EXPLANATORY MEMORANDUM TO

THE TRANSFER OF TRIBUNAL FUNCTIONS ORDER 2008

2008 No. 2833

THE APPEALS FROM THE UPPER TRIBUNAL TO THE COURT OF APPEAL ORDER 2008

2008 No. 2834

THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (COMPOSITION OF TRIBUNAL) ORDER 2008

2008 No. 2835

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 cover provisions of Part 1 of the Tribunals, Courts and Enforcement Act 2007, which establish the First-tier Tribunal and the Upper Tribunal ("the new tribunals"), and allow for the transfer of various existing tribunals into the new tribunals.

2.2 **The Transfer of Tribunal Functions Order** effects the transfer of various existing tribunals (listed in Schedule 1 of the Order) to the First-tier Tribunal and the Upper Tribunal ("the new tribunals") established under section 3 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

2.3 The order has various primary functions, and in addition contains various minor, consequential and transitional provisions, in respect of the functions of the transfers.

2.4 Article 3 effects the transfer of the functions and article 4 abolishes the tribunals from which the functions are transferred. Article 5 provides for members of the tribunals from which the functions are transferred to be themselves transferred to hold offices in the new tribunals. Where the original office has not been abolished the office holders will hold both the new and old office.

2.5 Articles 6 to 8 provide for onward appeal rights from decisions of specified Tribunals in Wales, Scotland and Northern Ireland to be heard in the Upper Tribunal.

2.6 Article 9 brings Schedule 3 and Schedule 4 of the Act into effect. Schedule 3 contains minor and consequential amendments to primary legislation resulting

from the transfer of tribunal functions and members, abolition of tribunals and new appeal rights provided for in this Order. Schedule 4 make transitional and saving provisions for cases which would previously have been dealt with by the tribunals from which the functions are transferred by article 3.

2.7 Article 2 adds three tribunals to the table in Part 4 of Schedule 6 to the 2007 Act, bringing them within the scope of the Lord Chancellor's power to transfer tribunal functions to the First-tier Tribunal or the Upper Tribunal. None of the three tribunals are affected by the transfer in article 3.

2.8 **The Appeals from the Upper Tribunal to the Court of Appeal Order** relates to permission to appeal from the Upper Tribunal to the Court of Appeal in England and Wales or leave to appeal to the Court of Appeal in Northern Ireland, where the appeal before the Upper Tribunal had been made on a point of law from a decision made by the First-tier Tribunal. The Order provides that permission or leave will only be granted only where the relevant appellate court considers the proposed appeal would raise some important point of principle or practice or there is some other compelling reason for the relevant appellate court to hear the appeal.

2.9 **The First-tier Tribunal and Upper Tribunal (composition of tribunal) Order** makes provision, in relation to matters that fall to be decided by the First-tier Tribunal or the Upper Tribunal, for determining the number of members of the tribunal who are to decide the matter. Provision is also made for determining whether the member or members of the tribunal are to be judges of the tribunal or other members of the tribunal. The Tribunals are created under Section 3 of the Tribunals, Courts and Enforcement Act 2007.

2.10 The orders come into force on 3rd November 2008 and are subject to affirmative resolution.

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

3.1 Paragraphs 224 to 227 of Schedule 3 of the Transfer of Tribunal Functions Order makes amendments to the Child Maintenance and Other Payments Bill. This Bill is still making its passage through Parliament but is expected to receive Royal Assent in June 2008. The Order is drafted in a way that anticipates that the Bill will become an Act before this Order is debated in Parliament. However, amendments may need to be made to the Order if any relevant provisions of the Bill are amended in Parliament. Amendments will also need to be made to include the correct chapter number of the Act.

4. Legislative Background

4.1 The 2007 Act received Royal Assent in July 2007. Part 1 of the 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 30 of the Act allows for the Lord Chancellor to transfer functions of tribunals listed in Schedule 6 of the Act to either or both of these two Tribunals.

4.3 Sections 30(1) and (4), 31(1), (2) and (9), 32(3) and (5), 33(2) and (3), 34(2) and (3), 37(1), 38 and 145 of the 2007 Act provide for order making powers to give effect to the transfers.

4.4 Once transferred the procedure of the tribunals will be governed by Tribunal Procedure Rules and consequential amendments in Schedule 3 of the Order have been made to this effect under paragraph 30 of Schedule 5 to the 2007 Act.

4.5 Section 11 of the Act provides for right to appeal to Upper Tribunal from First-tier Tribunal. Section 13 of the Act provides for right to appeal to the Court of Appeal, including the Court of Appeal in Northern Ireland, from decisions made by the Upper Tribunal.

4.6 Section 13(7) of the Act defines as a specific category of appeals, application for permission (or leave) to appeal from any decision of the Upper Tribunal made on an appeal on a point of law form the First-tier Tribunal. Section 13(6) provides that the Lord Chancellor may by order make provision for permission or leave in appeals covered under 13(7) to be granted only where the appeal satisfies the requirements listed in Section 13(6)(a) or (b) of the Act.

4.7 Paragraph 15(1) of Schedule 4 to the Act requires the Lord Chancellor to make provision by order in relation to every matter that may fall to be dealt with by either Tribunal, for determining the number of members of the Tribunal who are to decide the matter. If such an order provides for a matter to be decided by a single member of a tribunal, the Lord Chancellor is required to make provision for determining whether the matter should be decided by a judge or one of the other members (NLMs) (paragraph 15(2) of Schedule 4). Equally if the order provides for a matter to be decided by two or more members, the Lord Chancellor must make provision as to whether (and how many) are to be judges or other members (paragraph 15(3) of Schedule 4).

4.8 Duties under 15(1) (2) and (3) may be discharged by providing for the thing to determined by the Senior President of Tribunals or a Chamber President

5. Extent

5.1 The Appeals from the Upper Tribunal to the Court of Appeal Order applies to England and Wales and Northern Ireland. The Transfer of Tribunal Functions Order and the First-tier Tribunal and Upper Tribunal (composition of tribunal) Order apply to the United Kingdom.

6. European Convention on Human Rights

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

In my view the provisions of the Transfer of Tribunal Functions Order 2008 are compatible with the Convention rights.

7. Policy background

7.1 Tribunals constitute a substantial part of the justice system. They deal with a wide range of disputes including those between the individual and the state (such as benefits, tax and immigration) and between private individuals (such as employment disputes).

7.2 Until now, most 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 sometimes responsible for the decisions which are appealable to the tribunal.

7.3 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.

7.4 The Government's response to Sir Andrew Leggatt's recommended single tribunal system was to enact the Tribunals, Courts and Enforcement Act 2007 which creates two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, into which existing tribunal jurisdictions can be transferred. The Upper Tribunal is primarily, but not exclusively, an appellate tribunal from the First-tier Tribunal.

7.5 The Act also provides for the establishment of "chambers" within the two 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 and the tribunals' judiciary will be headed by a Senior President of Tribunals. The first two chambers in the First-tier Tribunal, the Social Entitlement Chamber and the Health, Education and Social Care Chamber, will be opened in November 2008 and the Administrative Appeals Chamber in the Upper Tribunal will be opened at the same time. This order transfers the tribunals that will populate those chambers into the First-tier and Upper Tribunal.

7.6 It is intended that the new tribunals will exercise the jurisdictions currently exercised by the tribunals listed in Parts 1 to 4 of Schedule 6 of the 2007 Act, which constitute most of the tribunal jurisdictions administered by central government. The Government's policy is that in the future, when a new

tribunal jurisdiction is required to deal with a right of review or appeal, that right of appeal or review will be to these new tribunals.

7.7 A distinctive feature of tribunals in their current form is their membership. Some tribunals consist of a lawyer sitting alone. Others comprise a lawyer sitting with one or more members who may be experts in their field (such as doctors or accountants) who have experience relevant to the work of the tribunal, or have no relevant experience but have generic skills. A few tribunals have no legal members at all.

7.8 At present, there is no coherent system in place for deploying tribunal members. While some sit in more than one jurisdiction, this will be as a result of the member having gone through the whole appointments process for each additional jurisdiction.

7.9 The 2007 Act creates new offices for the First-tier and Upper Tribunal. It creates new titles (giving the legal members the title of judges) and a new system of deployment. Judges of the First-tier Tribunal or Upper Tribunal will be assigned to one or more of the chambers of that tribunal, having regard to their knowledge and experience. The fact that a member may be allocated to more than one chamber allows members to be deployed across the jurisdictions within the tribunal. This Order provides for members of transferred tribunals to become members of the new tribunals.

7.10 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 and a decision of the Upper Tribunal may be appealed to a court. The grounds of appeal must relate to a point of law.

7.11 Instead of tribunal rules being made by the Lord Chancellor and other government Ministers under a multiplicity of different rule-making powers, a new Tribunal Procedure Committee will be responsible for tribunal rules. This committee has been modelled on existing rule committees which make rules of court.

7.12 The Tribunals Service, launched in April 2006, 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.

7.13 Consultation Paper Transforming Tribunals – Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007 (CP30/07) was published 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.

7.14 Chapter 7 and 8 set out the proposals for transfers of existing Tribunals into Chambers within the new Tribunals. Appendix C set out the proposed

structure of Tribunal Chambers. 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. The Government intends to transfer functions of Tribunals in two phases. The Transfer of Tribunal Functions Order covers functions of Tribunals in the first phase and are in accordance with the proposals set out in the Consultation paper

7.15 The consultation paper did not ask any specific questions in relation to onward appeals to the Court of Appeal. The Government has decided that the provisions in 13(6)(a) and (b) should apply to all onward appeals that fall within 13(7). It has taken this view noting that any such cases will already have had two appeals, one to the First-tier Tribunal and one to the Upper Tribunal, and it is therefore appropriate that any further application for permission or leave should satisfy at least one of the requirements without exception

7.16 Chapter 9 of the consultation paper set out the overriding principle the Government intended that the order stipulating tribunal composition would reflect. These included; Hearings of more than one judge are only appropriate if it is a significant question of law, or training is taking place; in tribunals of two the chair has the deciding vote, NLMs are there to provide expertise and should be applied selectively, NLMs may be able to hear cases alone and expertise is not confined to those with professional qualifications. The Government also stated that it intended the order would set a default position close to the present rules for the composition of existing tribunals, but would also provide for a general discretion for a tribunal to be composed in a different way for a particular hearing.

7.17 Of the 84 respondents that answered this question 50 agreed that this was the right approach to Tribunal composition, 8 expressed no opinion and 26 disagreed with the approach. 11 of these however answered in respect of Employment Tribunals and the Employment Appeal Tribunal which is not covered under the proposed order.

7.18 The provisions in the First-tier Tribunal and Upper Tribunal (composition of tribunal) Order generally reflect the intentions as set out in the Consultation Paper, by leaving the decision on the number of members to decide any matter to the Senior President of Tribunals.

7.19 In relation to the First-tier Tribunal, rather than setting a default position as to the number of members, the Order requires the Senior President to have regard to the provisions for determining the number of members of the tribunal which would have dealt with the matter prior to the establishment of the new Tribunals, if the matter is a function that was transferred from a previous tribunal to the new Tribunals. The Senior President is also required to have regard to the need for members to have particular expertise etc. (article 2).

7.20 In relation to the Upper Tribunal, a default position of a single member has been set which may be overridden by the Senior President (article 3). The

remaining articles make provision as to whether a matter is to be determined by judges or NLMs, or a combination of both.

Specific Tribunals

7.21 The transfer of the Pensions Appeal Tribunals relates only to tribunals in England and Wales; Pensions Appeal Tribunals in Scotland and Northern Ireland retain their functions as these are not administered by the Tribunals Service. As non-devolved matters the Government intention is to align appeal routes so that there are equitable appeal routes across Great Britain. Onward appeal for Pensions Appeal Tribunals Scotland are currently to Social Security Commissioners. The Social Security Commissioners for Scotland will transfer to the Upper Tribunal so appeals from the Pension Appeal Tribunals in Scotland will be to the Upper Tribunal. Appeals from Pensions Appeal Tribunals in Northern Ireland will continue to the Social Security Commissioners for Northern Ireland.

7.22 There is currently no onward appeal right for a decision made under section 5 of the Pensions Appeal Tribunals Act 1943, however section 11 of the 2007 Act provides that appeals can be made to the Upper Tribunal on all decisions of the First-tier Tribunal on a point of law with permission. Therefore, for decisions under section 5 of the 1943 Act made by the First-tier Tribunal an onward appeal right would be created. In consequence of the Order makes provision for the equivalent onward appeal right to Upper Tribunal from decisions under section 5 of the 1943 Act by the Pensions Appeal Tribunal for Scotland and Northern Ireland. The Social Security Commissioners for Northern Ireland by virtue of section 5 of the 2007 Act will be members of the Upper Tribunal and will therefore be able to deal with the section 5 assessment appeals under this appointment.

7.23 For Mental Health Review Tribunals the transfer relates only to tribunals in England; the Mental Health Review Tribunal for Wales retains its functions as this Tribunal is not administered through the Tribunals Service. Powers within section 32 of the Act have been used to provide for appeals from the tribunal 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. In the special educational needs regime the functions of the Special Educational Needs and Disability Tribunal (which relates to England) are transferred but the functions of the Special Educational Needs Tribunal for Wales are not as some of the jurisdiction of this Tribunal covers devolved matters. Powers within section 32 of the Act have been used to provide for appeals from this Tribunals in Wales to the Upper Tribunal in order to ensure equal access to justice in England and Wales.

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 this order, the RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals bringing tribunals together in one organisation. This will consists of a First-tier Tribunal and Upper Tribunal, with the First-tier Tribunal hearing appeals from the decision making body and the Upper Tribunal being the appellate level for decisions of the First-tier.

8.2 The RIA further stated the legislation would create a coherent system of appeals with appropriate oversight from the courts, ensuring that only those cases that should be dealt with in a court are and reducing the need for Judicial review.

8.3 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.

9. Contact

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