EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (AMENDMENT) RULES 2013

2013 No. 477 (L. 2)

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

2. Purpose of the instrument

2.1 The Tribunal Procedure (Amendment) Rules 2013 ("the Rules") makes changes to most of the rules that apply in the First-tier Tribunal, and to the Upper Tribunal Rules 2008.

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 eg health, immigration and asylum and education. In addition to statutory appeals, the Upper Tribunal may also deal with certain kinds of judicial reviews.

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").

4.3 Schedule 5 to the 2007 Act makes provision for the process of making the rules, and the content of those rules.

5. Territorial Extent and Application

5.1 This instrument extends to the UK.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

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

7.1 The Rules make amendments to five sets of rules which apply in the First-tier Tribunal and to one set of rules which applies in the Upper Tribunal. They are, broadly, to take account of other legislative changes; to deal with practical issues that have been drawn to the TPC's attention; and in response to a report into the use of costs (in Scotland "expenses") within tribunals.

7.2 The Rules also contain amendments specific to the Social Entitlement Chamber to reflect the introduction, under powers conferred by the Welfare Reform Act 2012, of mandatory reconsideration of decisions prior to appeal; direct lodgement of appeals at

the Tribunal; and time limits for responses. These amendments are detailed in paragraph 7.10.

7.3 The consequential amendments made in response to other legislative change are set out in the Explanatory Note accompanying the Rules; and the practical and costs issues being addressed by the Committee are set out in the following paragraphs.

Treating decisions on preliminary issues the same as those which dispose of all issues

7.4 The TPC has identified that the current rules do not work satisfactorily in relation to decisions on preliminary issues and interlocutory decisions. Decisions on preliminary issues (where one or more issues arising in the main proceedings are dealt with ahead of other issues, because the way they are decided will determine how the other issues should be approached) are binding in the proceedings unless challenged at the time.

7.5 Accordingly the TPC feels they should be treated in the same way as a final decision; in particular there should be the same right to a hearing, the provision of reasons and the same rights of appeal to the Upper Tribunal. Sometimes it may be more efficient to defer the possibility of an appeal until after all other issues have been dealt with, so a power to extend the time for appealing against a preliminary issue is also included.

Providing time limits for appeals against interlocutory decisions where none currently exists

7.6 An interlocutory decision (typically a case management decision) can be reversed at any time. Therefore, even if it is not challenged immediately it can still render a final decision erroneous in point of law. Interlocutory decisions are appealable, and whilst this is not encouraged they can prove to be a useful approach when a final hearing might be long, or the interlocutory decision eg a case management decision, is likely to determine the final outcome. However, unlike with preliminary issues, the Tribunal does not provide reasons for interlocutory decisions, as the reasons are usually apparent from the context. The current rules cause difficulty, however, as the time for appealing runs from the date that reasons are given for the decision. Therefore this amendment provides a time limit for appeals in interlocutory decisions by simply providing that time runs from the date of a decision.

Removing a defect in relation to the withdrawal of cases adjourned part-heard

7.7 The Committee has identified a defect in relation to the withdrawal of cases adjourned part-heard. The current rules state that once a final hearing has started a case may only be withdrawn orally. This causes difficulty where there is a lengthy adjournment, so the amendment will allow notice of withdrawal to be given in writing at any time. However, oral notice of withdrawal will still be permitted at a hearing.

Clarifying the date from which time for applying for costs runs after a withdrawal

7.8 Furthermore, in applications for costs following a withdrawal, the current rules do not work where consent is not required for the withdrawal. This has been remedied by ensuring that the date for applying for costs in such cases runs from the date of the notice sent following the withdrawal, and clarifying the nature of the notice.

Miscellaneous minor amendments relating to costs

7.9 In December 2011, the then Senior President of Tribunals (SPT) published a report, '*Costs in Tribunals*' (a link to the report is contained in the Explanatory Note to the Rules), 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. The TPC's aim is to achieve a costs

regime in tribunals that promotes access to justice while keeping cost proportionate and that works efficiently and fairly.

7.10 The Rules contain three amendments to the sets of rules that apply in Chambers where costs awards are made. 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. 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. Finally, the Rules contain an amendment to make it clear that a detailed assessment of costs should include the costs of the assessment.

Amendments specific to the Social Entitlement Chamber

7.11 The Rules contain amendments to allow for direct lodgement of appeals, time limits for responses and introduction of mandatory reconsideration of decisions in social security and child support cases. Currently the rules require such appeals to be lodged with the decision-maker and only notified to the Tribunal when the response by DWP is submitted. There is currently no time limit for that response.

7.12 Mandatory reconsideration is being introduced by decision-makers for some (but not all) benefits as part of welfare reforms, and will provide that there is no right of appeal unless someone has first applied for reconsideration of a decision. Where it exists, and has taken place, the appellant will be able to lodge their appeal directly with the Tribunal and the decision-maker will be required to submit its response within a specified time limit.

7.13 Amendments to these rules come into force on 8 April 2013 to coincide with the introduction of mandatory reconsideration; save for Rule 27 (time limits for responses) which comes into force on 1 October 2014. This is to allow for the new procedures to bed down and avoid any detrimental impact on operations and tribunal users.

- ***Consolidation***

7.14 Consolidated versions of the Procedure Rules will be updated onto the Justice website when this instrument comes into force. They will be found at:
http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm

8. Consultation outcome

Amendments specific to the Social Entitlement Chamber

8.1 For the amendments providing for the appeals in social security and child support cases to be sent direct to the First-tier Tribunal, and for time limits for responses in such cases, the TPC ran a 12-week consultation exercise on the proposed amendments. It coincided, and related to, a consultation by the Department for Work and Pensions (DWP) on the introduction of a provision for mandatory reconsideration of decisions before appeal rights may be exercised.

8.2 Reference was also made in the TPC consultation to a similar exercise run by Her Majesty's Revenue and Customs (between July and October 2012) relating to mandatory reconsideration before appeal for Child Benefit, Guardians' Allowance and

Tax Credits. As the timescale for these is not until 2014, the Rules deal only with DWP-decided benefits.

8.3 The TPC received 26 responses to its consultation. The majority supported the proposals for direct lodgement, with a handful opposed because they felt it would introduce delay, or that it would be more efficient for it to continue to go to the decision-maker. The TPC, however, were not persuaded by either argument; it is usual for appeals to independent judicial bodies to be lodged direct with the court or tribunal, and that court or tribunal then has control over the management of the appeal.

8.4 With the current rules, until it receives a response from the decision-maker, the Tribunal is unaware of an appeal and is consequently unable to exercise any control. This has led to appellants, who are usually unrepresented, contacting the tribunal and asking it to intervene.

8.5 The reason for lodging with decision-makers is historical and was a feature of tribunals hearing social security and child support cases before 2008 when they transferred to the First-tier Tribunal. When developing the rules, the TPC had highlighted its wish to return to the issue in the future.

8.6 In relation to time limits for responding, everyone who commented on this question agreed they were needed but no firm consensus was forthcoming on what, specifically, they should be. The MoJ and TPC subsequently engaged with DWP to consider in more detail the most appropriate time limits for responding to the appeal. They also settled the absolute time limit beyond which an appellant loses the right to appeal.

8.7 These issues are set out in more detail in both the TPC's consultation document which can be found at: www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-closed-consultations and in the forthcoming Response that will be published on the Committee's website (www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee) in the near future.

Miscellaneous minor amendments; including those relating to costs

8.8 For the miscellaneous minor amendments affecting all sets of rules, a formal public consultation was not run. However the TPC has consulted with the relevant judiciary, including Chamber Presidents, and relevant stakeholders in HMCTS and other Government departments on the proposed amendments. Separate 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.

8.9 Fifteen responses were received in total. The consensus was that, as they were not controversial and related in the main to the effectiveness of the tribunals' process, there was general agreement. Some respondents did raise the question of whether there would be cost implications; however none was subsequently identified. All respondents were replied to individually, and draft amendments shared with them during December 2012 and January 2013.

8.10 The amendments relating to costs were dealt with at the same time as the miscellaneous minor amendments; again through separate papers being prepared and circulated to relevant stakeholders and judiciary. Furthermore, these amendments were canvassed in the TPC's Property Chamber public consultation (between June and September 2012) and attracted no adverse comments. Comments were invited on the '*Costs in Tribunals*' report by the SPT, and those received were shared with, and considered by, the TPC.

9. Guidance

9.1 Her Majesty's Courts and Tribunals Service (HMCTS) produce guidance for all tribunal jurisdictions which are routinely issued to appellants at key stages of the appeals process and are available on the HMCTS website. The guidance is updated as required to reflect changes to procedure.

10. Impact

10.1 The impact on business, charities, voluntary bodies and the public sector is nil.

10.2 An impact assessment has not been prepared for this instrument. A Regulatory Impact Assessment (RIA) was prepared for the 2007 Act. This can be found at:
http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm
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 and Upper Tribunal in the first 3 years and no further costs have been identified to change this assumption.

11. Regulating small business

11.1 The legislation does not impact on small businesses.

12. Monitoring & review

12.1 MoJ will keep the tribunal rules continually under review.

13. Contact

13.1 Julie McCallen, the TPC Secretary, (julie.mcallen@justice.gsi.gov.uk) can answer any queries about this instrument.