State for Justice, Bridget Prentice MP, sent a letter explaining the changes to all Members of Parliament in July 2009.

9. Guidance

9.1 The Tribunals Service website page has been updated with an explanation of the changes. Further updates to the website will take place closer to commencement, with more detailed explanations of the changes, updated forms and guidance material. Existing printed versions of guidance material will also be updated for each of the transferring jurisdictions. Existing Tribunals letters will also be updated to reflect the changes and to help appellants understand changes to the process.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment has not been prepared for this instrument. 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 (see pages 2 -14 for the tribunals' element of the RIA)

10.4 In terms of these orders, the RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals bringing tribunals together in one organisation. No additional costs have been identified from the setting up of the First-tier Tribunal or Upper Tribunal in the first 3 years (see paragraph 1.63 of the RIA), and no further costs have been identified to change this assumption.

11. Regulating small business

11.1 The legislation has no impact on small businesses.

12. Monitoring & review

12.1 The impact of these Orders and other Orders that transfer tribunals will be monitored and reviewed as part of the annual report of the Tribunals Service, which measures performance against key indicators. In addition an annual report by the Senior President of Tribunals on all relevant tribunal cases is published. This will include cases heard by the Immigration and Asylum Chambers and other chambers of the First-tier Tribunal and Upper Tribunal, where the Senior President considers this appropriate.

13. Contact

Andrew Moseley at the Ministry of Justice Tel: 020 3334 6553 or email: andrew.moseley@tribunals.gsi.gov.uk can answer any queries regarding the instrument.