



Tribunals Service

# Transforming Tribunals

Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007

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Ministry of  
**JUSTICE**

## Foreword by Bridget Prentice MP, Tribunals Minister

This government is working to create a culture of rights and responsibilities so both can be delivered effectively. This paper is about how we intend to do that for administrative justice and tribunals, a vital part of our system of justice and a major point of interaction between the citizen and the state.



Tribunals deal with a wide range of disputes, mostly between the individuals and the state, and were traditionally sponsored by the same government department whose decisions they were reviewing. The need to reform the Tribunals system was first set out in Sir Andrew Leggatt's review *Tribunals for Users – One System, One Service*. Our subsequent White Paper *Transforming Public Services: Complaints, Redress and Tribunals* made clear the government's commitment to transforming tribunals – the most radical change to this part of the justice system for 50 years. The establishment of the Tribunals Service in April 2006 was the first step towards this, bringing tribunals together in a single system separate from sponsoring departments.

The Tribunals, Courts and Enforcement Act 2007 provides us with the opportunity to take this process further, working with the tribunals judiciary and other stakeholders to create a truly modern, unified and independent tribunal system – one which enables the sharing and development of the considerable expertise that exists in each Tribunal's jurisdiction.

This paper sets out our proposals for the First-tier and Upper Tribunals created by the Act. It seeks views on areas such as how the chambers in the Tribunals should be structured, the assignment of Judges within and across the Chambers and the role of non legal members in the new Tribunals.

The paper also brings the story up to date in respect of other work that has been happening since the Tribunals Service was created, explaining the new regional management structure and plans for new Administrative Support Centres and a network of multi-jurisdictional Hearing Centres. Taken together, these reforms will deliver for the first time a national organisation with a strong local presence, further improving the service provided to tribunal users. Additionally we set out some of the areas where further reforms to tribunals are planned, such as in tax, and land, property and housing, and explain our early thinking in these areas.

The picture as a whole is one of change and continual improvement – a genuine transformation in the service offered to tribunal users. Tribunals deal with more than 500,000 cases a year often involving the most vulnerable people in society. It is vital that they are effective. We therefore welcome the opportunity to hear the views of all those who deal with the Tribunals on the issues set out in this paper.

A handwritten signature in black ink that reads "Bridget Prentice". The signature is written in a cursive, flowing style.

Bridget Prentice MP  
Tribunals Minister

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# Chapter 1: Executive Summary

## Radical Reforms: Consensus and Change

- 1 This paper looks at the radical changes in the administrative justice and tribunals world that were set in train by the Leggatt report. It also sets out the government's proposals for reform, and seeks views on a number of specific issues to do with implementation.
- 2 Fifty years ago a committee chaired by Sir Oliver Franks examined tribunals and inquiries and laid down the fundamental principle that tribunals perform a judicial role and should not be seen as part of executive government<sup>1</sup>.
- 3 The need to reform the UK tribunals system was highlighted by Sir Andrew Leggatt's 2001 Report *Tribunals for Users: One System, One Service*<sup>2</sup> which found that tribunals had grown in an almost entirely haphazard way and were not organised for the benefit of the users. In 2004 the government published *Transforming Public Services: Complaints, Redress and Tribunals*<sup>3</sup>, which set out the way ahead – including a new approach for redress, focusing on the needs of the user. The proposals were widely welcomed.
- 4 Tribunals do not exist in isolation. Each jurisdiction is part of a wider system for delivering justice, whether that is in employment matters, immigration, benefit entitlement, the protection of children or vulnerable adults, liability for taxation or in many other areas of modern life. In bringing the reform story up to date, this paper attempts to set the role of tribunals in that wider context; to chart the recent and radical reforms to the ways in which tribunals are organised and supported (including the passage of the Tribunals, Courts and Enforcement Act 2007); to fill out more detail on how the reformed system is to be organised in the future; and to seek views on the way ahead, including:
  - proposals for the First-tier and Upper Tribunals created by the 2007 Act
  - how the Chambers in the new Tribunals should be structured
  - the assignment of Judges within and across the Chambers, and
  - the role of non-legal members in the new structure.
- 5 The paper also reviews some of the areas where further reforms to tribunals are planned, such as in tax, and land, property and housing, and explains the government's early thinking in these areas.
- 6 This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out in Appendix A have been followed. The consultation period will run for 12 weeks from the publication of this document so that government and Parliament can consider issues in the first half of 2008. The consultation questions appear in the body of the text, and are also set out in Appendix A, together with details of where to send responses.

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<sup>1</sup> *Report of the Committee on Administrative Tribunals and Enquiries* (Chairman The Rt Hon Sir Oliver Franks, GCMG KCB CBE); Cmnd 218; July 1957.

<sup>2</sup> *Tribunals for Users: One System, One Service* – Report of the Review of Tribunals by Sir Andrew Leggatt; London: The Stationery Office; March 2001.

<sup>3</sup> *Transforming Public Services: Complaints, Redress and Tribunals* – A White Paper produced by the Department for Constitutional Affairs; Cmnd 6243; July 2004.

- 7 The changes to the Tribunals Service covered by this paper result from the 2007 Act. This was accompanied by a Regulatory Impact Assessment (RIA) which fully assessed the costs and benefits of those changes. The RIA can be found at [http://www.dca.gov.uk/risk/tce\\_bill.pdf](http://www.dca.gov.uk/risk/tce_bill.pdf). The RIA concluded that the legislation was not likely to lead to additional costs or savings for businesses, charities or the voluntary sector, nor were they likely to have an adverse impact on different groups of people, including minority groups. The government does not believe that any of the more detailed proposals in this document change the position but if you disagree with this conclusion, you are invited to send your reasons as part of your overall response.
- 8 Tribunals play a central role in defining the rights and responsibilities of individuals and businesses. More disputes are resolved through tribunal hearings than through court hearings. An independent, effective and accessible tribunal system is a vital element in the range of institutions which enable citizens in the modern state to obtain justice, which is in itself a key component in public confidence. A system which is inefficient and wasteful or organised for the benefit of the authorities is not acceptable: it undermines the compact between people and the institutions which are supposed to serve them.
- 9 The government's intention is that the principles suggested by the Franks Committee – that tribunals should be independent, efficient, expert and accessible – find a practical reality in a new and unified tribunal system, a system which also has a collective commitment to improvement and innovation for the benefit of the public it serves.
- 10 This consultation on implementing the reformed structure of the Tribunals Service is a collaborative process. The response to the Leggatt review and the 2004 White Paper, the way in which the government, the Council on Tribunals and the tribunals judiciary have worked together in the past six years, and the debates in Parliament on what is now the Tribunals, Courts and Enforcement Act 2007 have shown that there is wide and active support for reform. The government believes that with continuing commitment and co-operation positive change can be achieved for the benefit of tribunal users and society as a whole.

## Chapter 2: Developments in Administrative Justice

- 11 The 2004 White Paper set tribunal reform firmly in the context of a broad view of administrative justice. Administrative justice is now broadly recognised as a separate part of the justice system in its own right.
- 12 From the point of view of the person or business in respect of which a decision is made, the administrative justice system generally comprises the whole of the mechanism by which government decisions are taken and, if necessary, re-considered to achieve a fair result. It is not confined to the tribunal part of the process. It covers the initial decision-makers, those who reconsider decisions, Ombudsmen and other independent complaints handlers, the tribunals and the courts, and how the system which they produce as a result of their individual roles functions.
- 13 In the last three years, developments in the administrative justice area have mainly been in relation to tribunals. But that is not to say that the broader landscape has remained unchanged.
- 14 There have also been some important developments in some non-administrative areas, and in particular in the field of employment justice – the most significant non-administrative area of work for tribunals. This is covered in Chapter 4.
- 15 This Chapter explores the main developments, looks at some ongoing initiatives and briefly summarises some of the academic work which is increasingly being undertaken in the administrative justice field.

### Decision-making

- 16 A number of the most important decision-making departments in central government have made significant changes in the past few years.

### HM Revenue and Customs Reforms

- 17 HM Revenue and Customs is a new department integrating the work of the former Inland Revenue and HM Customs and Excise. In July 2003 Gordon Brown (then Chancellor of the Exchequer), announced a major review of the organisations dealing with tax policy and administration. The review, which considered the best organisational arrangements to achieve the government's tax objectives, reported to Treasury Ministers and was chaired by Gus O'Donnell, then Permanent Secretary to the Treasury. The review concluded that by removing departmental barriers and focusing on the customer, the departments could make a step change in effectiveness and efficiency. Enabling legislation was introduced in the Commissioners of Revenue and Customs Act, which received Royal Assent on 7 April 2005. The new department came into being on 18 April 2005. This means that appeals against decisions on both direct and indirect tax now involve the same department. As a consequence, the existence of four different tribunals to hear tax appeals is in need of review (see Chapter 11).

## Department for Work and Pensions: Child Maintenance

- 18 The Child Maintenance and Other Payments Bill was introduced on 5 June 2007. The key changes to Child Maintenance it introduces are:
- New institutional arrangements for the delivery of child maintenance. In particular this includes the creation of the Child Maintenance and Enforcement Commission as a Non-Departmental Public Body to replace the Child Support Agency.
  - The government will encourage and support voluntary maintenance arrangements.
  - Information and support services to encourage and support parents to establish effective maintenance arrangements – be these voluntary maintenance arrangements or those made through the statutory maintenance service. In providing information and support services the government will be working to meet parents' needs and aspirations.
  - An emphasis on stronger and more effective enforcement allied to increasing efforts to collect and reduce debt.
  - Further simplification of the assessment process.

## Decentralisation of Immigration and Nationality Directorate: The BIA

- 19 On 1 April 2007 the Immigration and Nationality Directorate of the Home Office (IND) became the Border and Immigration Agency (BIA), fulfilling a key recommendation from the 2006 Review of IND<sup>4</sup>.
- 20 The agency, which remains part of the Home Office, assumes the responsibilities of IND for managing the UK's immigration system. The agency will operate in shadow form initially. The timing of the transition to full agency status will depend on the progress of the reform agenda.
- 21 Moving to agency status gives BIA the freedom to focus on its strategic objectives. Ministers will continue to set the strategy but the agency will take the operational decisions enabling it to deliver its services and to meet clear, published targets.
- 22 The agency's new regional structure represents a fundamental change, and will have a significant impact on how it delivers its services. Six Regional Directors have now been appointed. They will work to put local delivery and relationships with stakeholders at the heart of the BIA's work, and will have the authority to deliver more co-ordinated operations across the UK.
- 23 A new Chief Inspector will be empowered to provide a comprehensive assessment of the agency for the public and Parliament, focusing on efficiency and effectiveness across all BIA operations, including the quality of decision-making.

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<sup>4</sup> *Immigration and Nationality Directorate Review: Fair, Effective, Transparent and Trusted – Rebuilding Confidence in our Immigration System*; Home Office; July 2006.

## Ombudsmen

- 24 The most significant development in the ombudsman system has been a Regulatory Reform Order which makes it easier for ombudsmen to work together. The Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007<sup>5</sup> amends The Parliamentary Commissioner Act 1967, the Local Government Act 1974 and the Health Service Commissioners Act 1993. In broad terms the Order enables the Parliamentary Ombudsman, the Local Government Ombudsmen for England and the Health Service Ombudsman for England to work together collaboratively on cases and issues that are relevant to more than one of their individual jurisdictions, if the complainant agrees.
- 25 The Order gives the Ombudsmen the following specific powers to help them work collaboratively on complaints to:
- share information ‘for the purposes of a complaint’
  - conduct joint investigations, subject to the consent of the complainant
  - authorise each other’s staff to work on joint investigations
  - issue joint reports.
- 26 There are also some new powers:
- for the Ombudsmen to appoint and pay a mediator or other appropriate person to assist in the conduct of an investigation, and
  - for the Local Government Ombudsmen to investigate a complaint that has not previously been notified to the local authority concerned.
- 27 The vast majority of complaints to the Parliamentary Ombudsman, the Local Government Ombudsmen and the Health Service Ombudsman will continue to be relevant to the jurisdiction of a single Ombudsman, but there are a number of areas where complaints may be relevant to more than one Ombudsman’s jurisdiction. Examples include complaints about the provision of health and social care; complaints about the administration of housing and welfare benefits; and complaints about planning and environmental issues.

## Future Developments in Administrative Justice and Tribunals

- 28 This section deals with some developments which may mean significant future changes in administrative justice and tribunals. These are:
- proposals for changes to the regulation of business in the draft Regulatory Enforcement and Sanctions Bill
  - two Law Commission projects, on housing and on remedies against public bodies
  - proposals for simplifying asylum and immigration legislation, and
  - the Border Review.

### The Regulatory Enforcement and Sanctions Bill

- 29 The Regulatory Enforcement and Sanctions Bill<sup>6</sup>, which was published in draft on 15 May 2007, would allow regulators to impose a range of sanctions in the event of regulatory non-compliance as an alternative to prosecution in the criminal courts. The accompanying consultation paper (*Implementing the Hampton Vision*)<sup>7</sup> proposed that appeals against the new administrative sanctions should be heard by the First-tier Tribunal. Enforcement of regulatory decisions would therefore in effect move from the criminal justice system to the administrative justice system.

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<sup>5</sup> SI No1889.

<sup>6</sup> *Draft Regulatory Enforcement and Sanctions Bill and Explanatory Notes*; Cm 7083; Cabinet Office; May 2007.

<sup>7</sup> *Implementing the Hampton Vision: Consultation on the Draft Regulatory Enforcement and Sanctions Bill*; Cabinet Office Better Regulation Executive; May 2007.

- 30 The consultation period ended on 15 August and the government's response was published on 1 October 2007<sup>8</sup>. The Regulatory Enforcement and Sanctions Bill has now been included in the government's legislative programme for 2007-08.

#### Housing Adjudication – Work Undertaken by the Law Commission

- 31 In 2004, the Department for Constitutional Affairs asked the Law Commission to consider the current system for resolving housing disputes. From the outset, the project took a broad approach, focussing on housing problems and how they may best be resolved, rather than confining itself simply to institutional issues. While the project arose out of the Commission's broader work on housing law reform, it was recognised that many of the issues raised were about the proportionality of dispute resolution generally, not just housing.
- 32 In April 2006, the Commission published an Issues Paper (*Housing: Proportionate Dispute Resolution*)<sup>9</sup>. This considered the contribution that could be made by mediation, by ombudsmen and by better management responses from, for instance, councils and housing associations.
- 33 The Paper's central theme was the need for a "triage plus" function. This approach would combine helping people with housing problems to navigate their way through the system; oversight of the system as a whole, and mechanisms to feed back lessons to decision makers. The Paper also considered how disputes that require formal adjudication should be handled.
- 34 Responses to the Issues Paper led the Commission to take forward further work on the project on two distinct tracks. One track related to the adjudication issue. However clear the law is, or proportionate the system for addressing housing problems, there will always be a need to submit legal disputes to a forum for final authoritative determination. In the Issues Paper, the Commission floated the idea of transferring all housing disputes to a new tribunal. In June 2007, the Commission issued a formal consultation paper on this question<sup>10</sup>. Having considered the responses, the Commission advocated a re-balancing of the generalist elements of the system (represented by the courts), and the principal specialist tribunal – the Residential Property Tribunal. The proposal sees the creation of the Tribunal as an opportunity to provide an appropriately supported specialist forum. It therefore envisages the incorporation of the Residential Property Tribunal Service (RPTS) into the Tribunals Service and the transfer of the Tribunal's functions to the new First-tier Tribunal; and then the transfer of further core housing jurisdictions to the First-tier Tribunal and the Upper Tribunal. Specifically, the proposal is that:
- rented accommodation possession cases and disrepair cases should be transferred from the County Court to the First-tier Tribunal
  - homelessness appeals on a point of law should be transferred to the Upper Tribunal, and
  - in respect of other housing related judicial reviews the Upper Tribunal should be given a jurisdiction concurrent with that of the High Court.

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<sup>8</sup> Government Response to the Consultation on the Regulatory Enforcement and Sanctions Bill; October 2007.

<sup>9</sup> *Housing: Proportionate Dispute Resolution: An Issues Paper*; Law Commission, April 2006.

<sup>10</sup> *Housing: Proportionate Dispute Resolution – the Role of Tribunals*; Law Commission Consultation Paper No180; June 2007.

- 35 The government agrees that the RPTS as it stands at present should transfer to the Tribunals Service.
- 36 The second track relates to “triage plus”. Responses to the Issues Paper indicated a broad level of support for the concept. At the same time, the Legal Services Commission (LSC) was further developing its strategy for the Community Legal Service. The LSC’s proposals appeared to embody many of the elements of “triage plus”, relating to holistic advice provision; feedback to decision makers and information gathering and sharing. The LSC’s strategy also referred to the feedback and learning elements of “triage plus”.
- 37 Rather than initiate a further round of formal consultation, the Commission engaged directly with the LSC and with advice providers, many of whom has claimed in response to the Issues Paper that their current practice amounted to a version of “triage plus”. With this process the Commission sought to understand how current systems operated, what the “triage plus” concept has to offer in these contexts, and how it could be developed further in the future.
- 38 The Commission will publish its final report early in 2008, bringing together both the tribunal and “triage plus” tracks.

#### Remedies Against Public Bodies – Law Commission Project

- 39 This is a project to review the law in relation to remedies against public bodies. The Commission’s Public Law team published a discussion paper as an initial consideration of the issues in October 2004<sup>11</sup>. This was followed by a seminar in November 2004, attended by judges, academics, practising lawyers, ombudsmen and government officials.
- 40 The Commission published a scoping paper to define the substantive law reform project on 10 October 2006<sup>12</sup>. That paper concluded that the substantive project should consider the broadly formulated question “When and how should the individual be able to obtain redress against a public body that has acted wrongfully?”
- 41 Within this, the Commission will look at remedies available against public bodies in both public and private law. The project will focus primarily on monetary compensation, but will look at other remedies so far as they relate to monetary compensation. The project will mainly be concerned with remedies awarded by the courts, but will also consider how these relate to remedies awarded by other non-court bodies, including ombudsmen.
- 42 A further seminar was held in April 2007. The Commission aims to publish a consultation paper setting out provisional proposals for reform before the end of 2007.

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<sup>11</sup> *Monetary Remedies in Public Law: A Discussion Paper*; Public Law Team, the Law Commission; October 2004.

<sup>12</sup> *Remedies Against Public Bodies: A Scoping Report*; Law Commission; October 2006.

## The Border and Immigration Agency: Simplification Project

- 43 The Border and Immigration Agency (BIA) recently consulted on initial plans to simplify the existing asylum and immigration legislation into one framework<sup>13</sup>. The BIA is currently working to develop more detailed proposals for simplification and intends to consult on these shortly. The proposals are likely to comprise much more than simply a consolidation of existing legislation.
- 44 The starting assumption is that BIA will continue to require a broadly three-tier framework: a single, focused piece of primary legislation; shorter, sharper and more consistent immigration rules, which are capable of quick adjustment in response to changing circumstances, alongside other secondary legislation; and shorter, sharper and consistent operational guidance where necessary.
- 45 This is likely to impact on the Asylum and Immigration Tribunal as well as on initial decision-making machinery.

## The Border Review

- 46 The Border Review was announced by the Prime Minister on 25 July. The aim is to strengthen the powers and surveillance capacity of the UK's border guards and security officers by integrating the work of the Border and Immigration Agency, HM Customs and Revenue, and UKVisas overseas and at the main points of entry into the UK, and establishing a unified border force.
- 47 The development of this agenda may have an impact on appeal rights to a number of Tribunals.

## Research and Academic Work

- 48 One notable feature of the development of the administrative justice landscape has been the interaction between government policy makers and academic researchers with an interest in the development of administrative justice.
- 49 Much of the background thinking to the policies now being taken forward derives from an International Conference on Administrative Justice, sponsored by the then Lord Chancellor's Department, held at the University of Bristol in 1997<sup>14</sup>. A number of leading academics acted as consultants to Sir Andrew Leggatt's inquiry (Professors Carol Harlow, Richard Susskind and Martin Partington). His inquiry also sponsored an academic research conference, one paper from which, by Professors Michael Adler and Anthony Bradley, was particularly influential in shaping Sir Andrew's recommendations<sup>15</sup>.

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<sup>13</sup> *Simplifying Immigration Law: An Initial Consultation*; Home Office/Border and Immigration Agency; June 2007.

<sup>14</sup> See M Partington and M Harris (eds) *Administrative Justice in the 21st Century*; Oxford 1999, Hart.

<sup>15</sup> See, for example, Leggatt, para 6.10 and footnote.

- 50 A number of further research studies have been published since Leggatt reported. These include a major study of the Social Security Commissioners by Buck, Bonnor and Sainsbury, and an equally significant report on the experiences of users of tribunals by Genn and others. There have also been a number of reviews of the published literature, including the review by Professors Adler and Gulland – *Tribunal Users’ Experiences, Perceptions and Expectations* – which was commissioned by the former Lord Chancellors’ Department and published by the Council on Tribunals in November 2003. The most recent literature review, a synopsis of published reports commissioned by the Senior President, has now been published on the AJTC’s website<sup>16</sup>.
- 51 In the employment justice field, Employment Market Analysis and Research (a multidisciplinary team of economists, social researchers and statisticians based in the Employment Relations Directorate in BERR) has published *Findings from the Survey of Claimants in Race Discrimination Employment Tribunal Cases*<sup>17</sup> and a review of judgments in race discrimination employment tribunal cases<sup>18</sup>.
- 52 Further empirical work is in progress. Professor Trevor Buck of de Montfort University Leicester is currently completing a research report on Precedent and Reporting in the Tribunals System. He is also one of three academic colleagues who are currently undertaking research into the Public Services Ombudsmen in the UK, Ireland and Australasia.
- 53 Dr Robert Thomas (School of Law, University of Manchester) is currently pursuing an empirical legal research project on asylum appeals determined by the Asylum and Immigration Tribunal. The project is examining both the procedure and substantive decision-making involved in asylum appeals. As a case-study in administrative justice, the study will examine how the asylum appeals process seeks to reconcile the tension between the competing values inherent in adjudication systems.
- 54 Professor Adler at the University of Edinburgh is examining the potential and limits of self-representation at tribunals. The research involves a telephone survey of 1,000 tribunal users, observation of 80 tribunal hearings, and post-hearing interviews with tribunal users, chairmen and members, and with the President and Chief Executive of the five tribunals in the study. It seeks to:
- compare the experiences of appellants who handle their appeal without any help with those who obtain pre-hearing advice but are not represented at the hearing and those who are represented (by various types of representative)
  - establish how each of the three groups of appellants prepares for their appeal, what their expectations are and how their experience of appealing matches their expectations
  - identify the effects of socio-economic and other variables on how they handle their appeal
  - assess the effects of representation on tribunal procedure and the ways in which tribunal chairmen and members compensate for its absence, and
  - determine what can be done to make tribunals more ‘user-friendly’ and to make it easier for appellants to represent themselves where they wish to do so.

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<sup>16</sup> *Empirical Research on Tribunals: An Annotated Review of Research Published between 2002-07* by Martin Partington Ed Kirton-Darling and Francis McClenaghan: 2007. Available at: [www.ajtc.gov.uk](http://www.ajtc.gov.uk)

<sup>17</sup> Employment Relations Research Series No 45, September 2006.

<sup>18</sup> Further details of EMAR’s work may be found at [www.berr.gov.uk/employment/research-evaluation](http://www.berr.gov.uk/employment/research-evaluation).

- 55 It is hoped that this will lead to an informed assessment of whether justice can be achieved in the absence of representation, and, if so, establish how tribunal procedures would need to change to make this possible.
- 56 Two series of research seminars, bringing together researchers, policy makers and tribunal judiciary have been sponsored over the last couple of years. The first, funded by the Nuffield Foundation<sup>19</sup> and organised by Professor Maurice Sunkin of Essex University has resulted in the Foundation deciding to fund a new stream of empirical research on administrative justice. The Foundation has now announced that it is seeking to attract research ideas under four broad headings:
- Pathways – examining how cases come into the administrative justice system and are handled as they pass through it.
  - Feedback – this will look at how lessons from the work of the administrative justice decision takers may be effectively fed back to initial decision takers.
  - Choice of redress mechanisms – how do different redress mechanisms work? How should choices between different mechanisms be made, and by whom?
  - Quality of decision making – how can the independence of decision takers be supported? How can decisions be made more consistently?
- 57 The second, funded by the Economic and Social Research Council, was organised by Professor Adler. Its aims were (among others):
- to review the current state of theoretical work on administrative justice
  - to consider recent developments in public administration, in the UK and elsewhere, for example, privatisation, marketisation, the establishment of administrative agencies, the growth of managerialism, the development of accounting and auditing procedures and a greater commitment to human rights, and to consider their implications for different mechanisms of redress and forms of accountability
  - against this background, to assess the current status of administrative justice in the UK, in particular the balance between external and internal forms of accountability and the degree of co-ordination between them.
- 58 What further work may arise from this seminar series is under consideration. But it has been suggested that the collective research effort would be enhanced by the establishment of an Institute of Administrative Justice, which would continue to ensure that researchers, policy makers and decision takers and adjudicators continued to work together.
- 59 The Council on Tribunals also played a part in stimulating debate on the themes raised in the White Paper, through conferences, seminars and consultation exercises. These have included feedback to original decision-makers; the role of the oral hearing; the use of proportional dispute resolution techniques (the report on this will be published shortly by the successor body to the Council – the Administrative Justice and Tribunals Council).
- 60 In addition, the Council on Tribunals sought the views of tribunal users and advice agencies on the reform programme generally and on tribunal user liaison processes. The Council on Tribunals has been actively engaged with the Nuffield and ESRC series, and contact with the academic world will be maintained by the Administrative Justice and Tribunals Council, which will have a role in making proposals for future research. The role of the AJTC is explored more fully Chapter 5.

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<sup>19</sup> [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)

## Chapter 3: Developments in Tribunals

- 61 The major changes in administrative justice have been in relation to tribunals, with the establishment of the Tribunals Service in April 2006 and the passage of the Tribunals, Courts and Enforcement Act in July 2007. These changes took place against a background of constitutional change which served to define further the position of tribunals in the justice system, and their relationship to the courts and the Executive.

### The Concordat and the Constitutional Reform Act 2005 – Unfinished Business

- 62 Following the creation of the Department for Constitutional Affairs in 2003 and the government's announcement that it wished to separate the powers of the Lord Chancellor as a minister from his role as a judge, there were detailed discussions between the Lord Chancellor and the Lord Chief Justice. These led to the Concordat of 2004 and the Constitutional Reform Act 2005 (CRA).
- 63 The Constitutional Reform Act 2005 gave modern statutory form to the relationship between the executive and the courts, particularly in England and Wales<sup>20</sup>. Central to the new scheme are the statutory guarantee of judicial independence, and the role of the Lord Chief Justice as head of the judiciary. The tribunal judiciary were brought within the Act for certain purposes only (notably appointments and discipline). In addition, with the support of the Lord Chief Justice, informal arrangements were made for some of the services of his office to be extended to tribunal judiciary (for example, the Judicial Communications Office), and for tribunal judges to be represented on the Judges' Council. It was, however, recognised that further legislation would be required to complete the process started by the CRA, as well as giving effect to the White Paper reforms. The Tribunals, Courts and Enforcement Act 2007 now extends the main principles of the 2005 Act to tribunals, including the guarantee of judicial independence. The responsibilities of the Senior President (see Chapter 6) are closely modelled on those of the Lord Chief Justice under the CRA.

### The Tribunals, Courts and Enforcement Act 2007

- 64 The Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) received Royal Assent on 19 July 2007. It contains provisions for a new, and widely accepted, judicial and legal framework to complement the common administrative arrangements of the Tribunals Service, including:
- the creation of two new tribunals, the First-tier Tribunal and the Upper Tribunal, into which most existing tribunal jurisdictions will be transferred
  - bringing the tribunal judiciary together under a Senior President, putting that office on a statutory footing and creating the new titles of Judge of the First-tier Tribunal, Member of the First-Tier Tribunal, Judge of the Upper Tribunal and member of the Upper Tribunal
  - permitting the flexible deployment of Judges and Members across jurisdictions and the creation of judicial 'chambers' each with responsibility for a range of related jurisdictions
  - establishing a consistent approach to onward appeals
  - creating a Tribunal Procedure Committee to bring greater consistency to tribunal procedure rules

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<sup>20</sup> The Act also extends for certain purposes to Scotland and Northern Ireland, reflecting the different devolution arrangements in those parts of the UK.

- transforming the Council on Tribunals into an Administrative Justice Council, with a wider remit to keep the administrative justice system as a whole under review, and
- providing a statutory guarantee of the independence of the tribunals' judiciary.

- 65 Implementation of the tribunals provisions in the Act is likely to take about 18 months. The first tranche of provisions, establishing among other things the guarantee of independence and the office of Senior President of Tribunals came into force on 19 September 2007. A second tranche, establishing the new Administrative Justice and Tribunals Council and its Scottish Committee, came into force on 1 November 2007. Further provisions, including establishment of the AJTC's Welsh Committee will come into force on 1 June 2008.
- 66 The Act contains extensive powers to create the new tribunal system. The use of these powers is the main theme of Chapters 5 to 12.

#### A Consensual Approach

- 67 The creation of the Tribunals Service and the preparation for the 2007 Act was marked by close co-operation between the judiciary, at all levels, and the Executive. The publication of the White Paper in 2004 coincided with the appointment of Lord Justice Carnwath as Senior President Designate, to provide strategic leadership to the tribunal judiciary pending the creation of the statutory office. Before his appointment, the then Lord Chief Justice had assigned responsibility for tribunals to Lord Justice Brooke, who had established the Tribunal Presidents' Group, and was himself closely involved in the consultations leading to the White Paper. Since July 2004 the Senior President Designate has taken an active part in the discussions on the Bill and the establishment of the Tribunals Service. He has sat as an observer on the Tribunals Service Management Board since its inception, established a Tribunal Judges' Executive Board, and chaired regular meetings of the Tribunals Presidents' Group. He has also set up a series of sub-groups covering topics such as appointments, training, and information technology, in which judiciary and administrators have been work closely together. Tribunal Judges' Forums have been established in Scotland and Northern Ireland, under the chairmanship of senior judges appointed respectively by the Lord President and the Lord Chief Justice of Northern Ireland.
- 68 The Senior President Designate has also established strong links with other bodies, including the Council on Tribunals and the Judicial Studies Board (which has recently completed for him a programme of evaluation visits to assess the provision of training, appraisal and mentoring within tribunals). Robert Carnwath was formally appointed as Senior President of Tribunals with effect from 12 November 2007.

#### The Tribunals Service

- 69 The Tribunals Service came into being in April 2006 as an executive agency of the Department for Constitutional Affairs. It brought together the tribunals then administered by DCA with the Employment Tribunal Service, the Appeals Service (Social Security and Child Support Appeals), and the administrations for the Criminal Injuries Compensation Appeals Panel, the Mental Health Review Tribunal for England and the Special Educational Needs and Disability Tribunal. The Care Standards Tribunal and the Asylum Support Adjudicators joined in April 2007.

- 70 The intention behind the creation of the Tribunals Service was to:
- ensure that tribunals were visibly independent of original decision makers
  - make it easier for users to understand the process of seeking redress
  - bring improved quality and efficiencies of scale to the provision of administrative and management support
  - allow the implementation of a national organisation, with a regional structure promoting a strong local presence, and
  - create an environment where best practice could be identified and developed throughout the organisation.
- 71 The relatively short period between the publication of the White Paper and the creation of the Tribunals Service resulted in there being time to do little more than transfer the incoming tribunals from sponsor departments in their existing state. The task of planning their integration and modernisation was identified as a key objective to be undertaken during the Agency's first year.

#### The First Year of the Tribunals Service

- 72 The significant successes achieved by the Tribunals Service in its first year as a national organisation are summarised in the Tribunals Service Annual Report<sup>21</sup>. Briefly, three key objectives were set for this period:
- to maintain or improve, where possible, levels of customer service. This has been one of the main successes of the new Service. Performance has improved significantly across most tribunals
  - to develop the capability to reform tribunals into one truly integrated and efficient service. Key steps involved developing the new regional management structure; developing a new business model comprising on multi-jurisdictional Administrative Support Centres supporting a network of Hearing Centres; and passage of the Tribunals Courts and Enforcement Act 2007, and
  - to introduce procedural changes to reduce the number of cases having to go to appeal or the proportion requiring a full hearing. Two pilots have been launched to test whether alternative dispute resolution techniques can be effective in resolving tribunal cases.
- 73 All of this has been achieved while reducing expenditure by £15m, which represents 5% of the Tribunals Service budget. These initiatives are considered in more detail below.

#### A NEW BUSINESS MODEL FOR OPERATIONAL DELIVERY

- 74 In anticipation of the reforms that will flow from the 2007 Act, all tribunal jurisdictions were analysed to identify areas of commonality and any constraints to integration. The new delivery model that resulted consists of three key components:
- the development of a network of multi-jurisdictional Hearing Centres in major towns and cities, providing more flexibility for customers and making the most efficient use of premises
  - the implementation of 6 multi-jurisdictional Administrative Support Centres to move 'back office' and common support service operations away from high cost locations in London and allow for the creation of efficient and effective common information and administration systems, and
  - the establishment of a regional management structure to operate the new model.

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<sup>21</sup> *Tribunals Service Annual Report and Accounts 2006-07*; HC905 SE2007/105; London: The Stationery Office; July 2007. This can be viewed at: [www.tribunals.gov.uk/publications.htm](http://www.tribunals.gov.uk/publications.htm)

75 The Transforming Tribunals Programme has been established to deliver these reforms.

#### REGIONAL MANAGEMENT STRUCTURE

76 The Tribunals Service began to implement the regional management structure in 2007 to support the transformation of the business and to build the capacity for major change. This is now in place across all tribunals and will support the inclusion of new and transferred tribunals in the future.

77 It will promote a greater focus on front line delivery to tribunal users and provide the flexibility to enable delivery of the long-term reform agenda and its associated transforming tribunals programme. The structure will divide operations across the United Kingdom into two regions, each with three areas as follows:

- North – Scotland and Northern Ireland, Northeast & Northwest, Midlands.
- South – Wales and Southwest, Greater London & Southeast, Central London.

78 Senior management responsibilities within the new structure have been defined and proposals for corporate and shared services have been agreed. This includes the creation of a Judicial Office bringing together all aspects of work in supporting the Senior President and dealing with judicial issues currently undertaken across the organisation. The re-structuring of the Finance & Resources Directorate includes the development of a centralised shared service transaction centre located in Bristol. Restructuring is expected to deliver a reduction of 20 senior management posts and 50 corporate services posts.

79 A central business-development team provides co-ordination and support for front line staff, working closely with a wide range of stakeholders to identify opportunities for improvement.

#### HEARING CENTRES

80 A network of multi-jurisdictional Hearing Centres in major towns and cities throughout the UK will provide a range of services to tribunal users, including, where appropriate, different methods of resolving their disputes. The hearing centres will ensure that the majority of tribunal users will not have to travel far to obtain justice. The network is still being developed and the Tribunals Service expects to be consulting on proposals in the early part of 2008.

#### ADMINISTRATIVE SUPPORT CENTRES

81 Administrative Support Centres will enable the Tribunals Service to reap economies of scale through multi-jurisdictional case-processing. This will in turn improve recruitment and retention of highly skilled and motivated staff and improve business resilience and flexibility to respond to changes in workload. These new arrangements will improve performance jurisdictionally and geographically, and make investment in developing e-services for tribunal users more cost-effective.

#### ESTATES STRATEGY

82 The Tribunals Service inherited a large and varied estate from six different government departments. A first draft Estates Strategy for the Tribunals Service has been produced and will be refined further during 2007-08 to reflect the development of the business delivery model. An underlying principle of the Strategy is that all venues should be considered as Tribunals Service venues rather than venues specific to individual jurisdictions.

- 83 Prior to the formation of the Tribunals Service, only AIT, the Employment Tribunal Service and the Appeals Service (now known as Social Security and Child Support Appeals - SSCSA) had a national network of permanent venues; other jurisdictions depended on ad-hoc hirings to provide local hearings. Sharing of hearing and related accommodation has increased significantly during 2007, with some smaller jurisdictions now hearing all their cases within Tribunals Service or wider HMCS/ Ministry of Justice accommodation. There will of course always be a need for some use of non-Ministry of Justice estate in remote areas - especially in Scotland – but such use has reduced significantly. As a result of the Lyons Review, the Tribunals Service is committed to reducing the number of staff based in the London area, with most non-customer facing work (including the Tribunals Service HQ) being moved out of London as soon as possible.

#### STRATEGIC PLAN

- 84 The tribunals service has published a Strategic and Business Plan for 2007-08<sup>22</sup>, setting out its vision and strategic objectives.

##### The Tribunals Service vision is:

“To deliver an efficient, independent and user-focused Tribunals Service”

with the aim of transforming tribunals progressively between now and the end of the period covered by the Comprehensive Spending Review.

This will be achieved through five strategic objectives:

- delivering effective services within the tribunals
- focusing on customers and the wider community
- making efficient use of available resources and infrastructure
- building capacity to deliver by unlocking potential
- working effectively in partnership with the judiciary and others.

- 85 Progress will be measured by means of a set of Key Performance Indicators (KPIs) that can be applied across all jurisdictions. The KPIs are being introduced across the organisation during 2007-08 and will be underpinned by a number of supporting indicators. Many existing performance measures will be retained for individual tribunals.

#### Proportionate Dispute Resolution

- 86 The Tribunals Service has had from the outset a commitment to pioneering new ways of providing justice to the public. The 2007 Act places a similar duty on the Senior President. This commitment has led to the establishment of the Early Dispute Resolution Project. Mediation and other forms of alternative dispute resolution are used increasingly in the justice system. They can provide more efficient and effective remedies, at lower cost and with less pressure on users.
- 87 The early dispute resolution project currently consists of two pilots. These pilots are designed to test whether alternative dispute resolution techniques can be effective in resolving tribunal cases and to make recommendations about the role of these techniques as future, mainstream services.

<sup>22</sup> *Tribunals Service Strategic and Business Plan for 2007-08: Delivering the Future, One System, One Service*; May 2007. This can be viewed at [www.tribunals.gov.uk/publications.htm](http://www.tribunals.gov.uk/publications.htm)

## Early Dispute Resolution: Employment Tribunals

- 88 A judicial mediation pilot was launched in three employment tribunal offices in August 2006. Participation in Judicial mediation is entirely voluntary and involves a trained member of the judiciary providing facilitative mediation with the aim of assisting the parties in resolving their dispute without the need for a hearing. The pilot targeted certain more complex cases in the race, sex and disability discrimination jurisdiction and ran for a period of 12 months until the end of July 2007.
- 89 Conflict with Acas' statutory role was avoided by forwarding details of cases where parties expressed interest in judicial mediation, and by building a slight delay into the process, so that Acas could make further attempts to help the parties settle.
- 90 Independent work to evaluate the impacts and benefits of the pilot in terms of effectiveness, costs and user-satisfaction is being carried out by a team from the Centre for Employment Research at the University of Westminster. Their report is expected early in 2008.

## Early Dispute Resolution: Social Security and Child Support Appeals Tribunal

- 91 The second pilot is operating in the Social Security and Child Support Appeals Tribunal and is examining whether a form of Early Neutral Evaluation can be effective as a means of dealing with some Disability Living Allowance and Attendance Allowance appeals.
- 92 In this pilot – known simply as 'ADR' – a designated member of the judiciary (a District Chairman) makes an early assessment of the case papers with the aim of forming a view of the likely outcome of the case at a hearing. The District Chairman will then contact the party who in his or her opinion is likely to lose the appeal.
- 93 This can lead either to the Disability and Carers Service being invited to reconsider their original decision, or the appellant being warned that the appeal is likely to fail. The District Chairman might also suggest that the appellant send in immediately any further evidence they may have, or that they seek advice, or focus on the specific issues the tribunal will need to consider. If new evidence is submitted, existing procedures already provide for it to be sent to the decision-making agency. This may result in a reconsideration of the original decision, thereby also providing a mechanism to reduce unnecessary hearings
- 94 In complex or finely balanced cases, the District Chairman might be unable to form a view of the likely outcome. Under these circumstances, there would be no contact with either party and the case would go forward for hearing in the normal way – although the District Chairman could issue directions about the case in the interests of avoiding an adjournment.
- 95 The pilot began in the Sutton Tribunal office in August 2007 and is expected to run for 6 months provisionally, based on the need to generate sufficient data for effective evaluation. Involvement in the pilot is entirely voluntary and appellants need to sign and return a form for their appeal to be included. The intention is to extend the pilot to another location – possibly Cardiff – once the operational impacts for both the Tribunals Service and the Disability and Carers Service are more fully understood from the early experience at Sutton.
- 96 A full specification for the independent evaluation of the pilot has been developed, focussing on effectiveness, costs and user-satisfaction. The results are expected in the summer of 2008.

## The Ministry of Justice

- 97 The creation of the Ministry of Justice<sup>23</sup> on 9 May 2007 brought the courts and tribunals, prisons and probation under one roof, along with policy for civil, family and criminal law. The new ministry replaced the Department for Constitutional Affairs and started life from a simple premise – that the justice system exists to serve the public.
- 98 The Tribunals Service continues as an executive agency of the new Ministry. In the administrative justice field, it supports the Ministry's aspiration that the justice system exists to serve the public by:
- developing policies that help citizens and communities to manage their problems more effectively, safeguarding their rights and connecting them more closely to the democratic system
  - changing radically the way services are delivered – so that tribunal arrangements meet the needs of customers and the taxpayer
  - providing an independent, responsive and proportionate tribunals service that promotes public confidence in the justice system and improves understanding of justice
  - protecting rights for individuals and communities; giving communities a greater role in the delivery of justice; making the justice system more effective, accessible and accountable; providing greater support for people going through the system and by encouraging diversity, and
  - providing access to advice and effective systems for resolving disputes to enable people, particularly those vulnerable to social exclusion, to understand and enforce their rights, preventing their problems from escalating.

## Chapter 4: Employment Tribunals and the Employment Appeal Tribunal

- 99 Under the protocol made in 2001 between the Lord Chancellor and the (then) Secretary of State for Trade and Industry, the Employment Tribunals Service (ETS) became one of the key component parts of the new Tribunals Service. As that agreement recognised, there are inevitably differences between the needs of employment tribunals, which deal with disputes between parties, and administrative tribunals which deal with disputes between party and state. This difference is often referred to as employment tribunals forming a distinct pillar within the new organisation. The protocol contemplated the sharing of some staff functions between the two pillars of the organisation, but with the processing of employment tribunal cases remaining an identifiably separate activity.
- 100 The policy lead for employment law is entirely retained by the new Department for Business, Enterprise and Regulatory Reform (BERR) but responsibility for administering employment tribunals and the Employment Appeal Tribunal (EAT) now rests with the Ministry of Justice. BERR also retains responsibility for the Employment Tribunals Act 1996 and the secondary legislation relating to employment tribunals, including the Rules of Procedure. Administrative procedures are for the Tribunals Service. In making changes to employment tribunals legislation, BERR consults with the Tribunals Service and the Employment Tribunals judiciary. The Lord Chancellor retains responsibility for making the Rules of Procedure for the Employment Appeal Tribunal.
- 101 The two departments work together on legislative changes to improve efficiency and to realise the potential for modernisation within the new Tribunals service.
- 102 Chairmen will continue to be appointed by the Lord Chancellor and the Lord President. Responsibility for the appointment of lay members (for England, Wales and Scotland) now lies with the Lord Chancellor in consultation with the Secretary of State for BERR.
- 103 Accommodation, for administrative staff processing cases, Chairmen involved in interlocutory work, and hearings themselves will, over time, be shared across the Tribunals Service. The special requirements of employment tribunal hearings will be fully reflected in the design of shared accommodation and hearing centres.
- 104 Within the Tribunals Service IT systems ETS will have its own IT applications for case processing, with a common platform where appropriate and sharing a common infrastructure. Where appropriate, Management Information Systems data may be held in common. Improved IT links with Acas will be promoted. A common telecommunications platform will also be established.
- 105 The 2007 Act makes a number of changes to the Employment Tribunals Act 1996<sup>24</sup>. These changes put employment tribunals and the EAT on a par with the First-tier Tribunal and the Upper Tribunal in terms of the powers and duties of the Senior President, removal from office, taking the judicial oath and mediation. The implementation of the 2007 Act will create a shared pool of tribunal members and “cross ticketing” (see Chapter 7), so that suitably qualified members may consider cases from more than one jurisdiction. However, the existing statutory requirements for sitting on the employment tribunals and the EAT will be retained. These will be operated in a way which will ensure that employment expertise will not be diluted.

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<sup>24</sup> See Schedule 8, paragraphs 35-48.

- I06 The 2007 Act also reforms the law on enforcement of employment tribunal awards and for the first time makes it possible for settlements brokered by Acas to be enforced in the same way as tribunal awards. Some detailed work remains to be done on this so that the new provisions work seamlessly between Acas, the tribunals, the county courts and enforcement agents.

## The Gibbons Review

- I07 In December 2006 the then DTI Secretary of State Alistair Darling appointed Michael Gibbons as an independent reviewer to review the options for simplifying and improving all aspects of employment dispute resolution, to make the system work better for employers and employees.
- I08 The review, which was published in March 2007<sup>25</sup> looked at all aspects of the system, including the statutory dispute procedures introduced by regulation<sup>26</sup> in 2004; the scope for new initiatives to help resolve disputes at an earlier stage, and how employment tribunals work. A summary of the review's recommendations is at Appendix B.
- I09 The government welcomed the Gibbons Review, and in March 2007 published a consultation document setting out measures to take it forward<sup>27</sup>. The consultation sought views on a package of measures to help resolve employment disputes successfully in the workplace so that:
- productivity is raised through improved workplace relations
  - access to justice is ensured for employees and employers
  - the cost of resolving disputes is reduced for all parties, and
  - disputes are resolved swiftly before they escalate.
- I10 The measures consulted on included repealing the current statutory dispute resolution procedures; providing better help and guidance to resolve disputes at an earlier stage; and improving how employment tribunals work.
- I11 To help the consultation process, the government ran a programme of events in England, Scotland and Wales in May and early June 2007. The consultation period ended on 20 June and a full analysis of the responses is currently being undertaken before the government publishes its proposals for the way forward. Any legislative changes would be introduced by an Employment Bill<sup>28</sup>.

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<sup>25</sup> *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain*; Michael Gibbons; Department for Trade and Industry; March 2007.

<sup>26</sup> Employment Act 2002 (Dispute Resolution) Regulations 2004.

<sup>27</sup> *Success at Work: Resolving Disputes in the Workplace – A Consultation*; Department for Trade and Industry; March 2007.

<sup>28</sup> See [www.commonleader.gov.uk/output/page2027.asp](http://www.commonleader.gov.uk/output/page2027.asp)

## Next Steps

- I12 The Tribunals Service continues to work closely with BERR to build on the judicial and administrative flexibility that is inherent in the new system, while continuing to recognise the degree of specialisation and expertise that makes the ET unique.
- I13 Discussions between the Tribunals Service, BERR and the Tribunal Presidents are underway to agree a range of objectives relating to employment tribunals in the light of practices developed within the Tribunals Service. It may then be desirable to consider amendments to the constitution and procedure regulations of the employment tribunals.
- I14 The discussions are at an early stage, and any amendments that are proposed will be subject to further consultation with stakeholders, as will proposed reforms arising from the Gibbons review of dispute resolution.

## Chapter 5: The Administrative Justice and Tribunals Council

- 115 The new landscape of justice which the government is seeking to develop has at its core two fundamental assumptions about the provision of justice. The first is that justice, while an all-encompassing concept, can usefully be sub-divided: criminal, civil, administrative, family, employment, housing and so on. There is room for debate about how many “justice systems” there are, the precise boundaries between them, and the extent to which they inevitably overlap. But the essential point is that justice, within each of these systems, is provided not just by courts or tribunals but by a range of interlocking institutions and mechanisms.
- 116 The second fundamental assumption is that the institutions will pursue the common goal in different ways. They are not intended just to respond or process, although they must of course be responsive and efficient: each, in their own way, seeks to improve the lot of those going through the system. Thus the Tribunals Service has been set up to play an active role in reforming and improving the system of administrative justice of which it is part.

### A New Body and a New Remit

- 117 Administrative justice and tribunals are complex and diverse worlds. The government – following Leggatt – concluded that in the new landscape created by its reforms there was a need for an institution independent of government, tribunals and the other participants. This institution would have a focus on the whole administrative justice system and an important role to play in setting standards and championing the interests of the user.
- 118 The result is the Administrative Justice and Tribunals Council (AJTC)<sup>29</sup>. In addition to taking on the Council of Tribunals’ existing role in respect of tribunals and inquiries, its remit is to:
- keep the administrative justice system under review
  - consider ways to make the system accessible, fair and efficient
  - advise Ministers and the Senior President on the development of the system and refer proposals for change to them, and
  - make proposals for research into the system.
- 119 There has been much debate among academics and practitioners about what is meant by the term “administrative justice system”. For the purpose of establishing the role of the AJTC it is defined by the 2007 Act as:
- “...the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including:
- (a) the procedures for making such decisions
  - (b) the law under which such decisions are made, and
  - (c) the systems for resolving disputes and airing grievances in relation to such decisions.”
- 120 The AJTC replaced the Council on Tribunals on 20 November 2007. That body was created as a result of the Franks Report. Throughout its distinguished 50 year history it has worked to raise standards and maintain the principles of openness, fairness and impartiality in the fragmented world of tribunals. However, its powers were limited. It is a tribute to its collective commitment and determination that it did so much to keep alive the original Franks vision, and to achieve the high standing and respect which it commanded throughout the tribunals world.

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<sup>29</sup> Created by section 44 of the Tribunals, Courts and Enforcement Act 2007.

- 121 When first created, the Council on Tribunals was the only body with oversight of the whole tribunals world. The Ministry of Justice now has a leading role within government on tribunals policy; the Tribunals Service provides a unified administration for most jurisdictions and is well placed to take the lead in ensuring the public receives the best possible service from tribunals; the Tribunal Procedure Committee (on which the AJTC will be represented) will lead on improving and unifying procedure. The Senior President will provide the unifying leadership for both the Tribunals Service tribunals and those outside the new structure<sup>30</sup>.
- 122 The AJTC's unique and primary role is to scrutinise and comment on the whole system and to provide a unifying focus for it.

### The AJTC's key objectives are:

We will focus first and foremost on the needs of users.

We will keep under review and influence the development of administrative justice and tribunals through:

- giving authoritative and principled advice and guidance to government, the Tribunals Service and others within the administrative justice system on changes to legislation, practices and procedures to improve the working of administrative justice, tribunals and inquiries, including a framework of generally applicable principles
- exploring and promoting the scope for new approaches to dispute resolution
- seeking to build up influence over forthcoming legislation, in particular in advance of publication
- recognising and responding to the diverse needs and circumstances of users, by applying effective monitoring arrangements and being alert to emerging issues, and
- raising awareness of the different approaches within the UK legal systems.

We will keep under review the work of the Tribunals Service, the tribunals within it and other tribunals:

- offering advice and assistance on wider policy issues that complement the Tribunals Service's own work programme or otherwise affect tribunals
- commenting from time to time on Tribunals Service priorities, and
- monitoring progress and performance of tribunals against common standards and performance measures.

We will respond authoritatively to emerging issues and proposals that affect or involve administrative justice, tribunals and inquiries more generally:

- identifying and responding to perceived needs and current/prospective concerns in relation to all aspects of administrative justice
- identifying priorities for, and encouraging the conduct of, relevant research
- monitoring the relationships between first instance decision makers, ombudsmen, tribunals and the courts to ensure they are clear, complementary and flexible
- promoting the accessibility of administrative justice and tribunals to users through open, fair and impartial procedures and high quality, user friendly information and advice, and
- employing a range of communication methods to give an account of our work and disseminate our views.

<sup>30</sup> See Tribunals, Courts and Enforcement Act 2007; Schedule 1, paragraph 12.

- 123 The AJTC will retain the expertise of the Council on Tribunals' existing membership, as well as its independence from the government. The former Chairman of the Council, Lord Newton of Braintree, is now first Chairman of the AJTC. The members of the Council on Tribunals, who serve for fixed terms, have become members of the AJTC. As part of the transition process all appointments to the Council on Tribunals since publication of the White Paper in mid-2004 have been made with an eye to the skills and experience needed for the AJTC's wider role.
- 124 The AJTC has also taken on the Council on Tribunals' existing statutory remit. It continues to oversee the tribunals outside the jurisdiction of the Tribunals Service, and to fulfil the Council on Tribunals' former role with regard to inquiries.
- 125 So far as tribunals are concerned, there will be a continuing need for the AJTC to act as a strong partner in the reform process. The AJTC will have a role in monitoring the development of the Tribunals Service, contributing its ideas in terms of further reform and championing the needs of users
- 126 The AJTC's remit also extends to devolved tribunals in Scotland and Wales – a fact that is reflected in the statutory arrangements for Scottish and Welsh Committees with a direct line of accountability to the devolved administrations. Thus the AJTC is uniquely placed to take a wide view – and to promote consistency across the whole of Great Britain, to the extent that this is appropriate.
- 127 The AJTC, like the Council, is a body independent of government and tribunals. The Council on Tribunals was never afraid to point out shortcomings in the provision of tribunal justice, whether those shortcomings arose as a result of faulty initial decision making or later in the process. But it was also prepared to support government initiatives when it thought it was right to do so – and most notably the current reform programme.
- 128 The AJTC remains committed to working with government to improve the administrative justice system, and the government looks forward to a continuing constructive dialogue, particularly as the AJTC formulates its programme of work.

## Chapter 6: Tribunal Structure – Overview

- 129 The 2007 Act puts in place a two tier structure for most jurisdictions: a First-tier Tribunal and an Upper Tribunal. The jurisdictions of existing tribunals will form part of one or the other of the new tribunals. The employment tribunals, Employment Appeal Tribunal and Asylum and Immigration Tribunal will stand as distinct pillars within the new system.
- 130 The First-tier Tribunal will be the first instance tribunal for most jurisdictions. Most appeals from the original decision making bodies will commence in this tier.
- 131 The Upper Tribunal will lead on developing the law underlying administrative justice. It will deal with appeals from the First-tier Tribunal and from some tribunals outside the unified system. It will also have power to deal with judicial review work delegated from the High Court. The Upper Tribunal will be the highest tribunal to which an appeal can be made within the new tribunals structure.
- 132 The Upper Tribunal will also have a limited first instance jurisdiction. This will be for complex cases or those dealing with issues which have general application and where the Upper Tribunal may set precedent for the First-Tier Tribunal.
- 133 Onward appeals from the First-tier will lie to the Upper Tribunal only with permission and normally on a point of law<sup>31</sup>. The onward right of appeal from the Upper Tribunal to the Court of Appeal or Court of Session will be on a point of law. The general principle is that an appeal hearing should not be an opportunity to re-litigate the factual issues that were decided in the First-tier Tribunal. Its purpose is to determine legal points and to ensure consistency of approach. It is the Lord Chancellor's intention to use his powers under s13(6) of the 2007 Act to prescribe that appeals from the Upper Tribunal to the Court of Appeal will only be permitted in cases of general importance or for other compelling reason (as for second appeals from the courts).
- 134 By bringing resources such as estates, staff, finances, IT and judiciary into a single organisation, the new structure will enable individual jurisdictions to offer the best possible service to users. Fuller use will be made of hearing venues, and by using judiciary who have the skills and expertise to sit in more than one jurisdiction, waiting times for users will be reduced.
- 135 However, the new structure will be more than just a federation of existing tribunals. While functions and systems will be brought together where this makes sense, the organisation of the new Tribunals will be flexible enough to preserve the inevitably specialist features of some tribunals, which stem from differing issues, different law and differing users.
- 136 The government believes that the new Tribunals must be allowed to function and develop in a way which reflects their distinctive nature and role in providing access to justice. Strong Judicial leadership will be required across both the First-tier and the Upper Tribunal, to ensure that:
- the needs of the various jurisdictions are met
  - there is cohesion and continuity across both tiers, and
  - the unified tribunal system has a strong identity within the justice system as a whole.
- 137 Under the 2007 Act, that role falls to the Senior President of Tribunals.

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<sup>31</sup> For exceptions, see Tribunals, Courts and Enforcement Act 2007; Section 11(5).

## The Senior President

- 138 The office of Senior President is established by the 2007 Act as a free-standing senior judicial office, independent both of the Executive and the Chief Justices responsible for the courts. The Senior President will be at the apex of the tribunals' judiciary giving a focus and leadership to those tribunals covered by the 2007 Act.
- 139 The 2007 Act requires the Senior President<sup>32</sup>, when carrying out his functions, to have regard to:
- the need for tribunals to be accessible
  - the need for proceedings before tribunals to be fair and handled quickly and efficiently
  - the need for the members to be experts in the subject matter or law to be applied in cases, and
  - the need to develop innovative methods of resolving disputes that might be brought before tribunals.
- 140 The Senior President will lead the tribunals' judiciary through the process of implementation of the 2007 Act and the metamorphosis into the new generic tribunals.

### The Senior President's Functions

- 141 The functions of the Senior President are set out in the 2007 Act. These will be commenced when the new tribunal structures are populated with judges, members and jurisdictions. The principal functions will include:
- responsibility for representing the views of tribunal judiciary to Parliament and Ministers
  - responsibility, within the resources provided by the Lord Chancellor, for the maintenance of appropriate arrangements for the training; guidance and welfare of judges and other members of the First-tier and Upper Tribunals as well as those of the AIT, ET and EAT (for which purpose he shares mutual duties of co-operation with the Lord Chief Justices of England and Wales, and of Northern Ireland, and the Lord President<sup>33</sup>)
  - concurrence (with the Lord Chancellor) in relation to the chambers structure for the First-tier Tribunal and the Upper Tribunal, the allocation of functions between chambers, and the making of orders prescribing the qualifications required for appointment of members of the First-tier Tribunal and the Upper Tribunal
  - assigning judges and members to chambers, for which purpose he is required to publish a policy agreed with the Lord Chancellor
  - reporting to the Lord Chancellor in relation to tribunal cases on matters which the Senior President wishes to bring to the attention of the Lord Chancellor and matters which the Lord Chancellor has asked the Senior President to cover
  - requesting court judges (with the agreement of the relevant chief justice) to act as a judge of the First-tier or Upper Tribunal
  - taking oaths of allegiance and judicial oaths (or nominating someone to do so) from tribunal judges and other members, and
  - acting as (or nominating) a member of the Tribunal Procedure Committee (it is expected that the Senior President or his nominee will chair the Committee).

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<sup>32</sup> Clause 2(3).

<sup>33</sup> Although the Lord President had no statutory responsibility for such provision at the time of Royal Assent to the 2007 Act.

- 142 Many of the responsibilities described above are completely new (for example those in relation to the organisation of the First-tier and Upper Tribunals), but judicial heads of the existing tribunal jurisdictions may already undertake many of these functions. The 2007 Act brings them together under the Senior President (subject to a power to delegate), but gives them a statutory basis and imposes an obligation on the Lord Chancellor to provide the necessary resources.
- 143 As the Senior President, Lord Justice Carnwath is a Lord Justice of Appeal and the Lord Chief Justice can already delegate to him certain functions in relation to judicial discipline and complaints under the CRA and the Judicial Discipline (Prescribed Procedures) Regulations 2006. The provisions in the 2007 Act make those functions delegable to the Senior President of Tribunals. The Lord Chief Justice's role in relation to tribunal appointments under the CRA remains unchanged.
- 144 Lord Justice Carnwath has been supported in his work by a small team to date. In the short term, that team will expand to create a Tribunals Judicial Office that can support the Senior President in his statutory and leadership functions. Where administrative staff within that office provide support to the Senior President and the other tribunals judiciary, the staff will be answerable to them. The Tribunals Judicial Office will work closely with the Judicial Office, to ensure a common approach on issues of joint concern, and to enable support services to be shared between courts and tribunals judiciary where it is sensible and practicable to do so.
- 145 In time the Tribunals Judicial Office will also provide support to Chamber Presidents and extend the existing pockets of judicial support that exist within some tribunals to benefit all those falling within their remit. For example, within the Commissioners' Office there are legal officers who undertake case specific research; in AIT there are legal officers who prepare comprehensive country specific advice, and in SSCSA there is a periodic Judicial Information Bulletin which includes case reports relevant to their jurisdictions. It is anticipated that case specific research will be extended across the Upper Tribunal and also that more comprehensive legal information services will be provided to both Tribunals.

## Training

- 146 The Senior President is responsible for maintaining appropriate arrangements for judicial training. His Judicial Office, the Tribunals Service and the Judicial Studies Board will work together to devise and maintain these arrangements, having particular regard to the value of shared training where there is sufficient in common, such as with general tribunal practice and judicial leadership. Common proposals for appraisal of judicial members will also be developed.

## Terms and Conditions

- 147 Over time the terms and conditions for all tribunal judges and members will need to be harmonised in a way that delivers efficiency and value for money as well as a fair system. The Senior Salaries Review Body has agreed to make recommendations on remuneration in 2008.

Chapters 7 and 8 set out the government's thinking on the organisation of the First-tier and Upper Tribunals, and seek views on some specific issues.

## Chapter 7: The First-tier Tribunal

- 148 The vast majority of cases will be dealt with by the First-tier Tribunal, and the intention is to build on the systems and approaches of the major tribunals which were brought together into the Tribunals Service in 2006. The principles of speedy, accessible and expert justice are well established. The task in creating the First-tier Tribunal is to make those principles a universal reality, through flexibility, innovation in procedure and enhanced skills. This chapter addresses two of the key issues in setting up an effective and responsive new system:
- the structure of the tribunal, and
  - the principles to be used for deploying judges and members.

### Chambers

- 149 The First-tier Tribunal will be large, with a combined annual caseload in the region of 300,000. It will have some 190 judges and 3,600 members covering issues from benefit entitlement to alleged carousel VAT fraud; from special educational needs to the regulation of driving instructors. The First-tier Tribunal will be too large and diverse to be organised and led as a single judicial unit, without losing the expertise and jurisdictional knowledge that is at the heart of an effective tribunal. However, the government believes it is important to recognise that a system which replicated the current rigid demarcation between tribunals would prevent the effective deployment of resources – judiciary, staff, money – across jurisdictions. The end result would be a system in which the user and taxpayer both suffer.
- 150 The government therefore envisages, and the Act provides for, the division of the First-tier Tribunal into Chambers. In some respects Chambers replace existing tribunals, but there are a number of important differences. Individual jurisdictions will be grouped together so that similar work, or jurisdictions requiring similar skills, will be dealt with in a single Chamber. Unlike existing jurisdictions, Chambers will be flexible groupings, able to maintain and expand expertise and incorporate new jurisdictions where they fit best.
- 151 The question of how many Chambers there should be and the jurisdictional content to be assigned to each is considered below. But each of the proposed new Chambers would be larger than any individual current tribunal and therefore would bring together jurisdictions and appeal rights from more than one tribunal.
- 152 Different issues arise where there is a case for dividing an existing tribunal's workload between the Upper Tribunal and the First-tier Tribunal. These are considered further in Chapter 8 – The Upper Tribunal.

### Chamber Presidents

- 153 The essential role of a Chamber is to ensure that the proper degree of judicial expertise is brought to bear on cases. Each Chamber is required by the 2007 Act to have a President, whose role is the maintenance and improvement of the Chamber's expertise. The Chamber President is also a judge of the Upper Tribunal.
- 154 Chamber Presidents need not be existing tribunal presidents, especially as the requirements of the work are rather different. Unless it is decided that a High Court Judge should preside over a Chamber, all Chamber Presidents will be selected by the Judicial Appointments Commission (JAC). There is also scope for the appointment of Deputy Presidents by the JAC. The final shape and content of the Chambers will help determine whether Deputy Chamber Presidents are necessary in any or all cases.

- 155 In the larger Chambers there may well be a need for a further tier of judicial management, as the larger tribunals have now. When existing jurisdictions transfer, it will be a matter for the Senior President to decide how to reflect existing judicial leadership structures within the new system. However, the extensive powers of delegation which the Senior President and Chamber Presidents have under the 2007 Act enable a range of judicial leadership posts to be created where they are needed.
- 156 In parallel with the jurisdictional expertise of the chambers the government also considers it important that the Tribunals have a strong regional identity so that leadership is not remote and local needs can best be met. For this reason, in addition to the regional administrative management structure that the Tribunals Service is establishing, there may also, at the discretion of the Senior President, be regional judicial management. This would complement the jurisdictional Chambers structure (and the structure of the employment tribunals and AIT) and foster the development and maintenance of a strong cross jurisdictional awareness.

## Deployment of Judges and Non-Legal Members

- 157 The deployment of judges is a judicial matter. Under the 2007 Act the Senior President will have oversight of the process and, with Chamber Presidents, will determine the role of individual judges and members within the tribunal system.
- 158 Legally qualified and non-legal members of existing tribunals will be transferred into the new generic offices of 'judge of the First-tier Tribunal' and 'member of the First-tier Tribunal'. Judges and members will initially be assigned to Chambers on the basis of their previous tribunal-specific appointments. This may mean that those who held several tribunal appointments may be assigned to more than one Chamber.
- 159 Under the 2007 Act, judges and members may sit in any of the jurisdictions within the Chamber or Chambers to which they are assigned. There is, however, no expectation that every judge and member will sit in all of a Chamber's jurisdictions immediately. Initially most judges and members are likely to deal with the types of cases with which they were previously dealing.

## 'Ticketing'

- 160 It will be for the Chamber Presidents to decide how best to use the judges and members *within* a Chamber in order to match their experience and expertise to the needs of the Chamber.
- 161 Judges and members will be given a 'ticket' by the Chamber President indicating their suitability to sit in a particular jurisdiction. This will be subject to business need, and before being allowed to sit in additional jurisdictions within the Chamber, judges and members will require training and induction in areas with which they are unfamiliar (this may, for example, include training to enable them to deal effectively with cultural differences, where these are relevant to the decisions they have to take). There will be some jurisdictions which generate comparatively few cases and where it will be necessary for cases to be dealt with by a more limited number of judges and members. But as Chambers will group similar subject matter and skills together there is an expectation that, over time, judges and members will increase the number of 'tickets' they hold, widening the pool of expertise within their Chambers.

## Assignment

- 162 A decision as to whether a judge or member should sit in a *different* Chamber follows a different process, known as assignment. It is important to bear in mind that the 2007 Act introduces the concept of appointment to a generic office of judge or member. This is different to the historical position of appointment to a particular jurisdiction. The assignment process will thus allow those judges and members appointed through the JAC to be deployed to a number of Chambers where the need arises.
- 163 Assignment will only take place with the consent of the Chamber President and the individual judge or member. The actual process for assignment may depend on whether the assignment is to meet a long or short term need.
- 164 Under the 2007 Act the Senior President is required to publish a document, to which the Lord Chancellor has to agree, setting out his policy on assignment. The overriding principles will be:
- that the judge or member has the necessary skills and ability to hear cases within the Chamber to which they are assigned
  - that the assignment process is open and transparent
  - that assignment will be based on merit, with a link to judicial appraisal where appropriate
  - that the assignment process will not be used for promotion. Promotion opportunities will be advertised and subject to the JAC processes, and
  - that, subject to business need, the process must also balance opportunities for judges and members to develop their judicial careers while at the same time retaining their skills and expertise.
- 165 The correct balance between new appointments through the JAC and the assignment of existing judges and members will need to be carefully considered as part of each year's judicial forecasting exercise.

### Consultation Question:

Q1. Do these proposals strike the correct balance between maintaining judicial expertise and encouraging judicial career development?

## Proposed Chambers Structure

- 166 How many chambers should there be? The government has come to the conclusion, after discussion with senior members of the tribunals judiciary, that the right approach is to group similar subject-matter together, which to some extent means that similar skills will be needed. Each Chamber should be broad enough to bring together Tribunals which deal with similar or related subject matter, but not too wide as to prevent any meaningful form of judicial leadership and jurisdictional guidance being provided by the Chamber President.
- 167 The government therefore proposes five chambers in the First-tier Tribunal:
- Social Entitlement
  - General Regulatory
  - Health, Education and Social Care
  - Taxation
  - Land, Property and Housing.

- 168 A detailed list of the jurisdictions which it is suggested are assigned to the Social Entitlement, General Regulatory and Health, Education and Social Care Chambers is set out in Appendix C. The Taxation and Land, Property and Housing Chambers are dealt with in Chapters 11 and 12 respectively.

#### Social Entitlement

- 169 The Social Entitlement Chamber would bring together the current jurisdictions of the Appeal Tribunal established under Chapter 1 of Part 1 of the Social Security Act 1998, the Pensions Appeal Tribunals for England and Wales, the Criminal Injuries Compensation Appeal Panel and the Asylum Support Tribunal. All these bodies deal with questions of entitlement to financial assistance of one kind or another.
- 170 These tribunals have different criteria for the award of financial entitlement and different processes. There is a substantial medical component to the work of the first three tribunals as entitlement can depend on medical assessment. The level and extent of representation before tribunals also differs. However, the fact that the legal framework differs is not in the government's view a bar to bringing the work together. Competent judges and members can be expected to be able to handle more than one jurisdiction, and medical issues are not jurisdiction-specific.
- 171 This will be a very large Chamber and so the Chamber President will have to be supported by a further tier of judicial management. The extent to which this managerial tier can be common to more than one Chamber and tribunal is for further discussion, and the managerial arrangements may well evolve over time.

#### General Regulatory Chamber

- 172 The General Regulatory Chamber includes a wide range of jurisdictions. Although the number of cases is relatively small at present, it may well increase as a result of the provisions of the Regulatory Enforcement and Sanctions Bill. This Bill, which was published in draft earlier this year and has been included in the government's legislative programme for 2007-08, will enable a wide range of regulators to impose civil penalties with a right of appeal rather than relying on prosecution as a means of enforcement. The government will make firm decisions about when this Chamber should be created when the timetable for regulators opting into this scheme is clearer. While the Chamber will cover a wide range of regulatory subject matter, the government believes that fundamental legal skills required for dealing with regulatory appeals are broadly similar. There will be a wide range of expert members to provide context and expertise.

#### Health, Education and Social Care

- 173 The largest part of the Health, Education and Social Care Chamber's work will be that of the Mental Health Review Tribunal for England (MHRT), although the Special Educational Needs and Disability Tribunal (SENDIST) and Care Standards Tribunal (CST) have significant workloads too. Much of the work of all three tribunals involves vulnerable people, medical and psychiatric evidence issues around disability and, for MHRT and CST risk assessment.
- 174 There are, however, differences in terms of composition and operating models. The MHRT in particular has quite different requirements for listing and accommodation. Nevertheless these tribunals share a reasonable number of members already, and the government's view is that they are best brought together into a single Chamber. As emphasised above, joining tribunals into a single chamber does not imply that every judge and every member is immediately expected to sit on all types of case. In this Chamber there will be a particular need to make sure that there is the right match of judges and members to type of case.

## Taxation

175 A radical restructuring of tax appeals is proposed and this is covered in Chapter 11.

## Land, Property and Housing

176 Proposals for the introduction and expansion of this Chamber are considered in Chapter 12.

### Consultation Questions:

Q2. Do you agree with this general approach for Chambers?

Q3. Is the allocation of jurisdictions to Chambers the right one?

## Chapter 8: The Upper Tribunal

- 177 The creation of the Upper Tribunal is probably the most significant innovation in the tribunal system. The need to rationalise the hotchpotch of appeal routes from administrative tribunals has been highlighted by a number of reports, including the Law Commission report on Administrative Law, the Woolf report on Civil Justice, and the Leggatt report. The present arrangements are illogical and incoherent, reflecting the piecemeal historical development of the tribunal system. Appeals routes from first instance tribunals in England and Wales vary between specialised tribunals, the High Court (Administrative Court or Chancery Division), and the Court of Appeal. In some cases there is no statutory right of appeal, but judicial review provides an alternative remedy in the Administrative Court; or judicial review may be required to fill the gaps in a restricted statutory scheme. There are similar variations in the form and nature of the appeal, for example: whether on law only, or on law and fact; whether leave is required; and whether the procedure is primarily oral or written.
- 178 The creation of the Upper Tribunal provides the opportunity not only to rationalise the procedures, but also to establish a strong and dedicated appellate body at the head of the new system. Its authority will derive from its specialist skills, and its status as a superior court of record, with judicial review powers, presided over by the Senior President. It is expected that the Upper Tribunal will come to play a central, innovative and defining role in the new system, enjoying a position in the judicial hierarchy at least equivalent to that of the Administrative Court in England and Wales. The government expects it to benefit from the participation of senior judges from the courts in all parts of the United Kingdom. Appeal from the Upper Tribunal will be to the Court of Appeal with permission. The Lord Chancellor intends to exercise his power to prescribe that such appeals in England and Wales will only be permitted in cases of general importance or for other special reason (as for second appeals from the courts).
- 179 The structure of the Upper Tribunal will need to reflect the variety of jurisdictions within its remit. It will work alongside the existing dedicated appeal systems, respectively, for asylum and immigration and for employment. These will continue as separate pillars of the new structure, each presided over by a High Court judge, but under the general supervision of the Senior President. Although the government's initial view was that the Upper Tribunal would be small enough to make separate chambers unnecessary, further discussion with the tribunals judiciary has resulted in the provisional view that it should be divided into three chambers: Administrative Appeals, Finance and Tax, and Land.

## The Administrative Appeals Chamber

- 180 The largest Chamber in terms of both workload and numbers of judges will be an Administrative Appeals Chamber (AAC). The main part of its work will come from the existing jurisdictions of the Social Security and Child Support Commissioners. But in addition it will provide the normal route for appeal from all decisions of the three administrative chambers of the first tier (Social Entitlement, General Regulatory, and Health, Education and Social Care). Whether the Upper Tribunal will provide the normal forum for judicial review of First-tier Tribunal decisions is a matter for directions given by the Lord Chief Justice. Although it is expected that the Senior President would sit regularly on important cases, the Chamber President would principally be responsible for judicial management and leadership (as in the AIT and EAT). It is also expected that there would be regular interchange of judges with the Administrative Court, to ensure consistency of approach to administrative justice. The AAC would operate separately from the First-tier Chambers; but the First-tier Chamber Presidents, as judges of the Upper Tribunal, would contribute to its work and help to ensure that it meets the needs of their respective jurisdictions. It is not envisaged that the AAC will have any first instance jurisdiction as such, but it will be possible for Upper Tribunal judges (who will automatically be members of the first tier) to be allocated to sit on important cases in the First-tier Tribunal.
- 181 The government believes that a different approach is required for Finance and Tax, and for Lands. As explained later in this chapter, the function of the Upper Tribunal in these areas will be hybrid, rather than purely appellate. Furthermore, in each case the reform programme raises distinctive issues and challenges, for which strong specialist leadership will be required.

## The Finance and Tax Upper Chamber

- 182 The Finance and Tax Upper Chamber will build on the strengths of Special Commissioners of Tax, and the other tax and finance jurisdictions currently associated with them, including FINSMAT and PRT. It will also become the appellate body for the first-tier taxation chamber, taking over the present appellate function of the Chancery Division of the High Court. Strong leadership and a close working relationship between the two tiers will be needed to ensure an appropriate division of work, and a smooth transition to the new appellate arrangements. For that reason the government favours having a Chamber President who will preside over both the Upper Tribunal Chamber and the First-tier Tribunal Chamber.
- 183 Since there will be a significant transfer of the existing workload of the Chancery Division, it may be appropriate for High Court judges from that Division to sit in the Upper Tribunal Chamber. Not only would this enhance the status of the Upper Tribunal, but it would also ensure the exchange of expertise in finance and tax matters, which will feed through in due course into the courts. Any such arrangement would be a matter for agreement between the Senior President and the Lord Chief Justice.

## The Lands Chamber

- 184 The Lands Tribunal plays a vital role in the field of land policy and valuation practice, particularly in connection with compensation for compulsory purchase, rating, and leasehold enfranchisement. Its combination of legal and professional specialisms has given it a justifiable reputation for independence and expertise among its users, including the interested professional bodies. Depending on the jurisdiction, it acts in both a first instance and an appellate capacity. It has recently taken on additional appellate jurisdictions in the housing field. The Lands Tribunal is already within the Tribunals Service, but the tribunals from which it hears appeals (the RPTS and the VTs) are not. The future arrangements for these tribunals are subject to decisions yet to be made, in the light of the Law Commission's recommendations. The expectation is that over time the present jurisdictions can be remodelled into a more logical two tier structure, providing a comprehensive and expert forum for all land, housing and valuation disputes not requiring the involvement of the courts.
- 185 In the immediate future, the priority is continuity – to preserve and enhance the special qualities of the Lands Tribunal within the new structure. The government considers this will be best achieved by recreating it, substantially unchanged, as a Lands Chamber of the Upper Tribunal, under a separate Chamber President. In the longer term, as the First-tier Tribunal takes shape, it may be sensible to consider devolving some of parts of its jurisdiction, and confining the role of the Upper Tribunal to appellate work and cases of special importance. In this way its work would in due course mirror the hybrid jurisdiction of the Finance and Taxation Chamber. In the meantime, as well as leading the ordinary work of the Lands Chamber, the Chamber President will be able to participate fully in the planning of the new two-tier structure. As with the tax jurisdictions the government provisionally favours having a single president covering both the Upper Tribunal Chamber and the First-tier Tribunal Chamber.

### Consultation Question:

Q4. Do you agree with the proposed three-chamber structure for the Upper Tribunal?

## Judiciary

- 186 The work of the Upper Tribunal will be drawn mainly from two sources: existing second-tier tribunals and the High Court and Court of Session. The government intends that its membership will be drawn in the main from existing second-tier tribunals, with the High Court and Circuit Benches and their equivalents in Scotland and Northern Ireland providing judicial assistance. There may be some new appointments as a consequence of the creation of a two-tier tax appeal system (see Chapter II) and there may be new appointments to deal with new appellate jurisdictions. The Act requires that each Chamber has a President, and those individuals will be carrying out work which is substantially on a par with the Presidents of the EAT and AIT, who are High Court Judges.

## Location

- 187 Cases will come to the Upper Tribunal from all parts of the United Kingdom. The likely number of cases from each territory will be determined partly by the size of their population and partly by the extent to which subject-matter has been devolved. This is likely to mean in practice that Scotland and Northern Ireland will generate comparatively few cases compared to England and Wales.
- 188 The Upper Tribunal will have a permanent headquarters in London where the Senior President and most of the salaried judges of the Upper Tribunal will be based. There will also be a permanent base in Edinburgh with some judges based there, as the Social Security Commissioners and the Special Commissioners of Income Tax are now. There is no permanent judicial presence in Wales and Northern Ireland at this level now and the government does not anticipate a need for one at the moment. The government will however ensure that hearing facilities are available throughout the United Kingdom, organised according to business need and the position of the parties. The judicial work in Wales and Northern Ireland will be dealt with by Upper Tribunal judges who sit in more than one part of the United Kingdom, or by judges who hold another court or tribunal appointment in Wales or Northern Ireland respectively.
- 189 The extent to which administrative processing of Upper Tribunal cases is decentralised will be considered in the light of the creation of administrative support centres – see Chapter 3.

### Consultation Question:

Q5. Do you agree with this approach to where the Upper Tribunal is located?

## An Appellate Body

- 190 The core function of the Upper Tribunal will be as an appellate body, providing the normal route of appeal or review on points of law from decisions of the first-tier tribunal. It will aim not only to do justice in the individual cases but also to provide through its decisions authoritative guidance for lower tribunals, for decision-makers and for potential users and their advisors. While there will be onward appeals from the Upper Tribunal to the Court of Appeal or the Inner House of the Court of Session, and ultimately from those courts to the House of Lords and the Supreme Court, the government believes that most of the authoritative guidance should come from the Upper Tribunal. This is both because of the relative number of cases and the size and composition of the Upper Tribunal.
- 191 Historically, very few cases move from the tribunal system to the higher appeal courts – so few that the courts provide guidance across only a very limited field. Decision-makers and First-tier Tribunals need the help of an appellate tier which can with authority and expertise address all the issues on which they need guidance. The size and composition of the Upper Tribunal will enable it to perform this function. The numbers should be small enough to provide a collegiate and therefore consistent approach, but large enough and with sufficient expertise to provide sound and expert guidance.

- 192 The structure will be designed to ensure that there is a close working relationship and good lines of communication between the Upper Tribunal and the First-tier Tribunal and other first-instance tribunals. The Upper Tribunal needs to be made aware of the issues which are causing difficulties at first instance, so that priority can be given where appropriate to suitable appeals to give authoritative guidance. The First-tier Tribunals need to be kept up to date with the decisions of the Upper Tribunal, and its guidance needs to feed back into improvements in first instance decision making.

## Jurisdictions of the Upper Tribunal

- 193 Existing second-tier tribunal jurisdictions are included in the list in Appendix C. The government intends that all these appeal rights will transfer to the Upper Tribunal.

### Consultation Questions:

Q6. Do you agree?

Q7. Are there other appeal rights not listed?

- 194 A number of tribunals intended for transfer to the First-tier Tribunal do not have appeal rights to a second tier, or have limited appeal rights. Some have appeals to the courts; others have no appeal rights though they are subject to judicial review. Section 11 of the 2007 Act creates a general right of appeal on a point of law as a default position but also allows this right of appeal to be excluded by an order made by the Lord Chancellor, so that the status quo is preserved. If there are to be exclusions or limitations the power can only be exercised when the jurisdiction is transferred, though the exclusion or restriction can be relaxed later.
- 195 The areas where there is no appeal or a limited appeal now, and so where the power could be used, are set out below, together with the government's current view on whether the exclusion or restriction should be maintained.

## Proposed Changes to and Exclusions from Appeals

### Mental Health Review Tribunal (MHRT)

- 196 At present there is no appeal on a point of law from a decision of the MHRT, although there is a right of appeal by way of case stated<sup>34</sup>. *Bone v MHRT [1985] 3 All ER 330* is the authority that provides parties should use Judicial Review in preference to an appeal by way of case stated. The government favours the default position under the 2007 Act, i.e. an appeal on a point of law with permission to the Upper Tribunal without exclusions or restrictions.

### Consultation Question:

Q8. Do you agree?

### Special Educational Needs Tribunal (SENDIST)

- 197 At present there is an appeal from SENDIST to the High Court. There is no permission requirement. The government favours the default position under the 2007 Act, i.e. an appeal on a point of law with permission to the Upper Tribunal without exclusions or restrictions, replacing the right of appeal to the High Court.

### Consultation Question:

Q9. Do you agree?

<sup>34</sup> See s78 of the Mental Health Act 1983.

## Pensions Appeal Tribunals

- 198 At present there is no appeal from a decision of a Pensions Appeal Tribunal on a matter relating to assessment. The only remedy therefore is judicial review. The government favours replacing this with the default position under the 2007 Act – i.e. an appeal on a point of law with permission to the Upper Tribunal without exclusions or restrictions.

Consultation Question:  
Q10. Do you agree?

## Care Standards Tribunal (CST)

- 199 At present, appeals on a point of law go to the High Court, although s4(9) of the Safeguarding Vulnerable Groups Act 2007 (yet to be implemented) enables an appeal on a point of law from the CST in that area of its jurisdiction to go directly, with leave, to the Court of Appeal. There is an argument that for this reason, and also because of the sensitive nature of some of the appeals from the Independent Safeguarding Authority, that appeals from the ISA should go to the Upper Tribunal rather than the First-tier Tribunal.

Consultation Question:  
Q11. Do you agree?

## Transport Tribunal

- 200 At present the right of appeal from Traffic Commissioners is not explicitly confined to a point of law but in practice is treated as such. Allowing section 11 of the 2007 Act to apply will therefore reflect the present position but will add a permission requirement. The government believes this is appropriate for all appeals in administrative justice.

Consultation Question:  
Q12. Do you agree?

## Lands

- 201 Appeals from Valuation Tribunals and Leasehold Valuation Tribunals are not restricted to points of law. Appeals are by way of rehearing and many of the issues are valuation questions, rather than questions of law in the narrow sense. The government considers that the current role of the Lands Tribunal in relation to appeals could not be preserved if appeals were confined to points of law so proposes that the broader right of appeal is preserved.

Consultation Question:  
Q13. Do you agree?

## Asylum Support and Immigration Services

- 202 The government favour continued exclusion of an appeal right because of the need for a rapid resolution of these cases and the risk of tactical appeals.

## First Instance Jurisdiction of the Upper Tribunal

203 The government recognises that some of the tribunals transferring to the new system hear cases of very considerable complexity and that in some instances it is appropriate that those jurisdictions be transferred to the Upper Tribunal rather than the First-tier Tribunal. However, it must be borne in mind that judges of the Upper Tribunal or judges of equivalent seniority may sit in the First-tier Tribunal where the weight of the case justifies their doing so. Moreover, provision may be made for the First-tier Tribunal to transfer particularly difficult cases to the Upper Tribunal. Accordingly, where it has been suggested that a jurisdiction should be transferred from an existing tribunal to the Upper Tribunal, the test that has been applied is whether there is any reason why an appeal should lie from the first tribunal decision to the Court of Appeal in every case. Only if the answer is 'yes' is it proposed that the jurisdiction should be transferred to the Upper Tribunal.

### Financial Services and Markets Appeal Tribunal and Pension Regulator Tribunal

204 These tribunals determine references relating to decisions of the Regulator, i.e. the Financial Services Authority and the Pensions Regulator. At present they have the same President who is also Presiding Special Commissioner and President of the VAT and Duties Tribunal (the government's proposals for these tribunals are covered in Chapter II). Aside from the President, they have their own judiciary and their own rules.

205 Both tribunals are component parts of new regulatory systems. Neither tribunal is appellate in any sense of that word. Their functions are to consider references, usually referred by regulated persons, of decisions by their regulator. The tribunals are required to consider all the circumstances relevant to the decision, then to determine the appropriate action for the regulator to take and to direct the regulator accordingly.

206 Four of the seven chairmen (who are common to both tribunals) hold appointments with other courts or tribunals that will qualify them to sit in the Upper Tribunal. Appeals on points of law lie, with leave, to the Court of Appeal. The government therefore proposes that the work of these two tribunals is dealt with in the Upper Tribunal. All the work of these two Tribunals is directed at decisions of the particular regulator and it could be contrary to the scheme of the regulatory codes to separate references into different classes by subject matter.

### Claims Management Services Tribunal

207 This tribunal was created by the Compensation Act 2006. Its judiciary (legal and non-legal) are the same as those of Financial Services and Markets Appeal Tribunal and Pension Regulator Tribunal. However, as the work covered by the Tribunal is more akin to that covered by the jurisdictions to be included in the General Regulatory Chamber of the First-tier Tribunal, it is considered that it should belong in that Chamber.

## Transport Tribunal

- 208 The Transport Tribunal hears appeals from Traffic Commissioners and from decisions of the Driving Standards Agency. The Traffic Commissioners are in part a tribunal and are subject to the supervision of the Administrative Justice and Tribunal Council in its tribunal supervisory role. The government considers it is appropriate to regard the Transport Tribunal as an appellate body when dealing with appeals from the Traffic Commissioners and therefore proposes that jurisdiction will be part of the Upper Tribunal. Appeals from the Driving Standards Agency, however, are a different matter and in the government's view ought to be linked with other regulatory appeals in the First-tier.

## Information Tribunal

- 209 The main work of the Information Tribunal is to hear appeals from the Information Commissioner. Appeals may be brought under the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA), the Privacy and Electronic Communications Regulations 2003 (PECR), or the Environmental Information Regulations 2004 (EIR). The Tribunal currently deals with approximately 100 cases a year and over 95% involve freedom of information and environmental information appeals. There is an appeal from the Tribunal to the High Court. Its position in the current court and tribunal hierarchy would imply that its jurisdictions are transferred to the First-tier Tribunal. There is considerable diversity in its caseload. A high proportion of its cases raise extremely important and serious issues, affecting national security or the role and powers of Ministers, MPs and local councillors or relations between Ministers and the civil service. Some are therefore of constitutional significance. At the other extreme some of its cases are much less weighty (although clearly of importance to the parties concerned and to local communities). They may relate, for instance, to local planning or to minutes of Parish Council meetings.
- 210 The decisions of the Information Commissioner are themselves detailed and fully argued and explained, and the Commissioner is subject to the supervision of the Administrative Justice and Tribunals Council. The role of the Tribunal is more akin to an appellate body in the way it deals with those decisions. In dealing with national security cases its role is explicitly that of applying judicial review principles.
- 211 There are broadly three options for the Tribunal's work. The first option would be to put the work into the First-tier, using Upper Tribunal judges and members to deal with the weightier cases. The Tribunal has a small and reducing caseload but since a high proportion of its cases are weighty that might be a rather artificial solution. It would also be an odd arrangement for national security cases, which are akin to judicial review.
- 212 A second option would be to put all the work into the Upper Tribunal on the assumption that the work of the Tribunal will move towards weightier cases over time, as has happened in other jurisdictions. However, that would be an undesirable solution if the bulk of the Tribunal's work did not move in that direction. A third option would therefore be to use the power in section 30(1)(c) of the 2007 Act to confer jurisdiction on both tiers, with a power for a named individual to decide case by case which is the appropriate level. This would provide a flexibility that the other two options do not have but the managerial arrangements would be complex. The First-tier jurisdiction would be most appropriately located in the Regulatory Chamber with an appeal to the Administrative Appeals Chamber of the Upper Tribunal. There would therefore be two chamber presidents with a role in the work. It would also be the only part of the Administrative Appeals Chamber work which was not a second-tier appeal.

**Consultation Question:**

**Q14.** Which would be the appropriate option for the Information Tribunal's work?

## Judicial Review Jurisdiction

- 213 The extent to which the Upper Tribunal can exercise its Judicial Review jurisdiction will be determined by decisions of the High Court and the Court of Session, or by an order made by the Lord Chief Justice with the agreement of the Lord Chancellor<sup>35</sup>. It is therefore for the judiciary, not the government, to take the initiative on the use of these powers. The government recognises the vital constitutional role of the High Court in overseeing the actions of the executive and protecting the citizen. However, many judicial review decisions relevant to tribunals raise no such constitutional issues, instead raising ordinary legal or procedural issues which could more appropriately and conveniently be dealt with inside the tribunal system.
- 214 The 2007 Act provides that the transferred judicial review jurisdiction can only be exercised by High Court judges, or other judges approved by the Lord Chief Justice and the Senior President. The Lord Chief Justice has made clear that he will make available High Court judges where necessary. Assurances were also given to Parliament that, where legal aid is currently available for judicial review cases in the Administrative Court, it will also be made available in the Upper Tribunal<sup>36</sup>.
- 215 Although the scope of transferred judicial review is a matter for the judiciary, the government will ensure that all the necessary processes are in place in order to receive transferred Judicial Review cases from the outset.

## How the Upper Tribunal will work

- 216 How the Upper Tribunal works as a collective body will be in large measure a matter for it to decide. However, the government envisages that it will work flexibly, including using non-oral hearings where appropriate. It will be necessary to have some procedural rules in place in order to make the appeal process work, and the government intends to appoint an interim procedure committee to advise on the making of these rules. Existing jurisdictional rules can remain in place with any necessary modifications until replaced. The government's general approach to rules is set out more fully in Chapter 10.

## Guidance and Precedent

- 217 The Upper Tribunal is a superior court of record. Its decisions are to be binding on lower tribunals and authoritative on the interpretation of the law (subject to onward appeals to the higher appeal courts). As such it will need to have mechanisms in place to make sure that its decisions are reported promptly and expressed in a way that can be implemented easily at all levels. Arrangements already exist within the AIT and SSCSC for highlighting cases of special significance. It is expected that the Senior President will wish to develop and extend such arrangements across the work of the Upper Tribunal as a whole.

<sup>35</sup> See Tribunals, Courts and Enforcement Act 2007; section 18(6).

<sup>36</sup> Tribunals, Courts and Enforcement Bill; Third Reading Debate; House of Commons Official Report; 27 June 2007, col 379-380.

## Membership

- 218 The 2007 Act provides for full judges of the Upper Tribunal, judges from the courts and the AIT, and deputy judges, as well as non-legal members. Those who hold salaried appointments in the jurisdictions transferring into the Upper Tribunal will become Upper Tribunal judges. Others will transfer as deputies or as members. Numerically, the largest group of salaried judges will be the existing Social Security Commissioners, but there will be additional judges from the other sources described above. Nevertheless, even if appeal rights are extended to the maximum considered in this chapter, the number of full-time equivalent judges will be in the region of 30. This is, in the government's view, a small enough number (comparing favourably with the Court of Appeal and the Court of Session) to be organised and led on a collegiate and centralised basis.
- 219 All First-tier Chamber Presidents will be judges of the Upper Tribunal. While selection of Upper Tribunal judges in later years will be a matter for the Judicial Appointments Commission, the government hopes that a proportion at least, of both judges and deputies, will come to be drawn from the first tier.
- 220 The Upper Tribunal will have some non-legal members. The role of non-legal members generally is discussed more fully in Chapter 9. Their role is inevitably less significant in the Upper Tribunal than it is in the First-tier Tribunal, because the work of the Upper Tribunal will mainly be making decisions on questions of law. There can be no expectation that non-legal members will sit routinely in the Upper Tribunal or that they will sit on the full range of Upper Tribunal cases. Nevertheless they may have a role in providing expertise and context for decisions on questions of law. As all Upper Tribunal members are automatically members of the First-tier Tribunal too they may find that their expertise is of more use in the First-tier.

## Conclusion

- 221 The Upper Tribunal is a central part of the new system. The government wants to see it establish itself rapidly as authoritative, responsive, independent and innovative – a model of how to develop the law for the benefit of users and the community.

## Chapter 9: The Role of Non-Legal Members

- 222 The role of non-legal members on tribunals has been the subject of much debate over the years. Not all tribunals have non-legal members and, of those that do, non-legal members may not be required for each type of case that the tribunal hears. There is a wide variance in their sitting frequency and significant variation in their role at hearings, whether in terms of the particular expertise (if any) they bring, or their function as wing member or chairman.
- 223 The variety of roles that non-legal members currently fill reflects the huge range of subjects across which tribunals operate. In many areas non-legal members are required to bring to bear on the case their particular professional expertise – without which justice cannot be done. In other areas, while there may not be a requirement for such a professionally qualified member, the legally qualified judiciary have come to rely on the specialist knowledge of non-legal members to elucidate the issues and evidence in an appeal. In some areas, the non-legal member is there as the ‘reasonable bystander’ – not because of any particular knowledge or professional qualification.
- 224 The position of non-legal members on tribunals is varied. In many they sit as ‘wing’ members, with a lawyer chairing proceedings. But the surveyor members of the Lands Tribunal sit alone, and in some tribunals (for example, the Criminal Injuries Compensation Appeals Panel) some non-legal members may chair the hearing.
- 225 The Leggatt review concluded<sup>37</sup> that all tribunal members should be appointed on the basis of the particular contribution which they have to make to the work of the tribunal, and that judicial managers should decide whether non-legal members should sit on particular cases or classes of case, and what their role should be<sup>38</sup>.
- 226 Whatever the history behind the present use of non-legal members, the government believes that now is the time for a major re-assessment. A review of the role of non-legal members (including tribunals outside the Tribunals Service) was announced by Baroness Ashton at the Council on Tribunals annual conference in November 2005. The context to that review and the outcomes are summarised in Appendix D. The remainder of this Chapter describes the provisions of the 2007 Act, and seeks to distil some principles for the use of non-legal members within the First-tier and Upper Tribunals.

### Appointments and Tribunal Composition

- 227 In future, members of the First-tier Tribunal will be appointed under paragraph 2(1) of Schedule 2 to the 2007 Act, and to the Upper Tribunal under paragraph 2(1) of Schedule 3. Members of the Asylum and Immigration Tribunal and the Employment Tribunals will become *ex officio* members of the First-tier Tribunal by virtue of sections 4(3)(c) and (d) and 5(2)(d). Similarly, members of the Employment Appeal Tribunal and the AIT will become *ex officio* members of the Upper Tribunal (by virtue of section 5(2)(c) and (d)). It is these provisions that will allow members to be pooled together and deployed across jurisdictions in the same way as tribunal judges. However, there is no general expectation that *ex officio* members will automatically sit on cases – they will only sit if requested to do so by the Senior President.

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<sup>37</sup> Paragraph 7.23.

<sup>38</sup> Paragraph 7.24.

- 228 Under the 2007 Act the general rules on composition of tribunals for hearings will be laid down by an order or orders made by the Lord Chancellor, with the concurrence of the Senior President and subject to Parliamentary approval<sup>39</sup>. The 2007 Act also allows the Lord Chancellor to delegate his duty in relation to regulating tribunal composition to the Senior President or to a Chamber President<sup>40</sup>. The government considers it important to identify what principles should underlie tribunal composition and the orders to be made.
- 229 Whatever may have been the policies that led to existing statutory rules on tribunal composition, the government's approach is centred on the user. In a number of tribunals, cases are routinely heard by more than one member. Generally, there are good reasons for that, and there is some evidence that users prefer this approach. However, it may not be necessary in all cases. It must be acknowledged that most tribunal users simply want to have their cases disposed of quickly, rigorously and fairly, with the right kind of expertise brought to bear. It is reasonable to note that all civil trial courts and many existing tribunals (particularly the Social Security Commissioners, the AIT, the VAT and Duties Tribunal and the Lands Tribunal) rarely have more than one member sitting on a case, and in other tribunals much of the work is dealt with by one judge or member sitting alone. There is no evident dissatisfaction from tribunal users. The government considers that the reputation of tribunal justice is high enough not to need to be buttressed by rigid rules on composition.
- 230 The government intends to map existing tribunal non-legal members into the new roles in a way which maximises the opportunity for their flexible use in appeals. The overriding principle will be that the use of non-legal members on a particular hearing should bring to the table skills, experience or knowledge that tribunal judges cannot provide (in certain employment tribunal cases, for example, there can arguably be circumstances in which little value is added by their presence. However, there is a clear body of opinion in support of their use in more complex cases).
- 231 To put that overriding principle into practice the government intends that the order stipulating tribunal composition will reflect the following:
- The maximum number hearing a case is three.
  - Hearings with more than one judge are appropriate only where there is a significant question of law to be considered, or for training purposes.
  - In tribunals of two the Chair has the deciding vote.
  - Non-legal members are there to provide expertise. They should therefore be deployed selectively on the basis of the needs of the case following the Leggatt principle set out above. The needs of the case include the likely skills and understanding of the parties.
  - Expertise comes in many forms: it is not confined to those with professional qualifications.
  - Analytical and chairing skills are not confined to judges, so non-legal members may be able to chair hearings or conduct cases alone.
  - Non-legal experts can and should be used outside formal hearings, such as by providing reports or chairing meetings of expert witnesses or advising generally, subject always to the rules of natural justice.

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<sup>39</sup> Tribunals, Courts and Enforcement Act 2007; Schedule 4 para 15 (1)-(3).

<sup>40</sup> Tribunals, Courts and Enforcement Act 2007; Schedule 4 para 15(4).

- Tribunal composition is not to change during a hearing except with the consent of the parties.
- Case management arrangements need to be in place to ensure that composition is geared to the needs of the individual case.

232 The government intends that the order will set a default position close to the present rules for the composition of existing tribunals but, in line with the principles above, it will also provide for a general discretion to order a tribunal to be composed in a different way for a particular hearing. It may also provide for non-legal expertise to be brought to bear in ways other than sitting in a hearing – for instance, by providing an independent examination and report or by leading a discussion between expert witnesses. If expertise is being provided in this way it would be open to the judiciary to conclude that the presence of the expert at a hearing was not always necessary.

**Consultation Questions:**

Q15. Do you agree that this is the right approach to tribunal composition?

Q16. Should there be different principles for certain chambers or appeal rights, and if so, why?

## Categories of Non-Legal Member

233 Non legal members will be mapped into Chambers on the basis of the subject matter of the cases they currently adjudicate. Within their Chamber they will then be ‘ticketed’ (as will tribunal judges) to hear those cases for which they have the appropriate skills, expertise and training. The Lord Chancellor, with the concurrence of the Senior President, will in orders specify the qualifications of different categories of non-legal members. The government proposes three categories.

### Healthcare Qualified Professional

234 A single order could encompass doctors; nurses; psychologists and allied professionals. This would help to overcome some of the difficulties in recruitment highlighted by the review. The government is also thinking of supplementing the existing groups of fee paid medical members with a limited number of salaried clinically qualified members who might combine sitting for a substantial proportion of their time on tribunals with ordinary clinical practice. This would help them to maintain their levels of expertise and ensure that they meet professional requirements for revalidation.

235 Up to now medical membership of a tribunal has been limited to doctors. Some tribunals are used to all their medical members being consultants. In the changing world of health care, and with increasing demands from tribunals for some clinical specialisations, the government has it in mind to use a wider range of health care professionals in tribunals, according to the needs of the cases. This would be particularly appropriate if the role of the clinical expert member is more varied than simply sitting as a ‘wing’ member with a judge.

- 236 With an effective case management system in place and proper control of these different health care specialisations the government favours a ‘healthcare qualified professionals’ member category which is not confined to doctors. An alternative would be to have a number of medical/clinical groupings, based on the different health care professions. That might also include a separate category for psychiatrists in view of the particular demand for their services in cases of the type dealt with by the MHRT (although mental health cases form a significant proportion of the work of some other tribunals).

#### Other Qualified Professionals

- 237 There is a variety of other qualified professionals who are called upon across jurisdictions – these include surveyors; accountants; pharmacologists; social workers and vets. Their unifying feature is an independently and professionally validated qualification.

#### Other Experts

- 238 The government does not believe that there is a place for a purely lay category. All tribunal judges and members should have their place at the hearing table by virtue of their expertise. The government does recognise that there are experts who provide valuable assistance in the decision making process but whose expertise cannot be described in terms of a professional qualification. These experts include those who have experience in delivering specialist services (for example for people with mental health or disability problems) and those whose work experience has given them a particular insight (for example in the armed services or in a particular trade such as the hotel and catering industries). The users of certain services may also acquire relevant experience and expertise. In the mental health field, there are a number of people who either have used or still do use mental health services who can legitimately be described as ‘experts by experience’. The SSCSA currently has some members who are themselves disabled.
- 239 A member could satisfy the requirements for more than one category. Although the AIT non-legal members will be members of the Upper Tribunal, they will be eligible to sit in the First-tier tribunal. In practice their expertise is more likely to be of use in First-tier cases rather than appellate cases, as the latter are generally confined to points of law. Again, there is no general expectation that they will automatically sit on cases – they will only sit when invited to do so by the Senior President.

#### Consultation Question:

Q17. Do you agree that these are the appropriate categories for members?

## Titles

- 240 Tribunal members are known by a number of different titles. The 2007 Act talks of ‘member of the First-tier Tribunal’ and ‘member of the Upper Tribunal’. But like the term ‘tribunal judge’, these are not necessarily the titles by which they will be known.
- 241 The term ‘lay member’ is misleading, given that most members are currently appointed to tribunals for their professional expertise or experience. The term ‘lay’ has also been dropped from the magistracy, as it ‘fails to properly convey the conscientious and professional attitude of the magistracy’<sup>41</sup>. An alternative is the title ‘non-legal member’, although some consider this title to be a little clumsy, with possibly negative overtones. Another is the term ‘expert member’ (although arguably this invites confusion with the term ‘expert witness’).

### Consultation Questions:

- Q18. What should the description be?  
Q19. Would the term ‘member’ suffice?

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<sup>41</sup> Paras 4.78-4.80, *Supporting Magistrates’ Courts to Provide Justice* White Paper; Cm6681; HMCS; DCA: London; The Stationery Office; November 2005.

## Chapter 10: Tribunal Procedure

“The ability of a formal adjudicatory body to deliver proportionate dispute resolution depends to a large extent on its procedures.”<sup>42</sup> – Law Commission

242 The Tribunal Procedure Committee will have responsibility for making Tribunal Procedure Rules. The new tribunal system will inevitably evolve over time, and given the broader programme of reform within tribunals, the government is not suggesting that there will be a harmonised set of Tribunal Procedure Rules from the outset. The 2007 Act therefore provides that existing procedural rules may be used pending a programme of procedural reform. However, it may be possible to provide a common core of rules from an early stage.

### Procedural Reform

243 The government believes that there is scope for greater consistency in Tribunal Procedure Rules, and that reform should be possible while continuing to take into account the needs of individual jurisdictions. The 2007 Act and the structure of the new tribunal system will provide simplified appeal routes, but there is also scope for Tribunal Procedure Rules providing common terminology for processes and common pathways through those processes. The new tribunal system will bring together a large number of tribunals, each with their own sets of procedural rules. Some even have several sets of rules, depending on the appeal right dealt with by the tribunal.

The following four sets of regulations have many provisions in common, to the extent that the wording of complete regulations is in many cases identical:

- Child Support Commissioners (Procedure) Regulations 1999 (SI 1999/1305)
- Social Security Commissioners (Procedure) Regulations 1999 (SI 1999/1495)
- Social Security Commissioners (Procedure) (Tax Credits Appeals) Regulations 2002 (SI 2002/3237)
- Social Security Commissioners (Procedure) (Child Trust Funds) Regulations 2005 (SI 2005/1031)

244 The government believes that an historical tendency to over-prescribe procedure in primary legislation and rules contributed to unnecessary legalism and the inaccessibility of tribunals identified by Sir Andrew Leggatt. It also led to inconsistencies in the procedures of the tribunals that will be brought together under the 2007 Act. The Council on Tribunals has offered a rationalised set of procedural rules to tribunals and rule-making authorities, initially in the form of a set of model rules, latterly in the form of a guide<sup>43</sup>. The clarity and comprehensiveness of the Guide provide an invaluable foundation for considering how reform should be undertaken and consistency achieved.

<sup>42</sup> *Housing: Proportionate Dispute Resolution – the Role of Tribunals*; Law Commission Consultation Paper No 180; June 2007. Para 5.1.

<sup>43</sup> *Guide to Drafting Procedure Rules*; Council on Tribunals; November 2003.

- 245 The provisions of the 2007 Act which detail the composition and operation of the Committee are based on the Civil Procedure Act 1997. But this model is not meant to imply that the Committee is expected to produce something akin to the Civil Procedure Rules. The government does not believe that would be appropriate for tribunals. Instead, it is suggested that the Committee will at first need to do the following:
- Make rules which are necessary to bring the 2007 Act into effect – for instance, to deal with new procedures or rights triggered by the Act, such as new permission requirements for appeal to the Upper Tribunal.
  - Make rules to limit or to activate general provisions in the 2007 Act, such as the power to review decisions of the First-tier and Upper Tribunal and the power to determine by whom and to what extent costs are to be paid.
  - Conduct a dialogue with judges, members, staff and users about what needs to be in rules and what should be left to case management in individual cases.
- 246 It is the government's intention to use the transitional powers in paragraph 2 of Schedule 9 of the 2007 Act to enable members of existing tribunals to be appointed to the Committee so that it can start work as soon as the appointments are made and there is no delay in making the most urgent changes.
- 247 The government believes that an important part of the Rule Committee's work will involve pursuing a broad programme of harmonisation of tribunal procedural rules, while ensuring that the new rules do not have an adverse effect on process, efficiency and costs. This will inevitably begin with a fundamental look at the extent to which rules are needed and the extent to which processes can be left to practice directions, common sense or discretion. Procedural reform will inevitably be an iterative process. There will always be changes in circumstances, and new technology and new ways of working will open up new possibilities.

## Tribunal Procedure Committee – Composition and Purpose

- 248 The Committee will comprise:
- the Senior President of Tribunals or a person nominated by him
  - three persons appointed by the Lord Chancellor, each of whom must be a person with experience of practice in tribunals or advising persons in tribunal proceedings
  - one person nominated by the Administrative Justice and Tribunals Council
  - one of the judges of the First-tier Tribunal
  - one of the judges of the Upper Tribunal
  - one member of either the First-tier or Upper Tribunal
  - one person with experience in and knowledge of the Scottish legal system, and
  - not more than four persons appointed for their experience in or knowledge of a particular issue or a particular subject area in relation to which the First-tier or Upper Tribunal has, or is likely to have, jurisdiction.
- 249 The Committee's role is to make procedural rules. What the rules consist of is a matter for the Committee, although it will be concerned with the practice and procedure of tribunals and not the substantive law. The rules will set out the methods and machinery to be followed in judicial proceedings in the First-tier and Upper Tribunal. Schedule 5 to the 2007 Act makes clear some of the Committee's powers. The Committee can also be required to make rules to meet a defined objective<sup>44</sup>.

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<sup>44</sup> Tribunals, Courts and Enforcement Act 2007; Schedule 5, paragraph 29.

- 250 The Tribunal Procedure Rules are subject to Parliamentary scrutiny<sup>45</sup>, and when making rules the Committee has to have regard to an overriding objective<sup>46</sup>:
- 251 “Power to make Tribunal procedure Rules is to be exercised with a view to securing:
- (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done
  - (b) that the tribunal system is accessible and fair
  - (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently
  - (d) that the rules are both simple and simply expressed, and
  - (e) that the rules where appropriate confer on members of the First-tier Tribunal or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.”

### Practice Directions

- 252 The Senior President of Tribunals will also be able to give Practice Directions as to the practice and procedure of the First-tier and Upper Tribunal<sup>47</sup> and the procedure of employment tribunals, Employment Appeal Tribunal<sup>48</sup> and the practice of the Asylum and Immigration Tribunal<sup>49</sup>. Practice Directions support relevant rules but cannot supplant or replace them.
- 253 Practice Directions will require the approval of the Lord Chancellor except where they consist of guidance about the application or interpretation of the law, or the making of decisions by members of the First-tier or Upper Tribunal. This follows the Lord Chief Justice’s direction making power under Schedule 2 to the Constitutional Reform Act 2005 and is thus in line with the principles outlined in the Concordat.

### Priorities for the Tribunal Procedure Committee

- 254 The remainder of this Chapter deals with the issues the government will invite the Committee to consider at an early stage. It also covers the associated question of fees (which will not be within the Committee’s remit).
- 255 The issues for the Committee are:
- impact of Delivery Model
  - alternative dispute resolution
  - delegation to staff
  - costs.

### Impact of Delivery Model

- 256 The Tribunals Service is moving from a jurisdiction-based structure to one in which work is done through multi-jurisdictional administrative support and hearing centres. Procedural rules should not obstruct provision of the service in this way and it will thus be necessary to provide a common pathway through processes where this is feasible.

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<sup>45</sup> Tribunals, Courts and Enforcement Act 2007; Schedule 5 para 28 (6).

<sup>46</sup> Tribunals, Courts and Enforcement Act 2007; Section 22(4).

<sup>47</sup> Tribunals, Courts and Enforcement Act 2007; Section 23.

<sup>48</sup> Employment Tribunals Act 1996; Section 7A and Section 29A.

<sup>49</sup> Nationality, Immigration and Asylum Act 2002; Section 107(2A).

## Alternative Dispute Resolution

257 The development of alternatives to present ways of resolving disputes is in its infancy. Pilot projects are described in Chapter 3. The 2007 Act provides some detail on what factors the Committee must take into account if they make provision in relation to mediation<sup>50</sup>. At this stage the government believes that the role for the Committee is to examine whether existing rules assist in ensuring that alternative methods of resolving disputes are available where appropriate.

## Improving the Service to Tribunal Users

258 The 2007 Act extends the guarantee of continued judicial independence to the tribunal judiciary, and the government is committed to upholding the independence of judicial decision-making. As noted above, the 2007 Act also sets an overriding objective for the Procedure Committee, aimed at ensuring that tribunals within the system are able to provide the best possible service to their users.

259 To help the Committee achieve this objective, paragraph 3 of Schedule 5 to the Act empowers the Committee to make rules which allow the functions of the First-tier Tribunal and Upper Tribunal to be carried out by staff. The Act does not create any restriction on which functions the Committee may authorise to be performed by staff. The Committee therefore has a wide discretion to decide the range of functions which it may be appropriate for staff to perform and the necessary safeguards to be applied.

260 Most of the functions of tribunals are judicial in nature. But staff are not judges: they are usually civil servants and in general are subject to direction from higher up their management chain. They are primarily provided to a tribunal as a way of the Lord Chancellor fulfilling his duty under s39 of the 2007 Act to ensure that there is an efficient and effective system to support tribunals. If judicial functions are given to staff, it is plainly inappropriate for them to be exercised in a way which is incompatible with the principle that users have access to independent judicial decision-making. The Committee will decide which functions may be exercised by staff; the use of the restrictions specified in paragraph 3(2) which provide that a function can only be exercisable by certain members of staff, and the establishment of any other restrictions, procedures and safeguards that it considers appropriate. It might for instance decide to establish a general right to refer to a judge any staff decision where the staff member is carrying out a function of a tribunal.

261 There would be no point in establishing a system where all or most staff actions have to be reconsidered by judges, but with appropriate safeguards in place it should be possible to provide a better and more cost-effective service to users, coupled with better-quality work for both judges and staff. In the government's view there are three key requirements to making a success of this opportunity:

- Suitable processes and safeguards laid down by the Procedure Committee.
- An understanding by the staff concerned and their managers that judicial work under these provisions differs from administrative work.
- The staff concerned have whatever professional qualifications, training, skills and knowledge are necessary to do the work well.

### Consultation Questions:

Q20. Do you agree that where a function of a tribunal is carried out by staff there should always be right of access to a judge?

Q21. Are there any functions of a tribunal which should never be performed by staff, whatever the safeguards?

<sup>50</sup> Tribunals, Courts and Enforcement Act 2007; Section 24.

## Costs ('Expenses' in Scotland)

- 262 Tribunals have a variety of costs regimes (that is, sets of rules which determine whether and to what extent one party is to pay the costs of another). They are linked to fee regimes because any system which requires the payment of a fee usually has a provision whereby a successful party can reclaim the cost of the fee from an unsuccessful party, even if there is no, or limited, provision for the payment of costs.
- 263 The government made it clear during the passage of the Tribunals, Courts and Enforcement Bill that it had no intention of seeking to introduce costs regimes which prevent socially and financially vulnerable people from accessing justice<sup>51</sup>. Existing costs regimes will continue. However, in the tax area there are presently four tribunals hearing tax appeals with widely differing arrangements regarding costs. As the tax appeal tribunals are to be reformed, the government believes that it is now time to take a fresh look at a costs approach for the new Tax Chamber (see Chapter 11).
- 264 In many tribunals there are no costs provisions – each side must bear its own costs (for example in FINSMAT and in Social Security appeals). The most common provision for costs is that they may be awarded where the actions were wholly unreasonable or vexatious (for example the Special Commissioners or SENDIST). This differs from the courts, where the general rule is that the costs follow the loser – a model followed by the Lands Tribunal on rating appeals. In Scotland the general rule is the same. However, costs there are capped at an hourly rate which is generally lower than that claimed in England and Wales
- 265 There are ways in which the general operating mode of the new tribunals should itself reduce the costs of appeals:
- Encouraging the use of alternative forms of dispute resolution as well as early neutral evaluation.
  - Stronger judicial case management, ensuring that there are fewer unnecessary adjournments and postponements and that hearings focus on disputed matters only.
  - The opportunity to make full use of paper, rather than oral, hearings in appropriate circumstances.
- 266 However, although the new business model for appeals should act to reduce costs for both sides there will inevitably be some costs in most cases – whether they be the costs of legal representatives in preparing a case; presenting the case at hearing; tribunal fees or loss of earnings. Whilst it would be possible to continue with existing costs regimes, the government believes there is a case for re-examining the existing provisions to see how viable it is to arrive at a costs regime that (subject to exemptions to ensure access to justice) could operate across the work of the First-tier and Upper Tribunals. The government considers that any regimes should be:
- fair – both to government and private litigants
  - easy to understand – so that the potential financial costs of appeals are clear to litigants from the beginning of the process
  - proportionate to the issue to be decided, and
  - widely accepted by users of the tribunals.

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<sup>51</sup> In the Second Reading Debate in the House of Lords on 29 November 2006 Baroness Ashton said ‘...I have written to Stewart Wright at the Child Poverty Action Group...in my letter of 27 November I said: “Let me say straight away that the government has no intention of introducing a costs regime which would deter social security claimants from bringing meritorious appeals. The Bill is intended to provide a better service for vulnerable people, not to erect barriers to access to justice for them.”’

- 267 They should also promote access to justice, encourage early resolution of disputes and encourage good value legal services. This is a matter for the Tribunal Procedure Rules. The Rules will also provide the opportunity for greater coherence.

**Consultation Question:**

Q22. Are these the right criteria against which a costs regime should be judged. Is there good reason for the inclusion of other principles?

- 268 The government does not intend to change the parameters for awards of costs or introduce any new costs regimes at the point of a jurisdiction's transfer except in the area of tax. However there is much to recommend the eventual introduction of a single broad scheme for the award of costs within which exemptions might apply rather than setting up a series of Chamber specific regimes. Consideration of the options for such a scheme will fall to the Tribunal Procedure Committee.

## Fees

- 269 Fees that may be payable by tribunal users are a matter for the Lord Chancellor rather than the Tribunal Procedure Committee. The Lord Chancellor may prescribe fees for anything done by the First-tier Tribunal, the Upper Tribunal, the Asylum and Immigration Tribunal, or additional tribunals specified by the Lord Chancellor. Before making any such order the Lord Chancellor must consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council.
- 270 In some areas it may be appropriate for those bringing an appeal to bear the cost to the tribunal system rather than the taxpayer (the Lands Tribunal, Gambling Appeals Tribunal and the Gender Recognition Panel currently charge fees).
- 271 The government's intention is that fees will continue to be charged where they are charged at present, and it will reserve its position as to where it may be appropriate to charge fees in other circumstances in the future. This may include circumstances where the original decision maker charges fees; where the case is commercial in nature, or where fees are charged for similar proceedings in the civil courts. The introduction of fees to any tribunal would require safeguards to ensure that such fees did not prevent access to justice or cause financial hardship<sup>52</sup>. Affirmative resolutions would be needed before fees could be charged for the first time in respect of any matter, ensuring that Parliament has the opportunity to debate any such proposal<sup>53</sup>. The government is in any case committed to further public consultation prior to the introduction of any new fees.

<sup>52</sup> Tribunals, Courts and Enforcement Bill; Committee Stage; House of Commons Official Report; 15 March 2007, col 65.

<sup>53</sup> Tribunals, Courts and Enforcement Act 2007; clause 42(3) and clause 49(6)(a).

## Chapter II: Tax Appeals Modernisation

- 272 Reform of the present system of tax tribunals is a discrete project within the wider tribunal reforms outlined in this document. Tax tribunal reform pre-dates the wider Tribunal reforms envisaged by the Leggatt Review. It seeks to modernise the current fragmented and to some extent out-dated structures for tax appeals and create a more unified system. The merger of the Inland Revenue and HM Customs and Excise into HM Revenue and Customs in 2005 brought together responsibility for direct and indirect taxation into a single department, making a coherent appeals system for tax appeals even more necessary.
- 273 Besides transferring the present tax jurisdictions into the new structures of First-tier and Upper Tribunals, tax tribunal reform requires these different jurisdictions to be brought together to create a single coherent tax appeals jurisdiction. In particular, this means the abolition of the offices of the General Commissioners of Income Tax and their Clerks and the transfer of their work to the new system. The current legal and non-legal members of the other three tax tribunals are expected to transfer into the new generic offices created by the Act. In the future, the administration of the new system will be provided by the Tribunals Service.
- 274 Although it has some distinct aspects, the aims and objectives of tax appeals reform are wholly consistent with the wider reforms of the tribunal system and the new tax appeals system will form part of the First-tier and the Upper Tribunal system. As proposed in Chapters 7 and 8, there will be separate Tax Chambers in each tier, which will preserve the necessary specialisation and expertise of a tax appeals jurisdiction.
- 275 The intention is that the new tax appeals system will be implemented in April 2009, to ensure a smooth transition to the new system.

### The Current Tax Appeals Tribunals

- 276 Independent tax appeals tribunals consider appeals against decisions made by HMRC in relation to direct and indirect taxation. There are currently four distinct Tribunals. They are:
- the General Commissioners of Income Tax (General Commissioners)
  - the Commissioners for the special purposes of the Income Tax Act (Special Commissioners)
  - the VAT & Duties Tribunal, and
  - the Tribunal constituted under Section 706 of the Income and Corporation Taxes Act 1988.

#### General Commissioners

- 277 The General Commissioners hear the most straightforward appeals against HMRC decisions in relation to direct taxation. Around 2,000 General Commissioners are appointed to around 400 geographic Divisions covering England, Scotland, Wales and Northern Ireland. General Commissioners are lay people appointed for their local and business knowledge by the Lord Chancellor on the advice of local advisory committees. They in turn appoint Clerks (usually qualified solicitors) to provide administrative support and legal advice. The clerks receive fees for their work, paid by the Tribunals Service.
- 278 The Tribunals Service also provides some administrative services around processing of expenses, providing guidance and, as far as the current structure allows, it monitors the tribunal and provides training to the General Commissioners.

## Special Commissioners

- 279 The Special Commissioners are all legally qualified and the Tribunal deals with more complex direct taxation cases. Some matters are within their exclusive jurisdiction, but most other appellants are able to choose to have their cases heard before Special Commissioners if they wish. There are currently 25 Special Commissioners of whom 6 (including the Presiding Special Commissioner) are salaried. The rest are paid fees. The remit of the Special Commissioners is UK-wide, and they are appointed by the Lord Chancellor, in consultation with the Scottish Ministers. Five assessors are appointed by the Lord Chancellor for the purposes of the Proceeds of Crime Act jurisdiction of the Special Commissioners, to provide such assistance to the tribunal as the nature of the case requires.
- 280 The Tribunals Service provides the administration for the Special Commissioners in London, which is where most of the hearings are held. Cases are also heard in Edinburgh and Belfast and can be heard in other locations where necessary.

## The VAT and Duties Tribunal

- 281 The VAT and Duties tribunal hears appeals against decisions of HMRC in relation to indirect taxation, mostly VAT, excise and customs duties. There are 35 legally qualified Chairmen (most of whom sit part-time) and 87 part-time lay people. The 25 Special Commissioners also sit as VAT and Duties Chairmen. Members are either salaried or paid fees.
- 282 The Tribunals Service also provides the administrative services for the VAT & Duties Tribunal. There are three main processing and hearing centres in London, Manchester and Edinburgh, though a network of satellite hearing centres is also used.

## The Section 706 Tribunal<sup>54</sup>

- 283 This is a separately constituted body, the functions of which are:
- to determine whether HMRC have a prima facie case for assessing under the anti-avoidance provisions of Section 706, and
  - to hear appeals (by way of rehearing) from the Special Commissioners relating to assessments under Section 706.
- 284 The latter are infrequent. The members of the Tribunal are appointed by the Lord Chancellor. The Tribunal is funded by HMRC, with administrative services provided by a Registrar appointed by the Tribunals Service.

## The Objectives of Tax Appeals Modernisation

- 285 There have been a number of reviews and consultation exercises over recent years in relation to Tax Appeals. These include a Tax Law Review Committee review of the tax appeal system in 1999<sup>55</sup> and the Leggatt Report, where comment was sought and received on reform of tax tribunals as well as tribunals generally. A strong consensus on the need for reform emerged. The government agreed, and the 2004 White Paper set out a commitment to draw together the four existing appeal bodies into a single structure, capable of hearing the full range of direct and indirect tax cases.

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<sup>54</sup> The workload of this Tribunal has now been split into two tribunals through the Income Tax Act 2007. When dealing with counteraction of income tax advantages after 6 April 2007, the provision constituting the Tribunal is section 704 of the Income Tax Act. For earlier periods and for corporation tax, it remains section 706 of the Income and Corporation Taxes Act 1988.

<sup>55</sup> *A Unified Tax Tribunals System: A Second Report on the Reform of the Tax Appeals System*; The Law Committee; Institute of Fiscal Studies; October 1999.

- 286 The General Commissioners and their Clerks have provided an excellent service over the years. However the statute, the structures, the systems of appointment and the nature of the offices themselves are all now in need of modernisation. The changing nature of tax appeals and in particular the introduction of self-assessment has meant declining workloads and left many divisions with little or no work. The appeals currently dealt with by the General Commissioners will therefore transfer to the taxation chamber of the First-tier Tribunal and will be dealt with alongside other direct and indirect taxation cases, with all administration being provided by the Tribunals Service staff.
- 287 Stakeholders have expressed consistent support for a more unified tax tribunal system hearing both direct and indirect tax cases and ensuring the manifest independence of the tax appeals system from HMRC. At the same time, there has been support for continued local access to tribunals and use of non-legal members within the context of a judicial panel that is flexibly constituted to meet the needs of the individual case.

### Design of the New System

- 288 A wide range of matters are heard by these tribunals. A large number, particularly in the direct tax field, are straightforward and can be disposed of quickly. Some turn on questions of fact; some are essentially procedural, and others require the *ex parte* agreement of the tribunal to imposition of penalties. At the other end of the scale are the cases heard by the Special Commissioners and the most difficult VAT & Duties cases, which can be factually and legally complex and lengthy. Users range from individuals and small businesses through to large multinationals. HMRC is almost invariably a party to these.
- 289 The new system therefore needs to be flexible. It needs to retain the best elements of the General Commissioners' system, with cases dealt with quickly, locally and informally. Many matters will need little or no legal input and non-legal members with appropriate expertise are expected to play a crucial role in dealing with these. It is possible that some cases could be chaired by non-legal members sitting without a legal member. Non-legal members should have experience and skills appropriate to the matter in dispute.
- 290 The Tax Chamber will be headed by a Chamber President who will be a judge of the Upper Tribunal. Members of the Upper Tribunal may include some non-legally qualified members. All members of the Upper Tribunal will be members of the First-tier Tribunal and will be able to hear First-tier Tribunal cases too. The Upper Tribunal will also have members acting as deputy judges, some of whom will carry tax expertise into the new system. The mapping of current judicial office holders into the new system is discussed in Chapters 7 and 8.
- 291 Most cases from the existing four tax appeal tribunals will go to the First-tier Tribunal. For cases heard in the First-tier Tax Chamber, there will generally be an onward right of appeal on a point of law and with permission to the Upper Tribunal.
- 292 It will be possible for certain cases to be heard by the Upper Tribunal in the first instance. This will be decided by the holder of an office specified in an order made by the Lord Chancellor, or his or her delegate. The nominated person will probably be the Chamber President, who may well specify criteria relating to classes of case (for example, group litigation proceedings and lead cases) which will always be heard in

the Upper Tribunal. Parties will also be able to make special applications in respect of other types of case (i.e. cases which raise an important point of law or which are likely to reach the Court of Appeal in any event).

- 293 The design of the new system will need to ensure that heavy and sensitive cases are identified quickly and that appropriate case management is initiated.
- 294 Judicial office holders in the new tax chamber will, between them, have to deal with different classes of tax and duties issues. The composition of the tribunals to hear particular cases will be the overall responsibility of the Chamber President. But it is a fundamental principle they must have the appropriate skills and knowledge to hear the various kinds of tax appeals. Chapter 9 discussed more fully the important issues of appointments to Tribunals and tribunal composition.
- 295 The Tribunals Service is working with the Tax Appeals Modernisation Project Stakeholder Group to take forward the detailed design of the tax appeals system. This Group comprises representatives of key stakeholders, including the legal and accountancy professions, Low Incomes Tax Reform Group and the Confederation of British Industry (CBI). The General Commissioners and the Clerks are also represented on this Group.

## An Appropriate Costs Regime for Tax Appeals

- 296 The question of the costs regime that should apply in tax cases has aroused considerable interest among tax appeals stakeholders. Currently neither the General Commissioners nor the Section 706 Tribunal have powers to award costs. The Special Commissioners may award costs against a party that has acted wholly unreasonably in connection with a hearing. The VAT and Duties Tribunal have broad powers to award costs to a successful party, though current and long-standing HMRC policy has limited the circumstances in which HMRC seeks costs when it wins. This is a significant issue for taxpayers and their advisers and one that stakeholders are particularly interested in. While the differing rules on costs in the four existing tax appeals tribunals have provided practical experience of a spectrum of arrangements the creation of a new, unified tax appeals jurisdiction provides an opportunity to apply a single consistent approach to costs for all tax appeals heard in the first tier of the tax chamber.
- 297 The government's intention is that on the move to the new tribunal, the "Sheldon" practice in the VAT and Duties Tribunal, under which taxpayers are able to seek costs whenever they win but HMRC does not seek costs in the majority of cases it wins, will cease to apply.
- 298 Across government tribunals as a whole the most common approach is to have no provision for costs so that each party bears their own but is not at risk for those of the other party. There was a consensus in the stakeholder group that this is the right approach for at least the majority of more straightforward tax appeals. This would also mean no change for most cases since costs are not available for cases heard by the General Commissioners now. So it is proposed that no costs would be the default position. However, the government would welcome views on whether this rule should be modified by some limited provision for costs, such as where either party behaves unreasonably or the issues involved are substantial or complex. In the latter case if there were to be provision for costs, and on the basis that either side were liable to pay the other's costs if they lose, it would be helpful to gain views on the criteria for identifying the sort of cases where costs should be available.

## Administrative Arrangements

299 The Tribunals Service will provide the administration for all tax appeals cases and will provide the hearing rooms in which cases are heard. A description of the Tribunals Service's future Delivery Model is set out in Chapter 3. A number of stakeholders have expressed the view that many tax appeals should be heard locally – that is, within reasonable access from the taxpayer's home or place of business. The government agrees, and the planned network of permanent and core hearing facilities will achieve this. The use of such hearing centres will help to promote the speedy resolution of cases by suitably qualified judiciary and provide the right standard of accommodation for all tribunal users. In more remote locations, other options for providing hearing room facilities such as local hires, courtroom venues or video-conferencing will be promoted.

## Rules for the New Tax Chamber

300 The Tribunals Service is discussing with the tax modernisation stakeholder group an approach to appropriate rules of procedure for tax appeals. The intention is that there should be one unified set of rules for the new tax appeals system.

## Start of Jurisdiction

301 In parallel to this consultation, HMRC are consulting on aspects of lodging an appeal against an HMRC decision on tax, with a view to legislation being included in the Finance Bill 2008. The objective is to ensure that new processes make the manifest independence of the new Tax Chamber clear to users and also ensure that access to the tribunal is unfettered. The intention is also to ensure that cases only come to the tribunal when they need to, and that they do not do so before the parties have the opportunity to reach a settlement by other means.

## Tax Credits

302 In the short term, Tax Credit appeals will be transferred to the Social Entitlement Chamber with Child Benefit and non-tax Child Trust Fund (CTF) appeals. The government proposes that in the longer term Tax Credit appeals will move into the Tax Chamber.

## Cross-Border Issues

303 Though the four tax appeals tribunals have a UK-wide jurisdiction, there are some differences in arrangements between England and Wales, and Scotland and Northern Ireland. There are significant differences around appointments (in relation to the direct tax tribunals), administrative support (in relation to indirect tax) and appeal rights. This raises a number of practical implementation issues in relation to Scotland and Northern Ireland, which are under discussion with officials and stakeholders there.

### Consultation Questions:

- Q23. What features of the present system should be retained in the new one?
- Q24. What are your views on the type of cases that could be heard by non-legal members?
- Q25. What types of cases should go straight to the Upper Tribunal?
- Q26. What types of cases will require early case management?
- Q27. What are the types or features of cases that you think should be subject to an award of costs?
- Q28. How do you think the award of costs should operate in practice?

## Chapter 12: Land, Property and Housing

- 304 At present a number of courts and tribunals have jurisdiction over matters relating to land, property and housing in England and Wales. They are:
- High Court
  - County courts
  - Lands Tribunal
  - Residential Property Tribunal Service
  - Valuation Tribunals
  - Adjudicator to the Land Registry
  - Agricultural Lands Tribunal.
- 305 Only the Lands Tribunal is fully within the existing tribunal system administered by the Tribunals Service. The Adjudicator has the power to employ his own staff, although in practice his administrative support is provided by the Tribunals Service. The Lands Tribunal, the Adjudicator to the Land Registry, and the Agricultural Lands Tribunal are listed in Schedule 6 of the 2007 Act. There is therefore a presumption that they will become part of the new unified system.
- 306 The Residential Property Tribunal Service (RPTS) and the Valuation Tribunals are currently under the auspices of the Department for Communities and Local Government and are not listed in Schedule 6.

### A Long-Term Vision

- 307 The Law Commission has considered the roles of the courts and tribunals in its reports and consultation documents (see Chapter 2). The government will not reach a final view on these issues until it has had the opportunity to consider the Law Commission's final report. The proposals in this Chapter set out both what the government sees as the long term vision for the tribunal structure in this area based on current jurisdictions, and what the interim steps toward that vision might be. While this document does not comment on any of the wider issues raised by the Law Commission in respect of work that could be transferred into RPTS or the Upper Tribunal, the proposals set out here would not prevent any of the recommendations subsequently being implemented where the government response supports them.
- 308 The government's view is that the aim should be for a two-tier structure for those land, property and housing jurisdictions which are ultimately assigned to the tribunal system. As with other tribunal areas, the First-tier Tribunal should hear first-instance cases and appeals against administrative decisions. The Tribunal should be appropriately constituted, according to the principles laid down in Chapter 9 – i.e. composition should be geared to the needs of the case. Some cases may be most suitable for a judge sitting alone, some for a surveyor sitting alone, others for mixed groupings of various kinds. The judges and members should be a mixture of salaried and fee-paid. 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 through the appointment of a Chamber President.

- 309 The role of the Upper Tribunal in these matters should be similar to its role in other areas. It should predominantly be an expert appellate body, dealing authoritatively with issues of law and general practice. (It will be important that it is able to make authoritative rulings on valuation matters as well as legal issues in the narrow sense.) Again, as with other areas, Upper Tribunal judges and members would be able to hear the most significant First-tier cases, and other senior tribunal judges could be appointed to the First-tier Tribunal.
- 310 The government believes that a structure of this kind would provide expertise, independence and accessibility at a lower cost to users and the taxpayer.

**Consultation Question:**

**Q29.** Do you agree that this is the right long-term vision for tribunals dealing with land, property and housing? If not, do you have an alternative?

- 311 The present collection of tribunals do not fit this vision. The Residential Property Tribunal, the Adjudicator to the Land Registry and the Valuation Tribunals are by these criteria first-instance tribunals and so their jurisdictions would fit with the First-tier Tribunal. However, their organisation and composition differ significantly. Adjudicator to the Land Registry cases are dealt with only by legally-qualified decision-makers, some salaried, some fee-paid. Strictly speaking, they are employees of the Adjudicator, not judges in their own right. The Valuation Tribunals' cases are dealt with by unpaid volunteers who are not required to have any legal or other professional qualifications. The Residential Property Tribunals Service has a mixture of legal, surveying and lay members, most of whom are fee-paid.
- 312 The Lands Tribunal is a hybrid. Some of its jurisdictions are first-instance. The Tribunal also hears appeals from other tribunals but even these appellate jurisdictions usually require a rehearing of the evidence. Some of the first-instance cases are very weighty. See Chapter 8 for the government's proposals on the Lands Tribunal.
- 313 The respective roles of the courts, the tribunals and the ALR are all under review. It is not therefore possible at this stage to chart a detailed route from the present situation to the two-tier structure envisaged above. The government's objectives at this stage are:
- to maintain current standards of expertise and service
  - to keep options open pending the Law Commission's work and final decisions on the distribution of jurisdictions, and
  - to allow the tribunals system as a whole to benefit from the expertise in the tribunals which currently deal with land, property and housing as soon as is reasonably feasible.
- 314 The government therefore proposes to take the following interim measures:
- The existing jurisdictions of Residential Property Tribunal and Adjudicator to the Land Registry are to be transferred to the First-tier Tribunal.
  - The administration of the Residential Property Tribunals Service to transfer to the Tribunals Service.
  - A Lands, Property and Housing Chamber to be created in the First-tier tribunal.
- 315 Whether any of the jurisdictions of the Valuation Tribunals and of the courts should transfer will, as indicated above, be considered later.

- 316 The government welcomes views on this approach. While options have as far as possible been kept open, the government has concluded that it should indicate its preference for the RPTS for the following reasons:
- The Law Commission has assumed in its consultation paper (see Chapter 2) that RPTS will transfer to the unified tribunal system. It would assist the Commission and those who wish to comment on its work to know the government's provisional view on this proposal in relation to the existing Residential Property Tribunal jurisdiction.
  - There would be little point in creating a Lands, Property and Housing Chamber in the First-tier Tribunal unless the RPTS jurisdictions are transferred.

**Consultation Question:**

**Q30.** Do you agree that the jurisdictions of the RPTS and the Agricultural Land Tribunal should be transferred to the First-tier Tribunal and their administration to the Tribunals Service?

# Appendix A: Consultation Questions

## Chapter 7: Overview of Tribunal Structure

### Assignment

- Q1 Do the proposals on assignment of judges and members strike the correct balance between maintaining judicial expertise and encouraging judicial career development?

### Proposed Chambers Structure

- Q2 Do you agree with this general approach for Chambers?  
Q3 Is the allocation of jurisdictions to Chambers the right one?

## Chapter 8: The Upper Tribunal

### Structure of the Upper Tribunal

- Q4 Do you agree with the proposed three-chamber structure for the Upper Tribunal?

### Location

- Q5 Do you agree with this approach to where the Upper Tribunal is located?

### Jurisdictions of the Upper Tribunal

- Q6 Do you agree with the proposals for transferring existing appeal rights?  
Q7 Are there other appeal rights not listed?

### Proposed Changes to and Exclusions from Appeals

- Q8 MHRT. Do you agree?  
Q9 SENDIST. Do you agree?  
Q10 PAT. Do you agree?  
Q11 CST. Do you agree?  
Q12 Lands. Do you agree?  
Q13 Transport. Do you agree?

### First Instance Jurisdiction of the Upper Tribunal

- Q14 Which would be the appropriate option for the Information Tribunal's work?

## Chapter 9: Review of the Role of Non-Legal Members

### Appointments and Tribunal Composition

- Q15 Do you agree that this is the right approach to tribunal composition?  
Q16 Should there be different principles for certain chambers or appeal rights, and if so, why?

### Categories of Non-Legal Member

- Q17 Do you agree that these are the appropriate categories for members?

Titles

- Q18 What should the description be?
- Q19 Would the term 'member' suffice?

## Chapter 10: Tribunal Procedure

Improving the Service to Tribunal Users

- Q20 Do you agree that where a function of a tribunal is carried out by staff there should always be right of access to a judge?
- Q21 Are there any functions of a tribunal which should never be performed by staff, whatever the safeguards?

Costs

- Q22 Are these the right criteria against which a costs regime should be judged. Is there good reason for the inclusion of other principles?

## Chapter 11: Tax Appeals Modernisation

Tax Appeals Modernisation

- Q23 What features of the present system should be retained in the new one?
- Q24 What are your views on the type of cases that could be heard by non-legal members?
- Q25 What types of case should go straight to the Upper Tribunal?
- Q26 What types of case will require early case management?
- Q27 What are the types or features of cases that you think should be subject to an award of costs?
- Q28 How do you think the award of costs should operate in practice?

## Chapter 12: Land, Property and Housing

Land, Property and Housing

- Q29 Do you agree that this is the right long-term vision for tribunals dealing with land, property and housing? If not, do you have an alternative?
- Q30 Do you agree that the jurisdictions of the RPTS and the ALR should be transferred to the First-tier Tribunal and their administration to the Tribunals Service?

## How to Respond

Please send your response by 22 February 2008 to:

Miss Claire Gray  
Tribunals Service  
Directorate of Reviews and Legislation  
First Floor  
4 Abbey Orchard Street  
London  
SW1P 2BS

Email: [Claire.Gray@tribunals.gsi.gov.uk](mailto:Claire.Gray@tribunals.gsi.gov.uk)

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at [www.justice.gov.uk/index.htm](http://www.justice.gov.uk/index.htm).

Alternative format versions of this publication can be requested from:  
[Claire.Gray@tribunals.gsi.gov.uk](mailto:Claire.Gray@tribunals.gsi.gov.uk). Tel: 0207 340 6547.

### Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on the Tribunals Service and Ministry of Justice websites.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## The Consultation Criteria

The six consultation criteria are as follows:

- 1 Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- 2 Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
- 3 Ensure that your consultation is clear, concise and widely accessible.
- 4 Give feedback regarding the responses received and how the consultation process influenced the policy.
- 5 Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- 6 Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

## Consultation Co-ordinator Contact Details

If you have any complaints or comments about the consultation *process* rather than about the topic covered by this paper, you should contact Laurence Fiddler, Ministry of Justice Consultation Co-ordinator, on 020 7210 2622, or email him at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk).

Alternatively, you may wish to write to the address below:

Laurence Fiddler  
Consultation Co-ordinator  
Ministry of Justice  
5th Floor Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the 'How to Respond' section of this paper.

# Appendix B: Gibbons Review Recommendations

## The Recommendations

The Gibbons Review recommended that the government should:

Support employers and employees to resolve more disputes in the workplace

- 1 Repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations.
- 2 Produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.
- 3 Ensure there are incentives to comply with the new guidelines, by maintaining and expanding employment tribunals' discretion to take into account reasonableness of behaviour and procedure when making awards and cost orders.
- 4 Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, for example, through greater use of in-house mediation, early neutral evaluation, and provisions in contracts of employment.

Actively assist employers and employees to resolve disputes that have not been resolved in the workplace

- 5 Introduce a new, simple process to settle monetary disputes on issues such as wages, redundancy and holiday pay, without the need for tribunal hearings.
- 6 Increase the quality of advice to potential claimants and respondents, through an adequately resourced helpline and the internet, including as to the realities of tribunal claims and the potential benefits of alternative dispute resolution to achieve more satisfactory and speedier outcomes.
- 7 Redesign the employment tribunal application process, so that potential claimants access it through the helpline and receive advice on alternatives when doing so.
- 8 Offer a free early dispute resolution service, including where appropriate mediation, before a tribunal claim is lodged for those disputes likely to benefit from it. The government should pilot this approach.
- 9 Offer incentives to use early resolution techniques by giving employment tribunals discretion, to take into account the parties' efforts to settle the dispute, when making awards and cost orders.
- 10 Abolish the fixed periods within which Acas must conciliate.

Make the employment tribunal system simpler and cheaper for users and government

- 11 Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees.
- 12 Simplify the employment tribunal claim and response forms, removing requirements for unnecessary and legalistic detail, eliminating the 'tick box' approach to specifying claims and encouraging claimants to give a succinct statement or estimate of loss.
- 13 Unify the time limits on employment tribunal claims and the grounds for extension of those limits; this should simplify claim pre-acceptance procedures.

- 14 Give employment tribunals enhanced powers to simplify the management of so-called 'multiple-claimant' cases where many claimants are pursuing the same dispute with the same employer.
- 15 Encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.
- 16 Review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.
- 17 Consider whether the employment tribunals have appropriate powers to deal with weak and vexatious claims and whether the tribunals use them consistently.

## Appendix C: Tribunals and Chambers

This appendix proposes that existing jurisdictions are allocated to the two new tribunals and First-tier Tribunal chambers as set out below. The Taxation and Land, Property and Housing Chambers are dealt with in Chapters 11 and 12 respectively.

### Upper Tribunal

TRIBUNAL
Financial Services and Markets Tribunal for Section 132 of the Financial Services and Markets Act 2000
Pensions Regulator Tribunal for Section 102 of the Pensions Act 2004
Child Support Commissioner for Section 22 of the CSA Act 1991
Social Security Commissioner for Schedule 4 to the Social Security Act 1998
Transport Tribunal for Section 4 to the Transport Act 1985

Plus appeals from First-tier Tribunals and certain Northern Ireland, Scottish and Welsh tribunals, Judicial Reviews and High Court Business.

First-tier Tribunal

GENERAL REGULATORY CHAMBER
Consumer Credit Appeals Tribunal for Sections 40A of the Consumer Credit Act 1974
The Secretary of State deciding appeals under Section 7(1) of the Estate Agent's Act 1979
Foreign Compensation Commission, Section 1 of the Foreign Compensation Act 1950
Information Tribunal, Section 6 of the Data Protection Act 1950*
Sea Fish Licence Tribunal, Section 4AA of the Sea Fish (Conservation) Act 1967
Immigration Services Tribunal, Section 87 of the Immigration & Asylum Act 1999
Aircraft and Shipping Industries Arbitration Tribunal, Section 42 of the Aircraft and Shipping Industries Act 1977
Antarctic Act Tribunal, Regulation 11 of the Antarctic Regulations 1995
Plant Varieties and Seeds Tribunal, Section 42 of the Plant Varieties and Seeds Tribunal 1997
Tribunal, Rule 6 of the model provisions with respect to appeals as applied with modifications by the Chemical Weapons (Licence Appeal Provisions) Order 1996
Tribunal, Health Service Medicines (Price Control Appeals) Regulations 2000
Transport Tribunal, Schedule 4 to the Transport Act 1985**
Gambling Appeals Tribunal, Section 140 of the Gambling Act 2005
Insolvency Practitioners Tribunal, Section 396(1) of the Insolvency Act 1986
Tribunal, Section 150 of the Mines and Quarries Act 1954
Charity Tribunal, Section 2A of the Charities Act 1993
Case or Interim Case Tribunal from the Adjudication Panel for England, Section 76 of the Local Government Act 2000
Appeals Tribunal, Part 3 of the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003
Claims Management Services Tribunal, Section 12 of the Compensation Act 2006

\* See Chapter 8.

\*\* In part (appeals from the Driving Standards Agency) – see Chapter 8.

### SOCIAL ENTITLEMENT CHAMBER

Asylum Support Adjudicator, Section 102 of the Immigration and Asylum Act 1999

Appeal Tribunal, Chapter 1 of Part 1 of the Social Security Act 1998

Adjudicator, Section 5 of the Criminal Injuries Compensation Act 1995

Appeal Tribunal, Part 2 of Schedule 9 to the Scheme set out in Schedule 2 to the Firefighters' Pensions Scheme Order 1993

Tribunal, Regulation H6(3) of the Police Pensions Regulations 1987

Pensions Appeal Tribunal in England and Wales, Paragraph 1(1) of the Schedule to the Pensions Appeal Tribunals Act 1943

Gender Recognition Panel, Section 1 of the Gender Recognition Act 2004

### HEALTH AND SOCIAL CARE CHAMBER

Tribunal, Part 1 of Schedule 3 to the Misuse of Drugs Act 1971

Family Health Services Appeal Authority, Section 49S of the National Health Service Act 1977

Care Standards Tribunal, Section 9 of the Protection of Children Act 1999

Mental Health Review Tribunal for a region of England, Section 65(1) and (1A)(a) of the Mental Health Act 1983

Special Education Needs and Disability Tribunal for Section 333 of the Education Act 1996

## Appendix D: Non-Legal Members

- 1 Sir Andrew Leggatt received many representations in favour of wide use of non-legal members. A number of arguments were put forward in their favour including:
  - their role in ensuring that tribunals were representative of the communities which they serve and in which they operate
  - that they broadened the experience of the tribunal
  - that the presence of someone with an expert qualification helped some users cope with the stressful experience of appearing before a tribunal<sup>56</sup>, and
  - that users found multi-member hearings easier to address<sup>57</sup>.
- 2 However, Sir Andrew also found that few people argued for the appointment of 'lay members' with no specific expertise or qualifications for the work of the tribunal. He recommended a clearly defined role for non-legal members, arguing that there was "no justification for any members to sit, whether expert or lay, unless they have a particular function to fill"<sup>58</sup>.
- 3 The White Paper *Transforming Public Services: Complaints, Redress and Tribunals* committed the government to a review of the role of all types of non-legal members (NLMs) across a range of tribunals. It identified three particular issues that needed to be considered:
  - What precisely should the role of non-legal members be? Is it to add balance to the tribunal? Or to ensure particular interests are represented?
  - For expert members, is it desirable for the tribunal to have a particular expert among those hearing the case, as opposed to being available as a witness?
  - What role could non-lawyers play in the new alternatives to hearings which the Tribunals Service is committed to developing?<sup>59</sup>
- 4 A review of the role of non-legal members was announced by Baroness Ashton at the Council on Tribunals annual conference in November 2005. An initial data-gathering exercise, completed in June 2006, collected detailed information about NLMs across a wide range of tribunals, not just those that form part of the Tribunals Service.
- 5 This was followed up with a series of discussion groups with both non-legal and legally qualified members from a cross-section of tribunals, held over the summer and autumn of 2006. These two exercises have helped to shape proposals for the future of NLMs in the tribunal system.

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<sup>56</sup> Leggatt Review, para 7.19.

<sup>57</sup> Leggatt Review, para 7.25.

<sup>58</sup> Leggatt Review, para 17.

<sup>59</sup> White Paper, para 6.67.

## Data Collection Exercise

- 6 The data-collection exercise looked at 32 tribunals that deploy non-legal members. Tribunals excluded from this analysis were those specialist tribunals that have been specifically excluded from membership of the Tribunals Service, tribunals with legal members only, and tribunals that have not sat for a number of years.
- 7 At the time of the exercise there was a total of nearly 8,000 non-legal members. The table on page 76, which was produced at the time of the exercise, breaks down this figure by type of member.
- 8 The General Commissioners of Income Tax and the Valuation Tribunals have an exclusively lay membership and deploy the vast majority of the lay (non-expert) members, with 1,987 and 1,082 members respectively.
- 9 The other main tribunals in terms of size of non-legal membership are the employment tribunals (1,935 members) and Social Security and Child Support Appeals (with 1,153 medical, financial and disability expert members).

## Qualifications

- 10 The governing legislation for tribunals tends not to be prescriptive, referring instead to the general experience members require (where appropriate). For those NLMs appointed by the Lord Chancellor there is a competence framework for each competition. The framework for MHRT lay members, for example, is:
  - professionalism (technical knowledge expertise, showing authority, independence and integrity, developing knowledge and managing workload)
  - judgement (investigating and analysing and resolving and deciding), and
  - people skills (building positive relationships and communicating).
- 11 In recent years there has been a move away from purely 'lay' members. The lay panel for Child Support and Social Security Appeals was abolished in 1998 and current regulations now prescribe four categories of tribunal members and the qualifications and expertise required. The General Commissioners of Income Tax will be abolished by the 2007 Act as their work is incorporated into the unified tribunal system (see Chapter 11).

## Tribunal Composition

- 12 The traditional tribunal composition is a legally-qualified member either sitting alone or chairing a hearing with two or three NLMs, although this is not always the case. A number of tribunals have no NLM representation, whereas in others those hearing the case are completely lay – neither the General Commissioners of Income Tax nor the Valuation Tribunals have legal membership, although both are advised on points of law by a clerk.
- 13 Sir Andrew Leggatt recommended that there should be a maximum of three members, as anything more could be oppressive<sup>60</sup>.

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<sup>60</sup> Leggatt Review, recommendation 146.

## Table showing Non-Legal Members of Tribunals

Number and type of member

TRIBUNAL	Medical	Financial	Disability	Employment	Other expert	Non-expert	Total
<b>Current DCA Tribunals</b>							
General Commissioners of Income Tax	0	0	0		0	1987	1987
VAT and Duties Tribunals		90					90
Pensions Appeal Tribunal for England & Wales	33				31		64
Asylum and Immigration Tribunal						60	60
Information Tribunal					45		45
Financial Services and Markets Tribunal		17					17
Pensions Regulator Tribunal					17		17
Special Immigration Appeals Commission					11		11
Immigration Services Tribunal					8	0	8
Transport Tribunal					6		6
Lands Tribunal for England and Wales					3		3
<b>Tribunals that joined DCA in 2006</b>							
Employment Tribunals England and Wales & Employment Tribunals Scotland				1750			1750
Appeals Service (now Social Security and Child Support Appeals)	641	18	494				1153
Mental Health Review Tribunal for England	318				277		595
Special Educational Needs and Disability Tribunal					133		133
Employment Appeals Tribunal				68			68
Criminal Injuries Compensation Appeals Panel	14					27	41
Re-instatement Committees							0
<b>Other Central Government Tribunals to transfer post April 2007</b>							
Reserve Forces Appeal Tribunal					181		181
Agricultural Land Tribunal for England					140	0	140
Care Standards Tribunal					73	0	73
Family Health Services Appeal Authority	32				26		58
Adjudication Panels for England					21	0	21
Insolvency Practitioners Tribunal		14					14
Consumer Credit Licensing Appeals (but to be replaced by the Consumer Credit Tribunal)					12		12
Estate Agents Appeals					12		12
Section 703 Tribunal		10					10
<b>Other Tribunals</b>							
Valuation Tribunal Service						1082	1082
Residential Property Tribunals Service					135	80	215
Schools Adjudicators					8		8
Schools Admission Appeals Panels							0
Schools Exclusion Appeals Panels							0
	1038	149	494	1818	1139	3236	7874

## Role

- 14 The role of non-legal members varies across tribunals. Expert members are there to provide expert opinion. Medical members, as well as providing expert input to the decision-making process, may also be called upon to provide medical examinations. Members of the employment tribunals are there to provide expertise but also balance. Genuinely lay members provide a 'man on the street' perspective and/or perform a 'reasonable bystander' role.
- 15 Traditionally NLMs sit as 'wing' members to a legal chair. There are, however, exceptions to this. The surveyor members of the Lands Tribunal sit alone while experienced NLMs of the Criminal Injuries Compensation Appeals Panel can and do chair hearings, even in the presence of a legally-qualified member.
- 16 Non-legal members are usually there to decide issues of fact, but sometimes also consider and decide points of law even though they are not legally trained. Their involvement is sometimes required by the governing legislation. Non-legal members can question the parties but practice varies. When sitting, NLMs normally have an equal vote. In some tribunals NLMs can even overrule the legal member on a question of law. There is little evidence of NLMs getting involved in mediation or other forms of alternative dispute resolution.
- 17 Within the SSCSA the appeal tribunal composition is prescribed in affirmative secondary legislation. There is a small element of discretion in relation to the use of one or two doctors for industrial injuries and vaccine damage cases. The latter is a very narrow area of the jurisdiction, and in this case the President has nominated a salaried, legally-qualified member (District Chairman) in each region, who issues a direction where two doctors are required.
- 18 However in the VAT and Duties Tribunal the President gives guidance that non-legal members should sit on cases where:
  - there is an allegation of fraud or dishonesty raised against an appellant in the proceedings. In those cases two non-legal members are generally used, one of those will normally have a direct experience of the business involved in the appeal, for example, a catering expert will sit where the appeal relates to a restaurant
  - there is a need for a specialist to appraise the issue and help evaluate the evidence for example customs duty classification matters; disputes about the proper level of a small business's turnover
  - the appellant raises a defence of "reasonable excuse" to a compliance penalty assessment, and
  - in complex fact-heavy cases (such as tax avoidance schemes where bona fide commerciality may be an issue) two members of appropriate experience may be used.

## Sitting Patterns

- 19 In many tribunals NLMs sit infrequently (for example General Commissioners average only 3 hearings a year with a significant number not sitting at all) however there are four full time salaried NLMs (one medical member in SSCSA and three surveyor members in the Lands Tribunal). For other tribunals, where the NLMs are all fee-paid, sitting patterns vary from, for example, the Agricultural Land Tribunals, where members sit roughly once every three years, to MHRT where lay members sat on average 51 times in 2005, through to the Residential Property Tribunals Service, where members can sit up to three days a week.

## Recruitment and Cross-Deployment

- 20 There are some examples of NLMs sitting in more than one jurisdiction. Members of the Care Standards Tribunal, for instance, often hold appointments to SENDIST, the MHRT and the Family Health Services Appeals Authority. However the practice is not widespread and where it does occur is in spite of the current systems which usually require members to apply separately for each individual post.
- 21 There are particular problems with recruiting medical members to tribunals. A number of reasons are put forward for this:
- Tribunals are effectively ‘fishing in the same pool’ for candidates.
  - Remuneration (medical members often have to pay a locum to replace them, which can outstrip the fee they earn for sitting on the tribunal).
  - A lack of career path for those sitting on tribunals.

## Training and Appraisal

- 22 Again, practices vary between tribunals. Some have induction training only, while others have ongoing training programmes. Some NLMs receive annual appraisal or feedback, while some tribunals have no formal mechanisms in place.

## Fees/Remuneration

- 23 Almost all non-legal members are fee-paid, although there is a salaried medical member of the Child Support and Social Security Appeals tribunal and three surveyor members of the Lands Tribunal are salaried. In contrast General Commissioners are unpaid volunteers.

Fee rates vary between tribunals. Some NLMs, such as the General Commissioners, receive no remuneration beyond travel and subsistence. Some (including members of the Agricultural Land Tribunals and the Valuation Tribunals) can claim a financial loss allowance, while other receive a daily fee for sitting. The government has asked the Senior Salaries Review Body to consider NLMs’ fees as part of its review of remuneration in Tribunals.

## Cost

- 24 The cost of non-legal members is significant, covering fees, travel and subsistence, training, appraisal and general administration. It is therefore important that non-legal members add real value for money.

## Proposals

- 25 The government, and more importantly stakeholders, value the input NLMs have to the tribunals process. But as highlighted above, there are problems with the system and implementation of the Act presents a unique opportunity for reform.
- 26 In particular, the provisions in the 2007 Act will allow radical changes to the way NLMs are appointed and deployed. For the first time it will be possible to pool the skills and expertise of NLMs across the First-tier and Upper Tribunals, Asylum and Immigration Tribunal, employment tribunals and the Employment Appeal Tribunal. Proposals for the future of NLMs are found in Chapter 9 of the main document.

