EXPLANATORY MEMORANDUM TO

THE TRANSFER OF TRIBUNAL FUNCTIONS 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 Transfer of Tribunal Functions Order 2009 (the Order) is part of a series that transfers the jurisdictions of a range of tribunals into the First-tier Tribunal and Upper Tribunal under the tribunal structure created by the Tribunals, Courts and Enforcement Act 2007 (c. 15).

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

3.1 None

4. Legislative Context

4.1 The jurisdictions of the Gambling Appeals Tribunal, Claims Management Services Tribunal, Information Tribunal, Immigration Services Tribunal, Adjudication Panel for England, Financial Services and Markets Tribunal, Pensions Regulator Tribunal (in Great Britain) and Family Health Services Appeal Authority are being transferred into the unified tribunal structure created by the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) as part of a series of tribunal transfers.

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.

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 extends to the UK save that the provisions in relation to the Pensions Regulator Tribunal extend only to England and Wales and Scotland. The extent of the jurisdiction of, and the legislation relating to, each other tribunal transferred by this order varies, but in relation to each tribunal the provisions in this order extend to all relevant parts of 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 Order transfers the entire jurisdiction of the Gambling Appeals Tribunal, Claims Management Services Tribunal, Immigration Services Tribunal, Adjudication Panel for England and Family Health Services Appeal Authority into the First-tier Tribunal and abolishes each Tribunal. The Order also abolishes the Information Tribunal and transfers the entire jurisdiction into the First-tier Tribunal and the Upper Tribunal, with the question as to which one of them is to exercise the functions in a particular case being determined by or under the Tribunal Procedure Rules.

7.3 An amendment to the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 No. 2684 (the Chambers Order) will provide for the former jurisdiction of the Family Health Services Appeal Authority to be dealt with by the Health, Education and Social Care Chamber of the First-tier Tribunal and for the other jurisdictions to be dealt with in the General Regulatory Chamber of the First-tier Tribunal (and, in the case of the former jurisdiction of the Information Tribunal, in the Administrative Appeals Chamber of the Upper Tribunal). Onward appeals from all of these First-tier Tribunal jurisdictions will be heard in the Administrative Appeals Chamber of the Upper Tribunal**.**

7.4 The jurisdiction of the Financial Services and Markets Tribunal is transferred to the Upper Tribunal and the former Tribunal abolished. An amendment to the Chambers Order will provide for the former jurisdiction of the Financial Services and Markets Tribunal to be dealt with by the Tax and Chancery Chamber of the Upper Tribunal.

7.5 The jurisdiction of the Pensions Regulator Tribunal in Great Britain is transferred to the First-tier Tribunal and the Upper Tribunal. Currently that jurisdiction arises under the Pensions Act 2004, and amendments to that Act made by the Order provide that those cases will be heard by default in the Upper Tribunal. An amendment to the Chambers Order will provide for those cases to be dealt with by the Tax and Chancery Chamber of the Upper Tribunal.

7.6 Work is currently under way on the implementation of the Pensions Act 2008. When commenced, provisions in this Act will create new powers for the Pensions Regulator and provide for a right to refer matters in respect of these to a tribunal. Due to the nature of the provisions in that Act, it is intended that those references will be primarily heard in the First-tier Tribunal, and the amendments to that Act made by the Order provide for those references to be heard by default in the First-tier Tribunal. As part of the implementation of the Pensions Act 2008, the allocation of references under previous pensions legislation, the Pensions Act 2004, will be reviewed. In anticipation of this, the Order provides for rules of procedure to be able to set out circumstances in which a reference under the Pensions Act 2004 can be heard in the First-tier Tribunal, and circumstances in which a reference under the Pensions Act 2008 can be heard in the

Upper Tribunal. However, until the Pensions Act 2008 is implemented the Pensions Regulator Tribunal's former jurisdiction will solely be dealt with by the Upper Tribunal. Any amendments to Tribunal Procedure Rules to accommodate transfer between tiers in the future will be subject to further full public consultation.

7.7 The Tribunals, Courts and Enforcement Act 2007, at section 30(5) (b), does not allow the transfer of the Pensions Regulator Tribunal's jurisdiction in Northern Ireland. It is intended that the Northern Ireland jurisdiction will transfer to the First-tier Tribunal and Upper Tribunal at the same time as the jurisdictions for Great Britain; this will be achieved via Northern Ireland legislation.

- ***Consolidation***

7.8 No consolidation is necessary; the instruments remove the references to the current Tribunals 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 Transforming Tribunals – Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007 (CP30/07) was published on 28 November 2007 with the response published on 19 May 2008. The consultation ended on 22 February 2008 with 140 responses received. The consultation and response are available at http://www.justice.gov.uk/consultations/cp3007.htm

8.2 The Government set out in the consultation its intention to establish a General Regulatory Chamber in the First-tier Tribunal and proposed to transfer the Gambling Appeals Tribunal, Claims Management Services Tribunal, Immigration Services Tribunal and Adjudication Panel for England to that Chamber (see paragraphs 166-168, 172 & 207 of the consultation)**.** In response to the question of whether the general allocation of jurisdictions to Chambers was the right one, 67 respondents provided a response to the question and 48 thought the approach was correct. Of those who disagreed, none were in relation to the tribunals named above. Further details are available on page 11 of the response.

8.3 The consultation asked for comments on 3 options as to where the work of the Information Tribunal should transfer (see paragraphs 209 – 212 of the consultation). Of the 13 responses received, 7 agreed with the approach of the work being dealt with in either the First-tier Tribunal or Upper Tribunal depending on the weight of the case on the basis that it offered the greatest flexibility. Of those who disagreed, 3 respondents preferred the work transferring into the First-tier Tribunal with Upper Tribunal judges hearing weightier cases, 2 thought all work should transfer to the Upper Tribunal and 1 expressed concerns in relation to both these options. The Government considered these responses carefully and decided to confer the jurisdiction on both tiers, providing for the maximum flexibility in how appeals are handled, recognising the diversity of the tribunal's work and its role in national security cases (see page 19 of the response).

8.4 This approach is achieved by the transfer order in combination with the rules for the General Regulatory Chamber made by the Tribunal Procedure Committee (TPC). The order provides for Tribunal Procedure Rules to determine the question as to whether the First-tier Tribunal or Upper Tribunal is to exercise the functions in a particular case. During the consultation on the rules for the General Regulatory Chamber, the TPC sought views on whether there were any types of proceedings in this jurisdiction which should always be dealt with by the Upper Tribunal. Respondents were specifically asked to consider appeals against National Security certificates under Section 28 of the Data Protection Act 1998 and Section 60 of the Freedom of

Information Act 2000 in their responses. Of the three responses, two agreed that such appeals should be heard in the Upper Tribunal and one agreed that section 60 FOI Act 2000 cases should be heard in the Upper Tribunal but offered no comment on section 28 DPA Act 1998 cases.

8.5 The response has yet to be published but the questions related to the Information Tribunal maybe found at Page 5 section 8 of the consultation at: http://www.tribunals.gov.uk/Tribunals/Documents/Grc/GRConsultationPaper.pdf. Amendments to the rules for the General Regulatory Chamber to provide for these matters will be made and laid before Parliament before the Order takes effect.

8.6 In a response to the above rules consultation, the Immigration Law Practitioners' Association (ILPA) raised the concern that there was no appeal from a decision of the Immigration Services Tribunal, and therefore no way to challenge such a decision other than by way of judicial review. In light of these comments, the Government looked again this issue and decided that appellants to this jurisdiction should have a right of appeal from a decision of the First-tier Tribunal to the Upper Tribunal.

8.7 The Senior President of Tribunals, the President of each 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. The Welsh Ministers have consented to the transfer of the Family Health Services Appeal Authority, as required by section 30(8) of the 2007 Act.

8.8 The Chief Executive of the Tribunals Service sent a letter explaining the changes to key stakeholders, professional bodies and relevant Government Departments in February 2009. Further update letters were sent to stakeholders in July 2009.

9. Guidance

9.1 The respective Tribunals Service website pages have 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 this Order, 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 this Order 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 General Regulatory Chamber and the Health, Education and Social Care Chamber of the First-tier Tribunal and the Administrative Appeals Chamber and Tax and Chancery Chamber of the Upper Tribunal, where the Senior President considers this appropriate.

13. Contact

Gillian Brooks at the Ministry of Justice can answer any queries regarding the instrument. Tel: 020 3334 3104 or email: gillian.brooks@justice.gsi.gov.uk