EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (PROPERTY CHAMBER) RULES 2013

2013 No. 1169 (L. 8)

THE TRIBUNAL PROCEDURE (AMENDMENT NO. 3) RULES 2013

2013 No. 1188 (L. 9)

THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (CHAMBERS) (AMENDMENT) ORDER 2013

2013 No. 1187

AND

THE QUALIFICATIONS FOR APPOINTMENT OF MEMBERS TO THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (AMENDMENT) ORDER 2013

2013 No. 1185

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 A Property Chamber ("PC") of the First-tier Tribunal is to be created in July 2013 and will require Rules in order for it to operate. These will be the new **Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013** ("PC Rules"). The PC Rules consolidate and reform the rules of procedure previously governing proceedings in several tribunals which are due to transfer in to the First-tier Tribunal and the new PC. More detail can be found in paragraph 7.3.

2.2 **The Tribunal Procedure (Amendment No. 3) Rules 2013** ("Amendment No. 3 Rules") make changes to the Upper Tribunal (Lands Chamber) Rules 2010 that will allow cases and appeals from the new PC to be dealt with in the Upper Tribunal. They also make amendments relating to costs and to address some practical issues.

2.3 **The First-tier Tribunal and Upper Tribunal (Chambers) Order 2013** ("the Chambers Order 2013") creates the PC of the First-tier Tribunal and allocates functions to this new Chamber. It also adds to the functions of the Lands Chamber and the Tax and Chancery Chamber of the Upper Tribunal.

2.4 **The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal (Amendment) Order 2013** ("the Qualifications Order 2013") enlarges the range of existing qualifications and experience that make a person who is not a judge of the tribunal eligible for appointment as a member of the First-tier Tribunal or Upper Tribunal.

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

3.1 None

4. Legislative Context

4.1 Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") created a two-tier tribunal system into which existing tribunals can be transferred, or new appeal rights directed. Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal, which together make up this two-tier system. Both Tribunals are divided into Chambers which deal with different areas of jurisdiction e.g. health, immigration and asylum and education. Section 7 of the 2007 Act provides for the Lord Chancellor, with the concurrence of the Senior President of Tribunals, to make provision by Order for the organisation of each Tribunal into a number of Chambers.

4.2 Section 22 of the 2007 Act provides for Tribunal Procedure Rules to be made, governing the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal. It also provides for the rules to be made by the Tribunal Procedure Committee ("TPC"). Schedule 5 to the 2007 Act makes provision for the process of making, and the content of, those rules.

4.3 Section 7 of the 2007 Act provides for the Lord Chancellor with the concurrence of the Senior President of Tribunals (SPT), to make provision by order for the organisation of each tribunal into a number of Chambers. Paragraph 2(2) of Schedule 2 and paragraph 2(2) of Schedule 3 provide for the Lord Chancellor, with the concurrence of the SPT, to prescribe by order the qualifications required in order to be eligible for appointment to the First-tier Tribunal and Upper Tribunal for persons who are not judges.

4.4 The Chambers and Qualifications Orders put in place the legislation necessary to support the transfers by allocating work into the PC and extending the scope of the qualifications and experience required for the appointment of members who are not judges.

4.5 The Chambers Order 2013 amends the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (S.I. 2010/2655); articles 3 and 4 of the 2013 Order provide for the creation of the PC and the allocation of functions to that chamber. Articles 5 to 7 allocate onward appeals from decisions of the PC of the First-tier Tribunal to different chambers of the Upper Tribunal.

4.6 The Qualifications Order 2013 amends the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 (S.I.

2008/2692.) It adds new grounds of eligibility for appointment as a member of the First-tier Tribunal or the Upper Tribunal who is not a judge

5. Territorial Extent and Application

5.1 The instruments extend to England and Wales.

5.2 As regards rent assessment committees and agricultural land tribunals, the Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036) ("the Transfer Order") has only transferred into the unified tribunal structure the functions of those tribunals in relation to England. The PC Rules will not affect the continuing functions in relation to Wales of those tribunals.

5.3 The UTLC Rules, however, do apply in both England and Wales in consequence of the conferral by the Transfer Order of jurisdiction on the Upper Tribunal over appeals from decisions of rent assessment committees in Wales and the agricultural land tribunal in Wales.

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

- ***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*' which found that tribunals had grown in a haphazard way and were not organised for the benefit of users. The 2007 Act was passed to implement Sir Andrew Leggatt's recommendation of a single tribunals system. It created 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, a tribunal for hearing appeals from the First-tier Tribunal. These instruments support the ongoing programme of transfers of tribunals, and are made as part of the Government's continuing commitment to implement the provisions of the 2007 Act and provide a unified tribunals structure designed to meet the needs of users.

7.2 On 1 July 2013 the new First-tier Tribunal PC will be established. These instruments are, in the main, consequential to that and are to ensure that: functions are allocated to the Chamber; it has rules of procedure in place; appeals and cases from it can be dealt with in the Upper Tribunal; and the current Qualifications Order for non-judicial members is amended to include qualifications and experience necessary for the PC. In addition, there are some amendments to the Upper Tribunal (Lands Chamber) Rules 2010 in response to the Report of the Costs Review Group to the Senior President of Tribunals regarding the award of costs in tribunals (see paragraph 7.13), and to

address some practical issues that have been brought to the attention of the TPC.

The new First-Tier Tribunal PC Rules

7.3 The PC will accommodate applications, appeals and references presently determined by the following source jurisdictions which will transfer in to the First-tier Tribunal on 1 July 2013:

- tribunals or committees previously known as the Residential Property Tribunal Service (comprising Residential Property Tribunals, Leasehold Valuation Tribunals, Rent Tribunals and Rent Assessment Committees);
- Agricultural Land Tribunals; and
- the Adjudicator to Her Majesty's Land Registry.

7.4 Each of the source jurisdictions transferring into the PC presently has its own procedural rules and regulations. There are seven sets in total. The PC Rules bring these together into a single set of rules, and when developing them the TPC took the opportunity to rationalise the existing rules and regulations and to harmonise them with the rules in force in other Chambers. This ensures core rules of general application that are both simple and simply expressed; are easy for tribunal judges, practitioners and others to interpret; and provide greater flexibility in case management.

7.5 Experience has shown that these core rules work well across different Chambers. Accordingly, the TPC considered the core rules to be a sound starting point for consideration of rules for new Chambers. However, each Chamber is different and sometimes an element of the core rules is inappropriate, or conversely it may require a rule that other Chambers do not. For example, in the PC many of the cases to be dealt with will be 'party v party' as opposed to 'citizen v state'. The PC Rules therefore omit certain parts of the core rules and include unique rules to recognising the differences between party v party and citizen v state cases. They also include (in Part 5) some rules that are specific to particular source jurisdictions.

7.6 In relation to costs, the rules for the PC provide for the parties to bear their own costs (known as 'no costs shifting') for the Residential Property Tribunal Service and Agricultural Land Tribunals source jurisdictions, except where there has been unreasonable conduct. For the Adjudicator to the Land Registry source jurisdiction, the 'full costs shifting' practice has been maintained. This position is in accordance with recommendations of the Report of the Costs Review Group to the Senior President of Tribunals (paragraph 7.13).

Consequential amendments to the Upper Tribunal Lands Chamber Rules

7.7 The Amendment No. 3 Rules contain amendments that are required to the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("UTLC Rules") to allow the transfer of cases from, and appeals from cases heard in, the PC (with one exception relating to appeals; see paragraph 7.10).

7.8 Only limited changes have been made to the UTLC Rules to accommodate the rights of appeal from decisions of the PC. Parts 3 and 4 of the UTLC Rules already provide procedures for appellate cases, and the consultation by the TPC did not lead to reported concerns that the rules for handling appeals do not work satisfactorily.

7.9 The jurisdiction to determine appeals from Residential Property Tribunals and leasehold valuation tribunals already lies with the UTLC. Appeals from Agricultural Land Tribunals, Rent Tribunals and Rent Assessment Committees which previously lay to the High Court will now lie to the Upper Tribunal and be handled under the UTLC Rules.

7.10 In relation to the appeals from decisions relating to land registration cases, those appeals are allocated by the Chambers Order to the Tax and Chancery Chamber of the Upper Tribunal, rather than the UTLC. The TPC has considered the Tribunal Procedure (Upper Tribunal) Rules 2008 that apply in the Tax and Chancery Chamber, and concluded that they did not require any changes.

7.11 In relation to cases previously dealt with by the Residential Property Tribunal Service, the Transfer Order conferred functions on both the First-tier Tribunal and the Upper Tribunal, leaving it to rules of procedure to determine which Tribunal should hear a particular case. Rule 25 of the PC Rules provides a procedure by which a direction may be made to transfer a case from the PC to the UTLC. Rule 44A of the UTLC Rules makes provision that except to the extent that specific directions are made to the contrary, the PC Rules will continue to apply to the case which has transferred to the UTLC under rule 25. In this way, the features specific to the residential property tribunal service cases which have been assimilated into the PC Rules will continue to apply where such a case is determined in the UTLC.

Amendments relating to costs issues in the UTLC

7.12 Until now the TPC has not made significant use of its powers under section 29(2) of the 2007 Act, to limit the circumstances in which the UTLC may award costs. Currently the UTLC applies the practice known as 'full two way costs shifting' where the unsuccessful party is normally ordered to pay the successful party's costs.

7.13 In December 2011, the then Senior President of Tribunals published a report, '*Costs in Tribunals*', detailing the findings of a costs review group he had commissioned earlier in the year to review the costs regimes applicable in tribunals. In its report the group made numerous recommendations in respect of the First-tier and Upper Tribunals, which are being considered in turn by the TPC with the aim of achieving proportionate, efficient, and fair costs regimes. The report recommended that the UTLC depart from its general costs shifting practice towards a practice of not awarding costs against an unsuccessful party if they have behaved reasonably and incurred reasonable costs in exercising their rights.

7.14 Accordingly a new costs rule has been drafted that will limit the UTLC's discretion to make costs shifting orders. The new costs rule introduces a general 'no costs shifting' rule unless the UTLC considers there has been unreasonable behaviour on the part of one of the parties. This new costs rule will also reflect the rule which will apply regarding awards of costs in the PC, namely, unless one party has behaved unreasonably, the losing party will not be ordered to pay the successful party's costs.

7.15 However, there will be occasions and individual cases where an element of 'costs shifting' will remain in the UTLC. The proceedings in which costs shifting will continue are cases relating to compulsory purchase, injurious affection of land, restrictive covenants, appeals from valuation tribunals and any judicial reviews heard in the UTLC. In certain circumstances the UTLC is given power to make a direction in a case lifting the no-costs shifting rule for subsequently incurred costs. In those circumstances, the UTLC is required, if it is considering making a costs order, to bear in mind the size and nature of the matters in dispute. Therefore, the UTLC still has the power to lift the no costs general rule and use costs shifting in appropriate cases.

7.16 The rules on costs awards in the UTLC will remain subject to provisions contained in section 4 of the Land Compensation Act 1961 ("1961 Act".)

7.17 The TPC consulted on a proposal to move from primary legislation into UTLC Rules the provisions of section 4 of the 1961 Act. Section 4 covers a wide variety of circumstances in which costs incurred prior to the commencement of tribunal proceedings can be awarded by the tribunal and may be set off against the amount of compensation awarded. Until there is a suitable vehicle to repeal section 4 of the 1961 Act, the TPC's wider proposal cannot be taken forward.

7.18 Rule 10 of the Amendment No. 3 Rules makes transitional provision maintaining the Tribunal's discretion to apply the old costs rules in cases which have started in the Lands Chamber before 1st July 2013, when the amendments come into force. This is to reflect the fact that at the time proceedings were commenced parties might have expected to be awarded their costs if their case was successful, whereas under the new rules on costs, an award of costs is less likely to be made at the end of the case in the absence of unreasonable behaviour.

Miscellaneous minor amendments relating to costs in most tribunals

7.19 The Amendment No. 3 Rules also contain four miscellaneous and minor costs amendments to UTLC Rules that have recently been made to the rules that apply in other Chambers of the First-tier and Upper Tribunals.

7.20 Firstly, applications for wasted costs orders are capable of generating significant costs of their own, yet there is currently no power to make an order in respect of these. This amendment introduces an express power to allow any tribunal which has power to make a wasted costs order to be able to make an order in respect of the costs of the application.

7.21 Secondly, whilst a tribunal may have the power to make an award of costs at any stage of the proceedings and make a costs order in respect of a distinct part of the proceedings, the current rules do not expressly provide for the making of a payment on account of costs. This has been addressed.

7.22 Thirdly, the Rules contain an amendment to make it clear that a detailed assessment of costs should include the costs of the assessment.

7.23 Finally, an amendment has been made clarifying the date from which time for applying for costs runs where a party withdraws their case.. In such cases, the date for applying will run from the date of the notice sent following the withdrawal. The amendment also clarifies the nature of the notice.

Other miscellaneous amendments

7.24 Both the UTLC Rules and the PC Rules adopt improvements to the rules relating to appeals from decisions on preliminary issues which have been introduced to the rules of other chambers.

7.25 Similarly both sets of UTLC Rules and PC Rules adopt improvements to the provisions governing the withdrawal of cases which have been adjourned part-heard. The rules will dispense with the requirement that once a final hearing has started a case may only be withdrawn orally. This causes difficulty where there is a lengthy adjournment.

Chambers Order 2013

7.26 The Chambers Order 2013 amends the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 ("the 2008 Order.") The 2008 Order organised the First-tier Tribunal and Upper Tribunal into chambers and made provision for the allocation of those tribunals' functions between the chambers. The 2013 Order creates a new PC in the First-tier Tribunal, and allocates functions to this new chamber.

Qualifications Order 2013

7.27 The Qualifications Order 2013 extends the range of qualifications and experience that make a person who is not a judge of the tribunal eligible for appointment as a member of the First-tier Tribunal or Upper Tribunal. As a consequence of the transfer of agricultural land tribunals and rent assessment committees in areas in England, as from 1st July 2013, eligibility is extended to persons having substantial relevant experience of any of the following fields: the drainage of land, farming and the ownership or management of agricultural property, housing and housing conditions, landlord and tenant relationships and in valuation.

- ***Consolidation***

7.28 Consolidated versions of the rules and orders will be updated onto the Justice website when the instruments come into force. They will be found at: http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm

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 and ended on 22 February 2008; 140 responses were received.

8.2 This Consultation set out the Government's long-term vision for property tribunals. The Government's aim was for a two tier structure, providing a comprehensive and expert forum for all land, housing and valuation disputes. The First-tier Tribunal should hear first-instance cases and appeals against administrative decisions. The work should be allocated to a chamber dedicated to land, property and housing matters so that a proper level of expertise can be guaranteed. The role of the Upper Tribunal should predominantly be an expert appellate body, dealing authoritatively with issues of law and general practice. A large majority of the respondents who answered the question about the creation of a PC of the First-tier Tribunal agreed with the proposals.

The First-Tier Tribunal Property Chamber

8.3 Ongoing engagement and consultation has been in hand since 2011 with key stakeholders as part of the planning process and rules development for the new PC. This includes legal and policy colleagues from other government departments such as the Department for Business, Innovation and Skills, Department for Communities and Local Government (DCLG) and Department for Environment, Food and Rural Affairs (Defra) who currently oversee some of the policy, rules and procedure of the source jurisdictions. The Senior President of the Residential Property Tribunal Service was co-opted by the TPC to assist with the development of the PC Rules.

8.4 On the proposed new PC Rules the TPC ran a 12-week public consultation exercise during the summer of 2012; it closed on 6 September 2012. Stakeholders identified by each of the source jurisdictions, DCLG, Defra and Her Majesty's Courts and Tribunals Service (HMCTS), were contacted in writing and informed of the consultation.

8.5 Nineteen responses were received to the consultation. All supported the move to using the proven core tribunal procedure rules and the only issues raised related to specific rules required for the source jurisdictions. Many helpful comments were received on this and the TPC established a Property and Lands Sub-group which discussed the developing rules with judicial leads from each of the source jurisdictions. The TPC and its sub-group met several times between November 2012 and March 2013 to consider the responses in detail and revising the rules accordingly; circulating them to stakeholders and

members of the tribunals' judiciary for further comments and feedback each time.

8.6 The issues raised by respondents and the agreements reached are set out in more detail in both the TPC's consultation document which can be found at: http://www.justice.gov.uk/about/tribunal-procedure-committee/ts-committee-closed-consultations and in the forthcoming joint Response to both the PC and UTLC Rules consultations that will be published on the Committee's website (http://www.justice.gov.uk/about/tribunal-procedure-committee) in the near future.

The Upper Tribunal Lands Chamber, including costs issues

8.7 The TPC also ran a 12-week public consultation exercise on the proposed consequential amendments to the UTLC Rules and costs issues raised in '*Costs in Tribunals*'. This exercise was slightly later than for the PC Rules and ran during the autumn, closing on 5 December 2012. It received six responses to the consultation all of which related to costs issues.

8.8 The TPC sub-group and the UTLC Chamber President, met and considered the consultation responses. As with the PC Rules, the revised UTLC proposed amendments were circulated for further comments from relevant tribunals' judiciary and feedback.

8.9 Again, the issues raised and agreements reached are set out in more detail in both the TPC's consultation document and the forthcoming Response (see paragraph 8.6).

Miscellaneous minor amendments relating to costs; preliminary issues; and withdrawal of cases part-heard

8.10 For these miscellaneous minor amendments that related to many sets of procedural rules in both the First-tier and Upper Tribunals, a formal public consultation was not run. However the TPC consulted relevant judiciary, including Chamber Presidents, and relevant stakeholders in HMCTS and other government departments on the proposed amendments. Papers were prepared for each Chamber setting out the rationale and proposed changes, and were distributed to contacts between August and October 2012 inviting comments.

8.11 Fifteen responses were received in total; none related specifically to the UTLC. The consensus was that, as they were not controversial and related in the main to the effectiveness of the tribunal process, there was general agreement. All respondents were replied to individually, and draft amendments shared with them during December 2012 and January 2013.

The Chamber and Qualifications Order

8.12 The Senior President of Tribunal and the Chamber President designate of the Property Chamber have both been consulted during the development of Orders and the Senior President of Tribunals has concurred with the making of them.

Other government departments have been consulted on the functions allocated by the Chambers Order.

9. Guidance

9.1 HMCTS produces guidance for all tribunal jurisdictions, which are routinely issued to appellants at key stages of the appeals process and are available on its website at: http://www.justice.gov.uk/tribunals. The guidance will be updated as required to reflect the introduction of the new PC.

9.2 The Chambers and Qualifications Orders do not stand alone but support the programme of transfers of tribunals into the unified tribunal's structure. Therefore, whilst separate guidance on these orders is not planned, they will also be made available on the HMCTS website.

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 (IA) has not been prepared for these instruments. A Regulatory IA was prepared for the 2007 Act and can be found at: http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm The Regulatory IA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals, bringing them together in one organisation. No additional costs were identified from the setting up of the First-tier Tribunal and Upper Tribunal within the first 3-years, and no further costs have been identified since to change this assumption.

11. Regulating small business

11.1 The legislation does not impact upon small businesses.

12. Monitoring & review

12.1 The TPC keeps all sets of tribunal procedure rules continually under review. The impact of the Orders will be monitored and reviewed by the MoJ.

13. Contact

13.1 Julie McCallen, TPC Secretary, (julie.mcallen@justice.gsi.gov.uk) can answer any queries about the Property Chamber and Amendment No. 3 Rules.

13.2 Mary Dallas, Tribunals Policy Team, (mary.dallas3@hmcts.gsi.gov.uk) can answer any questions about the Chambers Order and Qualifications Order.