Guide to Drafting **Tribunal Rules**

November 2003

Preface

The main function of the Council on Tribunals is to keep under review, and report on, the constitution and working of the tribunals under its supervision, and where necessary to consider and report on the administrative procedures of statutory inquiries.

The Council seeks to ensure that tribunals and inquiries:

- Are independent
- Are open, fair and impartial
- Are accessible to users
- Have the needs of users as their primary focus
- Offer cost effective procedures
- Are properly resourced and organised
- Are responsive to the needs of all sections of society

This Guide to Drafting Tribunal Rules is the successor of the Model Rules of Procedure for Tribunals published by the Council in 1991.

The change of title is for two reasons. First, it is to make clear that this is not a uniform code of procedural rules which could, or should be adopted without modification for use by any Tribunal. In fact, it is a selection of different samples of rules, inviting the reader to "pick and mix". Secondly, the change of title identifies the likely reader. The Council intends this Guide to be a useful tool for the person who has to draft procedural rules for a newly formed Tribunal, or to up-date the old rules of an existing Tribunal.

All Tribunals are creatures of statute, and their powers are limited to those granted by primary legislation. Therefore some of these draft rules (e.g. to make orders for costs, or to order a party to undergo medical examination) will be outside the powers of some Tribunals. Tribunals vary enormously in their procedures, from informal to legalistic. Some of the more prescriptive of these draft rules will not be appropriate for the less formal Tribunal, but might readily be adopted by a Tribunal where the parties are normally represented by lawyers. Similarly, the time for complying with a Tribunal's orders will need to be considered in the light of circumstances. References in the former Model Rules to "within 3 days" or "within 7 days" have been replaced here by "within ... days".

The Notes in this Guide are believed to be accurate in July 2003. It is hoped to post matters of importance on the Council's website from time to time at www.council-on-tribunals.gov.uk.

Contents

Section	Rule	Title	Page
Introduction		Enacting formula	10
	Rule 1	Citation, commencement, application and interpretation	10
	Rule 2	The overriding objective	10
	Rule 3	Application by the Tribunal of the overriding objective	12
	Rule 4	Alternative dispute resolution procedure	12
Start of Proceedings		**Action by Appellant/Applicant**	
	Rule 5A	Notice of appeal and reasons for appeal	16
	Rule 5B	Initiating applications to the Tribunal	20
	Rule 6	Fee for notice of appeal/initiating application	22
	Rule 7	Application for extension of time limit	24
	Rule 8	Notice of proposal	26
	Rule 9	Reference to the Tribunal by *Authority*	26
		Action by the Tribunal	
	Rule 10	Acknowledgement and registration of appeal/application	28
	Rule 11	Publication of initiating application	30
	Rule 12	Distribution of documents by Registrar	30
	Rule 13	Notification to *authority/authorities responsible for appointing members of ad hoc Tribunal*	32
		Action by Respondent	
	Rule 14A	Action by *Authority* on receipt of notice of appeal/statement of reasons for appeal	34
	Rule 14B	Action by respondent on receipt of initiating application	36
	Rule 15	Nominal respondent	38
		Additional Parties	
	Rule 16	Action on receipt of copy of notice of appeal/initiating application or reply	40
	Rule 17	Addition of new parties to proceedings	42
	Rule 18	Authority with interest entitled to be heard on initiating application	42
		Persons under a Disability and Death or Insolvency of a Party	
	Rule 19	Appellant/applicant a minor or mentally or physically impaired	44
	Rule 20	Death or insolvency of a party	44

		Provisions relating to all Appeals/Applications and Replies	
	Rule 21	Additional matters	46
	Rule 22	Information to accompany notice of appeal or statement of reasons for appeal/initiating application or reply	48
	Rule 23	Amendment of notice of appeal/initiating application or reply and delivery of supplementary reasons for appeal/application or reply	48
	Rule 24	Misconceived appeals/initiating applications	50
	Rule 25	Withdrawal of appeal/application	50
Management Powers of Tribunals		**Preparation for the Hearing**	
	Rule 26	Interim relief	54
	Rule 27A	Disclosure and inspection of documents	54
	Rule 27B	Automatic disclosure and inspection	54
	Rule 27C	Documents relating to proceedings before administrative authority from whom appeal made	56
	Rule 28	Pre-hearing review	58
	Rule 29	Preliminary issues	60
	Rule 30	Hearing bundles	62
		Other Tribunal Powers	
	Rule 31	Entry on land or premises	64
	Rule 32	Other case management powers	66
	Rule 33	Representative parties with the same interest	70
	Rule 34	Representation of interested persons who cannot be ascertained	72
	Rule 35	Translations and interpretation etc.	74
	Rule 36	Arbitration	76
		Directions	
	Rule 37	Directions	78
	Rule 38	Direction as to respondent's reply	82
	Rule 39	Varying or setting aside of direction	82
	Rule 40	Failure to comply with direction	84
		Grouping of Proceedings	
	Rule 41	Consolidation of appeals/applications	86
	Rule 42	Test cases	86
	Rule 43	Group proceedings direction	88
	Rule 44	Effect of GPD	90
	Rule 45	Case management under GPD	92
	Rule 46	Removal from group register	92
	Rule 47	Test appeals/applications under GPD	92

Evidence

Evidence of Witnesses

Rule 48	Summoning of witnesses	96
Rule 49	Evidence of witnesses - general rule	98
Rule 50	Evidence by telephone, video link or other means	98
Rule 51	Use at hearing of witness statements	100
Rule 52	Form of witness statement	102
Rule 53	Witness summaries	104
Rule 54	Use of witness statements, witness summaries and affidavits for other purposes	104
Rule 55	Availability of witness statements, witness summaries and affidavits for inspection	106

Expert Evidence

Rule 56	Tribunal's power to restrict expert evidence	108
Rule 57	Expert's overriding duty to the Tribunal	108
Rule 58	Form and content of expert's report	108
Rule 59	Discussions between experts	110
Rule 60	Evidence by single joint expert	112
Rule 61	Written questions to experts	114
Rule 62	Filing of expert's report	114
Rule 63	Tribunal's power to obtain assistance of experts	116
Rule 64	Medical evidence	116

Hearings and Decisions

Hearings

Rule 65	Notice of date, time and place	120
Rule 66	Alteration of date, time or place and adjournments	122
Rule 67	Procedure	122
Rule 68	Absence of member of the Tribunal	126
Rule 69	Hearings in public or in private	128
Rule 70	Representation	130
Rule 71	Persons entitled to be present	134
Rule 72	Exclusion of persons disrupting proceedings	134
Rule 73	Failure of parties to attend	136
Rule 74	Inability to attend through physical or mental sickness or impairment	138

Decisions

Rule 75	Power to decide appeal/application without hearing	140
Rule 76	Decision of the Tribunal	142
Rule 77	Publication	144
Rule 78	Review	146
Rule 79	Further consideration	148

Appeal to *Appellate Tribunal*

Rule 80	Application for permission to appeal	150
Rule 81	Tribunal's power to suspend its decision pending appeal to *the appellate tribunal*	150

Costs, Expenses and Interest

Rule 82	Orders for costs and expenses	152
Rule 83	Payment of expenses, allowances and fees	154
Rule 84	Interest	154

Appeals from Tribunals

Rules relating to Appellate Tribunals

Rule 85	Application to *appellate tribunal* for permission to appeal	158
Rule 86	Notice of appeal and extension of time limit	162
Rule 87	Written representations	166
Rule 88	Withdrawal of applications for permission to appeal and appeals	166
Rule 89	Directions	168
Rule 90	Hearings	170
Rule 91	Evidence	172

Appeals to the Courts

Rule 92	Application for permission to appeal to the courts	174
Rule 93	[*Appellate*] tribunal's power to suspend its decision pending appeal to the courts	176

Miscellaneous and Definitions

Rule 94	Disqualification	180
Rule 95	Assessors and advocate to the Tribunal	182
Rule 96	Power of the Chair to exercise powers of the Tribunal etc	184
Rule 97	Performance of Registrar's functions	184
Rule 98	The register	186
Rule 99	References to the Court of Justice of the European Communities	188
Rule 100	Reference by the Tribunal to *the appellate tribunal* of question of law	190
Rule 101	Investigatory Tribunals: appointment of solicitors and counsel: methods of inquiry	190
Rule 102	Irregularities	194
Rule 103	Complaints	194
Rule 104	Signature of documents	194
Rule 105	Proof of documents and decisions	194
Rule 106	Method of delivering and receipt of documents	196
Rule 107	Substituted delivery of documents	198
Rule 108	Supply of documents from Tribunal records	200
Rule 109	Sanction for disregard of safeguards on confidential information	202
Rule 110	Interpretation	202

Annex

Checklist of matters to be considered when preparing legislation establishing a tribunal or other adjudicative body 210

Introduction

Enacting Formula and Rules 1 – 4

1. In drafting procedural rules, Departments and tribunals should always have in mind the need to do all they can to assist parties who are not professionally represented. This requires consideration to be given to the structure as well as the content and language of the rules. It is desirable that those rules which concern the initial stage of making the appeal/application are set out at the commencement of the rules of procedure and are not obscured by preliminary rules concerning definitions and matters of a technical nature. Accordingly the rules which must precede the appeal/application rules (rules 1 to 4) should be kept to the minimum - i.e. title, commencement, scope of application, overriding objective and alternative procedure for resolving disputes.

2. It follows that, in order to make the rules clearer to unrepresented persons and lay advisers, definitions and technical matters, as well as revocations, should be set out at the end of the procedural rules.

Enacting Formula

The *Secretary of State*, in exercise of the powers conferred by [*state the relevant provision of the enabling Act*], and after consultation with the Council on Tribunals in accordance with section 8 of the Tribunals and Inquiries Act 1992, hereby makes the following Rules.

Rule 1

Citation, commencement, application and interpretation

(1) These Rules may be cited as the ... Tribunal[s] (Procedure) Rules 20... They shall come into force on ... 20...

(2) These Rules apply to proceedings before [the ... Tribunal] [all Tribunals] other than proceedings arising from an appeal/application made under [*state the enactment(s) establishing the exceptional jurisdiction*].

(3) Provision for interpretation of the Rules is in Rule 110.

Rule 2

The overriding objective

(1) These Rules are a new procedural code with the overriding objective of enabling the Tribunal with the assistance of the parties to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes-

(a) dealing with the case in ways which are proportionate to the complexity of the issues and to the resources of the parties;

(b) seeking informality and flexibility in the proceedings under these Rules;

(c) ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of his or her case without advocating the course he or she should take;

(d) using the Tribunal's special expertise effectively; and

(e) avoiding delay, so far as compatible with the proper consideration of the issues.

This formula recites that the rule-making authority has complied with the requirements of section 8 of the TIA to consult the Council on Tribunals before making, approving, confirming or concurring in procedural rules (defined in that section as including any statutory provision relating to the procedure of the tribunal in question) whether in the form of rules, regulations, orders or other instruments. Departments and other rule-making authorities should ensure that the requirement to consult the Council on Tribunals, if applicable, is cited as well as the enabling powers; see the Council's Code for Consultation, published January 2001.

Purpose of rule: To specify the title of the rules, the date they come into force, their scope of application and where definitions of terms used are to be found.

Paragraph (1): 'Tribunal[s]'. The square brackets acknowledge that the enabling Act may establish one tribunal (whether or not it sits in two or more divisions) or a series of tribunals with the same subject jurisdiction.

Paragraph (2): 'These rules apply to'. Provision defining the scope of the rules of procedure is only necessary if the tribunal has more than one jurisdiction and one or more jurisdictions require a substantially different procedure from the others.

Paragraph (3): 'Provision for interpretation'. For definitions of terms used in the rules see draft rule 110.

Purpose of rule: This draft rule indicates the overriding objective of the rules which in accordance with draft rule 3 will govern the application and interpretation of the rules. It thus states the principles to be applied by tribunals in individual cases and aims to give effect to section 3 of the Human Rights Act 1998.

Paragraph (1): 'These Rules are a new procedural code'. These words have been interpreted in the context of the Civil Procedure Rules as requiring a fresh approach to the interpretation of the rules. See *Marsh v Frenchay NHS Trust* (2001) The Times, 13 March, DC.

Paragraph (1): 'with the assistance of the parties'. See *HFC Bank plc v Midland Bank* [2000] CPLR 197, (2000) 97(19) LSG 43, (2000) 144 SJLB 182, (2000) The Times, 26 April where the Court of Appeal in considering the similar provision of the Civil Procedure Rules said the parties must notify the court immediately when there is a possibility of the case being settled, so that the court's resources can be properly and efficiently deployed.

Paragraph (2): 'ensuring ... the parties are on an equal footing procedurally'. This has a bearing on the overall procedure as well as the manner of conducting the hearing: *Krcmar and Others v Czech Republic* (2001) 31 EHRR 41 and *Apehuldozatteinek Szovetsege and Others v Hungary* (2002) 34 EHRR 34 but it does not go so far as ensuring that the parties' representatives are of the same standing: *Maltez v Lewis* (2000) 16 Const LJ 65, (1999) 96(21) LSG 39, (1999) The Times, 4 May.

Paragraph (2): 'ensuring ... the parties ... are able to participate fully in the proceedings'. This would include making arrangements to ensure that parties who are disabled are not merely represented but have an equal opportunity to participate.

Rule 3

Application by the Tribunal of the overriding objective

(1) The Tribunal must seek to give effect to the overriding objective when it-

(a) exercises any power under these Rules; or

(b) interprets any rule.

(2) In particular the Tribunal must manage cases actively in accordance with the overriding objective.

Rule 4

Alternative dispute resolution procedure

The Registrar must bring to the attention of the parties the availability of any alternative procedure for the resolution of the dispute ("ADR procedure") and explain the procedure to them, and, if the parties wish, must facilitate the use of the procedure if it would not cause undue delay.

Purpose of rule: To require the tribunal to seek to give effect to the overriding objective specified in draft rule 2 and in particular to intervene at an early stage to clarify the key issues rather than pursuing each and every issue the parties may care to raise.

Paragraph (2): 'must manage cases actively'. The judge calling counsel out to the corridor to discuss the possibility of settlement was active case management not apparent bias: *Hart and Another v Relentless Records Ltd and Others* [2002] EWHC 1984, (2002) 152 NLJ 1562, (2002) The Times, 8 October, Chancery Division.

Purpose of rule: To require the Registrar to bring to the attention of the parties the availability of any alternative procedure for the resolution of the dispute, to explain the procedure to them and, if they wish, to facilitate the use of the procedure. This would include arbitration under draft rule 36 (see the definition of 'ADR procedure' in draft rule 110).

'the availability of any alternative procedure'. Where the statute requires the parties to use an ADR procedure the following provision would be required in place of this draft rule:-

'[*In any case where provision is made requiring the parties to use an ADR procedure*] the Registrar must notify the parties of the requirement to use that procedure and explain the procedure to them.'

'ADR procedure'. In addition to statutory provisions for ADR, there may be informal procedures available for the resolution of disputes without proceeding to a hearing such as exist under NHS complaints procedures. Such procedures would also be covered by the term 'ADR procedure' as defined in draft rule 110.

Start of Proceedings

Action by Appellant/Applicant	Rules 5A – 9
Action by the Tribunal	Rules 10 – 13
Action by Respondent	Rules 14A – 15
Additional Parties	Rules 16 – 18
Persons under a Disability and Death or Insolvency of a Party	Rules 19 – 20
Provisions relating to all Appeals/ Applications and Replies	Rules 21 – 25

1. The purposes for which tribunals are commonly established are-

    (a) to provide an appeal against an original decision of an administrative authority; and
    (b) to provide a forum for hearing disputes of a particular nature between parties (with or without a public element) which Parliament has committed to a specialised tribunal rather than the courts.

    Administrative authorities may have a role not only in the case of category (a) but also in the case of category (b) where they are an ordinary party (e.g. a landlord) or where they have an administrative role in relation to, or as a consequence of, a particular decision. For example proceedings before employment tribunals may involve payments out of the Redundancy Fund where the Secretary of State has a possible interest in the decision.

    Draft rules for making appeals as regards category (a) and for making applications as regards category (b) are to be found in draft rules 5A to 7 below.

    In general these draft rules are framed so that they can be used for either category, or can be easily adapted. However, when there are alternative rules for appeals in category (a) and for applications in category (b) they are lettered A and B e.g. draft rules 5A and 5B.

2. The purposes for which tribunals or bodies with adjudicative functions have been established go wider than categories (a) and (b) and include-

    (c) the deciding of an application made to an authority (e.g. an application for a benefit) which, if not granted by the authority, is to be referred to a tribunal; and
    (d) the deciding of issues between a regulatory authority and those subject to its jurisdiction (which may involve an investigation into how the latter carry on their business or profession). When the regulatory authority has already made a decision, the matter should properly fall within category (a). However, provision may be made for hearing representations, either by the authority itself or by an independent tribunal, against proposed decisions ('minded to cases') and this may require a difference in the way the proceedings are started as well as subsequent procedures.

    Draft rules applicable to the start of proceedings before tribunals or adjudicative bodies in cases of this kind are to be found in draft rules 8 and 9 below.

3. Tribunals may also be established to hear appeals from tribunals of first instance and provision may be made for appeals to the courts. See draft rules 85 to 93 below.

4. Rules relating to persons under a disability and to succession are to be found in draft rules 19 and 20 below

5. Draft rules 21 to 84 below relate to all proceedings in categories (a) to (d).

Rule 5A

Notice of appeal and reasons for appeal

(1) An appeal to the Tribunal must be made by written notice. An approved form for making an appeal may be obtained from the offices of [*the relevant department*] or the office of the Tribunal. If the approved form is for any reason not used, the notice of appeal may be in any form acceptable to the Tribunal.

(2) The notice of appeal must state-

(a) the name and address of the person making the appeal (in these Rules called “the appellant”);

(b) that the notice is a notice of appeal;

(c) the date and any reference number of the decision against which the appeal is brought (here called “the disputed decision”), and the name and address of the Authority which made the disputed decision;

(d) the name and address [,and the profession,] of the representative of the appellant, if any, and whether the Tribunal should send replies or notices concerning the appeal to the representative instead of the appellant; and

(e) unless they are to be given in a separate written statement under paragraph (7), the reasons for the appeal.

(3) The appellant must attach to the notice of appeal a copy of the disputed decision.

(4) The appellant or the appellant’s representative must sign the notice of appeal.

(5) The appellant must deliver the notice of appeal to the Registrar at the office of the Tribunal not later than […days] after the date on which the disputed decision was received by the appellant. Where the disputed decision does not include the full reasons for it the period of […days] will not start to run (for the purposes of this paragraph and paragraph (8) until the full reasons are received by the appellant.

(6) If a person has informed the Tribunal [the Authority] in writing before the expiry of the period of [… days] referred to in paragraph (5) of an intention to appeal, and a notice of appeal is

Purpose of rule: To establish consistency in the form and content of notices of appeal. Provision is made for an alternative of a separate statement of reasons for appeal to allow the appellant time to formulate and lodge his or her reasons for appeal when there is insufficient time to include them in the notice of appeal. Some of the requirements imposed on appellants by this draft rule may be unduly prescriptive for some tribunals (e.g. paragraphs (7) to (10)).

Paragraph (1): 'written notice'.
'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are to be construed accordingly: Schedule 1 to the Interpretation Act 1978. This would cover electronic communications which reproduce words in a visible form. In *Burns International Security Service (UK) Ltd v Butt* [1983] ICR 547, EAT, it was held that although the requirement of the rule in the 1980 Industrial Tribunals Rules (the current rules are the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (S.I.1171)) corresponding to paragraph (1) of this draft rule that an initiating application was to be in writing was mandatory, the requirements corresponding to the requirements of paragraph (2) were directory only; see also *Dodd v. British Telecom* [1988] MLR 16 noted in 1988 CJQ 366.

Paragraph (1): 'An approved form ... in any form acceptable to the Tribunal'.
The Council on Tribunals considers it desirable, particularly in cases where an appellant is unlikely to be professionally represented, that provision for a notice of appeal to a tribunal should be made by way of an approved form which may be filled in by the appellant.

To prescribe a form in the rules may result in an unnecessary rigidity and inhibit the amendment of forms as circumstances require. This rule, therefore, merely sets out what is required to be contained in a notice of appeal, leaving it to the Department or the tribunal (or the tribunal President) to adopt an appropriate form, with guidance for completing it, and to make copies available at relevant Departments and offices.

Forms must not be too onerous. Some people with a disability may find it difficult to complete any form and may require assistance. The content and shape of the form will be substantially governed by the jurisdiction and procedures of the particular tribunal and may be considerably influenced by assumptions about the prospective appellants/applicants and respondents and by the nature and extent of the guidance material to be available to them. "Model forms" would, therefore, be of little assistance to Departments and tribunals. The latter are advised to consult the Court Service Publications Unit of the Department for Constitutional Affairs when designing their forms.

In preparing forms, the Department or tribunal should draw particular attention to such preliminary points as may be especially relevant, such as where a preliminary application or a notice as to evidence needs to be brought to the attention of the tribunal at an early stage. Examples of such preliminary matters are set out in draft rule 21. In deciding what should be included in, or should accompany, the notice of appeal, it is necessary to take into account the following considerations:-

(a) the desirability of avoiding overloading the requirements where that might overawe or confuse an appellant; appellants must be able to rely on the Registrar to assist them in ensuring they have all necessary material available to the tribunal and the other parties at the appropriate stages prior to the hearing and at the hearing itself; and

(b) the desirability both of ensuring that the tribunal and the other parties will have, as early as possible, a reasonable indication of the content of the appeal and of limiting the occasions on which it is necessary to seek further information and material from the appellant. The appellant should deliver to the Registrar with the notice of appeal or as soon as it becomes available as much information about the nature of his or her case (draft rule 22). A particular point for consideration, when the enabling Act permits the suspension of an administrative decision if an appeal is made, will be the desirability of including in the initial notice of appeal a request for such suspension; see draft rule 21.

If the notice is in the appellant's own form it should be accepted by the tribunal provided it is legible and contains the necessary information. The address of the Registry or other office of the tribunal to which notices or communications should

delivered to the office of the Tribunal not later than [… days] after the approved form was received by that person from the Tribunal [Authority], the notice shall be taken to have been delivered to the Tribunal at the time the Tribunal [the Authority] was informed of the intention to appeal.

(7) The appellant must state the reasons for appeal either in the notice of appeal itself or in a separate written statement. If the reasons for appeal are set out in a separate written statement, the statement must also contain-

(a) the name and address of the appellant; and

(b) a statement that the appellant has delivered to the Tribunal a notice of appeal and the date on which the notice of appeal was delivered.

(8) Any separate written statement must be signed by the appellant or the appellant's representative and must be delivered to the Registrar at the office of the Tribunal not later than [... days] after the date on which the disputed decision was received by the appellant.

(9) A form approved by the Tribunal, which may be used for making a separate written statement of reasons for appeal, may be obtained from the offices of [*the relevant department*] or the office of the Tribunal. If a copy of the approved form is for any reason not used by the appellant, the statement may be in any form acceptable to the Tribunal.

(10) If the appellant has informed the Tribunal in writing before the expiry of the period of days specified in paragraph (8) of an intention to state the reasons for appeal in a separate written statement, and a written statement is delivered to the office of the Tribunal not later than [... days] after the form was received by the appellant from the Tribunal, the statement shall be taken to have been delivered to the Tribunal at the time it was informed of that intention.

be addressed should be printed or stamped on all copies of forms supplied to prospective appellants. At appropriate stages, forms or accompanying guidance literature should give an adequate indication of the procedure followed by the tribunal and 'what happens next', state the availability of staff of the tribunal to provide general procedural advice, and draw attention to other sources of advice and, in particular, advice agencies available locally. The form should also draw attention to the availability of any alternative procedure for resolving the dispute and explain the procedure.

There may be special cases where the appellant is not the person most intimately concerned, e.g. an appeal by a relation in respect of a patient under the Mental Health Act. Any form or rule should then provide for the identification of both the appellant and the person on whose behalf the appeal is made.

Paragraph (5): 'deliver the notice of appeal to the Registrar'. Notice of appeal to a tribunal from an administrative authority should be given to the tribunal rather than to the administrative authority from whose decision the appeal is brought. If the first stage of an appeal against an administrative decision is an internal or administrative review of the decision (e.g. by a Department for Work and Pensions decision maker), the administrative authority must make it clear in the notice of the decision that if the individual remains dissatisfied an appeal to the tribunal is the second stage. When the individual is told of the result of the review he or she should be reminded of the right to appeal to the tribunal.

Paragraph (5): 'not later than [… days] after the ... disputed decision was received'. It is important that the time limits should be reasonable and defined as clearly as possible in the rules. This is particularly the case when, under the enabling Act, the jurisdiction of the tribunal depends (under a formula such as "... must only be entertained by the tribunal if presented within ...") on appeals being made within a statutory time limit. A rule prescribing the time limit for appealing should always be included in the procedural rules notwithstanding that it repeats a provision in the enabling Act. See also the notes to draft rule 7 regarding applications for the extension of the time limit.

Appellants should be warned that if they post rather than deliver their forms by hand or electronically they should use recorded delivery or obtain and preserve other proof of posting; see draft rule 106(3) and note.

The time within which notice of appeal must be given should be sufficient to allow the appellant an opportunity to take advice so as to enable the appellant to include in the notice a statement of reasons for appeal. This avoids an additional stage for the submission of reasons for appeal.

If the times for giving notice of appeal prescribed by the enabling Act are so limited as to make it onerous for the appellant to include the reasons for appeal in the notice of appeal, such a separate stage may be required. In that case, paragraphs (7) to (10) provide for a separate statement of reasons for appeal. The form of notice of appeal should contain an additional note drawing attention to the ability of the appellant to file a separate statement of reasons for appeal and the availability of any form for that purpose.

The square brackets round "... days" here and elsewhere in these draft rules indicate that different time limits may be appropriate for different tribunal jurisdictions.

Where the disputed decision does not contain the reasons for it, the time for appeal will not start to run until those reasons are received by the appellant.

Paragraph (6): 'a notice of appeal is delivered'. The tribunal forms should warn appellants that if they post rather than deliver their forms by hand or electronically they should use recorded delivery or obtain and preserve other proof of posting. As to 'deliver' and 'delivered' in this draft rule see draft rule 106.

Paragraph (6): '[... days] after the approved form was received by that person'. Where a form is provided for an appeal, the individual must have time to get the form before the time for appeal starts to run.

Paragraph (8): 'not later than ... days'. For the extension of this time limit see draft rule 7.

Paragraph (9): 'A form approved by the Tribunal'. See note on paragraph (1).

Rule 5B

Initiating applications to the Tribunal

(1) An application to the ... Tribunal under section ... of the ... Act for [*state purpose of the application*] must be made in writing. An approved form for making an application may be obtained from the office of the Tribunal. If the approved form is for any reason not used, the application may be in any form acceptable to the Tribunal.

(2) The application must state-

(a) the name and address of the person making the application (in these Rules called "the applicant");

(b) that the application is an initiating application;

(c) the name(s) and address (or addresses) of the person(s) or authority against whom [the application is brought] [relief is sought];

[(d) the address and description of the [property/land] which is the subject of the application;]

(e) [the claim of the applicant and the reasons for it] [the reasons for claiming relief]; and

(f) the name and address [, and the profession,] of the representative of the applicant, if any, and whether the Tribunal should send replies or notices concerning the application to the representative instead of the applicant.

[(3) When land (the whole or any part of which is sub-let) is the subject of an application to the Tribunal, every landlord, tenant or subtenant of that land shall be a party to the proceedings on that application.]

(4) The applicant or the applicant's representative must sign the application.

(5) The applicant must deliver the application to the Registrar at the office of the Tribunal not later than [3 calendar months] after the event giving rise to the claim.

(6) If a person has informed the Tribunal in writing before the expiry of the period referred to in paragraph (5) of an intention to make an application and an application is delivered to the office of the Tribunal not later than [3 calendar months] after the form was received by that person from the Tribunal, the application shall be taken to have been delivered to the Tribunal at the time it was informed of the intention to make the application.

(7) An application made under this rule is called an "initiating application".

Purpose of rule: To establish consistency in the form and content of initiating applications. It is designed for applications to a tribunal otherwise than by way of appeal against a decision of an administrative authority and may be used whether the procedure is essentially between parties or whether there is a public law element involving a public authority. As regards the latter, the Council takes the view that, as in the case of appeals against decisions of administrative authorities, the application should be made to the tribunal and not to the authority concerned.

There may however be cases where any application, e.g. for a statutory benefit, is made to an authority and that authority has power to refer particular issues to a tribunal. (See note to draft rule 9). An initiating application to a tribunal may then be inappropriate since the matter may not raise any issues which the authority would consider it necessary to refer to a tribunal. In such a case the appropriate course would be for an application or claim to be made to the authority; the proceedings before the tribunal would then commence with a reference from the authority and not by appeal or application: see draft rule 9.

Paragraph (1): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Paragraph (1): 'An approved form ... in any form acceptable to the Tribunal'. See note to draft rule 5A(1).

Paragraph (3): 'every landlord, tenant or subtenant ... shall be a party'. This provision is based on rule 13 of the Agricultural Lands Tribunal (Rules) Order 1978 (S.I.259).

Paragraphs (5): 'The applicant must deliver the application ... not later than [3 calendar months]'. Time limits may be provided in the enabling Act for some applications but not for others. For time limits generally see notes to draft rule 5A. Time limits should be set out in any approved form. For applications out of time, see draft rule 7 and notes to it. As to 'deliver' and 'delivered' in this draft rule, see draft rule 106.

Paragraph (6): 'an application is delivered'. See note on 'a notice of appeal is delivered' to draft rule 5A(6).

Rule 6

Fee for notice of appeal/initiating application

(1) The appellant/applicant must deliver to the Registrar with the notice of appeal/initiating application [a fee of £…] [the fee decided by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs] from time to time with the consent of the Treasury]. The fee must be specified in any form approved for the purpose of making an appeal/application.

(2) The Registrar may, on application by the appellant/applicant, reduce or disapply the fee in a particular case for reasons of financial hardship.

Purpose of rule: To specify the fee payable on a notice of appeal/initiating application with provision for reduction of the fee in cases of financial hardship. It is the view of the Council that provision for the charging of fees should be exceptional, and that fees should not be charged-

(a) where the liberty of the subject is involved, in claims for social welfare benefits, in education or health matters or in appeals to tax tribunals;

(b) for hearings before a licensing authority which makes decisions about the right of an individual or body to pursue a livelihood; or

(c) in respect of a tribunal established as an instrument of social policy for disputes between individuals as in the case of rent controls and employment relations.

Other considerations may apply where a tribunal is provided as an expert alternative to a court (e.g. the Copyright Tribunal and certain jurisdictions of the Lands Tribunal) but, even so, the fees must not be excessive or act as a deterrent to prospective parties.

Paragraph (1): 'the appellant/applicant must deliver'. As to 'deliver' see draft rule 106.

Paragraph (1): 'the fee decided by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs]'. The provision for fees in the enabling Act may confer this power on a Minister of the Crown other than [the Lord Chancellor] [the Secretary of State for Constitutional Affairs], in the case of certain tribunals in Scotland, on Scottish Ministers or the Lord President of the Court of Session or, in the case of certain tribunals in Wales, on the National Assembly for Wales.

Where fees are charged, they must not be set at a level which is a practical impediment to access to the tribunal. This is a requirement of Article 6(1) of the European Convention on Human Rights ('ECHR') and of the common law: see *R v Lord Chancellor ex parte Witham* [1998] QB 575. In some cases, any fee may prevent access to the tribunal. For this reason, the Council is of the view that where fees are charged, provision should be made for a prospective party to apply for the fee to be reduced or disapplied by reason of financial hardship. Furthermore, prospective appellants/applicants should be notified of their right to ask for the fee to be reduced or disapplied.

The second alternative in paragraph (1) would enable the fee to be altered without there being a need to amend the rules.

Rule 7

Application for extension of time limit

(1) The Tribunal may extend the time limit imposed by paragraph (5) or (8) of Rule 5A or paragraph (5) of Rule 5B, whether or not it has already expired, if-

(a) it would not be reasonable to expect the appellant/applicant to comply or, as the case may be, to have complied with the time limit; or

(b) not to extend the time limit would result in substantial injustice.

(2) If it is likely that a notice of appeal or statement of reasons for appeal/initiating application will be delivered to the office of the Tribunal after the expiry of the time limit referred to in paragraph (1), the appellant/applicant may include with the notice of appeal or statement of reasons for appeal/initiating application a statement of reasons for the delay and the Tribunal must treat this as an application for an extension of the time limit.

(3) Before deciding whether or not to extend the time limit the Tribunal must give persons whose interests might be affected by the extension an opportunity to be heard and, in addition to their representations and those of the appellant/applicant, must consider-

(a) in the case of an application to extend the time limit for a notice of appeal,

(i) whether the receipt of the disputed decision by the appellant was sufficient to notify the appellant properly and effectively of the disputed decision, and
(ii) whether the existence of the right of appeal to the tribunal and the relevant time limit were notified to the appellant, whether in the disputed decision or otherwise;

(b) in the case of an application to extend the time limit for delivery to the Registrar of a statement of reasons for appeal, whether the existence of the relevant time limit was notified to the appellant; or

(c) in the case of an application to extend the time limit for an initiating application, whether the existence of the right to apply to the Tribunal and the relevant time limit was notified to the applicant.

Purpose of rule: To enable the tribunal to extend the time limit for an appeal or statement of reasons for appeal/application when it would not be reasonable to expect the appellant/applicant to comply or have complied with the time limit or an extension is necessary to prevent substantial injustice.

Paragraph (1): 'Tribunal may extend the time limit'. In *Costellow v Somerset County Council* [1993] 1 All ER 952, [1993] 1 WLR 256, [1993] PIQR P147, (1992) The Times, 25 November the Court of Appeal said that it was for a party applying for the extension to furnish a convincing excuse for the delay but the extension should be granted if the other party could show no substantial prejudice from the delay and justice so required. In *Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others* [2001] CP Rep 18, (2000) 97(7) LSG 41, (2000) 144 SJLB 85, (2000) The Times, 7 March, DC the Court explained the matters to be considered and the correct approach on an application for an extension of a time limit.

In addition to the matters specified in this draft rule the Tribunal should also have regard to Article 6(1) of the ECHR which confers a right of access to a tribunal, that is a right to effective access.

Time limits are permissible and indeed necessary provided that there is discretion to extend them and that this discretion is exercised reasonably; see *Miragall Escolano and Others v Spain* (2002) 34 EHRR 24, paras 33-39.

This draft rule together with draft rule 106(3) will serve to avoid the difficulty which arose in *R (on the application of Katie Lester) v The London Rent Assessment Committee* [2003] EWCA Civ. 319, [2003] 1 WLR 1445, (2003) The Times 25 March, [2003] EGCS 115, [2003] NPC 35 where the tenant's notice to the Committee under section 13(4) of the Housing Act 1988 challenging the landlord's notice of proposed increase in the rent, although posted in time, was received by the Committee after the time had expired so that the Committee had no jurisdiction to settle the rent; there was no provision in the Act to extend the time for the tenant's counter-notice. In *Peters v Sat Katar Co Ltd (in liquidation)* (2003) The Times, 1 July, CA the notice of appeal to the Employment Tribunal was posted in time but not received by the tribunal office; since the appellant was unrepresented and had acted conscientiously the Court of Appeal held that the time for appeal should be extended.

Paragraph (2): 'will be delivered'. As to 'delivered' and 'delivery' in this draft rule, see draft rule 106.

Rule 8

Notice of proposal

(1) Where *the regulatory authority* gives notice to any person [that it is minded to] [informing that person of the proposal to] ... under the Act, the notice must inform the person affected of the substance of the proposed decision and-

(a) the matters which *the regulatory authority* would propose to specify as the reasons for that decision; and

(b) any other matters which *the regulatory authority* has taken into account in considering the proposed decision.

(2) Every notice must-

(a) invite the person affected, within a period of not less than [… days] specified in the notice, to deliver to *the regulatory authority* his or her representations in writing as to why the decision should not be made (or, as the case may be, should be varied), and, if that person thinks fit, to notify *the regulatory authority* that he or she wishes to make representations orally and the reasons for wishing to have an oral hearing; and

(b) inform the person affected of the procedure *the regulatory authority* will follow on receipt of those representations.

Rule 9

Reference to the Tribunal by *Authority*

(1) Where [*the statutory requirements for a reference are satisfied*], *the Authority* must refer to the Tribunal-

(a), (b) ... [*the issues within the Tribunal's jurisdiction*]

or the ones which may be relevant to the matter, and must provide the Tribunal with copies of the [applicant's claim [and the relevant objections to it] and any other material produced to or considered by *the Authority* in considering the claim [and the objections]].

(2) *The Authority* must give notice to the applicant [and every objector] of the reference to the Tribunal.

Purpose of rule: To specify the requirements for notice by a regulatory authority of an intention to adopt a decision including informing the person affected of the substance of the proposed decision, the reasons and other matters to be taken account of; the notice must invite representations in writing within a specified time as to why the decision should not be made and indicate the procedure to be followed.

Paragraph (1): 'the proposed decision'. Certain statutes provide for the registration and regulation of persons carrying on particular businesses. A refusal by the regulatory authority to register a person, or the exercise of the statutory powers of regulation (e.g. by suspension or revocation of a licence or the attachment of new conditions), may, therefore, have a serious effect on the livelihood of the person concerned. In a number of cases provision has been made which requires the regulatory authority to give notice to the person concerned before taking a decision which would have adverse consequences, and inviting the latter to make representations. The representations are considered by, and any oral hearing takes place before, the regulatory authority itself.

The procedure in such cases is initiated by the regulatory authority, if it is "minded" or intends to consider making the relevant adverse decision, giving notice to that effect to the person concerned. Such a procedure may well be required by the statute (Consumer Credit Act 1974, the Estate Agents Act 1979 and the Financial Services and Markets Act 2000) or adopted by the authority itself (the Information Commissioner). An appropriate procedural rule supplementing a statutory requirement and ensuring that the individual is aware of the case he or she has to meet is set out in this draft rule. (For a variant of such provisions when the regulatory authority is required not to exercise discretionary or other powers adversely without giving an interested party an opportunity of being heard, see rule 54 of the Trade Marks Rules 2000 (S.I. 136)).

More formal provision is made in other regulatory statutes for the regulatory authority to refer the proposed exercise of a power (section 14 of the Misuse of Drugs Act 1971) or the exercise of a power (section 396 of the Insolvency Act 1986; section 127(4) of the Financial Services and Markets Act 2000), either of its own volition or when required by a person affected, to an independent tribunal for investigation and report. Such a provision will be found in the statute itself. The Council is of the view that, where a decision has been taken, an appeal against the decision should be possible direct to the tribunal (as in draft rule 5A), rather than by requiring the regulatory authority to refer the matter to the tribunal. Where there is an appeal to a tribunal, the decision should be that of the tribunal itself rather than that of the regulatory authority on the report of the tribunal.

Paragraph (2)(a): 'representations in writing'. The procedure following the submission of representations would not necessarily follow that appropriate in the case of an appeal or an application, but should make provision for-

(a) a decision whether to hold an oral hearing;
(b) notice of an oral hearing;
(c) representation and evidence; and
(d) a decision by the regulatory authority, together with the reasons and the facts on which it is based, and notification of any right of appeal.

As to 'in writing' see note on 'written notice' to draft rule 5A(1).

Paragraph (2)(a): 'to deliver to the regulatory authority'. As to 'deliver' see draft rule 106.

Purpose of rule: To provide for a reference to the tribunal by an authority of issues within the tribunal's jurisdiction and the procedure relating to it.

Paragraph (1): 'the Authority must refer to the Tribunal'. Provision may be made by statute for an administrative authority to refer certain issues to an independent tribunal. (See, e.g. section 5(6) of the Commons Registration Act 1965, where a registration authority is required to refer disputes to a Commons Commissioner. In the case of section 127(4) of the Financial Services and Markets Act 2000, if the Financial Services Authority decides to impose a penalty in case of market abuse, a person on whom the penalty is to be imposed may refer the matter to the Financial Services and Markets Tribunal; this would require an adaptation of the text of this draft rule). The proceedings before the tribunal will not be commenced unless and until a particular reference is made, though the matter may have been initiated by an (earlier) application to the authority concerned.

Action by the Tribunal

Rule 10

Acknowledgement and registration of appeal/application

(1) Upon receiving a notice of appeal/initiating application the Registrar must-

(a) send an acknowledgement of its receipt to the appellant/ applicant;

(b) enter particulars of it in the register and must inform the parties in writing of the case number of the appeal/application entered in the register (which must thereafter constitute the title of the proceedings) and of the address to which notices and other communications to the Tribunal must be delivered; and

(c) inform the appellant/applicant or the appellant's/applicant's representative of any further steps which he or she must take to enable the Tribunal to decide the appeal/application and, subject to paragraph (2), the time and place of the hearing of the appeal/application.

(2) The acknowledgement of receipt of the notice of appeal/initiating application must include-

(a) a notification that general procedural advice in relation to the proceedings may be obtained from the office of the Tribunal and of other sources of advice;

(b) a statement that, if the appellant/applicant wants a hearing in private or does not want an oral hearing, the appellant/applicant must notify the Tribunal as soon as possible; and

(c) a notification of the [availability of][requirement to use] any ADR procedure and an explanation of the procedure in accordance with Rule 4.

Purpose of rule: This draft rule deals with the acknowledgement and registration of appeals/applications.

Paragraph (1)(b): 'enter particular of it in the register'. As to the register see draft rule 98.

Paragraph (1)(b): 'must be delivered'. As to 'delivered' see draft rule 106.

Paragraph (2): 'advice ... from the office of the Tribunal and ... other sources of advice ... ADR procedure'. An acknowledgement of a notice of appeal or initiating application is the first official response to the appellant/applicant and may indeed be the first occasion on which official advice may be offered to the appellant/applicant. The report of the review of tribunals by Sir Andrew Leggatt entitled 'Tribunals for Users, One System, One Service' ('the Leggatt Report') noted at paragraph 4.15 that "tribunals can only provide general procedural advice. Many users will need additional support if they are to participate fully in their cases".

The notification should therefore also draw attention to other sources of advice such as that provided by the Citizens Advice Bureau. The acknowledgement should also draw the attention of the appellant/applicant to the availability of any alternative procedure for resolving the dispute and explain the procedure. Such notifications may not, however, be necessary where an approved form for appeals/initiating applications is used which contains such references. In the absence of an approved form, consideration should also be given to including in the acknowledgement of notice of appeal/initiating application a note of 'what happens next.'

The Council also suggests that administrative provision be made to include with letters of acknowledgement lists of local advice agencies and local law centres. Consideration should also be given to the inclusion, with letters of acknowledgement and notifications to respondents, of a note on how the tribunal intends to proceed (having regard to any applicable burden and standard of proof and rules of evidence) of the kind referred to in the notes to paragraph (2)(a) of draft rule 65, as an alternative to including them with the notice of hearing.

The recommendations of the Civil Justice Review (Cm 394) are also pertinent in this connection. In addition to making a similar suggestion to that referred to above, the Review makes a recommendation (para. 363) with regard to advice by court staff that is equally applicable to tribunal staff:

"Individual litigants with cases involving small amounts should not be expected to incur the cost of seeking legal advice where this is likely to exceed or be disproportionate to the amount at stake. Their primary source of information and guidance is the staff of the court, who should be able to advise any litigant on the remedies open to him in relation to a particular claim, the procedure for pursuing those remedies and the precise manner in which court forms should be completed. Provided the staff are prepared to assist any litigant on request there can be no basis for any fear or accusation of partiality."

Paragraph (2): 'wants a hearing in private or does not want an oral hearing'. See draft rules 69 and 75.

Rule 11

Publication of initiating application

(1) Upon receiving an initiating application, the Tribunal must decide what notices are to be given, whether by advertisement or otherwise, to persons who appear to have a direct or financial interest in the proceedings and may for this purpose require the applicant to provide any information which it is within his or her power to provide.

(2) The applicant must give the notices directed by the Tribunal under this rule and must notify the Registrar in writing when the notices have been given.

Rule 12

Distribution of documents by Registrar

(1) The Registrar must as soon as possible send a copy of any document received from a party to all the other parties to the proceedings and, if any person or authority is subsequently joined as a party, to that person or authority:

but if matter of this kind is delivered to the Registrar after the time prescribed by these Rules, the Registrar may defer the sending of the copies pending a decision by the Tribunal about the extension of the time limit.

(2) The Registrar must send with any copy of an initiating application information which is appropriate to the case about-

(a) the means and time of delivering a reply;

(b) the consequences of failure to do so;

(c) the right to receive a copy of the decision;

(d) the availability of general procedural advice in relation to the application from the office of the Tribunal;

(e) the availability of other sources of advice; and

(f) the [availability of][the requirement for] any ADR procedure with an explanation of it.

Purpose of rule: A rule to this effect may be necessary if an application may affect the interest of third persons, e.g. contiguous landowners or the amenities of the neighbourhood: see for example rule 14 of the Lands Tribunal Rules 1996 (S.I. 1022), which relates to applications for relief from restrictive covenants affecting land. It would be appropriate to provide a sanction as in draft rule 40.

Paragraph (1): 'notices are to be given'. Alternative provisions for publishing an advertisement of an initiating application are-

(a) for the relevant authority, or the tribunal itself, to publish an advertisement; see rule 11 of the Commons Commissioners Regulations 1971 (S.I. 1727);

(b) for the applicant to be required by the rules themselves to insert appropriate advertisements. In such a case it would be desirable for the tribunal to provide an approved form for such advertisements. A rule for this purpose is as follows:

"The applicant must insert two separate advertisements of the initiating application having been made in a local newspaper circulating in the area where the property is situated. The advertisements must be in a form approved by the Tribunal and copies of the form may be obtained from the office of the Tribunal. The advertisements must appear in separate editions of the same newspaper within the [… days] immediately following the delivery of the initiating application to the Tribunal and the second advertisement must be published not more than [… days] after the first advertisement is published."

Paragraph (2): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Purpose of rule: This draft rule concerns the duties of the Registrar as to the copying of documents in the proceedings and the provision of information to the parties.

Paragraph (1): 'The Registrar must ... send a copy of any document'. The Council is in favour of a procedure whereby the tribunal is the post box for formal communications between the parties rather than parties sending documents to each other.

'Document' includes other material such as information delivered in electronic form such as emails: see draft rule 106(1) and the definition of 'document' in draft rule 110; in *Victor Chandler International v Commissioners of Customs and Excise and Another* [2000] 1 All ER 160, [1999] 1 WLR 2160(1999) The Times, 17 August, DC the court decided an advertisement sent by teletext was not a 'document' (a material object which contained information capable of extraction from it).

As to 'delivered' and 'delivering' see draft rule 106.

Paragraph (2):'The Registrar must send with any copy...'. This paragraph of the draft rule is drafted in terms of an initiating application. There should be no need for an equivalent provision in the case of an appeal where the respondent is an administrative authority.

(3) Upon receiving a notice of appeal or separate statement of reasons for appeal /initiating application or a reply in which any person other than the appellant/applicant or respondent is named as [having a direct interest] [having participated in proceedings before *the Authority* which led to the disputed decision], the Registrar must as soon as possible send to that person -

(a) copies of the notice or statement/application or reply;

(b) information which is appropriate to the case about the method of that person applying to be made a party to the proceedings as a respondent and delivering a reply;

(c) a notification of the availability of general procedural advice in relation to the appeal from the office of the Tribunal and of other sources of advice; and

(d) a notification of the [availability of][requirement for] any ADR procedure with an explanation of it in accordance with Rule 4.

(4) If the Registrar is satisfied that a party would be unable to understand or deal with any document required to be sent by this rule, the Registrar must send a copy to that party's named representative.

Rule 13

Notification to *authority/authorities responsible for appointing members of an ad hoc Tribunal*

Upon receiving a notice of appeal, the Registrar must immediately request [*the relevant appointing authority/authorities*] to appoint [respectively] the Chair and other members of the Tribunal to hear the appeal.

Purpose of rule: To enable a tribunal to be constituted where there is no continuing tribunal in being, generally from an existing panel or separate panels of persons qualified as chairs or other members, for a particular appeal.

For ad hoc tribunals, see also the Annex, but also on the question of the constitution of ad hoc tribunals see the decision of the Human Rights Court in *Morris v United Kingdom* (2002) 34 EHRR 1253 that the general structure of the court martial system violates article 6(1) for lack of apparent impartiality.

Action by Respondent

Rule 14A

Action by *Authority* on receipt of notice of appeal/statement of reasons for appeal

(1) An *Authority* which receives a copy of a notice of appeal specifying the reasons for appeal, or a separate statement of reasons for appeal, must deliver to the Registrar a written reply acknowledging receipt of the notice of appeal or statement of reasons for appeal and stating-

(a) whether or not *the Authority* intends to oppose the appeal and the reasons on which it relies in opposing the appeal;

(b) the name and address [, and the profession,] of the representative of *the Authority* and whether such address is the address for the delivery of documents to *the Authority* for the purposes of the appeal; and

(c) if in the opinion of *the Authority* any other person has a direct interest in the subject matter of the appeal, the name and address of that other person.

(2) *The Authority* must include with its reply a statement summarising the facts relating to the disputed decision and, if they are not part of that decision, the reasons for it [together with copies of the documents set out in Schedule … to these Rules]. It must deliver to the Registrar a sufficient number of additional copies of the reply and those other documents, to enable the Registrar to provide a copy of each of them to the appellant and any other person named by *the Authority* as having a direct or financial interest in the subject matter of the appeal.

(3) The reply must be signed by an officer of *the Authority* who is authorised to sign such documents.

(4) The reply must be delivered to the Registrar at the office of the Tribunal not later than [… days] after the date on which the copy of the notice of appeal or, if received later, the copy of the separate statement of reasons for appeal, was received by *the Authority* from the Registrar.

(5) The provisions of paragraph (2) of Rule 22 apply in relation to any document required to be included with the reply.

Purpose of rule: This draft rule lays down the requirements for a reply by an authority to a notice of appeal, its content and the documents to accompany it.

Paragraph (1): 'a written reply acknowledging receipt of the notice of appeal'. Even in the case of an appeal against the decision of an authority it may be useful to provide a common form for an acknowledgement of the notification of an appeal and a reply. It should not be necessary in the case of an administrative authority to state in the rules that forms are available; this can be notified administratively. Nor should it be necessary that any form adopted should include guidance notes as in the forms suggested for appellants/applicants, but side notes may be included at appropriate points in the form drawing attention to various rules - e.g. to paragraph (2) and draft rules 12, 21 and 22.

See note to draft rule 5A(1) on approved forms.

As to 'delivery', 'deliver' and 'delivered' in this draft rule see draft rule 106.

Paragraph (2): 'a statement summarising the facts'. This paragraph and paragraph (3) is designed to ensure that there is before the tribunal, and available to the appellant and third parties, sufficient material relating to the disputed decision to enable all parties to know the case they have to meet. It may be desirable to produce more than the decision and reasons themselves, in which case a requirement for a statement summarising the facts or for a list of appropriate material should be included in this rule or in a schedule.

The production of a statement of facts, or the compilation of a schedule of documents, may, however, take time and this needs to be taken into account in deciding on the time in which a reply is to be delivered or whether a separate period is to be allowed for the delivery of the statement or the documents.

For a provision where an appellant is invited to state which facts as disclosed by the authority are disputed, see the note on paragraph (1) to draft rule 23 (cf. rule 5 of the Pensions Appeal Tribunals (England and Wales) Rules 1980 (S.I. 1120)) and draft rule 38 for provision requiring the respondent to state which of the facts the respondent disputes.

Paragraph (2): 'disputed decision'. If it is a requirement of the rules relating to appeals (see draft rule 5A) that the disputed decision should be attached to the notice of appeal, it would not be necessary to repeat that requirement in this rule.

Paragraph (2): 'Registrar to provide a copy'. For the duty of the Registrar to send a notice of appeal/statement to the authority and a reply to the appellant, see draft rule 12.

Paragraph (4): 'not later than [… days]'. If the rules provide for both a notice and a separate statement of reasons for appeal and the appellant sends or delivers a separate statement, the time limit in this rule runs from the delivery of the separate statement. The square brackets around "… days" in this paragraph are because different lengths of the time limit may be appropriate for different tribunal jurisdictions.

Paragraph (5): 'The provisions of paragraph (2) of Rule 22 apply'. In general, it should be the aim to avoid a cross-reference where a rule applies directly as regards a lay appellant or respondent. Exceptions to this practice are more defensible where the rule applies, as in this case, directly as regards an administrative authority or refers to the powers or acts of the tribunal itself.

Rule 14B

Action by respondent on receipt of initiating application

(1) A person who receives a copy of an initiating application [making a claim] [seeking relief] against him or her ("the respondent") must deliver to the Registrar a written reply acknowledging receipt of the initiating application and setting out-

(a) the respondent's full name and address;

(b) a statement whether or not the respondent intends to resist the initiating application and, if so, the reasons on which the respondent relies in resisting it or what position the respondent will adopt;

(c) whether the respondent intends to be present or represented; and

(d) the name and address [,and the profession,] of any representative of the respondent and whether the Tribunal should send notices concerning the initiating application to the representative instead of to the respondent.

(2) The reply must be signed by the respondent or the respondent's representative and must be delivered to the Registrar at the office of the Tribunal not later than [… days] after the date on which the notification of the initiating application was received by the respondent from the Registrar.

(3) A reply which is delivered to the Registrar after the time appointed by this rule which contains the respondent's reasons for the delay must be treated as including an application for an extension of the time so appointed.

(4) A respondent who has not delivered a written reply within the time appointed or extended may not take any part in the proceedings before the Tribunal on the initiating application except-

(a) to apply for an extension of time for delivering a reply;

(b) to apply for a direction that the applicant provide further particulars of his or her claim;

(c) to apply under Rule 78 for a review of the Tribunal's decision for the reason that the respondent did not receive notice of the initiating application;

(d) to be called as a witness by another person; or

(e) to be sent a copy of a decision or corrected decision.

Purpose of rule: To specify the requirements for a reply to an initiating application, its content and the documents to be attached to it, the time within which it must be delivered to the office of the Tribunal and the degree of participation in the proceedings of a respondent who has not delivered a reply.

Paragraph (1): 'initiating application ... reply'. For the duty of the Registrar to send an initiating application to a respondent and a reply to an applicant, see draft rule 12.

As to 'deliver', 'delivered' and 'delivering' in this draft rule see draft rule 106.

Paragraph (1): 'a written reply'. See note on 'written notice' to draft rule 5A(1).

A standard form of reply is, in the view of the Council on Tribunals, as appropriate in respect of private party respondents as is a standard form for private party appellants/applicants. If the standard form of reply is combined with a notification of the initiating application, it would not be necessary to include in the rules themselves any indication where the form may be obtained. Notification and reply forms should contain a statement of the availability of the staff of the tribunal to assist the respondent and draw attention to the services of the Citizens Advice Bureau and other relevant local advice agencies. They should also give some indication of 'what will happen next'. See note on approved forms to draft rule 5A(1).

In any form of reply, a reference should be made to the preliminary steps which may be available to respondents - see draft rule 21 - and to any documents that may be required - see draft rule 22. As is the case with the forms suggested for appellants/applicants (see notes to draft rules 5A and 5B) it is important not to overload the form. The drafting Department or tribunal should therefore consider what matters, whether noted in draft rule 21 or otherwise, may most commonly be relevant to the particular jurisdiction and the extent to which it is desirable to draw them to the attention of the respondent.

A preliminary step to which attention should be drawn may be the possibility of raising a preliminary legal issue. This may be particularly relevant in certain jurisdictions where a question of the competence of the applicant is likely to come into issue: see rule 6 of the Copyright Tribunal Rules 1989 (S.I. 1129). See also draft rule 29.

Paragraph (1)(b): 'whether or not the respondent intends to resist'. For more specific provision in this respect see draft rule 38.

Rule 15

Nominal respondent

> The … shall be the respondent to the appeal, but if, for any reason, the … is unlikely to be available to take an appropriate part in the proceedings … may appoint [a person holding office in …] as respondent in his or her place.

Purpose of rule: To provide for the nomination of an officer of the authority as respondent. It will usually be the case that the authority (i.e. the Department or other authority concerned) will be the respondent, or principal respondent, in the proceedings. In that case, all that is necessary is a definition of respondent as in draft rule 110 and this draft rule may be omitted.

If, however, the decision-making authority is an individual, e.g. an officer in a particular service who is to be the respondent, a rule of this kind would be appropriate; it would be prudent to include provision to enable a substitute respondent holding a comparable office to be appointed.

Additional Parties

Rule 16

Action on receipt of copy of notice of appeal/initiating application or reply

(1) Any person who receives a copy of a notice of appeal/an initiating application or reply naming him or her as a person having an interest in the proceedings, or who otherwise claims a direct or financial interest in the proceedings, may give notice to the Registrar at the office of the Tribunal that he or she wishes to take part in the proceedings as a respondent party. That person must include in the notice-

(a) his or her full name and address;

(b) a statement of his or her interest and whether or not he or she opposes the appeal/application, together with any reasons on which he or she relies in support of his or her interest; and

(c) the name and address [,and the profession,] of any representative he or she appoints, and whether the Tribunal should send notices concerning the appeal/application to the representative instead.

(2) A person who wishes to take part in the proceedings as a respondent party must deliver to the Registrar a sufficient number of additional copies of the notice and accompanying documents to enable the Registrar to send a copy to each of the other parties.

(3) A notice given under this rule shall, if the person giving it is made a respondent party to the proceedings, be treated as that person's reply to the notice of appeal/initiating application.

Purpose of rule: To enable a person named by a party as having an interest, or him or herself claiming a substantial interest, to seek to be joined in any proceedings. Draft rule 12(3) sets out the duty of the Registrar to notify a person in certain cases that he or she has been so named. In those cases, it may be convenient to provide with the notification an approved form of notice for the purposes of this rule. For the power of the tribunal to join a person as an additional party, see draft rule 17.

Paragraph (2): 'must deliver to the Registrar'. As to 'deliver' see draft rule 106.

Rule 17

Addition of new parties to proceedings

If the Tribunal considers, whether on the application of a party or otherwise, that it is desirable that any person be made a party to the proceedings, the Tribunal may order that person to be joined as a respondent and may give any directions which may be just, including directions as to the delivery of documents.

Rule 18

Authority with interest entitled to be heard on initiating application

When [*set out connection between an authority and the application*], the Authority shall be entitled to be heard in the proceedings on the initiating application, [and must be joined to the proceedings as a respondent except for the purposes of Rule 14B(4) (consequences of failure to enter a reply) or Rule 82 (costs)].

Purpose of rule: To enable the tribunal to decide whether a person should be joined to the proceedings. It may be appropriate in certain cases to differentiate the additional party from the original respondent e.g. by referring to him or her as an additional party or intervener and to a notice of intervention. In that event, an appropriate amendment should be made to the definition of 'party', and care taken to ensure that the terms of rules referring to documents such as draft rule 12 are wide enough to cover such a 'notice of intervention'.

'order that person to be joined'. If a person is not joined as a party and is not called as a witness the tribunal cannot take into account any representation made by that person.

'the delivery of documents'. As to 'delivery' see draft rule 106, and as to 'documents' see note on 'Document' to draft rule 12.

Purpose of rule: To enable an authority to be heard and be joined in proceedings where a particular enabling Act contemplates some act by the authority which is incidental to the principal jurisdiction of the tribunal or where the authority has an interest in the exercise of such jurisdiction even though relief may not be directly claimed against that authority. For example see rule 10(7) in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001(S.I. 1171): where payments may fall on the Redundancy Fund or Maternity Pay Fund, the Secretary of State is entitled to appear as if he or she were a party.

'the Authority shall be entitled to be heard'. In *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074, [2002] ICR 1498, [2002]IRLR 711, [2002] Emp LR 1097, (2002) 99(38) LSG 33, (2002) 146 SJLB 201, (2002) The Times, 20 August the Court of Appeal held that the Disability Rights Commission was not entitled to make representations to an employment tribunal in proceedings in which it was not a party.

'must be joined to the proceedings'. See *Jones v Secretary of State for Employment* [1982] ICR 389, where the Employment Appeal Tribunal decided that as regards claims for redundancy payments, the Secretary of State could be a sole respondent. For a different kind of interest, see rule 2 of the Immigration and Asylum Appeals (Procedure) Rules 2003 (S.I. 652) which entitles the Representative of the U.K High Commissioner for Refugees to be treated as a party to an appeal if any other party is or claims to be a refugee within the High Commissioner's competence.

Persons under a Disability and Death or Insolvency of a Party

Rule 19

Appellant/Applicant a minor or mentally or physically impaired

(1) When the person by whom an appeal/application may be made is a minor, or is prevented by mental or physical impairment from acting on his or her own behalf, the appeal/application may, subject to any conditions imposed by the Tribunal, be brought by a parent or guardian, by any person having title or authority to do so or by a person appointed by the Tribunal.

(2) When an appeal/application is brought by a person acting on behalf of another, that person may take any steps and do any things for the purpose of the appeal/application that an appellant/applicant is by these Rules required or authorised to take or do.

Rule 20

Death or insolvency of a party

(1) If a prospective party or a party dies and there is no legal personal representative, the [*Authority*] [Tribunal] may appoint any person it thinks fit to initiate, continue or, as the case may be, defend proceedings in the place of that party; and these Rules shall apply, subject to the necessary modifications, to the initiation, continuation or, as the case may be, defence of proceedings by the person appointed by the [*Authority*] [Tribunal] until a legal personal representative has been appointed as they apply to a party.

(2) If in the course of proceedings the liability or interest of any party passes to another ("the successor") by reason of death or insolvency or otherwise the Tribunal may-

(a) on the application of the successor, direct that the successor shall be substituted for the party in the proceedings; or

(b) if within the period of [2 months] after giving prior written notice to the successor no such application is made, strike out the application/appeal .

Purpose of rule: This draft rule is designed for general use, but paragraph (1) may not be suitable for more specialised tribunals. For example, it may be necessary to substitute some other age for the age of majority if the tribunal has the power (as Social Security Appeal Tribunals have power) to entertain claims from younger persons. (Special provision is made in the Mental Health Act 1983 requiring the managers of a hospital to refer a patient to a Mental Health Review Tribunal in certain cases).

Paragraph (1): 'When the person … is prevented … from acting'. This rule may be adapted for appellants/applicants whose disability is legal, as well as mental or physical. See rule 7 of the Foreign Compensation Commission (People's Republic of China) Rules Approval Instrument 1988 (S.I. 153) (unincorporated associations).

Purpose of rule: This draft rule concerns the death of a prospective party or party or the insolvency of an individual or corporate body.

No provision will be required as regards a disability of an administrative authority from whose decision an appeal/application may be made because provision for the succession of one authority by another will be made by statute or statutory instrument.

Paragraph (1): 'If a prospective party or a party dies'. This provision derives from rule 28 of the Supplementary Benefit (Claims and Payments) Regulations 1981 (S.I. 1525) (replaced by regulation 30 of the Social Security (Claims and Payments) Regulations 1987 (S.I.1968).

Paragraph (2): 'the liability or interest of any party passes to another'. The entitlement to succeed in the event of death or insolvency will be conferred elsewhere. See *Grady v Prison Service* [2003] EWCA Civ 527, (2003) 147 SJLB 540, (2003) The Times, 24 February, Employment Appeal Tribunal. This provision derives from rule 13 of the Value Added Tax Tribunals Rules 1986 (S.I. 590) as substituted by S.I. 1994/2617.

Provisions relating to all Appeals/ Applications and Replies

Rule 21

Additional matters

(1) The appellant/applicant may include in the notice of appeal/ initiating application or in a separate application to the Tribunal-

(a) a request that [under section ... of the Act] the disputed decision be suspended until a decision has been given on the appeal/application, or for other interim relief; or

(b) any request or statement specified in paragraph (2) of this rule.

(2) The appellant/applicant or a respondent (each of which is included in the expression "a party") may include in the notice of appeal/application, statement of reasons for appeal or reply, or a separate application to the Tribunal, as appropriate-

(a) a request for additional information about a notice of appeal/application, statement of reasons for appeal, reply, supplementary statement or written representation;

(b) a request for a decision on any question as a preliminary issue;

(c) a request for an early hearing of the appeal/application or of any question arising out of the appeal/application, and the reasons for that request;

(d) a statement that the appellant/applicant or respondent wants a private hearing or does not want an oral hearing;

(e) a request for permission, at the hearing of the appeal/application, to rely on the evidence of an expert witness or expert witnesses and the name and address of the proposed witness or witnesses; or

(f) a request that an expert who was concerned in the taking of the disputed decision attend the hearing of the appeal/application and give evidence.

Purpose of rule: To enable the appellant/applicant or respondent to bring certain matters to the attention of the tribunal at an early stage, e.g. a request by an appellant/applicant for the suspension of a disputed decision. The tribunal itself may want early notice of those matters or of the intentions of the parties as to evidence. Where a tribunal has a discretion not to hold an oral hearing in public, this should be explained to the parties so that they can say if they want a hearing in private or do not want an oral hearing. These and a number of other preliminary or evidentiary points are set out in this draft rule. It should be borne in mind, however, that some of these matters may only be included if the enabling Act provides for them expressly e.g. the power to suspend an administrative decision or to grant other interim relief. Subject to that a decision of the tribunal on any of these matters may be taken under draft rule 26 or in the case of paragraph (2)(d), draft rule 69 or 75.

An alternative means of inviting applications like those set out in this rule would be on the Registrar's acknowledgement of the notice of appeal/application or notification of the respondent: see draft rules 10, 14A and 14B.

Paragraph (1): 'appellant/applicant may include in the notice of appeal/ initiating application'. If an appeal/ application or reply form is used, the relevant provision(s) or requirement(s) may be included in the form – regard being had to the desirability of not overloading the form – see note on approved forms to draft rule 5A. Even where forms are provided, a separate rule such as this, with the relevant selection of preliminary points, will be required.

Paragraph (1)(a): 'request that ... the disputed decision be suspended'. A tribunal has no inherent power to suspend an administrative decision against which an appeal is made; the necessary power must be found substantively or in the rule-making power in the enabling Act itself (cf. section 152(3)(a) of the Copyright, Designs and Patents Act 1988, which provides for rules enabling a tribunal to suspend its own orders when there is an appeal to the courts).

Paragraph (1)(a): 'or for other interim relief'. Interim relief is not necessarily confined to the suspension of decisions of administrative authorities: see sections 161-166 of the Trade Union and Labour Relations (Consolidation) Act 1992 which provide for a continuation of employment where there is a complaint of unfair dismissal.

Paragraph (2)(d): 'wants a private hearing or does not want an oral hearing'. The tribunal must, subject to any statutory requirement, hold an oral hearing in public unless a party has requested that the hearing be in private and the tribunal is satisfied that there is no important public interest consideration which requires an oral hearing in public; see draft rules 69 and 75.

Paragraph (2)(e): 'permission ... to rely on the evidence of an expert witness'. As to the tribunal's permission to call an expert witness, see notes to draft rule 56. Draft rule 58 requires an expert's evidence to be given in a written report unless the tribunal decides otherwise.

Rule 22

Information to accompany notice of appeal or statement of reasons for appeal/initiating application or reply

(1) A party (including a person wishing to be made an additional party to the proceedings as a respondent) must deliver to the Registrar, with the notice of appeal or statement of reasons for appeal/initiating application or reply (as the case may be) or as soon as it becomes available, as much information as possible about the nature of his or her case.

(2) If any proof, statement or summary of evidence or other document on which a party intends to rely contains any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence, or concerns national security, and for that reason the party seeks to restrict its disclosure, the party must inform the Registrar of that fact and of the reasons for seeking such a restriction, and the Registrar must send copies to each of the other parties only in accordance with the directions of the Tribunal.

Rule 23

Amendment of notice of appeal/initiating application or reply and delivery of supplementary reasons for appeal/application or reply

(1) A party may, at any time before he or she is notified of the date of the hearing of the appeal/application, amend the notice of appeal/initiating application, any statement of reasons for appeal or reply, or deliver a supplementary statement of reasons for appeal/application or reply.

(2) A party may amend any notice of appeal/initiating application, statement of reasons for appeal or reply with the permission of the Tribunal at any time after he or she has been notified of the date of the hearing of the appeal/application or at the hearing itself. The Tribunal may grant this permission on the terms it thinks fit, including the payment of costs and expenses.

(3) A party must send a copy of every amendment and supplementary statement to the Registrar.

Purpose of rule: To deal with two matters - the provision of information to support an appeal/application or reply and the steps open to a party to protect confidentiality and national security.

Paragraph (1): 'A party ... must deliver to the Registrar'. This provision is intended to encourage a party to give the tribunal and the other party or parties as much information as possible as early as possible about his or her case to save time and expense. If an approved form is used, this paragraph should be set out in the form with appropriate explanatory notes covering paragraph (2). As to 'deliver' see draft rule 106.

A more detailed provision might be appropriate for some tribunals:-

'(1) A party (including a person wishing to be made an additional party to the proceedings as a respondent) must deliver to the Registrar, with his or her notice of appeal or statement of reasons for appeal/initiating application or reply (as the case may be) or as soon as it becomes available, a copy of any proof, statement or summary of the evidence of any witness to be called by the party, any document referred to in it and any other document on which the party intends to rely including any expert's report, together with a sufficient number of additional copies of each of them to enable the Registrar to provide a copy to each of the other parties to the proceedings:

but the Tribunal may, on the terms it thinks fit, excuse a party from complying with this provision-

(i) in respect of any document if a copy of it is already in the possession of the Tribunal or some other party so that to require it to be provided at this stage would be unreasonable for reasons of expense or otherwise, or
(ii) in respect of any proof, statement or summary of evidence or any other document if the Tribunal is satisfied that the party lacks the resources to be able to provide the document or the copies.'

Paragraph (2): 'relates to intimate personal ... circumstances'. Paragraph (1) might involve the unnecessary disclosure of confidential information, hence this paragraph. Further provisions relating to confidentiality and national security are set out in draft rule 27A; see particularly paragraph (3).

Purpose of rule: To allow amendment of the notice of appeal/initiating application, statement of reasons for appeal or reply or the delivery of supplementary statements of reasons for appeal/application or reply at any time before the notification of the date of the hearing.

Paragraph (1): 'A party may ... amend ... or deliver a supplementary statement'. A party's power to amend and deliver a supplementary statement, together with the tribunal's powers (draft rule 37) to direct any party to make further statements, make it unnecessary to provide expressly for a rejoinder to the respondent's reply. It may be desirable, however, particularly where the authority against which an appeal is made is required to provide a statement of facts, to obtain from the appellant an indication of which facts he or she accepts or disputes. In such a case, a rule on the following lines may be considered:-

"Not later than […days] after the appellant receives the statement mentioned in rule 14A, the appellant must deliver to the Registrar a statement specifying-
(a) which matters of fact (if any) contained in the statement he or she disputes; and
(b) any additional matters relating to the statement which he or she considers should be drawn to the attention of the Tribunal."

See draft rule 38 for corresponding provision requesting the respondent to state in his or her reply which allegations in the notice of appeal/separate statement of reasons for appeal he or she admits or denies.

As to 'deliver' see draft rule 106.

Paragraph (2): 'payment of costs and expenses'. See rule 82(1)(e) for an award of costs and expenses in the case of the late amendment of reasons for appeal.

Rule 24

Misconceived appeals/initiating applications

(1) Where the Tribunal is satisfied that an appeal/initiating application cannot be made to, or cannot be entertained by, the Tribunal, it may direct that the appeal/initiating application be struck out.

(2) Before the Tribunal decides to give a direction under paragraph (1) the Registrar must send notice of its proposed decision together with copies of any documents relating to it to the appellant/applicant stating the reasons and inviting the appellant/applicant to state within a specified time why the appeal/initiating application should not be struck out.

(3) A proposal to exercise the power conferred by paragraph (1) may be heard as a preliminary point of law or at the hearing of the appeal/application.

Rule 25

Withdrawal of appeal/application

(1) The appellant/applicant may-

(a) at any time before the hearing of the appeal/application withdraw the appeal/application by delivering to the office of the Tribunal a notice signed by the appellant/applicant or the appellant's/applicant's representative stating that the appeal/application is withdrawn; or

(b) at the hearing of the appeal/application, with the permission of the Tribunal, withdraw the appeal/application.

(2) Where an appeal/application is withdrawn, a fresh appeal/application may not be made in relation to the same decision except with the permission of the Tribunal.

Purpose of rule: To limit the time taken to deal with obviously misconceived appeals/initiating applications.

Paragraph (2): 'the Registrar'. The Registrar includes an Assistant Registrar but not here any other member of the staff of the tribunal; see draft rule 97.

Purpose of rule: To provide for withdrawal of an appeal/application before the hearing or at the hearing. Where reference is made in any form, whether issued by the tribunal or an authority, to the withdrawal of an appeal/application, care should be taken to ensure that it is not in terms which appear to urge the appellant/applicant to withdraw.

Paragraph (1)(a): 'by delivering to the office'. As to 'delivering' see draft rule 106.
Paragraph (1)(b): 'permission of the Tribunal'. This provision is designed to safeguard the interests of the appellant in cases where pursuing the appeal would be to the appellant's advantage. In general, however, it would not seem appropriate to impose such a condition on withdrawal of first appeals before hearings. See the notes to draft rule 88 for withdrawal in appellate tribunals.
Paragraph (2): 'a fresh appeal/application may not be made'. This would require a rule-making power in the enabling Act which goes beyond a power to regulate practice and procedure e.g. a power to regulate the exercise of the right of appeal/to make an application, cf. para. 7 of Schedule 6 to the Data Protection Act 1998. Once an appeal has been withdrawn the tribunal has no jurisdiction to restore the appeal and proceed with it: *Rydqvist v Secretary of State for Work and Pensions* [2002] EWCA Civ 947, [2002] 1 WLR 3343, [2002] ICR 1383, (2002) 146 SJLB 247, (2002) The Times, 8 July, CA.

Management Powers of Tribunals

Preparation for the Hearing	Rules 26 – 30
Other Tribunal Powers	Rules 31 – 36
Directions	Rules 37 – 40
Grouping of Proceedings	Rules 41 – 47

(this page left blank intentionally)

Rule 26

Interim relief

(1) The decision of the Tribunal on any of the additional matters included under rule 21 in the notice of appeal/initiating application or in a separate application may be given before or at the hearing of the appeal/application.

(2) Whether there has been a hearing or not, the decision must be recorded as soon as possible in a document which, save in the case of a decision by consent, must contain a statement of the reasons [in [full][summary] form] for the decision and must be signed by the Chair and dated.

(3) The Registrar must send a copy of the document recording the decision to each party.

Rule 27A

Disclosure and inspection of documents

(1) Subject to paragraphs (2) and (3) of this rule, the Tribunal may give directions

  (a) requiring a party to deliver to the Tribunal any document which the Tribunal may require and which it is in the power of that party to deliver, and the Tribunal must make the provision it thinks necessary to supply copies of any document obtained under this rule to the other parties to the proceedings; or

  (b) granting to a party the right to inspect and take copies of any document which it is in the power of a party to disclose, and appointing the time at or within which and the place at which any such act is to be done.

  It shall be a condition of the supply of any document under this rule that a party must use the document supplied only for the purposes of the proceedings.

(2) Paragraph (1) does not apply in relation to any document which the party could not be compelled to produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be decided.

(3) In giving effect to this rule, the Tribunal must take into account the need to protect any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security.

Purpose of rule: To provide for a decision of the tribunal on any of the additional matters included in a notice of appeal/initiating application or in a separate application under draft rule 21. A tribunal has no inherent power to suspend an administrative decision against which an appeal is made (draft rule 21(1)(a)); the necessary power must be conferred by the enabling Act. The tribunal's decision may, where appropriate, be implemented by a direction under draft rule 37.

Paragraph (1): 'decision of the Tribunal'. Two preliminary questions need to be considered:
(a) whether interim proceedings may be heard in private; and
(b) whether interim proceedings may be heard without notice to the other party or parties.

As to (a), in *Storer v British Gas plc* [2000] 1 IRLR 495, [2000] ICR 603, (2000) The Times 1, March the Court of Appeal said that the rules require even interim proceedings before tribunals to be held in public.

As to (b), the solution adopted in these draft rules is to require the tribunal to send an application for an interim order to the other parties (see draft rule 12), who may then object to the making of the order. The tribunal may, if it considers it necessary, give the parties an opportunity of being present or represented on the application (see draft rules 29, 32 and 37).

Paragraph (2): 'statement of the reasons'. For the requirement to give reasons see the notes to draft rule 76.

Purpose of rule: To provide for two separate but connected questions:
(a) the ability of the tribunal to obtain information: paragraph (1)(a); and
(b) the right of a party to inspect and take copies of documents: paragraph (1)(b).
Paragraphs (2) and (3) are relevant to both questions. In cases where it may be considered to put too great a strain on the unrepresented party to make provision for that party inspecting and copying an opponent's documents (as in paragraph (1)(b)), it may be desirable to omit sub-paragraph (b) and to rely on sub-paragraph (a).

Alternatives are contained in draft rules 27B and 27C.

Paragraph(1)(a): 'requiring a party to deliver ... any document'. Specific provision should be made for disclosure; "In the absence of any formal order for discovery, there is no general duty on a party to proceedings before an industrial tribunal to disclose any of the documents in his possession, but no document should be withheld if the effect of non-disclosure would be to mislead another party as to the true meaning of any document which has been voluntarily disclosed …" (headnote to) *Birds Eye Walls Ltd v Harrison* [1985] ICR 278, EAT.
However a witness may be required to produce documents at the hearing pursuant to a witness summons under draft rule 48 notwithstanding the absence of directions under this draft rule.

As to 'deliver' see draft rule 106.

As to 'document' see definition in draft rule 110 and note to draft rule 12(1).

Paragraph (3): 'need to protect any matter'. As regards disclosure of confidential documents "relevance alone, though a necessary ingredient, did not provide an automatic test for ordering discovery, the ultimate test being whether discovery was necessary for disposing fairly of the proceedings and, in order to decide whether it was necessary, the tribunal should inspect the documents, considering whether special reasons [sic] such as 'covering up' or hearing in camera should be adopted"; see *Science Research Council v Nasse* [1980] AC 1028; [1979] ICR 921, HL; *British Railways Board v Natarajan* [1979] 2 All ER 794; [1979] ICR 326, EAT; *Williams v Dyfed C.C. and Ors* [1986] ICR 449, EAT.

A party cannot be required to produce any document to which legal professional privilege applies: *B and Others v Auckland District Law Society and Another* [2003] EWCA Civ 38, [2003] UKPC 38, (2003) The Times, 21 May, PC.

Paragraph (3): 'obtained in confidence'. See also draft rule 22. A particular point to which the Council has drawn attention in the past is that where confidential information has been obtained by the use of compulsory powers, the information should be supplied to others only after consultation with the person who supplied the information.

The right to confidentiality must be balanced against the public interest in the administration of justice: *Frankson and Others v Secretary of State for the Home Department* [2003] EWCA Civ 655, (2003) The Times, 12 May, CA.

Rule 27B

Automatic disclosure and inspection

(1) The Authority must within [...days] of delivering its reply, deliver to the appellant a list of the documents on which it proposes to rely at any hearing and the appellant must within [... days] of receipt of such a list deliver a similar list to the Authority. Copies of such lists must be delivered to the Registrar.

(2) A list under paragraph (1) must specify a reasonable period during which, and a reasonable place at which, the other party may inspect and take copies of the documents contained in the list.

(3) A party shall be entitled to inspect and take copies of any document set out in the list supplied by the other party during the period and at the place specified by that other party in that party's list, or during the period and at the place the Tribunal may direct.

(4) Unless the Tribunal otherwise directs, a party must produce any document set out in his or her list at the hearing of the case when called upon to do so by the other party.

Rule 27C

Documents relating to proceedings before administrative authority from whom appeal made

(1) The Tribunal must take all reasonable steps to ensure that there is supplied to each of the parties a copy of, or sufficient extracts from or particulars of, any document relevant to the proceedings which has been received from the Authority or from a party (other than a document which is in the possession of a party, or of which a party has previously been supplied with a copy by the Authority).

(2) Where at any hearing

(i) any document relevant to the appeal is not in the possession of a party present at that hearing; and

Paragraph (3): 'any matter that relates to intimate personal … circumstances'. A matter which may give rise to difficulty is where it is sought to withhold relevant medical evidence from a party (generally the appellant/applicant or a mental health patient) on the ground that it would adversely affect his or her health or welfare.

See also draft rule 64 which deals specifically with the withholding of medical evidence and the notes to that rule.

Paragraph (3): 'concerns national security'. It is for the Tribunal not one of the parties to decide whether evidence should be withheld for security reasons: *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, (2000) 8 BHRC 325, [2000] Crim LR 584, (2000) The Times, 1 March, ECtHR.

Purpose of rule: As an alternative to draft rule 27A, to provide for automatic disclosure of documents via exchange of lists of documents between the parties. This provision is probably only suitable for proceedings similar to court proceedings.

Paragraph (1): 'delivering its reply'. As to 'delivering' and 'deliver' see draft rule 106.

Paragraph (1): 'a list of documents'. See definition of 'document' in draft rule 110 and the note to draft rule 12(1).

Purpose of rule: As an alternative to draft rule 27A, to require the tribunal to provide the parties with copies of documents received from the parties.

Paragraph (1): 'any document'. See the definition of 'document' in draft rule 110 and the note to draft rule 12(1).

(ii) that party has not been supplied with a copy of, or sufficient extracts from or particulars of, that document by the Authority in accordance with the provisions of paragraph (1) of this rule, then unless:-

(a) that party consents to the continuation of the hearing; or
(b) the Tribunal considers that that party has a sufficient opportunity of dealing with that document without an adjournment of the hearing,

the Tribunal must adjourn the hearing for a period which it considers will afford that party a sufficient opportunity of dealing with that document.

Rule 28

Pre-hearing review

(1) If any proceedings would be facilitated by holding a pre-hearing review, the Chair may, on the application of a party or on his or her own initiative, give directions for a review to be held. The Registrar must give the parties not less than [… days] notice, or a shorter notice if the parties agree, of the time and place of the pre-hearing review.

(2) On a pre-hearing review the Chair or, subject to paragraph (5), the Registrar must, in accordance with the overriding objective, give all directions which appear necessary or desirable in the conduct of the appeal/application, and must fix the time and place, not being less than [… days] thereafter unless the parties agree to shorter notice, for the hearing of the appeal/application and, where appropriate, set a timetable for the hearing.

(3) The parties may appear and may be represented by [counsel or a solicitor or by] any other person.

(4) The Chair may, notwithstanding Rule 96, decide the appeal/application on the documents and statements then before the Chair without any further oral hearing only if-

(a) the parties so agree in writing and the Chair has considered any representations made by them;

(b) having regard to the material before the Chair and the nature of the issues raised by the appeal/application, to do so would not prejudice the administration of justice; and

(c) the Chair is satisfied that there is no important public interest consideration which requires a hearing in public.

Purpose of rule: To enable the tribunal to give the directions necessary or desirable to further the overriding objective in the conduct of appeals/applications, including, if the parties agree, deciding appeals/applications on the documents and statements before the tribunal at the pre-hearing review. For the holding of the review by telephone, through a video link or using any other means of communication; see draft rule 32(3)(f).

Paragraph (2): 'the Chair or, ... the Registrar'. A distinction is made between the powers that may be exercised by the Chair or, subject to the Chair's directions, the Registrar under this paragraph and those that may be exercised only by the Chair (paragraph (4)). 'Registrar' includes any Assistant Registrar but not any other member of the tribunal staff (draft rule 97). Paragraph (5), in effect, provides an appeal from the Registrar to the Chair.

The Chair and, subject to paragraph (5), the Registrar must use the powers conferred by paragraph (2) so as to secure that the parties make all admissions and agreements which ought reasonably to be made by them in relation to the proceedings. But this may not be suitable for appeals from decisions of administrative authorities. The power will need to be exercised with particular care if a party is not professionally represented.

If the Chair is unable to act, the powers of the Chair under this draft rule may also be exercised by the President of a system of tribunals or any chair being a member of the panel of chairs; see definition of 'Chair' in draft rule 110.

Paragraph (2): 'must ... give all directions'. The Chair (or Registrar) must give directions under this paragraph as to the disclosure of any document sought to be protected by reason of its confidential nature, its commercial sensitivity or national security and as to the safeguards to be observed by those to whom the document is disclosed.

Paragraph (4)(b): 'would not prejudice the administration of justice'. See *R (on the application of S) v Immigration Appeals Tribunal* [1998] Imm A R 252, [1998] INLR 168, (2003) The Times 25 February.

Paragraph (4)(c): 'a hearing in public'. See *Quadrelli v Italy* [2002] 34 EHRR 8 and *Storer v British Gas plc* [2000] 1 IRLR 495, [2000] ICR 603 and notes to draft rule 69.

Paragraph (6): 'someone familiar with the case'. This paragraph is to assist the tribunal in identifying the issues and agreeing them, fixing timetables and taking advantage of any settlement opportunity that may arise.

(5) The Registrar must exercise the powers conferred by paragraph (2) in accordance with the directions of the Chair and any direction given by the Registrar on a pre-hearing review may be set aside or varied by the Chair on the application of a party or on the Chair's own initiative.

(6) Each party must attend the pre-hearing review or be represented at it by someone-

(a) familiar with the case; and

(b) with sufficient authority to deal with any issues that are likely to arise.

Rule 29

Preliminary issues

(1) The Tribunal may direct that any question of fact or law which appears to be in issue in the appeal/application be decided at a preliminary hearing.

(2) If, in the opinion of the Tribunal, deciding that question substantially disposes of the whole appeal/application, the Tribunal may treat the preliminary hearing as the hearing of the appeal/application and may give such direction as it thinks fit to dispose of the appeal/application.

(3) The Tribunal may decide the question, and also dispose of the case, without a further hearing, but, in each case, only if-

(a) the parties so agree in writing and the Tribunal has considered any representations made by them;

(b) having regard to the material before it and the nature of the issues raised, to do so would not prejudice the administration of justice; and

(c) there is no important public interest consideration that requires a hearing in public.

(4) The decision of a Tribunal in relation to a preliminary issue may be given orally at the end of the hearing or reserved and, in any event, whether there has been a hearing or not, must be recorded as soon as possible in a document which, save in the case of a decision by consent, must also contain a statement of the reasons [in [full] [summary] form] for the decision and must be signed by the Chair and dated.

(5) The Registrar must send a copy of the document recording the decision on the preliminary issue to each party.

Purpose of rule: To simplify, and shorten the time taken for, proceedings before the tribunal.

Paragraph (1): 'preliminary hearing'. Preliminary issues may be of a general nature (e.g. that the appeal is misconceived – see draft rule 24 or specific (e.g. as to the capacity of the appellant/applicant – such as credentials issues under the Copyright Tribunal Rules 1989 (S.I. 1129)). Having regard to the particular jurisdiction of the tribunal, it may be helpful to draw attention in any approved form to the possibility of a preliminary hearing. See also draft rule 21(2)(b).

For comments on the appropriateness of a preliminary hearing by an industrial tribunal, see *Munir and Anor v Jang Publications Ltd* [1989] ICR 1, at 6, CA, *J Sainsbury plc v Morgan* [1994] ICR 800, EAT and *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1995] ICR 317, EAT.

The notice of hearing should draw the parties' attention to the consequences under draft rule 73 of a failure to attend.

Paragraph (3)(a): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Paragraph (3)(b): 'would not prejudice the administration of justice'. See note to paragraph (4)(b) of draft rule 28.

Paragraph (3)(c): 'a hearing in public'. See note to paragraph (4)(c) of draft rule 28.

Paragraph (4): 'decision of a Tribunal must be recorded ... in a document'. As to the tribunal's power, if a party does not attend the hearing, to hear and decide the appeal/application in that party's absence or adjourn the hearing see draft rule 73.

As to 'document' see definition in draft rule 110 and note to draft rule 12(1).

Paragraph (4): 'statement of the reasons'. For the requirement to give reasons see the notes to draft rule 76.

Rule 30

Hearing bundles

(1) The Tribunal must compile a hearing bundle for any hearing except a preliminary hearing or other interim hearing containing (subject to paragraph (2)) copies of all documents filed by the parties to an appeal/application and send a copy of the bundle to each of the parties not less than [… days] before the start of the hearing.

(2) The Tribunal may exclude from the hearing bundle copies of documents containing any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security.

(3) The documents contained in the hearing bundle may be used only for the purposes of the proceedings.

Purpose of rule: To require the tribunal to compile for any hearing except a preliminary hearing or other interim hearing a bundle containing copies of all documents filed by the parties to be sent to the parties before the hearing.

Paragraph (1): 'hearing bundle'. This will include documents referred to in a filed document if they have been filed. The originals of the documents in the hearing bundle should be available at the hearing. The hearing bundle should be paginated (continuously) throughout, and indexed with a description of each document and the page number.

Paragraph (1): 'copies of all documents'. This will include electronic communications; see the definition of 'document' in draft rule 110 and the note to draft rule 12(1).

Other Tribunal Powers

Rule 31

Entry on land or premises

(1) For the purpose of enabling it to understand the issues in any proceedings before it, the Tribunal may give a direction requiring the occupier of any land or premises ('the occupier') to permit [a person authorised to make a report, accompanied by any party who wishes to be present, with or without that person's representative] [the Tribunal, accompanied by the parties, with or without their representatives, and any of the Tribunal's officers or members of its staff it considers necessary], to enter and inspect the land or premises. The direction must specify a date and time for the entry and inspection not earlier than [… days] (or any shorter time which the occupier accepts) after the date when a copy of the direction is sent to the occupier or the occupier is notified of any change in the date specified.

(2) The Tribunal must also send a copy of the direction to the parties and must notify them of any change in the date or time specified.

(3) Where the Tribunal is to carry out the entry on, and inspection of, the land or premises and a member of the Council on Tribunals or its Scottish Committee is attending the hearing of the proceedings, the Tribunal must also send a copy of the direction to the Council on Tribunals and notify it of any change in the date or time specified. The member of the Council on Tribunals or of the Scottish Committee of that Council shall be entitled to be present at the entry on, and inspection of, the land or premises.

(4) In addition to making reference to the penalty for failure to comply with the direction, as provided in Rule 37(5), every direction under paragraph (1) of this rule must, unless the occupier had an opportunity of objecting to the giving of the direction, contain a statement to the effect that the occupier may apply to the Tribunal under rule 39 to vary or set aside the direction.

(5) The Tribunal must send to the parties a copy of any report made following an inspection and give them an opportunity to comment on the report.

(6) Where an inspection is made after the close of a hearing, the Tribunal must, if it considers that it is expedient to do so on account of any matter arising from the inspection, reopen the hearing.

(7) If the Tribunal considers it expedient to make enquiries of any local authorities within whose area the land in question is situated, the Tribunal may direct such enquiries to be made and may postpone the hearing until the local authority's reply has been received and copies supplied to the parties.

Purpose of rule: This draft rule is designed primarily for cases affecting land and provides for entry on land by an expert for the purpose of preparing a report for a tribunal (first alternative) or an inspection by the tribunal itself (second alternative). In either case provision is made for the presence of the parties and a member of the Council on Tribunals or of its Scottish Committee. A rule requiring entry will require specific authority in the enabling Act, as will any provision for a penal sanction.

Paragraph (1): 'a person authorised to make a report'. Where a report is made by an expert, copies should be sent to the parties (paragraph (5)) who should be given, at the minimum, an opportunity to comment on the report. More comprehensive provision may be made, as in draft rule 63, for the person who prepares a report to attend the hearing to give evidence. Under draft rule 67(4) the Tribunal may require any expert whose report has been filed to attend the hearing.

Paragraph (1): 'to enter and inspect the land or premises'. A right of entry may be required for purposes other than the inspection of land or premises. See paragraph 7(2)(d) of Schedule 6 to the Data Protection Act 1998 and rule 12 of the Information Tribunal (Enforcement Appeals) Rules 2000 (S.I. 189) which provide a right of entry for the purpose of testing data equipment or material.

Paragraph (4): 'an opportunity of objecting'. See draft rule 39 for the power to vary or set aside the direction.

Paragraph (6): 'the Tribunal must ... reopen the hearing'. Where entry is made for inspection in the course of a hearing, the parties should be in a position to comment at the conclusion of the hearing. If the inspection is made after the close of the hearing, this paragraph requires the tribunal to reopen the hearing.

Paragraph (7): 'enquiries of any local authorities'. In addition to entering upon land, this paragraph provides for enquiries of local authorities or other bodies which have a public function in relation to the jurisdiction of the tribunal.

Rule 32

Other case management powers

(1) The list of powers in this rule is in addition to any powers given to the Tribunal by any other rule or by any other enactment or any powers it may otherwise have.

(2) Subject to the provisions of [the Act] and these Rules, the Tribunal may regulate its own procedure.

(3) Except where these Rules provide otherwise, the Tribunal may-

(a) extend the time appointed [by or under the Act or] by or under these Rules for doing any act even if the time appointed has expired if-

(i) it would not be reasonable to expect the party in question to comply or, as the case may be, to have complied with the time limit, or

(ii) not to extend the time limit would result in substantial injustice;

(b) postpone the date or time or change the place fixed for any hearing or adjourn any hearing (particularly to enable the case to be settled by the use of an alternative dispute resolution procedure);

(c) require a party or a party's legal representative to attend a hearing;

(d) require the parties to provide a statement of agreed facts [facts in dispute][issue or issues to be decided by the Tribunal] [a list of agreed documents];

(e) specify the points of law on which it will require oral argument at any hearing;

(f) hold a hearing or pre-hearing review and receive evidence by telephone, through a video link or by using any other method of communication if the Tribunal is satisfied that this would not prejudice the administration of justice and if there is no important public interest consideration which requires a hearing in public;

(g) decide that part of any proceedings be dealt with as separate proceedings;

(h) suspend the whole or part of any proceedings or decision either generally or until a specified date or event;

(i) decide the order in which issues are to be considered;

(j) exclude an issue from consideration;

(k) if the appellant/applicant shall at any time give notice in writing of the withdrawal of his or her appeal/application, dismiss the proceedings;

Purpose of rule: To ensure that the tribunal has all the powers it may need not otherwise conferred by these draft rules to further the overriding objective specified in draft rule 2.

Paragraph (2): 'regulate its own procedure'. It has been held that an industrial tribunal may under such a rule transfer a case for rehearing by another industrial tribunal: *Charman v Palmers Scaffolding Ltd* [1979] ICR 335, EAT; and that it had an inherent power to refer a case to a differently constituted tribunal if the result in the first is likely to be ineffectual or inconclusive: *R v Industrial Tribunal Ex p. Cotswold Collotype Co. Ltd* [1979] ICR 190, DC. But see paragraph (4) which confers an express power to transfer cases.

However this power to regulate its own procedure does not enable a tribunal to strike out an appeal/application at the start of the hearing because it appears on the information then available to have no reasonable prospect of success: *Care First Partnership Ltd v Roffey and Others* [2001] ICR 87, [2001] IRLR 85, [2001] Emp LR 26, (2000) 97(45) LSG 41, (2000) The Times, 22 November, CA.

Paragraph (3)(a): 'extend the time … if'. If time for bringing an appeal is limited by the Act, an express provision for extending that time period will be necessary in the rule-making power of the Act. The courts are likely to take a liberal attitude to the interpretation of the power to extend time despite the limitations in subparagraphs (i) and (ii) in view of the Human Rights Court's interpretation of article 6 of the ECHR: see notes to draft rule 7; see also *Mehta v Secretary of State for Home Department* [1975] 1 WLR 1087, [1975] 2 All ER 1084, CA.

The Employment Appeal Tribunal has held that an application to an employment tribunal for an extension of time could be made after the decision but "there must inevitably be a very heavy burden on a respondent ... to justify the application": *St. Mungo Community Trust v Colleano* [1980] ICR 254, EAT.

An appeal or application may be filed to prevent time limits expiring in order to preserve the possibility of recourse to the tribunal after proceedings in another forum (e.g. the High Court) have been concluded. For a ruling by the Employment Appeal Tribunal in such a case, see *Warnock v Scarborough Football Club* [1989] 1 ICR 489.

Paragraph (3)(b): 'adjourn any hearing'. As to the exercise of this discretion see *Teinaz v Wandsworth Borough Council* [2002] EWCA Civ 1040, [2002] ICR 1471, [2002] IRLR 721, [2002] Emp LR 1107, (2002) 99(36) LSG 38, (2002) The Times, 21 August, CA.

For the definition of 'hearing' and 'preliminary hearing' see draft rule 110.

Paragraph (3)(d): 'statement of agreed facts'. See also note to draft rule 28(2) for a provision where the tribunal may seek to secure admissions or agreements during a pre-hearing review, and draft rule 38 where the Tribunal may seek to secure admissions by the respondent to an appeal in the respondent's reply.

Paragraph (3)(h): 'suspend the whole or part of any proceedings'. The power to suspend proceedings is compatible with article 6 of the ECHR: *Stevens v School of Oriental and African Studies and Others* (2001) The Times, 2 February, DC.

(l) subject to the proviso below, order the striking out or amendment of any notice of appeal/initiating application or statement of reasons for appeal, reply, supplementary statement or written representation because it is scandalous or vexatious;

(m) subject to the proviso below, order the striking out of any appeal/initiating application if it is not followed up:

but before deciding to exercise the power conferred by sub-paragraph (l) or this sub-paragraph, the Tribunal must send notice to the party likely to be affected by the exercise of the power giving that party an opportunity to state why the power should not be exercised; or

(n) take any other step or make any other decision for the purpose of managing the case and furthering the overriding objective.

(4) A ... Tribunal may transfer any proceedings before it to another ... Tribunal, [including a ... Tribunal established under the ... (Scotland) Rules, 20..] and any such Tribunal to which proceedings are transferred under this rule [or the equivalent provisions of the ... (Scotland) Rules 20..] shall have jurisdiction to hear and decide the same [and an appeal can be made from any such decision] as if the proceedings were properly commenced in that Tribunal in accordance with these Rules.

(5) Except where a rule or some other enactment provides otherwise, the Tribunal may exercise its powers on an application or on its own initiative.

(6) The Tribunal may exercise a power on its own initiative, without hearing the parties or giving them an opportunity to make representations.

(7) Where the Tribunal proposes to exercise a power on its own initiative-

(a) it may give any person likely to be affected an opportunity to make representations; and

(b) where it does so it must specify the date and time by and the manner in which the representations must be made.

(8) Where the Tribunal proposes-

(a) to exercise a power on its own initiative; and

(b) to hold a hearing to decide whether to exercise the power,

it must give each party likely to be affected at least [… days] notice of the hearing.

Paragraph (3)(m): 'if it is not followed up'. An appeal/application should not be struck out because of inexcusable delay unless it is clear that a fair trial would be impossible: *Taylor v Anderson and Another* [2002] EWCA Civ 1680, (2003) 100(1) LSG 25, (2002) The Times, 22 November, CA.

Paragraph (4): 'may transfer any proceedings ... to another Tribunal'. This provision should be included where a system of tribunals having the same jurisdiction is established. The first passage in square brackets is intended to enable transfers to take place even though the tribunals in England and Wales and those in Scotland are established under different rules. Similar provision may be made, as necessary, as respects Northern Ireland. The latter part of this paragraph is designed to avoid any lack of jurisdiction or restriction which follows from a system which establishes tribunals on a geographical basis.

See also the definitions 'office of the Tribunal' and 'Tribunal' in draft rule 110.

For the circumstances in which the power to transfer should not be used, see *Automobile Property Ltd v Healy* [1999] ICR 809, EAT, *Peter Swiper & Co Ltd v Cooke* [1986] IRLR 19, EAT and *Kennedy v Metropolitan Police Commissioner* [1990] The Times, 8 November, EAT.

(9) Where the Tribunal has exercised a power under paragraph (6) a party affected-

(a) may apply to have the exercise of the power set aside, varied or suspended; and

(b) must be notified of the right to make that application.

(10) An application under paragraph (9)(a) must be made-

(a) within the period specified by the Tribunal; or

(b) if the Tribunal does not specify a period, not more than [... days] after the party making the application was notified of the exercise of the power.

(11) The Chair or, subject to paragraph (12), the Registrar may exercise the power conferred by paragraph (3)(d).

(12) The Registrar must exercise the power conferred by paragraph (11) of this rule in accordance with the directions of the Chair and any direction given by the Registrar under that paragraph may be set aside or varied by the Chair on the application of a party or on the Chair's own initiative.

Rule 33

Representative parties with the same interest

(1) Where more than one person has the same interest in an appeal/application-

(a) the appeal/application may be begun; or

(b) the Tribunal may direct that the appeal/application be continued,

by one or more of the persons who have the same interest as representatives of any other persons who have that interest.

(2) The Tribunal may direct that a person may not act as a representative if it is satisfied that the administration of justice so requires.

(3) Any party or person having the same interest may apply to the Tribunal for a direction under paragraph (2).

(4) Unless the Tribunal otherwise directs any decision taken, direction given or order made in an appeal/application in which a party is acting as a representative under this rule-

(a) is binding on all persons represented in the appeal/application; but

(b) may only be enforced by or against a person who is not a party to the appeal/application with the permission of the Tribunal.

Paragraph (11): 'The Chair or, subject to paragraph (12), the Registrar'. The powers are to be exercised by the Chair or, subject to the Chair's direction, by the Registrar. As in draft rule 28 the Registrar here includes an Assistant Registrar but not any other member of staff of the tribunal; see draft rule 97.

Purpose of rule: This draft rule concerns the representation of identified but numerous persons with the same interest while the following draft rule 34 is about the representation of yet unborn or unascertainable persons with the same interest.

Rule 34

Representation of interested persons who cannot be ascertained

(1) This rule applies to appeals/applications about the meaning of a document including a statute.

(2) The Tribunal may give a direction appointing a person to represent any other person or persons in the appeal/application where the person or persons to be represented-

(a) are unborn;

(b) cannot be found;

(c) cannot easily be ascertained; or

(d) are a class of persons who have the same interest in an appeal/application and-
   (i) one or more members of that class are within sub-paragraphs (a), (b) or (c), and
   (ii) to appoint a representative would further the overriding objective.

(3) An application for a direction under paragraph (2)-

(a) may be made by-
   (i) any person who seeks to be appointed under the order, or
   (ii) any party to the appeal/application; and

(b) may be made at any time before or after the appeal/application has started.

(4) An application for a direction under paragraph (2) must be sent by the office of the Tribunal to-

(a) all parties to the appeal/application, if the appeal/application has started;

(b) the person sought to be appointed, if that person is not the applicant for the order or a party to the appeal/application; and

(c) any other person as directed by the Tribunal.

(5) The Tribunal's approval is required to settle an appeal/application in which a party is acting as a representative under this rule.

(6) The Tribunal may approve a settlement of an appeal/application where it is satisfied that the settlement is for the benefit of all the represented persons.

(7) Unless the Tribunal otherwise directs, any decision or order made or direction given in an appeal/application in which a party is acting as a representative under this rule-

(a) is binding on all persons represented in the appeal/application; but

(b) may only be enforced by or against a person who is not a party to the appeal/application with the permission of the Tribunal.

Purpose of rule: To provide for the representation of yet unborn or unascertainable persons with the same interest.

Rule 35

Translations and interpretation etc.

(1) In proceedings before the Tribunal in Wales which are not conducted in Welsh the Registrar must make arrangements-

(a) for the parties, witnesses and other persons who are to take part in the proceedings to be informed of the rights conferred by the Welsh Language Act 1993 and this rule; and

(b) for establishing and recording their choice of Welsh or English for participation in the proceedings,

to enable the Tribunal to decide whether the proceedings are to be conducted wholly in Welsh or wholly in English or partly in Welsh and partly in English.

(2) If a party, witness or other person taking part in proceedings before the Tribunal is unable to speak or understand the English language, or in Wales the Welsh or English languages, the Registrar must make arrangements for that party, witness or other person to be provided, free of charge, for the purposes of the proceedings with the translations and assistance of an interpreter necessary to enable his or her effective participation in the proceedings (whether or not he or she is represented).

(3) If a party, witness or other person taking part in proceedings before the Tribunal is without hearing or speech or both, the Registrar must make arrangements for that party, witness or other person to be provided, free of charge, for the purposes of the proceedings with the services of a sign language interpreter, lip speaker or palantypist necessary to enable his or her effective participation in the proceedings.

(4) A party, witness or other person who requires translations or the assistance of an interpreter, lip speaker or palantypist must at the earliest opportunity notify the requirement to the Registrar at the office of the Tribunal.

(5) There shall be paid to a translator, interpreter, lip speaker or palantypist providing services in accordance with arrangements made under this rule, as remuneration, fees and travelling expenses at the rates and subject to the conditions prescribed by rules for the time being in force made by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs] with the consent of the Treasury under section … of the … Act …

(6) A claim by a translator, interpreter, lip speaker or palantypist for fees or expenses payable under this rule must be made in writing to the Registrar at the office of the Tribunal.

Purpose of rule: To provide in the case of tribunal proceedings in Wales for the rights conferred by the Welsh Language Act 1993 and this rule to be brought to the attention of the parties, witnesses and other persons taking part in the proceedings and for establishing and recording their choice of Welsh or English for participation in the proceedings, so that the tribunal may decide the language in which the proceedings are to be conducted. The tribunal must provide, when necessary, free of charge, translation and interpretation services for parties, witnesses or other persons in any tribunal proceedings who are unable to speak or understand English, or, in the case of proceedings in Wales, Welsh or English. (More detailed provision for the use of Welsh in Tribunals in Wales may be made in schemes under the Welsh Language Act. Some tribunal systems have adopted their own non-statutory schemes. The Welsh Language Board can advise). Provision is also made for the necessary free services of sign language interpreters, lip speakers and palantypists for parties, witnesses or other persons taking part in tribunal proceedings who are without hearing or speech or both.

Paragraph (2): 'to be provided, free of charge'. In *Kamasinski v Austria* (1989) 13 EHRR 36 the Human Rights Court held that the provision of interpretation alone was not enough; those providing the service are responsible for the standard and the competence of the interpreter. In *Cuscani v United Kingdom* (2003) 36 EHRR 2, (2002) The Times, 11 October the Human Rights Court found a violation of article 6 where the accused an Italian had not been provided with a professional interpreter to enable him to understand the proceedings and present his case effectively.

Paragraph (5): 'rules … made by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs]'. The enabling Act may confer this power on a Minister of the Crown other than the [Lord Chancellor] [the Secretary of State for Constitutional Affairs], on Scottish Ministers or the Lord President of the Court of Session in the case of certain tribunals in Scotland or on the National Assembly for Wales in the case of certain tribunals in Wales.

Rule 36

Arbitration

(1) Where it is so agreed in writing between the persons who, if a question were to be the subject of an appeal to a Tribunal, would be the parties to the appeal, the Tribunal must act as an arbitrator on that question.

(2) Pursuant to section 94 of the Arbitration Act 1996 the provisions of Part I of that Act apply to an arbitration under this rule (as a statutory arbitration within the meaning of that section) subject to the adaptations and exclusions in sections 95 to 98 of, and subsection (2) of section 94 of, that Act. This paragraph does not apply to Scotland.

(3) In any arbitration in pursuance of this rule the award may include any direction or order which could have been made by a Tribunal in relation to the question.

(4) The Tribunal may order on a provisional basis any relief which it would have power to grant in a final award under this rule, and any such order shall be subject to the Tribunal's final adjudication; the Tribunal's final award, on the merits or as to costs or expenses, shall take account of any such order.

Purpose of rule: The enabling Act may provide that in certain cases a tribunal may act as an arbitrator or that the parties may consent to the tribunal deciding a question as an arbitrator. This draft rule applies in the latter circumstance. Arbitration under this rule would be an "ADR procedure" within the definition in draft rule 110 which draft rule 4 requires the Registrar to draw to the attention of the parties and explain, but that definition would also cover arbitration under other provisions or arrangements.

Paragraph (2): 'Arbitration Act 1996'. Part I of the Arbitration Act 1996 would apply to an arbitration by the Tribunal under this draft rule as a 'statutory arbitration' (referred to in section 94 of that Act as 'an arbitration under an enactment' including, as here, 'an enactment in subordinate legislation'). It may be desirable to select those provisions of Part I of the 1996 Act which should apply to such an arbitration. Section 3(8) of the Lands Tribunal Act 1949, for instance, provides:-

"Where the Lands Tribunal acts as arbitrator, the [provisions of the Arbitration Act 1996] shall apply only so far as they are applied by rules made under this section".

Rule 26 of the Lands Tribunal Rules 1996 (S.I. 1022), as substituted by S.I.1997/1965, made for that purpose is as follows:-

"Unless otherwise agreed by the parties, the following provisions of the Arbitration Act 1996 shall apply to proceedings under this Part, in addition to those set out in rule 32:-
a) section 8 (whether agreement discharged by death of party);
b) section 9 (stay of legal proceedings);
c) section 10 (reference of interpleader issue to arbitration);
d) section 12 (power of court to extend time for beginning arbitral proceedings, etc.);
e) section 23 (revocation of arbitrator's authority);
f) section 57 (correction of award or additional award) in so far as it relates to costs and so that the reference to 'award' shall include a reference to any decision of the Lands Tribunal;
g) section 60 (agreement to pay costs in any event).".

For the provision in the enabling Act for this alternative see paragraph A8 of the Annex.

Paragraph (2): 'This paragraph does not apply to Scotland'. The relevant provisions of the Arbitration Act 1996 do not extend to Scotland. Those preparing rules for tribunals in Scotland will need to consider whether equivalent provision is required.

Paragraph (4): 'order on a provisional basis'. This paragraph is intended to prevent a party using a reference to arbitration as a delaying tactic.

Directions

Rule 37

Directions

(1) At any stage of the proceedings the Tribunal may, either on its own initiative or on the application of a party, give the directions it considers necessary or desirable to further the overriding objective in the conduct of the appeal/application, and may in particular-

(a) direct any party to provide any further particulars or supplementary statements or to produce any documents which may reasonably be required;

(b) where a party has access to information which is not reasonably available to the other party, direct the party who has access to the information to prepare and file a document recording the information;

(c) summon any person to attend as a witness, at the time and place specified in the summons, at an oral hearing of any application for permission to appeal or of any appeal/application and to answer any questions or produce any documents in his or her custody or under his or her control which relate to any matter in question in the proceedings:

but no person is required to attend in obedience to the summons unless given at least [… days] notice of the hearing or, if given less than [… days], he or she has informed the Tribunal that he or she accepts that notice;

(d) by direction specify the persons who may be admitted to, and restrictions on the reporting of, the hearing;

(e) give a direction as to-

(i) the issues on which it requires evidence,
(ii) the nature of the evidence which it requires to decide those issues, and
(iii) the way in which the evidence is to be placed before the Tribunal;

(f) by direction exclude evidence that would otherwise be admissible if the evidence is irrelevant, unnecessary or improperly obtained;

(g) by direction limit cross-examination;

(h) direct any party to lodge before the hearing an outline argument; or

Purpose of rule: To enable the tribunal or, subject to conditions, the Registrar to give the directions necessary or desirable to further the overriding objective in the conduct of an appeal/application. Paragraphs (1)(d), (f) and (g) will require provision in the enabling Act on the lines of paragraph 4 of Schedule 1 to the Civil Procedure Act 1997.

Paragraph (1)(a): 'to provide any further particulars' etc. As to the exercise of this power see *Honeyrose Products v Joslin* [1981] ICR 317, EAT, where quoting the authority of *International Computers Limited v Whitley* [1978] IRLR 318, EAT, it was stated that "it would be most unfortunate if it became the general practice for employers to make applications for further and better particulars when the nature of the employee's case is stated with reasonable clarity". Particulars will not be ordered when the effect of the order would be to require a party to do the impossible: *Byrne v Financial Times Ltd* [1991] IRLR 417; in that case Wood J stated the basic principles thus:

'General principles regarding the ordering of further and better particulars include that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent postponement; that the order should not be oppressive; that particulars are for the purpose of identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged.'

For a provision where the tribunal itself seeks further information under a penal sanction see paragraph 7 of Schedule 11 to the Rent Act 1977.

Paragraph (1)(c): 'summon any person to attend as a witness'. The summons must contain the information specified in paragraph (5). It will also be desirable to incorporate in the relevant rule the appropriate provisions of draft rules 48 to 55.

For the definition of 'hearing' see draft rule 110.

Paragraph (1)(f): 'exclude evidence'. See *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 945, [2003] PIQR 23, (2003) The Times, 7 February, CA. The exclusion of evidence of negotiations under the 'without prejudice rule' should be applied with restraint and only in cases in which the public interests underlying the rule were plainly applicable: *Prudential Assurance Co Ltd v Prudential Assurance Co of America* (2003) The Times, 2 January, DC. As to excluding expert evidence see *Barings plc (in liquidation) and Another v Coopers and Lybrand (a firm) and Others* [2001] Lloyd's Rep Bank 85, [2001] Lloyd's Rep PN 379, [2001] PNLR 22, (2001) 98(13) LSG 40, (2001) The Times, 7 March, DC.

(i) give any direction necessary for the exercise of any of the powers conferred by these Rules.

(2) The Tribunal may on the application of a person summoned as a witness under this rule set the summons aside.

(3) When a document required under paragraph (1)(b) has been filed the Tribunal must send a copy of it to the other party or parties.

(4) An application by a party for a direction under paragraph (1) (otherwise than during a pre-hearing review or a hearing) must be made to the Registrar in writing or by any other means the Tribunal may accept and must set out the direction which the applicant is seeking to have made and the reasons for the application. Unless it is accompanied by the written consent of all the parties, a copy of the application must be sent by the Registrar to any other party who may be affected by the direction. If any party objects to the direction sought, the Tribunal must consider the objection and, if it considers it necessary for deciding the application, must give the parties an opportunity of being present or represented before it.

(5) A direction under these Rules which requires a person to act or refrain from acting must, as appropriate, include a statement of the possible consequences under Rule 40, of a party's failure to comply with the direction within the time allowed by the Tribunal, and such a direction under this rule must, as appropriate, contain a reference to the fact that under [section . . of the Act][Rule ...] any person who fails to comply with the direction will be liable on summary conviction to a fine not exceeding level ... on the standard scale.

(6) Subject to paragraph (7), the Registrar may exercise the powers of the Tribunal under this rule on an application under paragraph (1).

(7) The Registrar must exercise the powers conferred by paragraph (6) in accordance with the directions of the Chair and any direction given by the Registrar may be set aside or varied by the Chair on the application of a party or on the Chair's own initiative.

Paragraph (4): 'during a pre-hearing review'. For pre-hearing review see draft rule 28.

Paragraph (4): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Paragraph (5): 'A direction under these Rules'. 'direction' includes an order or witness summons in interim proceedings; see definition of 'direction' in draft rule 110.

Paragraph (5): 'contain a reference to the fact that'. Provision for a penal sanction may only be included if there is express authority in the enabling Act.

Paragraph (6): 'the Registrar may exercise the powers'. The Registrar includes an Assistant Registrar but not here any other member of the tribunal's staff; see draft rule 97 and notes.

Rule 38

Direction as to respondent's reply

(1) A direction under rule 37 may require the respondent to state in his or her reply-

(a) which allegations in the notice of appeal or separate statement of reasons for appeal/initiating application the respondent denies;

(b) which allegations the respondent is unable to admit or deny, but which the respondent requires the appellant/applicant to prove; and

(c) which allegations the respondent admits.

(2) A direction provided for in paragraph (1) must include a statement of the consequence under paragraph (4) of failing to deal with an allegation.

(3) Where in response to such a direction the respondent denies an allegation-

(a) the respondent must state the reasons for doing so; and

(b) if the respondent intends to put forward a version of events different from that given by the appellant/applicant, the respondent must state that version.

(4) A respondent who in response to such a direction fails to deal with an allegation-

(a) shall be taken to admit that allegation; but

(b) shall be taken to require that allegation to be proved if the respondent has set out in the reply the nature of his or her case in relation to the issue to which the allegation relates.

Rule 39

Varying or setting aside of direction

Where a person to whom a direction issued under these Rules is addressed had no opportunity of objecting to the giving of the direction, that person may apply to the Tribunal to vary it or set it aside, but the Tribunal must not do so without first notifying the parties other than the applicant and considering any representations made by them.

Purpose of rule: To enable the tribunal to require the respondent to state which of the allegations in the notice of appeal or separate statement of reasons for appeal/initiating application he or she denies, is unable to admit or deny or admits, so as to narrow down the issues for decision by the tribunal and thus save time and expense.

Purpose of rule: To provide for an application to the tribunal to vary or set aside a direction by a person who had no opportunity of objecting to it.

This draft rule would apply to parties (as well as to witnesses or occupiers) who have not been afforded an opportunity to object in writing e.g. as a consequence of not receiving a copy of an application for a direction. References to this power for witnesses and occupiers is set out in draft rules 31(4) and 48(3).

'a direction'. 'direction' includes an order or witness summons in interim proceedings; see definition of 'direction' in draft rule 110.

Rule 40

Failure to comply with direction

If any direction given to a party under these Rules is not complied with by that party, the Tribunal may, before or at the hearing-

(a) dismiss the whole or part of the appeal/application; or

(b) strike out the whole or part of a respondent's reply and, where appropriate, direct that a respondent shall be debarred from contesting the appeal/application altogether;

but a Tribunal must not dismiss, strike out or give a direction unless it has sent notice to the party who has not complied giving that party an opportunity to comply within the period specified in the notice or to establish why the Tribunal should not dismiss, strike out or give such a direction.

Purpose of rule: To provide a sanction for a party's failure to comply with a direction. It only relates to matters within a party's own power. It does not extend to the failure of a non-party witness to appear. The proviso to this rule is necessary to enable the tribunal to apply the principle of proportionality to its use of the powers conferred; see *Re Swaptronics Ltd* (1998) 95(36) LSG 33, (1998) The Times, 17 August and *Arrow Nominees Inc v Blackledge* (1999) The Times, 8 December.

'any direction'. 'direction' includes an order or witness summons in interim proceedings; see the definition of 'direction' in draft rule 110.

'any direction ... is not complied with'. A direction under these Rules which requires a person to act or refrain from acting must include a notice of the consequences under this rule of failure to comply; see draft rule 37(5).

'strike out the whole or part'. For a recent case concerning the reasonable use of the power to strike out see *TP and KM v United Kingdom* (2002) 34 EHRR 2, para 101. See also the decision of the Court in *Mortier v France* (2002) 35 EHRR 9 that the order of a French court striking out the applicant's appeal because he had failed to comply with the court's earlier order to pay the sum in issue in full was disproportionate because there was no evidence that the French court had taken account of his inability to pay. See also *R (on the application of S) v Immigration Appeal Tribunal* [1998] Imm AR 252, [1998] INLR 168, (1998) The Times 25 February and *Biguzzi v Rank Leisure* [1999] 4 All ER 934, [1999] 1 WLR 1926, [2000] CP Rep 6, [1999] CPLR 675, [2000] 1 Costs LR 67, (1999) The Times, 5 October.

For the definition of 'hearing' see draft rule 110.'

Grouping of Proceedings

Rule 41

Consolidation of appeals/applications

(1) Where two or more notices of appeal/initiating applications have been lodged in respect of the same matter, or in respect of several interests in the same subject in dispute, or which involve the same issues, the Tribunal may, on the application of a party to any of the appeals/applications or on its own initiative, direct that the appeals/applications or any particular issue or matter raised in the appeals/applications be consolidated or heard together.

(2) Before giving a direction under this rule, the Tribunal must give notice to the parties to the relevant appeals/applications and consider any representations made in consequence of the notice.

Rule 42

Test cases

Where the Tribunal considers that two or more appeals/applications involve the same issues, the Tribunal may, with the written consent of all parties to the appeals/applications, direct that one or more appeals/applications selected by the Tribunal be heard in the first instance as a test case or test cases and that the parties to each appeal/application shall, without prejudice to their right to appeal further [*to the appellate tribunal or court*], be bound by the decision of the Tribunal on the selected appeal/application or appeals/applications.

Purpose of rule: To avoid duplication of proceedings on the same matter by consolidating the proceedings or hearing them together. It would apply where the proceedings have already started as compared with draft rule 43 (group proceedings direction) where a number of appeals/applications on common or related issues are expected. This draft rule only applies to appeals/applications under the same jurisdiction.

Paragraph (2): 'must give notice'. In the case of regulatory authorities, there may be good reasons to require the tribunal to notify the relevant authority or a complainant if related proceedings have been instituted in order that connected issues may be considered together.

Purpose of rule: To provide for test cases. For practice and procedure in relation to test cases see *R v Secretary of State for the Home Department* [1999] 1 AC 450 at 457.

Rule 43

Group proceedings direction

(1) Where there are or are likely to be a number of appeals/applications giving rise to common or related issues of fact or law (“GPD issues”), the Tribunal may give a group proceedings direction (“GPD”).

(2) The following information must be included in a notice of application for a GPD or in evidence to accompany it:-

(a) a summary of the nature of the appeal/application;

(b) the number and nature of appeals/applications already made;

(c) the number of parties likely to be involved;

(d) the common issues of fact and law (the GPD issues) that are likely to arise in the proceedings; and

(e) whether there are matters that distinguish smaller groups of appeals/applications within the wider group.

(3) A GPD must-

(a) contain provision for the establishment of a register (“the group register”) on which the appeals/applications managed under the GPD will be entered;

(b) specify the GPD issues which will identify the appeals/applications to be managed as a group under the GPD; and

[(c) specify the tribunal (“the management tribunal”) which will manage the appeals/applications on the group register].

(4) A GPD may-

(a) in relation to appeals/applications which raise one or more of the GPD issues direct-

[(i) their transfer to the management tribunal;]
(ii) their stay until further order; and
(iii) their entry on the group register;

(b) direct that from a specified date appeals/applications which raise one or more of the GPD issues should be [started in the management tribunal and] entered on the group register; and

(c) give directions for publicising the GPD.

Purpose of rule: This draft rule addresses the problem of a large number of expected appeals/applications with common or related issues of fact or law which cannot be dealt with under draft rule 41 (consolidation of appeals/applications) or 42 (test cases) which are more appropriate where the related proceedings are few in number and/or have already started.

Paragraph (4)(a): 'transfer to the management tribunal'. If there is more than one tribunal with the same jurisdiction, provision is made for the GPD to direct that as from a specified date all appeals/applications that raise one or more of the GPD issues be started in the management tribunal. Failure to comply with the direction would not invalidate the appeal/application but it must be transferred to the management tribunal and entered in the register as soon as possible.

Rule 44

Effect of GPD

(1) Where a decision or order is made or a direction is given in an appeal/application on the group register in relation to one or more of the GPD issues-

(a) that decision, order or direction is binding on the parties to all other appeals/applications that are on the group register at the time the decision or order is made or the direction is given unless the Tribunal otherwise directs; and

(b) the Tribunal may give directions as to the extent to which that decision, order or direction is binding on the parties to any appeal/application which is subsequently entered on the group register.

(2) Unless paragraph (3) applies, any party who is adversely affected by a decision, order or direction which is binding on that party may seek permission to appeal against the decision, order or direction.

(3) A party to an appeal/application which is entered on the group register after a decision, order or direction which is binding on that party was made or given may not-

(a) apply for the decision, order or direction to be set aside, varied or suspended; or

(b) appeal the decision, order or direction,

but may apply to the Tribunal for a direction that the decision, order or direction is not binding on him or her.

(4) Unless the Tribunal orders otherwise, disclosure of any document relating to the GPD issues by a party to an appeal/application on the group register is disclosure of that document to all the parties to appeals/applications -

(a) on the group register; or

(b) which are subsequently entered on the group register.

Purpose of rule: To indicate that a decision, order or direction of the tribunal on an issue in an appeal/application on the group register is binding on the parties in all other appeals/applications on the register unless the tribunal otherwise directs, but subject to the right of any party in an appeal/application already on the register adversely affected to appeal or the right of any party in an appeal/application subsequently entered on the register to apply for a direction that the decision, order or direction should not apply to him or her.

Rule 45

Case management under GPD

Directions given by the Tribunal/the management tribunal in furtherance of the overriding objective may include directions-

(a) varying the GPD issues;

(b) providing for one or more appeals/applications on the group register to proceed as test appeals/applications;

(c) appointing the representative of one or more of the parties to be the lead representative for the appellants/applicants or respondents;

(d) specifying the details to be included in a notice of appeal/ initiating application or statement of reasons in order to show that the criteria for entry of the appeal/application on the group register have been met;

(e) specifying a date after which no appeal/application may be added to the group register unless the tribunal gives permission; and

(f) for the entry of any particular appeal/application which meets one or more of the GPD issues on the group register.

Rule 46

Removal from group register

(1) A party to an appeal/application entered on the group register may apply to the Tribunal/the management tribunal for the appeal/application to be removed from the group register.

(2) If the tribunal directs that the appeal/application be removed from the group register it may give directions about the future management of the appeal/application.

Rule 47

Test appeals/applications under GPD

(1) Where a direction has been given for an appeal/application on the group register to proceed as a test appeal/application and that appeal/application is settled, the Tribunal or, as the case may be, the management tribunal may direct that another appeal/application on the group register be substituted as the test appeal/application.

(2) Where a direction is given under paragraph (1), any decision or order made or direction given in the test appeal/application before the date of substitution is binding on the substituted appeal/application unless the tribunal otherwise directs.

Purpose of rule: To confer on the tribunal/the management tribunal powers of direction for the case management of the appeals/applications on the group register in accordance with the overriding objective.

'the management tribunal'. This means, where there is more than one tribunal for the same jurisdiction, the tribunal specified under draft rule 43(3)(c): see the definition in draft rule 110.

Purpose of rule: To enable a party to an appeal/application to apply to the tribunal to have it removed from the group register.

Purpose of rule: To provide for the substitution of an appeal/application on the group register as a test appeal/application for an appeal/application which is settled.

Evidence

Evidence of Witnesses | Rules 48 – 55

Expert Evidence | Rules 56 – 64

(this page left blank intentionally)

Rule 48

Summoning of witnesses

(1) The Tribunal may by summons require any person in the United Kingdom[,the Channel Islands or the Isle of Man] to attend as a witness at a hearing of an appeal/application at the time and place specified in the summons and, subject to paragraph (2) below, at the hearing to answer any questions or produce any documents in that person's custody or under that person's control which relate to any matter in question in the appeal/application:

but:

(a) no person may be required to attend in obedience to the summons unless that person has been given at least [… days'] notice of the hearing or, if less than [… days], that person has informed the Tribunal that he or she accepts the notice given; and

(b) no person, other than the appellant/applicant or the respondent, may be required in obedience to the summons to attend and give evidence or to produce any document unless the necessary expenses of attendance are paid or tendered to that person.

(2) No person may be compelled to give any evidence or produce any document that that person could not be compelled to give or produce on a trial of an action in a court of law in that part of the United Kingdom where the appeal/application is decided.

(3) In addition to making reference to the penalty for failure to attend, as provided by rule 37(5), every summons under paragraph (1) of this rule must, unless the person to whom the summons is addressed had an opportunity of objecting to it, contain a statement to the effect that under rule 39 that person may apply to the Tribunal to vary or set aside the summons.

(4) In exercising the powers conferred by this rule, the Tribunal must take into account the need to protect any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security.

Purpose of rule: To enable the tribunal to summon witnesses necessary for resolving issues in the case. Consistently with its view that procedural rules should be self-contained, the Council considers that an express provision for witnesses is to be preferred to the practice in some rules of making a cross-reference to the power to summon witnesses under the Arbitration Act 1996. A general power for the making of rules for the summoning of witnesses in the enabling Act which extended to the whole of the United Kingdom would appear to authorise a rule for the summoning of witnesses in the United Kingdom. Additional provision would be necessary for witnesses from the Channel Islands or the Isle of Man. But parties may be advised, e.g. in guidance notes, to produce witnesses even if there is no special power to summon them or sanction for failure to attend. See the guidance material referred to in the notes to draft rule 65.

Paragraph (1): 'The Tribunal may by summons require any person'. The tribunal should not issue a summons to an expert witness who is unwilling to attend because the party instructing the expert cannot or will not pay the expert's fee: *Brown and Another v Bennett and Others* (2000) The Times, 2 November, DC.

Paragraph (1): 'any documents'. See the definition of 'document' in draft rule 110 and the note to draft rule 12(1).

Paragraph (3): 'penalty for failure to attend'. A penalty for a witness's failure to attend requires express provision in the enabling Act. A witness summons should always draw attention to the existence of such a penalty (see draft rule 37(5)).

Paragraph (3): 'an opportunity of objecting'. See draft rule 39 for the power of the Tribunal to vary or set aside the summons.

Paragraph (4):'intimate personal and financial circumstances'. See note to draft rule 27A(3).

Rule 49

Evidence of witnesses - general rule

(1) The general rule is that any fact that needs to be proved by the evidence of witnesses is to be proved-

(a) at the hearing by their oral evidence; or

(b) in any interim proceedings, by witness statement, witness summary or affidavit.

(2) This is subject-

(a) to any provision to the contrary contained in these Rules or elsewhere; or

(b) to any direction of the Tribunal.

(3) At the hearing or in interim proceedings a party may also rely on the matters set out in-

(a) that party's statement of reasons; or

(b) that party's notice of appeal/initiating application or reply.

Rule 50

Evidence by telephone, video link or other means

The Tribunal may allow a witness to give evidence by telephone, through a video link or by any other means of communication if the Tribunal is satisfied that this would not prejudice the administration of justice.

Purpose of rule: To lay down the general rule for facts to be proved at hearings by oral evidence and in interim proceedings by witness statement, witness summary or affidavit. Provision to the contrary is made in draft rule 58(1) in respect of expert evidence which must be in written form unless the tribunal directs otherwise.

Paragraph (1): 'evidence of witnesses'. Equality of arms requires witnesses for all parties to be treated equally; in *Bonisch v Austria* (1985) 9 EHRR 191 the Human Rights Court said that an expert witness appointed by one side must be afforded the same facilities as the expert witness appointed by the other side but in *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, (2000) 8 BHRC 325, [2000] Crim LR 584, (2000) The Times, 1 March, the court held that considerations of national security or the protection of vulnerable witnesses may, in certain circumstances, justify an exception to this rule.

Purpose of rule: To permit the use of modern communication technology. The use of this power may not be appropriate in some circumstances or in the case of some tribunals. The tribunal would need to take steps to satisfy itself as to the identity of the witness.

'video link'. See *R (D) v Camberwell Green Youth Court* [2003] EWHC 227, (2003) 167 JP 210, (2003) 167 JPN 317, (2003) The Times, 13 February, DC (evidence of child witnesses by video links not incompatible with article 6 of the Convention if measures taken to ensure fairness); *Rail v Hume* [2001] EWCA Civ 146, [2001] 3 All ER 248, [2001] CP Rep 58, [2001] CPLR 239, (2001) 98(10) LSG 44, (2001) 145 SJLB 54, (2001) The Times, 14 March, CA (early notification to the Tribunal of an intention to use a film or video recording).

Rule 51

Use at hearing of witness statements

(1) A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.

(2) If-

(a) a party has filed a witness statement; and

(b) that party wishes to rely at the hearing on the evidence of the witness who made the statement,

the party must call the witness to give oral evidence unless the Tribunal directs that the party may put the statement in evidence without doing so.

(3) Where a witness is called to give oral evidence under paragraph (2), the witness statement of the witness shall stand as the witness's initial evidence unless the Tribunal directs otherwise.

(4) A witness giving oral evidence at a hearing may with the permission of the Tribunal-

(a) amplify his or her witness statement; and

(b) give evidence as to new matters which have arisen since the witness statement was filed.

(5) If a party who has filed a witness statement does not-

(a) call the witness to give evidence at the hearing; or

(b) put the statement in evidence without calling the witness,

any other party may put the witness statement in evidence without calling the witness to give oral evidence.

Purpose of rule: To lay down the requirements for witness statements and their use, including the circumstances in which other parties may use a witness statement. Prescriptive rules like this and draft rules 52 and 53 may not be appropriate for less formal tribunals.

Rule 52

Form of witness statement

(1) A witness statement should be headed with the title of the proceedings followed by a statement of the parties to the proceedings.

(2) The witness statement should, if practicable, be in the intended witness's own words, should be expressed in the first person and should also state-

(a) the full name of the witness;

(b) the place of residence or, if the witness is making the statement in his or her professional, business or other occupational capacity, the address at which the witness works, the position the witness holds and the name of the witness's firm or employer;

(c) the witness's occupation, or if the witness has none, the witness's description; and

(d) the fact that the witness is or has been a party or is the employee of such a party if it be the case.

(3) A witness statement must indicate-

(a) which of the statements in it are made from the witness's own knowledge and which are matters of information and belief; and

(b) the source for any matters of information and belief.

(4) A document referred to in a witness statement must be verified and identified by the witness.

(5) A witness statement should-

(a) be signed and dated by the person making the statement;

(b) be fully legible and should normally be typed or written on one side of the paper only;

(c) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the witness; and

(d) have the pages numbered consecutively.

(6) Any alteration to a witness statement must be initialled by the person making the statement.

Purpose of rule: To lay down the requirements as to form of witness statements to be acceptable in evidence.

Rule 53

Witness summaries

(1) A party who wishes to file a witness statement for use at the hearing but is unable to obtain one, may apply, without notice, for permission to file a witness summary instead.

(2) A witness summary is a summary of-

(a) the evidence, if known, which would otherwise be included in a witness statement; or

(b) if the evidence is not known, the matters about which the party filing the witness summary proposes to question the witness.

(3) Unless the Tribunal otherwise directs, a witness summary must include the name and address of the intended witness.

(4) Where a party files a witness summary, Rules 51(4) (amplifying witness statements) and 52 (form of witness statement) shall apply to the summary with any necessary adaptations.

Rule 54

Use of witness statements, witness summaries and affidavits for other purposes

(1) Except as provided by this rule, a witness statement, witness summary or affidavit may be used only for the purposes of the proceedings in which it is filed.

(2) Paragraph (1) does not apply if and to the extent that-

(a) the witness or deponent gives consent in writing to some other use;

(b) the Tribunal gives permission for some other use; or

(c) it has been put in evidence at a hearing held in public.

Purpose of rule: To enable a party who is unable to obtain a witness statement to file instead a summary of the evidence of the witness for use at the hearing and to lay down the requirements as to the form of a witness summary.

Purpose of rule: To specify the circumstances in which a witness statement, witness summary or affidavit may be used for a purpose other than that for which it has been filed.

Rule 55

Availability of witness statements, witness summaries and affidavits for inspection

(1) A witness statement, witness summary or affidavit which has been received in evidence is open to inspection during the course of the hearing unless the Tribunal otherwise directs, either on its own initiative or on application of any person.

(2) A direction under paragraph (1) may exclude from inspection words or passages in the statement, summary or affidavit.

(3) Any person may apply for a direction that a witness statement, witness summary or affidavit, or words or passages in it, are not open to inspection.

(4) The Tribunal must not give a direction under paragraph (1) unless it is satisfied that a witness statement, witness summary or affidavit, or words or passages in it, should not be open to inspection because of-

(a) the interests of justice;

(b) the public interest;

(c) the nature of any expert medical evidence in the statement, summary or affidavit;

(d) the nature of any confidential information (including information relating to personal financial matters) in the statement, summary or affidavit;

(e) the nature of any commercially sensitive information in the statement summary or affidavit;

(f) the need to protect national security; or

(g) the need to protect the interests of any child or patient.

Purpose of rule: To provide that a witness statement, witness summary or affidavit received in evidence will be open to inspection unless the tribunal directs otherwise in specified circumstances and to enable the tribunal to exclude from inspection words or passages in the statement, summary or affidavit.

Expert Evidence

Rule 56

Tribunal's power to restrict expert evidence

(1) No party may call an expert or put in evidence an expert's report without the Tribunal's permission.

(2) When a party applies for permission under this rule the party must identify-

(a) the subject in which the party wishes to rely on expert evidence; and

(b) where practicable the expert in that subject on whose evidence the party wishes to rely.

(3) If permission is granted under this rule it must be in relation only to the expert named or the subject identified under paragraph (2).

Rule 57

Expert's overriding duty to the Tribunal

(1) It is the duty of an expert to help the Tribunal on the matters within his or her expertise.

(2) This duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

(3) Expert evidence must be restricted to that which is reasonably required to resolve the proceedings.

Rule 58

Form and content of expert's report

(1) Expert evidence is to be given in a written report unless the Tribunal directs otherwise.

(2) An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.

(3) The Tribunal may require an expert's report to-

(a) give details of the expert's qualifications;

(b) contain a statement of the substance of all material instructions, whether written or oral, on the basis of which the report was written;

Purpose of rule: To give the tribunal oversight of the parties' choice of experts and the power to decide that expert evidence is unnecessary.

Paragraph (1): 'the Tribunal's permission'. In *Bandegani v Norwich Union Fire Insurance Society Ltd* (1999) unreported 20 May, CA Henry LJ said about the requirement for the court's permission: "I would say nothing to encourage the grant of such a permission in a case such as this for reasons of proportionality. There are published guides available in newsagents and used in the trade that give some indication as to the market price of second-hand cars which judges may find helpful. I suggest that in the ordinary case such guides would give better evidential value for money than the expensive calling of two live experts."

Purpose of rule: To enable the tribunal to control the quality and amount of expert evidence, in particular to ensure that the expert evidence it receives is impartial and objective and together with draft rule 56 (tribunal's power to restrict expert evidence) to prevent experts being called to give evidence unnecessarily and becoming additional advocates for the parties. Accordingly the expert addresses his or her report to the tribunal and the expert's duty to the tribunal under this provision would override his or her contractual duty to the party retaining and paying the expert.

Paragraph (1): 'duty of an expert to help the Tribunal'. In *Field v Leeds City Council* [2001] CPLR 129, [2000] 17 EG 165, [2000] 1 EGLR 54, (2000) 32 HLR 618, (2000) The Times 18 January, the Court of Appeal considered the impartiality of expert witnesses; a person employed by one of the parties could still be an expert witness if suitably qualified since the expert's duty was to the tribunal.

Purpose of rule: To specify how expert evidence is to be given and to lay down the requirements for the expert's report.

Paragraph (1): 'Expert evidence is to be given in a written report'. In *Stevens v Gullis* [2000] 1 All ER 527 the judge refused to allow a witness to give expert evidence because his report did not, despite an order that it should, comply with the requirements as to form. The report lacked a statement that the witness understood and had complied with his duty to the court and it did not contain a summary of his instructions. On appeal to the Court of Appeal Lord Woolf said: 'The requirement ... that an expert understands his responsibilities, and is required to give details of his qualifications and the other matters ... are intended to focus the mind of the expert on his responsibilities in order that litigation may progress in accordance with the overriding principles in Part I of the CPR.'. This decision was applied by the Technology and Construction Court in *Anglo Group plc v Winther Brown & Co Ltd* (2000) 72 Con LR 118, [1999-2000] Info TLR 61, [2000] ITCLR 559, [2000] Masons C:LR 13, (2000) 144 SJLB 197, DC.

In most cases it will not be necessary for an expert to attend the hearing because under draft rule 61 written questions can be put to the expert before the hearing. The expert's answers will form part of the expert's report.

(c) give details of any literature or other material which the expert has relied on in making the report;

(d) say who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision;

(e) give the qualification of the person who carried out the test or experiment;

(f) where there is a range of opinion on the matter dealt with in the report-

(i) summarise the range of opinion; and
(ii) give reasons for the expert's own opinion;

(g) contain a summary of the conclusions reached; and

(h) contain a statement that the expert understands his or her duty to the Tribunal and has complied with that duty.

Rule 59

Discussions between experts

(1) The Tribunal may, at any stage, direct a discussion between experts for the purpose of requiring the experts to-

(a) identify the issues in the proceedings; and

(b) where possible reach agreement on an issue.

(2) The Tribunal may specify the issues which the experts must discuss.

(3) The Tribunal may direct that following a discussion between experts they must prepare a written statement for the Tribunal showing-

(a) those issues on which they agree; and

(b) those issues on which they disagree and a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts must not be referred to at the hearing unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

Purpose of rule: To reduce differences of opinion or clarify the differences between experts before the hearing. The discussion between experts could take place over the telephone.

Paragraph (1): 'discussions between experts'. Such a discussion would not prejudice a fair trial in breach of article 6 of the ECHR: *Hubbard and Others v Lambeth Southwark and Lewisham Health Authority and Others* (2002) Lloyd's Rep Med 8, (2001) The Times, 8 October, CA.

Rule 60

Evidence by single joint expert

(1) Where two or more parties wish to submit expert evidence on a particular issue, the Tribunal may direct that the evidence on that issue is to be given by one expert only.

(2) Where the parties wishing to submit the expert evidence cannot agree who should be the expert, the Tribunal may-

(a) select the expert from a list prepared or identified by those parties; or

(b) direct that the expert be selected in such other manner as the Tribunal may direct.

(3) Where the Tribunal gives a direction under paragraph (1) for a single joint expert to be used, each party wishing to submit expert evidence may give instructions to the expert.

(4) When a party gives instructions to the expert ("the instructing party") that party must, at the same time, send a copy of the instructions to the other party or parties.

(5) The Tribunal may give directions about-

(a) the payment of the expert's fees and expenses; and

(b) any inspection, examination or experiment which the expert wishes to carry out.

(6) The Tribunal may, before an expert is instructed-

(a) limit the amount that can be paid to the expert by way of fees and expenses; and

(b) direct that the instructing parties pay that amount to the Tribunal.

(7) Unless the Tribunal otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

Purpose of rule: To enable the tribunal to require expert evidence to be given by a single expert appointed jointly by the parties and to provide that where a single joint expert is used each party may give instructions to the expert and put questions to the expert on the expert's report, but the expert's overriding duty is still to the tribunal: see draft rule 57.

Paragraph (3): 'each party ... may give instructions to the expert'.
A single joint expert must not hold a meeting with one party in the absence of the other party: *Peet v Mid-Kent Healthcare Trust* [2001] EWCA Civ 1703, [2002] 3 All ER 688, [2002] 1 WLR 210, [2002] CPLR 27, [2002] Lloyd's Rep Med 33, (2002) 65 BMLR 43, (2001) 98(48) LSG 29, (2001) 145 SJLB 261, (2001) The Times, 19 November, CA. In *Daniels v Walker* (2000) 1 WLR 1382, (2000) 5 CPLR 462, (2000) The Times, 17 May, the Court of Appeal considered the situation where a single joint expert is instructed but one party is dissatisfied with the expert's report. That party can then instruct his or her own expert.

Rule 61

Written questions to experts

(1) A party may put to-

(a) an expert instructed by another party;

(b) a single joint expert appointed under Rule 60, or

(c) an expert instructed by the Tribunal under Rule 63,

written questions about that expert's report.

(2) Written questions under paragraph (1)-

(a) may be put only once;

(b) must be put within [… days] of receipt of the expert's report; and

(c) must be only for the purpose of clarification of the report,

unless in any case-

(i) the Tribunal gives permission, or
(ii) the other party agrees.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where-

(a) a party has put a written question to an expert instructed by another party in accordance with this rule; and

(b) the expert does not answer that question,

the Tribunal may direct that the party who instructed the expert may not rely on the evidence, or a particular part of the evidence, of that expert.

Rule 62

Filing of expert's report

(1) A party who fails to file an expert's report may not use the report at the hearing or call the expert to give evidence orally unless the Tribunal gives permission.

(2) Where a party has filed an expert's report or the Tribunal has obtained an expert's report under Rule 63, any party may use that expert's report as evidence at the hearing.

Purpose of rule: To provide for the putting of written questions to experts. In cases where expert evidence is necessary this draft rule may enable the expert's evidence to be settled without the expert's needing to attend the hearing. If a question is not answered by an expert the tribunal may prohibit a party relying on that expert's evidence, or a particular part of it.

Purpose of rule: To deal with the consequence of failure to file an expert's report and to enable any party to use an expert's report filed by another party or obtained by the tribunal.

Paragraph (2): 'Where a party has filed an expert's report'. See draft rule 67(4) for the tribunal's power to require the personal attendance of an expert whose report has been filed.

Rule 63

Tribunal's power to obtain assistance of experts

(1) Where the Tribunal is of the view that any medical or other technical question arises on which it would be desirable to have the assistance of an expert, it may make arrangements for a person having appropriate qualifications to enquire into and report in writing on the matter, and may require the expert to be present at the hearing, give evidence and answer questions, and must require the expert to be present, give evidence and answer questions if a party so requests.

(2) A copy of the report must be supplied to each party in advance of the hearing or any resumed hearing.

Rule 64

Medical evidence

(1) At any time before the hearing of the appeal/application, the Tribunal may arrange for the appellant/applicant [person concerned] to be medically examined for a report on his or her condition and take any other steps which the medical member of the Tribunal considers necessary to form an opinion of the appellant's/applicant's [person concerned's] [mental] condition.

(2) If the appellant/applicant [person concerned] refuses or fails to submit to a medical examination arranged under paragraph (1) or to cooperate with any other steps under that paragraph the Tribunal may draw such inferences as it thinks fit.

(3) The appellant/applicant [person concerned] must have an opportunity of considering the report or any medical advice, document or other medical evidence and of commenting on it unless the Tribunal is satisfied on medical advice, including the advice of the medical member of the Tribunal, that this would adversely affect the health or welfare of the appellant/applicant [person concerned].

(4) A decision under paragraph (3) to withhold any report, advice, document or other evidence from the appellant/applicant [person concerned] must be recorded in writing.

(5) Where under paragraph (3) the Tribunal decides that the report, advice, document or other evidence should be withheld from the appellant/applicant [that person], the Tribunal must disclose it to a representative of the appellant/applicant [person concerned] or to a person appointed by the Tribunal to represent the interests of the appellant/applicant [person concerned] in that regard. In making that disclosure, the Tribunal may impose such conditions as regards the use or further disclosure of the report, advice, document or other evidence as it thinks fit.

Purpose of rule: To enable the tribunal to obtain any expert evidence necessary to decide the case before it when the parties have not provided it, or are unlikely to, and the necessary expertise does not exist within the Tribunal.

Comprehensive provision for experts and their reports is included in rule 10A of the Complementary Rules of Procedure in Schedule 3 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (S.I. 1171).

Paragraph (1): 'medical ... question'. Specific provision is made for reports on the medical condition of an appellant/ applicant [person concerned] in draft rule 64 but the power conferred by this draft rule could be used to obtain other necessary medical evidence.

Paragraph (1): 'assistance of an expert'. Necessary financial provision will be required to enable the tribunal to pay fees for the employment of experts.

Purpose of rule: To make special provision for medical evidence. It provides, in any case where a medical question arises, for an examination and report by a medical practitioner. This draft rule also makes special provision for the withholding of medical evidence. It departs from the precedents (which simply allow such withheld evidence to be taken into account) in that it requires that if it is withheld it must be disclosed to a representative of the appellant/applicant [person concerned] or a person specifically appointed to safeguard the appellant's/applicant's [person concerned's] interests, whether or not the tribunal decides to take it into account.

A consequential problem may arise when the decision is given if the tribunal considers that the full disclosure of the recorded reasons for the decision would adversely affect the health or interests of the relevant person: see rule 24(2) of the Mental Health Review Tribunal Rules 1983.

Paragraph (1): 'to be medically examined'. The medical practitioner who carries out the examination must not be the medical member of the tribunal. In *R (S) v Mental Health Review Tribunal and Another* [2002] EWHC 2522, (2003) 100(4) LSG 32, (2002) The Times, 6 December, DC the medical member conducted the examination of the patient; this was challenged but the court found he had kept an open mind. Nonetheless the Council considers that this practice poses a risk of bias and might be held to infringe article 6(1) of the ECHR.

Paragraph (2): 'may draw such inferences as it thinks fit'. The tribunal should be careful in drawing inferences adverse to the appellant/applicant: *Beckles v United Kingdom* (2003) 36 EHRR 13, (2003) 13 BHRC 522, (2002) The Times, 15 October, ECtHR.

Paragraph (5): 'disclose it to a representative ... or to a person appointed'. If the tribunal decides to withhold any medical evidence from the appellant/ applicant [person concerned] it must be disclosed to a representative of, or person appointed by the tribunal to represent, the appellant/applicant [person concerned], and the tribunal may impose conditions on its use or further disclosure.

For a condition limiting use and disclosure, see rule 12 of the Mental Health Review Tribunal Rules 1983 (S.I. 942). It is desirable to ensure that there is adequate statutory provision for a penal sanction for a breach of such a condition.

Hearings and Decisions

Hearings — Rules 65 – 74

Decisions — Rules 75 – 79

Appeal to *Appellate Tribunal* — Rules 80 – 81

Costs, Expenses and Interest — Rules 82 – 84

(this page left blank intentionally)

Hearings

Rule 65

Notice of date, time and place

(1) The Registrar must, with due regard to the convenience of the parties, fix the date, time and place of an oral hearing and, where appropriate, set a timetable for the hearing and, not less than [... days] before the date fixed (or a shorter time if agreed by the parties), send to each party a notice that the hearing is to be on that date and at that time and place and the details of any timetable for the hearing.

(2) The Registrar must include with the notice of hearing

(a) information and guidance, in a form approved by [the President of] the Tribunal, as to attendance at the hearing of the parties and witnesses, the bringing of documents, and the right of representation or assistance by another person and the procedure applicable to the hearing, having regard to any applicable rules of evidence and burden and standard of proof;

(b) a statement of the right of the parties to receive reasons in writing for a decision of the Tribunal;

(c) a statement explaining the possible advantages of attendance, consequences of non-attendance, and the right of an appellant and of any respondent who has presented a reply, who is not present and is not represented, to make representations in writing; and

(d) a request to be informed of any special needs, such as for wheelchair access, which any party may have.

(3) When a party receives the notice of the date, time and place of the hearing, he or she must inform the Tribunal whether or not he or she intends to be present or represented at the hearing, and whether he or she intends to call witnesses.

(4) If a party does not intend to be present or represented at the hearing, he or she may send to the to the Registrar additional written representations in support of his or her case.

Purpose of rule: To provide the procedure for notice of an oral hearing in a standard format and manner including information and guidance for the parties and to specify the duties of the parties on receipt of the notice.

An oral hearing includes a preliminary oral hearing under draft rule 29 and any other interim oral hearing; see definitions of 'hearing' and 'preliminary hearing' in draft rule 110.

Paragraph (1): 'not less than [… days] before the date fixed'. If there have been no interim proceedings for the attendance of witnesses or the production of documents, the parties may need a longer period of notice to make arrangements for the attendance of a witness (e.g. to contact the witness and arrange for his or her absence from work) or finding and assembling documents.

Paragraph (2)(a): 'information and guidance'. The content of the note should be as simple as the procedure allows without misleading the parties, should warn the parties of the need to produce witnesses and documents, and should draw attention (so far as the rules allow) to the availability of compulsory powers for securing the attendance of witnesses and the production of documents. The note should cover at least the following matters:- procedure at the hearing, having regard to any applicable rules of evidence and burden and standard of proof, witnesses, expert evidence, decisions and reasons and absence of a party from the hearing.

Paragraph (2)(c): 'advantages of attendance, consequences of non-attendance'. The experience of the Council on Tribunals is that parties who attend in person, or are properly represented, are more likely to succeed at a tribunal hearing.

Paragraph (4): 'additional written representations'. The Registrar is required to circulate written representations as with other statements of argument: see draft rule 12.

Rule 66

Alteration of date, time or place and adjournments

(1) The Tribunal may alter the date, time or place of any oral hearing and the Registrar must give the parties not less than [… days] (or a shorter time if the parties agree) notice of any such alteration:

but any altered hearing date must not (unless the parties agree) be before the date notified under rule 65.

(2) The Tribunal may from time to time adjourn the oral hearing and, if the date, time and place of the adjourned hearing are announced before the adjournment, no further notice shall be required.

(3) When any hearing is adjourned in order that further information or evidence may be obtained, the Tribunal may give directions regarding the disclosure of the information or evidence to, and the filing of comments on the information or evidence by, the parties prior to the resumption of the hearing.

Rule 67

Procedure

(1) At the beginning of any hearing the Chair must explain the manner and order of proceeding, having regard to any applicable burden and standard of proof and rules of evidence.

(2) Subject to this rule, the Tribunal may, in accordance with the overriding objective, conduct the hearing in the manner it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it must so far as appears to it appropriate seek to avoid formality and inflexibility in its proceedings.

(3) The parties shall be entitled to give evidence, to call witnesses, to question any witnesses and to address the Tribunal both on the evidence and generally on the subject matter of the appeal.

(4) The Tribunal may at any stage of the proceedings require the personal attendance of any maker of a witness statement or deponent of an affidavit, or any expert whose report has been filed.

(5) The Tribunal may receive evidence of any fact which seems to the Tribunal to be relevant even if the evidence would be inadmissible in proceedings before a court of law, but, subject to Rule 56, must not refuse to admit any evidence presented in due time which is admissible at law and is relevant and necessary and has not been improperly obtained.

Purpose of rule: To allow the date, time or place of oral hearings to be altered and provide for adjournment of oral hearings.

Paragraph (1): 'any oral hearing'. An oral hearing includes a preliminary hearing under draft rule 29 and any other interim oral hearing; see the definitions of 'hearing' and 'preliminary hearing' in draft rule 110.

Paragraph (2): 'adjourn the oral hearing'. A party prejudiced by the late withdrawal of his or her representative should be granted an adjournment: *Royal Bank of Scotland v Craig* (1997) 94(39) LSG 39, (1997) The Times, 24 October, CA. In *Teinaz v Wandsworth London Borough Council* [2002] EWCA Civ 1040, [2002] ICR 1471, [2002] IRLR 721, [2002] Emp LR 1107, (2002) 99(36) LSG 38, (2002) The Times, 23 August, the Court of Appeal explained when an adjournment had to be granted and how a tribunal should address a request for an adjournment.

Purpose of rule: To establish the procedure for any hearing including the manner and order of proceeding, having regard to any applicable burden and standard of proof and rules of evidence and to require the Tribunal to assist any party unable to make the best of his or her own case.

Paragraph (1): 'any hearing'. A hearing includes a preliminary hearing under draft rule 29 or any other interim hearing; see the definitions of 'hearing' and 'preliminary hearing' in draft rule 110.

Paragraph (1): 'the Chair must explain'. The Council attaches particular importance to unrepresented parties knowing the course the proceedings will follow. Hence the provision in paragraph (1) that the Chair must explain at the start of the hearing the manner and order of proceeding, having regard to any applicable burden and standard of proof (see below) and rules of evidence. The Chair should also introduce the members of the tribunal.

All this information should also have been made available to the parties in guidance furnished by the Registrar. The Council also commends the practice adopted by some tribunals of the clerk to the tribunal giving unrepresented parties such an explanation before the commencement of the hearing.

Paragraph (1): 'burden and standard of proof'. In the absence of any express provision in the enabling Act or the rules as regards the burden or standard of proof, the ordinary rule applies, namely that the onus lies on the party seeking to establish a claim on a balance of probabilities.

The Act may itself alter the burden and standard of proof or may authorise the making of rules for that purpose. Possible rules are:

"In any proceedings before the Tribunal it shall be for the Authority to satisfy the Tribunal that the disputed decision should be upheld." (Cf. rule 22 of the (Information Tribunal (Enforcement Appeals) Rules 2000 (S.I. 189));

"... in no case shall there be any onus on any claimant under this article to prove the fulfilment [of the prescribed conditions] and the benefit of any reasonable doubt shall be given to the claimant". (Cf. Article 4(2) of the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order 1978 (S.I. 1525)).

Even in the absence of an express provision, the standard of proof may vary with the jurisdiction of the tribunal. The Divisional Court has held that where a decision affects a person's livelihood, the standard of proof should not be lower than in criminal proceedings: R v Milk Marketing Board ex parte Austin (1983) The Times, 21 March quoted in 1983 CJQ 283. In *Karanakaran v Secretary of State for the Home Department* (2000) The Times, 16 February the Court of Appeal decided that the standard of proof in assessing historical and existing facts in asylum cases before the Immigration Appeal Tribunal was to a reasonable degree of likelihood rather than the conventional civil standard.

The question of the bearing of article 6 of the ECHR on the applicable burden and standard of proof was considered by the

(6) At any hearing the Tribunal may, if it is satisfied that it is just and reasonable to do so, permit a party to rely on reasons not stated in the party's notice or statement of reasons for appeal or, as the case may be, the party's reply and to adduce any evidence not presented to *the Authority* before or at the time it took the disputed decision.

(7) A Tribunal may require any witness to give evidence on oath or affirmation and for that purpose there may be administered an oath or affirmation in due form.

(8) It shall be the duty of the Tribunal to assist any party who seems to it to be unable to make the best of his or her own case without advocating the course that he or she should take.

Competition Commission Appeal Tribunal in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* (2002) 64 BMLR 165. The tribunal accepted that because of the severity of the penalties for infringement under the Competition Act 1998 the proceedings were criminal for the purposes of article 6 but the applicable burden and standard of proof was a matter for domestic law. The more serious the consequences of a finding of infringement the higher the civil standard of proof both under domestic law and article 6 to the point that, as in this case, there would be no different outcome between the application of the civil standard and the criminal standard of proof (beyond reasonable doubt). In *R v Lambert, Ali and Jordan* [2002] QB 1112, [2001] 1 All ER 1014, [2001] 2 WLR 211, [2001] 1 Cr App R 14, [2001] HRLR 4, [2000] UKHRR 864, (2000) 97(35) LSG 36, (2000) The Times, 5 September, the Court of Appeal held that the placing of the burden of proof of a defence on the accused did not contravene the common law or the ECHR.

However, section 73 of the Mental Health Act 1983 which placed the burden of proof on a restricted patient to show that he or she was no longer suffering from a mental disorder warranting continued detention was incompatible with article 5 of the Convention: *R (H) v Mental Health Review Tribunal, North and East London Region and Another* [2001] EWCA Civ 415, [2002] QB 1, [2001] 3 WLR 512, [2001] HRLR 36, [2001] UKHRR 717, (2001) 4 CCL Rep 119, [2001] Lloyd's Rep Med 302, (2001) 61 BMLR 163, [2001] ACD 78, (2001) 98(21) LSG 40, (2001) 145 SJLB 108, (2001) The Times, 26 February, CA,

Paragraph (2): 'may … conduct the hearing in the manner it considers most suitable'. The power conferred by this provision does not go so far as to allow the tribunal to strike out an appeal/ application at the start of the hearing because on the information then available it appears to have no reasonable prospect of success: *Care First Partnership Ltd v Roffey and Others* [2001] ICR 87, [2001] IRLR 85, [2001] Emp LR 26, (2000) 97(45) LSG 41, (2000) The Times, 22 November, CA.See also *Logan v Commissioners of Customs and Excise* (2003) The Times, 4 September, CA. for guidance on whether a plea of no case to answer should be accepted (tribunal should rarely accept plea of no case to answer} and *Stanley Cole (Wainfleet) Ltd v Sheridan* (2003) The Times, 5 September, CA (a procedural failure by the tribunal should not normally invalidate the proceedings).

If the Chair indicates the tribunal's view of the case at the start or at any time before the hearing is concluded the Chair must not state this view trenchantly but make it clear that the view is only preliminary and the tribunal is open to persuasion: *Jimenez v Southwark London Borough Council* [2003] EWCA Civ 502, (2003) 147 SJLB 476, (2003) The Times, 1 May, CA. On procedural fairness see the general guidance by Mummery LJ in *Bache v Essex County Council* [2000] 2 All ER 847, [2000] ICR 313, [2000] IRLR 251, (2000) 97(5) LSG 33, (2000) 150 NLJ 99, (2000) The Times, 2 February, CA.

A question may arise as to whether a tribunal's function is essentially that of an arbiter in adversarial proceedings or whether it is inquisitorial. Where it is intended that a tribunal shall have investigatory functions of its own, the enabling Act should confer or provide for the appropriate powers. Where, however, the essential role of the tribunal is adjudicative then, even where there are inquisitorial aspects to its functions, there should usually be no need for any special provision beyond ensuring that the tribunal has the power on its own initiative (in case it is needed) to call witnesses or to require particulars or the production of documents. An example of a power to obtain additional information subject to a penal sanction is to be found in paragraph 7 of Schedule 11 to the Rent Act 1977.

Paragraph (2): 'to avoid formality and inflexibility'. Paragraphs (2) and (3) are designed to permit the tribunal (as is the practice in some tribunals) to vary the order of proceedings, for example to allow an official representing a respondent authority to give a statement of the facts rather than to put the burden of "opening" the proceedings on an unrepresented appellant. Such a variation in order does not, however, affect the requirements of paragraph (3) which is designed to provide all parties with a full opportunity to put their case.

A less flexible procedure may be called for, e.g. where the issue is professional misconduct: see rule 10 of the Misuse of Drugs Tribunal (England and Wales) Rules 1974 (S.I. 85).

Paragraph (4): 'require the personal attendance'. As to requiring the attendance of expert witnesses see note to draft rule 48(1).

Paragraph (5): 'must not refuse to admit any evidence'. The power to admit evidence which would be excluded in a court of law may be cut down by excluding certain evidence unless the parties consent; see rules 21 and 28 of the Value Added Tax Tribunals Rules 1986 (S.I. 590). In order to avoid restricting in such a fashion the nature of written evidence which may be admitted, the words "if the parties to the proceedings consent" are omitted from this paragraph, the necessary safeguard being provided by the second element of that paragraph. Other evidence which may be excluded is evidence withheld from the appellant or other person who is the subject of the proceedings: see note on medical evidence to draft rule 64.

The latter half of paragraph (5) is designed to give effect to the decision in *Rosedale Mouldings Ltd v Sibley* [1980] ICR 816, EAT but draft rule 56 enables the

Rule 68

Absence of member of the Tribunal

If, after the commencement of any hearing, a member other than the Chair is absent, the appeal/application may, with the consent of the [appellant] [parties], be heard by the other two members and, in that event, the Tribunal shall be deemed to be properly constituted.

[Alternative]

Any case may, with the consent of the [appellant] [parties] present, be proceeded with in the absence of any one member other than the Chair.

[Further Alternative]

A ... Tribunal must not decide any question unless all members are present and, if any member is absent, the matter must be adjourned or referred to another ... Tribunal.

tribunal to exclude expert evidence where appropriate.

Paragraph (6): 'permit a party to rely on reasons not stated ... to adduce any evidence not presented'. The first leg of this paragraph confers a discretion on the tribunal to be used with care. 'It should not be necessary, and indeed in view of the type of person frequently appearing before tribunals it would in many cases be positively undesirable, to require the parties to adhere rigidly at the hearing to the case previously set out, provided always that the interests of another party are not prejudiced by such flexibility' (Franks Report, para. 72). The interests of the other party include knowledge in good time of the main points of the opposing case.

The second leg is intended to avoid the consequences of the general rule that, on an appeal from a decision, events subsequent to the decision are to be ignored: see *R v IAT ex parte Weerasuriya* [1983] 1 All ER 195: *R v IAT ex parte Kotecha* [19831] WLR 487; [1983] 2 All ER 289.

Paragraph (7): 'evidence on oath'. An express provision to this effect has become customary notwithstanding that, so far as England and Wales are concerned, there is a general power to administer oaths in section 16 of the Evidence Act 1851. Provision for oaths and affirmations in Welsh is made by section 23 of the Welsh Language Act 1993 and the Welsh Courts (Oaths and Interpreters) Rules 1943 (SR&O 1943/683). In proceedings before tribunals in Wales witnesses should be advised that they may take the oath or affirm in English or in Welsh.

Paragraph (8): 'duty ... to assist any party ...'. This derives from rule 11(3) of the Pensions Appeal Tribunals (England and Wales) Rules 1980 (S.I.1120). In *Chilton and Anor v Saga Holidays plc* [1986] All ER 841 CA (small claims arbitration in county court), Sir J Donaldson, MR commented as follows:

'The problem which arises where you have one represented party and one unrepresented party is very well known to all judges and in particular to judges who deal with small claims in the county court. It becomes the duty of the judge so far as he can, without entering the arena to a point where he is no longer able to act judicially, to make good any deficiencies in the advantages available to the unrepresented party. We have all done it; we all know that it can be done and that it can be done effectively. That is the proper course to be adopted. The informality which is stressed by the rule and the requirement that the arbitrator may adopt any method of procedure which he considers to be convenient (it would have been better perhaps if it had said just and convenient) covers the situation where, as so often happens, a litigant in person is quite incapable of cross-examining but is perfectly capable in the time available for cross-examination of putting his own case. The judge or the registrar then picks up the unrepresented party's complaints and puts them to the other side.'

Purpose of rule: To specify the circumstances in which the tribunal may proceed to hear an appeal/application in the absence of a member of the tribunal.

'any hearing'. A hearing includes a preliminary hearing under draft rule 29 or any other interim hearing; see the definitions of 'hearing' and 'preliminary hearing' in draft rule 110.

'If ... a member other than the Chair is absent'. It is desirable in most cases to provide for possible absences of members of the tribunal. However, particular consideration should be given to such a provision where the tribunal is intended to be representative of different disciplines and interests if the absence of any such discipline or interest would be of particular significance. In such a case, the further alternative above may be justified.

'with the consent of the [appellant] [parties] present'. The consent of a party not present at the hearing is not required in this alternative.

Rule 69

Hearings in public or in private

(1) All hearings by the Tribunal must be in public except-

(a) where the Tribunal is satisfied that a private hearing is required in the interests of morals, public order or national security in a democratic society, the interests of juveniles or the protection of the private lives of the parties, or to the extent strictly necessary in the opinion of the Tribunal in special circumstances where publicity would prejudice the interests of justice; or

(b) where a party has requested in writing that the hearing be in private if the Tribunal is satisfied that there is no important public interest consideration that calls for the public to be present.

(2) The Tribunal may decide under paragraph (1) that part only of the hearing shall be in private or that information about the proceedings before the Tribunal, the names and identifying characteristics of persons concerned in the proceedings or specified evidence given in the proceedings shall not be made public or disclosed to a party or parties.

(3) Without prejudice to any other rule of law, the Tribunal may prohibit photography at any hearing if satisfied that such a prohibition is desirable in order to ensure a fair hearing.

Purpose of rule: This draft rule is concerned with the question whether hearings are to be held in public or in private.

The powers conferred by this draft rule may be exercised by directions under draft rule 37.

Paragraph (1): 'All hearings'. A hearing includes a preliminary hearing under draft rule 29 or any other interim hearing; see the definitions of 'hearing' and 'preliminary hearing' in draft rule 110. In *Quadrelli v Italy* (2002) 34 EHRR 8 the Human Rights Court observed that Article 6 was equally applicable to preliminary hearings; see also *Storer v British Gas plc* [2000] 1 RLR 495, [2000] ICR 603, (2000) The Times 1 March, where the Court of Appeal decided that interim proceedings before tribunals must also be held in public.

Paragraph (1): 'All hearings ... must be in public'. The right to a public hearing is one of the component parts of Article 6(1) of the ECHR. Public hearings also contribute to the maintenance of confidence in tribunals and enable the public to be informed about issues that affect them. However, as discussed below in the note on paragraph (1)(b), there may also be circumstances in which a party may want to waive his right to a public hearing.

The right to a public hearing implies a right to an oral hearing under article 6(1), where such a hearing is necessary to obtain clarification of essential points; *Fredin v Sweden* (No 2) (1994) A273 paras 21-27; *Fischer v Austria* (1995) 20 EHRR 349, para 44.

Article 6(1) starts with a presumption in favour of a public hearing in all cases, but this is subject to the exceptions specified in paragraph (1)(a) of this draft rule which derive from the second sentence of the Article. The presumption is a strong one: in *Diennet v France* (1995) 21 EHRR 554 the European Court of Human Rights held that derogations from the right to a public hearing should be "strictly required by the circumstances".

For the strictness with which the exceptions are applied see *Gautrin v France* (1999) 28 EHRR 196, paras 42-43: it was a violation of Article 6 not to hold professional medical disciplinary proceedings in public.

In *Campbell and Fell v UK* (1985) 7 EHRR 165 the European Court of Human Rights had regard to the principle of proportionality in deciding whether one of the exceptions could be invoked. The application of the principle of proportionality involves balancing the individual's right to a fair hearing against the specified interests set out in Article 6(1). Tribunals should only restrict the right to a public hearing if it is "necessary" to do so in a democratic society. However, while "necessary" is a stronger term than "useful", "reasonable" or "desirable" it is not synonymous with "indispensable".

Accordingly, (subject to waiver which is considered below) a tribunal may only hold a hearing, or part of a hearing, in private where it is satisfied that it is necessary for one of the categories of exception specified in this draft rule. If none of these categories of exception is held to apply a hearing in private will be a violation of Article 6(1); *Gautrin v France* (1999) 28 EHRR 196, para 42-43 (there was a violation of Article 6(1) where professional medical disciplinary proceedings were not held in public).

In *B v United Kingdom* (2002) 34 EHRR 19 it was held that proceedings under section 8(1) of the Children Act 1989 could be required to be held in private and that the public pronouncement of the judgment was not required provided particulars of the judgment were published or open to public inspection. The tribunal should ensure that any part of the hearing which does not need to be held in private is held in public.

Considerations of cost or administrative convenience are not under Article 6(1) of the ECHR likely to be acceptable reasons for not making adequate provision to accommodate the public at hearings; in *Storer v British Gas plc* (2000) above, proceedings of an employment tribunal were held to be invalid because owing to pressure of business they were conducted in the Regional Chairman's office behind a door marked 'Private' and with a coded lock: this was not in public. In *R (Noorkoiv) v Secretary of State* [2002] EWCA Civ 770, [2002] 4 All ER 515, [2002] ! WLR 3284, [2002] HRLR 36, [2002] ACD 66, (2002) 99(27) LSG 34, (2002) 146 SJLB 145, (2002) The Times, 31 May, the Court of Appeal decided that lack of resources provided by other arms of government would not excuse a breach of article 5(4). But in *Helmers v Sweden* (1991) 15 EHRR 285, para 36 the European Court said that the hearing of an appeal might be held in private to reduce the court's workload if there had been a hearing in public at first instance.

The exceptions permitted by Article 6(1) apply to the hearing, not to the pronouncement of the judgment, for which see notes to draft rule 77.

Paragraph (1)(a): 'private hearing is required'. Even when the subject matter of the hearing justifies a private hearing, parties must not be deprived of the procedural rights they would normally have if the hearing were in public, for example the right to call witnesses.

Paragraph (1)(b): 'requested in writing that the hearing be in private'. This provision enables a party to request that the hearing be in private. Having consulted the other parties the Tribunal may decide to hold the hearing in private if there is no "important public interest consideration" that calls for the public to be present. Any such waiver must be unequivocal and there must be no 'important public interest considera-

Rule 70

Representation

At any hearing and at any pre-hearing review a party may conduct his or her own case (with assistance from any person if he or she wishes) or may be represented by any person whether or not legally qualified:

but if in any particular case the Tribunal is satisfied that there is a good reason, it may refuse to permit a particular person to assist or represent a party at the hearing.

[*Additional provision where the respondent is an administrative authority.*] At any hearing and at any pre-hearing review *the Authority* may be represented by counsel or a solicitor or by an official of the ... Department.

tion' that calls for the public to be present: *Hakansson and Sturesson v Sweden* (1990) 13 EHRR 1, para 66, applied in *Pauger v Austria* (1997) 25 EHRR 105, para 58. Hence the waiver is required to be in writing. Where there is power for the tribunal to hold a hearing or part of a hearing in private, that is a matter for the tribunal and not (in the absence of provision in the enabling Act or rules) a matter for agreement by the parties: *Milne and Lyall v Waldren* [1980] ICR 138, EAT. The Council is of the view that tribunals should not regard a party as having waived his or her right to a public hearing unless that party has made an informed and independent choice which has been expressed in writing.

As to 'in writing' see note on 'written notice' to draft rule 5A(1).

Paragraph (2): 'part only of the hearing shall be in private'. The extent of the privacy which is necessary will vary. For example, although a tribunal considers that a hearing needs to be held in private in the interests of juveniles, it may only be necessary to hold part of the hearing in private or that reports of the proceedings are suitably edited rather than to prohibit any reporting of the proceedings.

Paragraph (3): 'may prohibit photography'. This provision may not be necessary in the case of some tribunals (if section 41 of the Criminal Justice Act 1925 applies).

Purpose of rule: To allow a party to conduct his or her own case or be assisted by any person or represented by any person whether or not legally qualified.

For the need to ensure that there is statutory authority for this draft rule, see *Bache v Essex County Council* [2002] 2 All ER 847, [2000] ICR 313, [2000] IRLR 251, (2000) 97(5) LSG 33, (2000) 150 NLJ 99, (2000) The Times, 2 February, CA.

'At any hearing'. A hearing includes a preliminary hearing under draft rule 29 or any other interim hearing; see the definitions of 'hearing' and 'preliminary hearing' in draft rule 110.

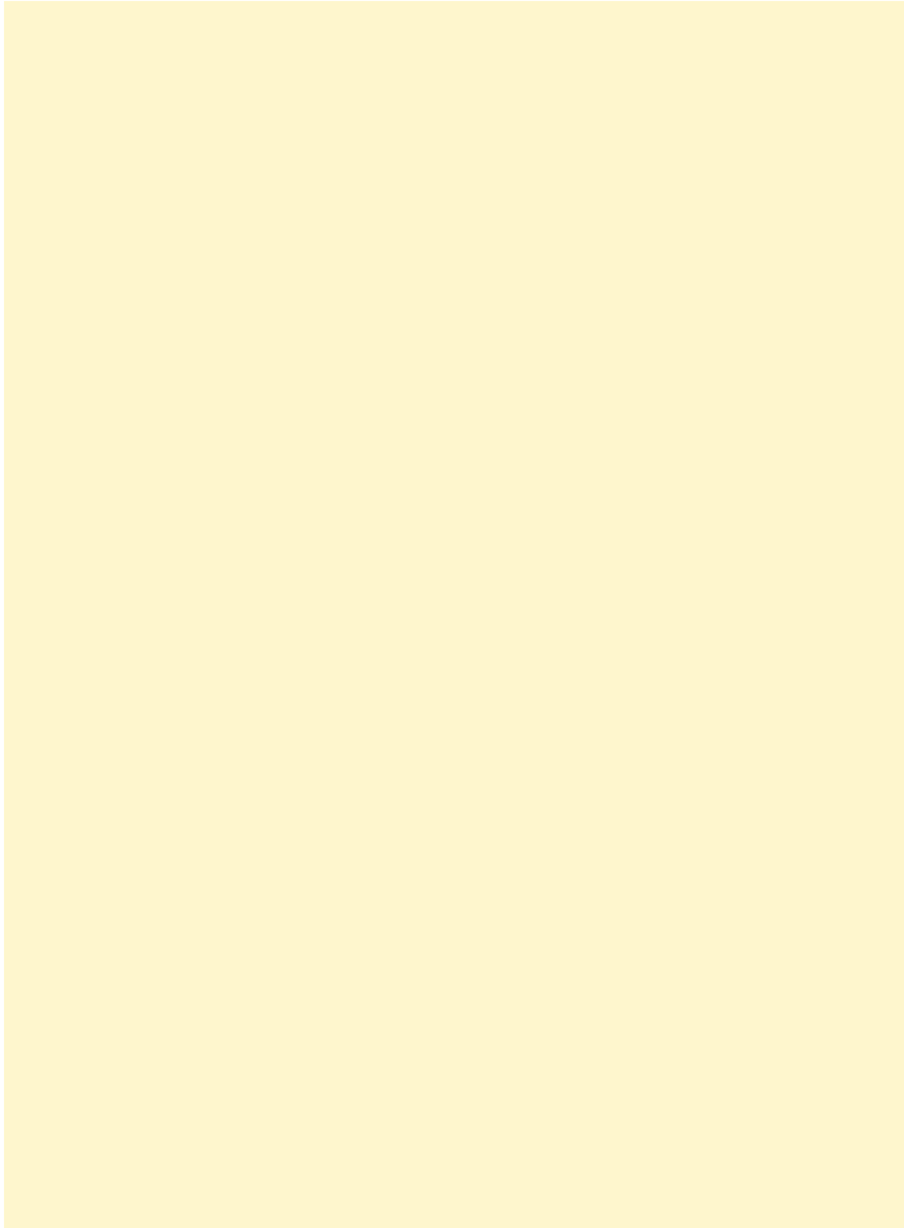
'with assistance from any person'. The reference in parenthesis to 'assistance from any person' is intended to refer to the practice where a party conducts his or her own case but is assisted by another who may advise the party on the manner of conducting it and suggest particular issues to be explained or questions to be put.

'may be represented by any person'. Funding by the Legal Services Commission is available subject to a means test for legal advice and assistance (but not advocacy) in proceedings before all tribunals. Advocacy in proceedings before tribunals (except for the Employment Appeal Tribunal, any Mental Health Review Tribunal, the Immigration Appeal Tribunal and Immigration Adjudicators, the Proscribed Organisations Appeal Commission and the Special Immigration Appeals Commission) is a service that is generally excluded from the scope of the Community Legal Service, but the Council on Tribunals welcomes any steps that can be taken to make advocacy legal services more readily available before tribunals under Schedule 2 to the Access to Justice Act 1999. For the Financial Services and Markets Tribunal sections 134 to 136 of the Financial Services and Markets Act 2000 make provision for a special scheme of legal assistance and the funding of that scheme by regulations made by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs]; see the Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001 (S.I.3632) and the Financial Services and Markets Tribunal (Legal Assistance Scheme - Costs) Regulations 2001 (S.I.3633).

[The Lord Chancellor] [The Secretary of State for Constitutional Affairs] has power under section 6(8) of the Access to Justice Act 1999 to direct the Legal Services Commission to fund excluded services in circumstances specified in the direction, and to extend funding in specified circumstances or, if the Commission requests [the Lord Chancellor] [the Secretary of State for Constitutional Affairs] to do so, in an individual case.

In *Airey v Ireland* (1979) 2 EHRR 305 the Republic of Ireland was held to have infringed Article 6 by not allowing legal aid for representation to an indigent woman to apply for a judicial separation because she had no reasonable prospect of presenting her own case given the complexity of the points of law and the factual and expert evidence. However in *A v United Kingdom* (Application No. 35373/97) (2002) The Times, 28 December, the Human Rights Court said that it was no violation of article 6 if legal aid was not available for defamation proceedings because since 1998 the applicant could proceed under a conditional fee arrangement.

In *P, C and S v United Kingdom* (2002) 35 EHRR 1075, (2002) 3 FCR 1, (2002) 2 FLR 631, (2002) The Times, 16 August, there was a breach of article 6(1) where the applicants did not have the assistance of a lawyer during the hearing concerning child custody, the judge having refused an application for an adjournment to



allow an application for legal aid.

If a representative were incompetent this might be a denial of a fair hearing: *R v Nangle* [2001] Crim LR 506, (2000) 97(45) LSG 40, (2000) 144 SJLB 281, (2001) The Times, 9 January, CA.

'whether or not legally qualified'. The Council opposes restricting the right of representation of appellants/applicants (or lay respondents) to counsel or solicitors and has continually recognised the value, and sought to promote the availability, of lay representation and assistance to appellants/applicants and respondents before tribunals. The Council recognises that there may, in certain cases, be good reasons for excluding lay representation, e.g. by members of staff of a tribunal with the same jurisdiction, by persons who have been convicted of offences particularly relevant to a tribunal's jurisdiction (e.g. agents convicted of an offence under the Patents Acts from acting in proceedings under the Design Right (Proceedings before the Comptroller) Rules 1989 (S.I. 1130)), or by a person peculiarly liable to be subject to proceedings before a tribunal of comparable jurisdiction (see rule 10(1) of the Mental Health Review Tribunal Rules 1983 (S.I. 942)). Restrictions on lay representation are also recommended in paragraph 354 of the Civil Justice Review (Cm 394) in the case of 'corrupt or unruly' representatives.

'refuse to permit a particular person to assist or represent a party'. Tribunals should have regard to Article 6(1) of the ECHR before making an order in accordance with the proviso.

The right to a fair hearing includes the right of a party to have a reasonable opportunity to present his or her case under conditions which do not put the party under a substantial disadvantage vis-a-vis the party's opponent. In *R v Lea and Shatwell* (2002) 2 CR App R(S) 334, (2002) 2 CRAppR 342, (2002) The Times, 28 February, the Court of Appeal noted that the opportunity to be present was as much a principle of the common law as of human rights law but it did not entitle a party to be represented by leading counsel just because the other party had leading counsel if he was represented by a competent barrister or solicitor. But if the opponent is, for example, a government department, it will probably be unfair to refuse to allow the appellant to be represented; the applicable principle is that of equality of arms.

Article 6(1) also includes a right of access to a tribunal. In some cases an appellant will require legal assistance in order to have effective access to the tribunal. In such a case, a decision excluding the appellant's representative would be in breach of the ECHR. Unlike criminal proceedings to which article 6(3)(c) applied, in civil proceedings entitlement to legal assistance 'will depend on the specific circumstances of the case and, in particular, whether the individual concerned would be able to present his case properly and satisfactorily without the assistance of a lawyer': *McVicar v United Kingdom* (2002) 35 EHRR 22, applying *Airey v Ireland.*

For an exceptional provision where the tribunal itself may appoint a representative, see rule 10(3) of the Mental Health Review Tribunal Rules 1983 (S.I. 942).

'Additional provision'. This is for appeals/applications and other proceedings against an authority.

Rule 71

Persons entitled to be present

(1) The following persons shall be entitled to attend a hearing and the Tribunal's deliberations on the hearing, whether or not it is in private:

(a) the President or any Chair or member of the Tribunal not forming part of the Tribunal for the purpose of the hearing;

(b) a member of the Council on Tribunals or of the Scottish Committee of that Council;

(c) the staff of the Tribunal; and

(d) any other person permitted by the Tribunal with the consent of the parties.

None of the persons specified above who are present at the Tribunal's deliberations may take any part in the deliberations.

(2) Where the Tribunal sits in private it may admit persons to the hearing on such terms and conditions as it considers appropriate.

Rule 72

Exclusion of persons disrupting proceedings

(1) Without prejudice to any other powers it may have, the Tribunal may exclude from any hearing, or part of it, any person (including a party or the party's representative) whose conduct has disrupted the hearing or whose conduct has otherwise interfered with the administration of justice.

(2) In deciding whether to exercise the power conferred by paragraph (1) the Tribunal must, apart from other considerations, have regard to the-

(a) interests of the parties;

(b) in the case of the exclusion of a party, the extent to which the proceedings involve an assessment of the party's conduct, personal character or manner of life; and

(c) in the case of the exclusion of a party or a party's representative, whether the party will be adequately represented.

(3) If the tribunal decides to exclude a party it must allow the party's representative sufficient opportunity to consult the party.

Purpose of rule: To specify the persons entitled to attend a hearing and the tribunal's deliberations and provide for the admission of persons to a hearing in private.

Paragraph (1)(d): 'any other person'. This is intended for bona fide researchers who would take no part in the hearing or deliberations.

Purpose of rule: To enable the tribunal to exclude any person including a party to the proceedings or the party's representative, from the whole or part of a hearing. In exercising this power against a party to the proceedings or the party's representative, tribunals should have regard to the right of a party to be personally present, and to be represented in certain circumstances, which constitutes part of the right to a fair hearing guaranteed by Article 6(1) of the ECHR: see notes to draft rule 69.

Paragraph (1): 'any hearing'. A hearing includes a preliminary hearing under draft rule 29 or any other interim hearing; see the definitions of 'hearing' or 'preliminary hearing' in draft rule 110.

Paragraph (1): 'may exclude from any hearing'. Save in exceptional circumstances, parties to tribunal proceedings must be allowed to be personally present. The European Court has said that the right to be present at the hearing flows from the right to a fair trial: *Ekbatani v Sweden* (1988) 13 EHRR 504, para 66, applied in *Pauger v Austria* (1997) 25 EHRR 105, para 58 but in civil cases the right to be present does not apply in all cases; it does not apply where 'the personal character and manner of life' of the party is directly relevant to the decision or the case involves an assessment of the appellant's/applicant's conduct: *X v Sweden N. 434/58 and Muyldermans v Belgium* (1991) 15 EHRR 204, para 64.

Many tribunal hearings will involve an assessment of a party's conduct and it is the Council's view that, save in exceptional circumstances, parties to tribunal proceedings should be allowed to be personally present. A party may, however, waive this right. The waiver must be 'established in an unequivocal manner and ... [be] attended by minimum safeguards commensurate to its importance': *Poitrimol v France* (1993) 18 ECHR 130, para. 31 but a party who does not attend a hearing, having been given effective notice, may be taken to have impliedly waived the right to be present: *C v Italy* (1988) No. 10889/84, 56 DR 40. A hearing in the absence of a party may be permitted when diligent attempts to give the party notice have proved unsuccessful: *Colozza and Rabinet v Italy* (1985) 7 EHRR 516 paras. 28 and 29. It may, in the interests of the administration of justice, be possible to proceed in the absence of a party in cases of illness: *Ensslin, Baader and Raspe v Federal Republic of Germany* [1979] 14 DR 64, para. 22.

The circumstances in which it may be fair to exclude a party to proceedings on the grounds that the party's conduct has disrupted proceedings or has otherwise interfered with the administration of justice will be rare. A tribunal should normally warn a party to the proceedings or the party's representative that the party will be excluded from the hearing if the party persists in disrupting the

Rule 73

Failure of parties to attend

(1) If a party fails to be present or represented at a hearing, the Tribunal may, if it is satisfied that the party was duly notified of the hearing and that there is no good reason for such absence-

(a) hear and decide the appeal/application or question in the party's absence; or

(b) adjourn the hearing;

and may give directions as it thinks fit (including orders for the payment of costs and expenses).

(2) Before deciding to dispose of any appeal/application or question in the absence of a party, the Tribunal must consider any representations in writing submitted by that party in response to the notice of hearing and, for the purpose of this rule, the appeal and any reply shall be treated as representations in writing.

(3) Where an appellant/applicant has failed to be present or represented at a hearing of which he or she was duly notified, and the Tribunal has disposed of the appeal/application, no fresh appeal/application may be made by the appellant/applicant to a Tribunal [against the same disputed decision] [for relief arising out of the same facts] without the prior permission of the Tribunal:

but nothing in this paragraph shall preclude the appellant/applicant making an application for a review of the Tribunal's decision under rule 78.

proceedings before deciding to exclude him; in respect of difficulties caused by unruly representatives see *Bache v Essex County Council* [2000] 2 All ER 847, [2000] ICR 313, [2000] IRLR 251, (2000) 97(5) LSG 33, (2000) 150 NLJ 99, (2000) The Times, 2 February, CA concerning lay representation before the Employment Tribunal. See also *Bennett v Southwark London Borough Council* [2002] EWCA Civ 223, [2002] ICR 881, [2002] IRLR 407, (2002) 146 SJLB 59, (2002) The Times, 28 February, CA, where an employment tribunal discontinued the hearing when a lay representative impugned the tribunal's impartiality and another tribunal subsequently struck the case out; the Court of Appeal said the tribunal should first have warned the unruly representative.

Paragraph (1): 'may exclude ... any person'. The position in relation to persons who are not parties to the proceedings is different. A tribunal which is considering excluding a witness must consider the party's right to a fair hearing, including the principle of 'equality of arms'. Thus, for example, the tribunal might decide to exclude the disruptive witness from the hearing, save to allow him or her to give evidence. In addition, in order to maintain fairness between the parties, the tribunal could exclude all other witnesses (apart from the parties) until it is their turn to give evidence. See *Dombo Beheer B v Netherlands* (1994) 18 EHRR 213.

Purpose of rule: To confer power to give effect to a warning set out in the notice of hearing (see notes to draft rule 65(2)(c)) of the possible consequences of a failure to be present or represented at a hearing.

Paragraph (1): 'at a hearing'. A hearing includes a preliminary hearing under draft rule 29 or any other interim hearing; see the definitions of 'hearing' and 'preliminary hearing' in draft rule 110.

As to the drawing of inferences from a party's failure to attend see *Secretary of State for Health v C* [2003] EWCA Civ 10, (2003) The Times, 30 January, CA.

Paragraph (1): 'no good reason'. See *Brazil v Brazil* [2002] EWCA Civ 1135, [2003] CP Rep 7, [2002] NPC 113, (2002) The Times, 18 October, CA.

Paragraph (2): 'in the absence of a party'. A tribunal should have regard to a party's right to be present and, in particular, the need to be satisfied that proper and effective notification of the hearing was given, before exercising its discretion to proceed with the hearing in the absence of a party. See notes to draft rule 72.

Paragraph (2): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Paragraph (3): 'application for a review'. The Council considers that where a tribunal makes a decision under a rule of this kind, it should include with the copy of the decision sent to the absent party a notification of his or her right to a review.

Rule 74

Inability to attend through physical or mental sickness or impairment.

If the Chair is satisfied that any party is unable, through physical or mental sickness or impairment, to attend the Tribunal and that the party's inability is likely to continue for a long time, the Chair may make such arrangements as may appear best suited, in all the circumstances of the case, for disposing fairly of the appeal/application, and in particular may arrange:

(a) for the party to be visited at some convenient place by one or more members of the Tribunal, or by other persons appointed for the purpose by the Chair, for the purpose of recording the party's evidence and any statement he or she may wish to make or for the party to be medically examined;

(b) for taking, whether before the Tribunal or otherwise, the evidence of medical or other witnesses on behalf of the party and the other party or parties, and in particular the evidence of the near relative, guardian or other representative of the party;

(c) for enabling the party's representative and the other party or parties to comment, whether at a hearing of the Tribunal or in writing, on the evidence so taken and to make a statement in writing or to address the Tribunal;

(d) for the hearing of the appeal/application to take place at the party's home, hospital or elsewhere convenient to the party; or

(e) for the appeal/application to be decided in the absence of the party:

but any arrangement made under paragraph (a), (b) or (d) must make provision for the other party or parties and their representatives, if they so wish, to be present while the evidence of the party or his or her witnesses is taken and to ask questions of the party or the witnesses.

Purpose of rule: To cater for parties unable to attend through mental or physical sickness or impairment particularly, although not exclusively, in cases concerning pensions or disability claims.

'in writing'. See note on 'written notice' to draft rule 5A(1).

Decisions

Rule 75

Power to decide appeal/application without hearing

(1) If-

(a) no reply is delivered to the Registrar within the time appointed by rule 14A/14B or any extension of time allowed by the Tribunal;

(b) the respondent states in writing that he or she does not resist the appeal/application;

(c) the respondent withdraws his or her opposition to the appeal/application; or

(d) all parties agree in writing

the Tribunal may decide the appeal/application on the basis of the notice of appeal/application and any reply without an oral hearing if-

(e) there is no other opposition to the appeal/application;

(f) having regard to the material before the Tribunal and the nature of the issues raised by the appeal/application, to do so will not prejudice the administration of justice; and

(g) there is no important public interest consideration that requires a hearing in public.

(2) Before deciding an appeal/application in the absence of a party, the Tribunal must consider any representations in writing submitted by that party in response to the notice of hearing.

Purpose of rule: To enable the tribunal to simplify proceedings and save time and expense by dispensing with an oral hearing in the case of uncontested appeals/applications or if the parties agree in writing. Although the decision would be subject to review in accordance with draft rule 78, it would be essential to give warning of the effect of this rule at an early stage – e.g. in the notes to the approved form for reply.

Paragraph (1): 'decide the appeal/ application ... without an oral hearing'. A rule on these lines would also enable a tribunal to dispense with an oral hearing when the terms of the decision are agreed in advance by the parties.

There are precedents for dispensing with a hearing in other circumstances. The most extreme case, which the Council on Tribunals does not favour, is where the tribunal has power to decide a question without an oral hearing unless a hearing is requested by the appellant or either party: see rule 45 of the Immigration and Asylum Appeals (Procedure) Rules 2003 (S.I. 652). More defensible are those cases where the same issue has been previously decided by a tribunal on materially similar facts, e.g.:

'If the Tribunal considers that the issues raised on an appeal have been decided by [the Tribunal] [a Tribunal having the same jurisdiction] in previous proceedings to which the appellant was a party on the basis of facts which did not materially differ from those to which the appeal relates and the Tribunal has given to the parties an opportunity to make representations to the effect that the appeal ought not to be decided without a hearing, the Tribunal may decide the appeal without an oral hearing'.

See rule 13(1)(b) of the Information Tribunal (Enforcement Appeals) Rules 2000 (S.I. 189).

In applying this rule, tribunals should have regard to the right to a public hearing guaranteed by Article 6(1) of the ECHR; see notes to draft rule 69.

As to 'delivered' see draft rule 106.

Paragraph (1)(c): 'withdraws ... opposition'. Where opposition is withdrawn the tribunal must seek the appellant's/applicant's consent before deciding an appeal/application without a hearing except where the appeal/application is to be allowed. The withdrawal of opposition does not dispense with the need of the appellant/applicant to satisfy the tribunal, at least where there is an element of public interest, that he or she is entitled to the relief sought: *Re: West Anstey Common* [1985] Ch 329; [1985] 1 All ER 618, CA.

In considering the consequences of withdrawal (or consent to an appeal/application without a hearing), it is necessary to have regard to the interests of third parties: *Ellesmere Port etc v Shell UK Ltd* [1980] 1 WLR 205; [1980] 1 All ER 383, CA.

Paragraph (2): 'in the absence of a party'. A tribunal should have regard to a party's right to be present and, in particular, the need to be satisfied that proper and effective notification of the hearing was given, before exercising the discretion conferred by this paragraph to proceed with the hearing in the absence of a party. The party is entitled to have his or her representations considered by the tribunal: *Dularaus v France* (2001) 33 EHRR 45.

Rule 76

Decision of the Tribunal

(1) A decision of the Tribunal may be taken by a majority [and the decision must record whether it was unanimous or taken by a majority]:

but where the Tribunal is constituted by [two] [an even number of] members, the Chair shall have a second or casting vote.

(2) A decision of the Tribunal-

(a) may be given orally at the end of the hearing or reserved;

(b) whether there has been a hearing or not, must be recorded as soon as possible in a document which [save in the case of a decision by consent] must also contain a statement of the reasons [in [full] [summary] form] for the decision; and

(c) must be signed by the Chair and dated.

(3) The Registrar must send a copy of the document recording the decision to each party.

[Alternative]

(3) Subject to paragraph (4), every document referred to in this rule must, as soon as possible, be entered in the register and the Registrar must send a copy of the entry to each party.

(4) Where any document refers to any evidence that has been heard in private, [the material relating to that evidence must be omitted from the register] [only a summary of the document, omitting the material relating to that evidence, must be entered in the register] as the Tribunal may direct, but copies of the complete document must be sent to the parties together with a copy of the entry.

(5) Every copy of [a document] [an entry] sent to the parties under this rule must be accompanied by a notification of any provision of the Act relating to appeals from the Tribunal and of the time within which and place at which an appeal or any application for permission to appeal must be made.

(6) Except where a decision is announced at the end of the hearing, it shall be treated as having been made on the date on which a copy of the document recording it is sent to the appellant/applicant.

(7) Any sum payable in pursuance of a decision shall, if a County Court so orders, be recoverable by execution issued from a County Court. In the application of this provision to Scotland for the references to the County Court there shall be substituted references to the Sheriff Court.

Purpose of rule: To establish the procedure for the taking, notification and recording of decisions of the tribunal.

Paragraph(1): 'may be taken by a majority'. The Council on Tribunals is of the view that a tribunal should as a rule consist of an uneven number of members, but if in the course of the hearing a member, other than the chair, should be unable to continue to sit (e.g. on account of illness), the tribunal should, if the parties agree, continue to sit without its full complement – see draft rule 68. The Council considers that only exceptional circumstances would justify a tribunal which normally consists of three members commencing a hearing with only two members and then only if the parties agreed.

There is authority that as a general principle where matters of a public nature are entrusted to a tribunal consisting of a number of members, the decision of the majority is the decision of the tribunal: *Picea Holdings Ltd v London Rent Assessment Panel* [1971] 2 QB 216, [1971] 2 All ER 805 distinguishing *Brain v Minister of Pensions* [1947] KB 625, [1947] 1 All ER 892 and *Minister of Pensions v Horsey* [1949] 2 KB 526, [1949] 2 All ER 314. An express power to make a majority decision would, however, be prudent.

Paragraph (2): 'A decision of the Tribunal'. Parties to proceedings have a right to a decision within a reasonable time: Article 6(1) of the Convention: *Stagmuller v Austria* (1969) 1 EHRR 155, para 5; *H v United Kingdom* (1987) 10 EHRR 95, para 86 (a period of two years and seven months taken to decide on the applicant's access to her child in public care was unreasonable); *Mennitto v Italy* (2002) 34 EHRR 48 (just under four years and five months too long for claim for payment of disability allowance). What is a reasonable time will differ from case to case depending on the complexity of the factual and legal issues and the nature and importance of the interests which are at stake.

The Council takes the view that where decisions are given orally on the spot they should always be confirmed in writing. The Council has been concerned over delays in furnishing written decisions. Although the decision will have been given when it was pronounced, the Council is of the view that the right to a hearing within a reasonable time also applies to the issue of the written decision. The reason for this is that it will often be necessary for an appellant to see the written decision before deciding whether to appeal or before lodging a notice of appeal.

The decisions of a tribunal may also require to be perfected by other implementing orders and in appropriate cases (e.g. where the order is to be given effect to by an administrative authority) it may suffice for the power to give such orders (when authorised by the enabling Act) to be conferred on the tribunal.

The following is an example of a rule in this sense from the Valuation and Community Charge Tribunals Regulations 1989 (S.I. 439):

"29. (1) On or after deciding an appeal the tribunal may in consequence of the decision by order require

(a) the alteration of any community charges register (prospectively or retrospectively);

(b) the alteration of any estimate made under regulations made under Schedule 2 to the Act;

(c) the revocation of any designation of an individual as a responsible individual in pursuance of regulations under Schedule 2 to the Act;

(d) the quashing of a penalty imposed under Schedule 3 to the Act;

(e) the revocation of a designation under section 5.

(2) An order may require any matter ancillary to its subject matter to be attended to."

Paragraph (2): 'must also contain a statement of the reasons'. The Council takes the view that the general rule should be that written reasons should be provided for all decisions, whether given orally or in writing. As to the detail required see *R (Asha Foundation) v Millennium Commission* (2003) 100(11) LSG 31, (2003) The Times, 24 January, CA. In *English v Emery Reinbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409, [2002] CPLR 520, [2002] UKHRR 957, (2002) 99(22) LSG 34, (2002) 152 NLJ 758, (2002) 146 SJLB 123, (2002) The Times, 10 May, the Court of Appeal explained the scope of the duty to give reasons at common law and under article 6:-

'Where a judicial decision affected the substantive rights of the parties, Strasbourg law required that the decision be reasoned. In contrast some judicial decisions did not require that the parties should be informed of the reasoning underlying them: for example, interlocutory case management decisions. Furthermore ... there were circumstances where the reasoning would be implicit from the decision itself so that it did not need to be set out by the judge.

At common law, justice would not be done if it was not apparent to the parties why one party had won and one had lost. The adequacy of reasons depended on the nature of the case

Not every factor which weighed with the judge had to be identified and explained, but the issues the resolution

Rule 77

Publication

(1) The Tribunal must make arrangements for the public pronouncement of its decisions, whether by giving its decisions orally at a public hearing or by publishing its decisions in writing.

(2) The Tribunal may exclude from public pronouncement or publishing particulars of any decisions in the interests of morals, public order or national security in a democratic society, the interests of juveniles or the protection of the private lives of the parties or to the extent strictly necessary in the opinion of the Tribunal in special circumstances where publicity would prejudice the interests of justice. For this purpose the Tribunal may make any necessary amendments to the text of a decision.

of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained.

In cases of conflicts of expert evidence the judge should explain why he had accepted the evidence of one expert and rejected that of another.'

Paragraph (3): 'must send a copy ... to each party'. This paragraph provides for a copy of the decision to be sent to each party or, in the alternative, for it to be entered in the tribunal register and a copy of the entry to be sent to each party. If the decision has not been pronounced publicly, tribunals should adopt the latter of these alternatives. As long as the tribunal register is available to the public, Article 6(1) of the ECHR will be satisfied: see draft rule 77 and the notes to it.

Paragraph (7): 'any sum payable ... shall ... be recoverable'. It is highly improbable that in the general run of cases provision would be made to enable a tribunal itself to enforce any monetary award (including interest and costs). The usual practice is for such awards to be enforceable by execution issued from the County Court. This requires authority in the enabling Act-see section 15 of the Employment Tribunals Act 1996; but a repetition of the statutory provision in the procedural rules would be a helpful indication to those to whom the Act is not easily available or understandable.

Purpose of rule: To ensure that a tribunal's decision is pronounced publicly. It serves a similar purpose to draft rule 98.

Paragraph (1): 'public pronouncement of its decisions'. Any decision which can be categorised as a determination of "civil rights and obligations" must be "pronounced publicly" in order to comply with Article 6(1) of the ECHR. But the European Court has interpreted this to mean tribunals must either give their decisions orally during a public hearing or, if they have not done so, make arrangements for the publication of their decisions: in *Werner v Austria* (1997) 26 EHRR 310, paras 65-69 there was a violation of Article 6(1) because although the judgment was served on the parties it was not made available to the public at large.

There are no exceptions to the right to have a decision pronounced publicly. In particular the exceptions in Article 6(1) do not apply: see *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, para 90. However, the European Court of Human Rights has not adopted a literal interpretation of the requirement that judgment must be pronounced publicly; see *Preto v Italy* (1983) 6 EHRR 182, para 26. In *Axen v Federal Republic of Germany* (1983) 6 EHRR 195, paras 29-32 the Court held:

'However, many member States of the Council of Europe have a long standing tradition of recourse to other means, besides reading out aloud, for making public the decision of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public. The authors of the Convention cannot have overlooked that fact, even if concern to take it into account is not so easily identifiable in their working documents as in the travaux preparatoires of the 1966 Covenant … The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity to be given to the "judgement" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1.'

In *B v United Kingdom* (2002) 34 EHRR 19 the Court said that a judgment following proceedings in chambers under section 8(1) of the Children Act 1989 did not have to be pronounced publicly given that a report of it would be available.

Paragraph (1): 'publishing its decisions in writing'. Even where a tribunal has complied with Article 6(1) by giving its decision orally, consideration should be given to the publication of reports:

"Publication of reports of leading cases dealt with by final appellate tribunals would be of help, not only in satisfying the public that decisions were reasonably consistent but also as a guide to appellants and their advisers. Accordingly we recommend that all final appellate tribunals should publish selected decisions and circulate them to any lower tribunals. The selection of such cases should be the responsibility of the appellate tribunals" (Franks Report, para. 102).

As to 'in writing' see note on 'written notice' to draft rule 5A(1).

Paragraph (2): 'may make any necessary amendments'. This may be necessary for any of the reasons set out in this paragraph. For example, in a case concerning a child, it may be necessary to remove references to the child's name or provide for the anonymity of witnesses or parties to the proceedings. This provision is in line with the second sentence of article 6(1) of the ECHR; see also draft rules 69 and 98.

Rule 78

Review

(1) If, on the application of a party or on its own initiative, a Tribunal is satisfied that

(a) its decision was wrong because of an error on the part of the Tribunal or its staff; or

(b) a party, who was entitled to be heard at a hearing but failed to be present or represented, had a good reason for failing to be present or represented; or

(c) new evidence, to which the decision relates, has become available since the conclusion of the proceedings and its existence could not reasonably have been known or foreseen before then; or

(d) otherwise the interests of justice require,

the Tribunal may review and set aside or vary the relevant decision.

(2) An application for the purposes of paragraph (1) of this rule-

(a) may be made immediately following the decision at the hearing;

(b) if not so made, must be delivered to the Registrar at any time not later than [… days] after the date on which the decision was received by the applicant; and

(c) must be in writing stating the reasons in full.

When the Tribunal proposes to review its decision on its own initiative, it must send notice of that proposal to the parties within the same period.

(3) The parties must have an opportunity to be heard on any application or proposal for review under this rule and the review must be decided by the Tribunal which decided the case or, where it is not practicable for it to be heard by that Tribunal, by a Tribunal appointed by the [President or a Regional Chair]. If, having reviewed the decision, the decision is set aside, the Tribunal must substitute the decision it thinks fit or order a rehearing before either the same or a differently constituted Tribunal.

(4) On the setting aside or variation of the Tribunal's decision the Registrar must immediately make such correction as may be necessary in the register and must send a copy of the entry so corrected to each of the parties [and to *the Authority*].

(5) Rule 76 shall apply to the Tribunal's decision on the review.

Purpose of rule: To enable the Tribunal to review and set aside or vary its decision on account of an error, a party being unable to be present or represented at the hearing or new evidence becoming available or if otherwise the interests of justice require, thus avoiding the need for an appeal.

Paragraph (1): 'may review ... the relevant decision'. In industrial tribunal cases, it has been held by the Employment Appeal Tribunal that the review procedure is available for the correction of major or minor errors and that where it is clear that the original decision could not stand and the right order was obvious, the tribunal had the power to substitute the correct order without ordering a rehearing. See *Trimble v Supertravel Ltd* [1982] ICR 440, EAT, and *Stonehill Furniture Ltd v Phillippo* [1983] ICR 556, EAT.

This draft rule gives effect to such decisions, but omits the provision whereby a Chair of an employment tribunal may refuse an application if in the Chair's opinion, it has no reasonable prospect of success.

The scope of the power to review was considered by the Court of Appeal in *Regina (C) v Lewisham London Borough Council* (2003) The Times, 12 August.

The power to review a decision in the interests of justice may be thought to be too wide-reaching, particularly where there is an appellate tribunal. Drafting Departments and tribunals will need to give particular consideration to whether it should be included.

There is some authority that a tribunal may reopen a case in appropriate circumstances even in the absence of an express power: *R v Kensington and Chelsea Rent Tribunal ex parte Macfarlane* [1974] WLR 1486; [1974] All ER 390.

Paragraph (2): 'must be delivered to the Registrar'. See *R (on the application of Katie Lester) v London Rent Assessment Committee* [2003] 1 WLR 1449 in note to draft rule 7(1).

As to 'delivered' see draft rule 106.

Paragraph (2): 'it must send notice'. Any formula relating to 'service' should be avoided, because it could attract section 7 of the Interpretation Act and defeat an object of the paragraph: *T and D Transport (Portsmouth) Ltd v Limburn* [1987] ICR 696, EAT.

Paragraph (5): 'Rule 76 shall apply'. The tribunal must give its reasons for its decision on the review: *Commissioners of Customs and Excise v Alizitrans Sl* (2003) The Times, 10 February, DC.

Rule 79

Further consideration

Where the Tribunal has made a decision which requires *the Authority* whose decision was the subject of the appeal/application to reconsider, or involves it in reconsidering, the subject of the disputed decision and, following such reconsideration and any further decision by *the Authority*, a fresh appeal/application is made to the Tribunal by a party to the original appeal/application, the Tribunal may give directions to the parties to the fresh appeal/application with a view to avoiding any duplication of evidence or documents produced or heard on the original appeal/application.

Purpose of rule: To avoid repetition of evidence or documents on any fresh appeal/application where the tribunal has decided that the Authority from whose decision the original appeal/application was brought should reconsider the matter. The powers of a tribunal may be limited to deciding whether the disputed decision was right or wrong, thus excluding the power to substitute its own decision on the merits. In such a case the matter may be returned to the relevant authority which may make a new decision which is also the subject of an appeal/application.

'may give directions'. A tribunal giving directions under this draft rule would have to consider whether further argument on certain issues might be precluded by the general principles governing finality in litigation.

Rule 80

Application for permission to appeal

(1) An application to the Tribunal for permission to appeal to *the appellate tribunal* from a decision of the Tribunal may be made

(a) orally at the hearing after the decision is announced by the Tribunal; or

(b) in writing to the Registrar at the office of the Tribunal not later than [… days] after the decision is received by the party making the application.

(2) Where an application for permission to appeal is made in writing, it must be signed by the applicant or the applicant's representative and must

(a) state the name and address of the applicant and of any representative of the applicant;

(b) identify the decision and the Tribunal to which the application relates; and

(c) state the reasons on which the applicant intends to rely in the appeal.

(3) An application to the Tribunal for permission to appeal may be decided by the Chair of the Tribunal [or any other chair of a …. Tribunal] in the absence of the parties, unless the Chair considers that special circumstances render a hearing desirable.

(4) The decision of the Tribunal on an application for permission to appeal must be recorded in writing together with the reasons for any refusal and the Registrar must notify the applicant [and, unless the decision is given immediately following an oral application, each of the other parties] of the decision and reasons.

(5) A notification under this rule must, as appropriate, include a statement of any relevant statutory provision, rule or guidance relating to any further application for permission to appeal and of the time and place for making the further application or for giving notice of appeal to *the appellate tribunal.*

Rule 81

Tribunal's power to suspend its decision pending appeal to *the appellate tribunal*

When an appeal to the *appellate tribunal* is lodged, the Tribunal may, on application or on its own initiative, suspend its decision which is the subject of the appeal until a decision on the appeal has been given.

Purpose of rule: To enable the tribunal to be sure that the applicant has a reason to appeal and to provide for an application for permission to appeal to be decided by the Chair of the tribunal and to specify the procedure for the decision.

Paragraph (1): 'permission to appeal'. The hearing of an appeal by the appellate tribunal may be subject to the condition that the appellant first obtains permission from either the first instance tribunal or the appellate tribunal. Such a provision may be included specifically in the enabling Act rather than in a rule-making power.

Paragraph (1): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Paragraph (2): 'the applicant'. For the purposes of the rules dealing with applications for permission to appeal the 'appellant' is referred to as the applicant.

Paragraph (5): 'for giving notice of appeal'. The refusal of an application for permission to appeal is not, in the absence of an express provision to the contrary, a decision from which an appeal can be made to a higher appellate authority: *Bland v Chief Supplementary Benefits Officer* [1983] 1 WLR 262;[1983] 1 All ER 537 CA; applied in *White v Chief Adjudication Officer* [1986] 2 All ER 905 CA.

Purpose of rule: To enable the tribunal to suspend its decision pending an appeal to the appellate tribunal.

Rule 82

Orders for costs and expenses

(1) The Tribunal must not normally make an order awarding costs and expenses, but may, subject to paragraph (2), make such an order-

(a) against a party (including a party who has withdrawn his or her appeal/application or reply) if it is of the opinion that that party has acted vexatiously or that the party's conduct in making, pursuing or resisting an appeal/application was unreasonable; or

(b) against t*he Authority,* where it considers that the decision against which the appeal/application is made was unreasonable; or

(c) as respects any costs or expenses incurred, or any allowances paid, as a result of a postponement or adjournment of a hearing at the request of a party;

(d) as respects any costs or expenses incurred in connection with a medical examination or any other steps under Rule 64(1); or

(e) as respects any costs or expenses incurred as a consequence of the late amendment of reasons for an appeal/application or reply or the late introduction of evidence.

(2) No order may be made under paragraph (1) against a party without first giving that party an opportunity of making representations against the making of the order.

(3) An order under paragraph (1) may require the party against whom it is made to pay the other party or parties either a specified sum in respect of the costs and expenses incurred by that other party in connection with the proceedings or the whole or part of those costs as assessed (if not otherwise agreed).

(4) In making an order awarding costs under this rule the Tribunal must take into account the resources of the party against whom the order is to be made.

(5) An award of costs under this rule may not exceed £...

(6) Any costs required by an order under this rule to be assessed may be assessed in the County Court.

(7) In the application of paragraph (6) to Scotland, for the references to 'assessed' and 'the County Court' there shall be substituted references to 'taxed' and 'the Sheriff Court'.

Purpose of rule: To specify the circumstances in which the tribunal may make an order awarding costs and expenses.

Paragraph (1): 'may ... make such an order'. Provision for the award of costs needs to be authorised specifically in the enabling Act. Specific authority for the enforcement of an order for costs also needs to be included in the enabling Act, see e.g. sections 13(1) and 15(1) of the Employment Tribunals Act 1996.

The Council takes the view that costs should normally only be awarded where a party has acted vexatiously or unreasonably or in favour of an appellant where there is a successful appeal against an administrative decision affecting the appellant's livelihood. Other considerations may apply where a tribunal is provided solely as an expert alternative to a court (e.g. the Copyright Tribunal or the Lands Tribunal).

For recovery of costs awarded, see note to paragraph (7) of draft rule 76.

Paragraph (4): 'must take into account the resources of the party'. This provision reflects section 13(1A) of the Employment Tribunals Act 1996, inserted by section 22 of the Employment Act 2002 in direct response to the decision of the Court of Appeal in *Kovacs v Queen Mary and Westfield College and Another* [2002] IRLR 414, (2002) The Times, 12 April, that the means of a party could not be taken into account.

Rule 83

Payment of expenses, allowances and fees

(1) The Tribunal must make the prescribed payments in respect of expenses, allowances and fees.

(2) In this rule, "prescribed" in relation to any amount means the amount payable as decided by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs] from time to time with the consent of the Treasury.

Rule 84

Interest

When a decision awards a party a monetary sum (other than in respect of costs and expenses), the award shall, unless set aside, and subject to any variation on appeal or review, carry interest at the rate of .... per cent from the date of the [decision] [*the event giving rise to the application to the Tribunal*]. The interest may be recovered in the same manner as the award.

Purpose of rule: To provide for the payment of expenses, allowances and fees. For the expenses and fees of interpreters at hearings see draft rule 35.

Paragraph (1): 'payments in respect of expenses, allowances and fees'. Provision for the payment by the tribunal of expenses, allowances and fees needs specific authority in the enabling Act. Where provision is made in the Act, it would be appropriate to include a rule that payment may be made for expenses, allowances and fees, but it would be advisable for the rates of payment to be fixed – as in the draft rule – in a manner which enables changes to be made quickly.

Paragraph (2): 'as decided by [the Lord Chancellor] [the Secretary of State for Constitutional Affairs]'. The provision for expenses, allowances and fees in the enabling Act may confer this power on a Minister of the Crown other than [the Lord Chancellor] [the Secretary of State for Constitutional Affairs], on Scottish Ministers or the Lord President of the Court of Session in the case of certain tribunals in Scotland or on the National Assembly for Wales in the case of certain tribunals in Wales.

Purpose of rule: To provide for the award and recovery of interest on monetary sums (other than in respect of costs and expenses).

'the award shall ... carry interest'. It would be necessary to make express provision in the enabling Act for the payment of interest on an award and for its recovery (e.g. by execution by the county court: see the Employment Tribunals Act 1996, sections 14 and 15). For the Council on Tribunals' view on a proposal for including provision for an award of interest, see the Annual Report 1987/1988, para. 4.20.

For recovery, see note to paragraph (7) of draft rule 76.

Appeals from Tribunals

Rules relating to Appellate Tribunals	Rules 85 – 91
Appeals to the Courts	Rules 92 – 93

1. The draft rules that follow provide for different or more concise procedures before appellate tribunals than those envisaged elsewhere in the Draft Rules for first instance tribunals. A number of the rules for first instance tribunals may also be required, appropriately modified, for proceedings before appellate tribunals. As well as the rules set out below therefore, it would be necessary to consider whether any rules of the kind in draft rules 94 to 109 and the definitions in draft rule 110 are necessary to supplement the statutory provisions establishing the appellate tribunal and the need for inclusion in the appellate tribunal's rules of rules relating to:

    - distribution of documents (draft rule 12);
    - hearing bundles (draft rule 30);
    - representation (draft rules 33, 34 and 70);
    - grouping of proceedings (draft rules 41 to 47);
    - conduct of the hearing, including evidence (draft rules 65 to 74);
    - decisions (draft rule 76);
    - review of decisions (draft rule 78);
    - costs, expenses and interest (draft rules 82 to 84).

2. Where parties are, or are likely to be, unrepresented in cases before appellate tribunals, it is important that the tribunals should take similar steps to those recommended in draft rule 67 and the note to that rule, and to indicate at the start of the proceedings the procedure which will be followed by the tribunal.

Rule 85

Application to *appellate tribunal* for permission to appeal

(1) An application for permission to appeal against a decision of *a first instance tribunal* may be made to *the appellate tribunal* only where the applicant has been refused that permission by *the first instance tribunal.*

(2) The application must be made in writing and must be delivered to *the office of the appellate tribunal* not later than [… days] after the date on which notice in writing of the refusal of permission to appeal by *the first instance tribunal* was received by the applicant. An approved form for making an application may be obtained from the offices of [*the relevant department*] or the office of the appellate tribunal. If a copy of the approved form is for any reason not used, the application may be in any form acceptable to the appellate tribunal.

(3) The application must contain

(a) the name and address of the applicant;

(b) the reasons on which the applicant intends to rely in the appeal;

(c) the name and address [,and the profession,] of the representative of the applicant, if any, and whether *the appellate tribunal* should send notices concerning the appeal to the representative instead of the applicant; and

(d) the date on which the applicant received notice of the decision of *the first instance tribunal* refusing permission to appeal,

and must be accompanied by

(e) a copy of the decision of *the first instance tribunal* against which permission to appeal is being sought; and

(f) if not part of that decision, a copy of the decision of *the first instance tribunal* refusing permission to appeal.

(4) *The appellate tribunal* may extend the time limit for making an application for permission to appeal, whether or not the time has already expired if-

(a) it would not be reasonable to expect the appellant to comply or, as the case may be, to have complied with the time limit; or

Purpose of rule: To provide for an application for permission to appeal to the appellate tribunal where permission has been refused by the original tribunal and, to save the time and expense, to treat the application as the appeal.

Paragraph (1): 'only where the applicant has been refused that permission'. Care needs to be taken that the enabling power extends to rules 'regulating the exercise of the right of appeal' as the paragraph goes beyond regulating 'procedure'.

Paragraph (2): 'in writing'. See note on 'written notice' to 5A(1).

Paragraph (2): 'must be delivered'. As to 'delivered' see draft rule 106.

Paragraph (2): 'not later than [… days]'. See paragraph (4) and note for the appellate tribunal's power to extend this time limit.

Paragraph (2): 'An approved form … may be obtained'. 'Approved' forms are as important for appellate tribunals as they are for first instance tribunals: see notes to draft rule 5A.

Paragraph (4): 'may extend the time limit'. The tribunal should extend the time limit where the applicant has acted reasonably; in particular a litigant in person who posts a notice of appeal cannot be expected to check that the notice has been received: *Peters v Sat Katar Co Ltd* (2003) The Times, 1 July CA.

(b) not to extend the time limit would result in substantial injustice.

(5) If it is likely that the application will be delivered to the office of *the appellate tribunal* after the expiry of the time limit, the applicant may include with the application a statement of reasons for the delay and *the appellate tribunal* must treat this as an application for an extension of the time limit.

(6) Before deciding whether or not to extend the time limit *the appellate tribunal* must give persons whose interests might be affected by the extension an opportunity to be heard and, in addition to their representations and those of the applicant, must consider-

(a) whether the receipt of the disputed decision was sufficient to notify the applicant properly and effectively of the disputed decision; and

(b) whether the existence of the right of appeal to *the appellate tribunal,* the requirement for permission to appeal and the time limit for applying were notified to the appellant, in the disputed decision or otherwise.

(7) *The appellate tribunal* must decide the application for permission to appeal in the absence of the parties, unless it considers that special circumstances render a hearing desirable. The decision, together with reasons for refusing an application, must be recorded in writing and *the office of the appellate tribunal* must notify the applicant and each of the other parties to the proceedings before *the first instance tribunal* of the decision and reasons.

(8) Where *the appellate tribunal* grants permission to appeal under this rule, the written application shall be taken to constitute the notice of appeal and to have been received by *the appellate tribunal* on the date on which permission to appeal is granted.

(9) If on consideration of an application for permission to appeal *the appellate tribunal* is minded to grant permission, it may, with the consent of all the parties, treat the application as the appeal.

Paragraph (7): 'the reasons for refusing an application'. The refusal of an application for permission to appeal is not, in the absence of an express provision to the contrary, a decision from which an appeal can be brought: see note to draft rule 80(5). However, even if permission is refused, the giving of reasons is desirable to enable the applicant to understand the decision.

Rule 86

Notice of appeal and extension of time limit

(1) Subject to paragraph (2) of this rule, an appeal shall be made by a written notice to *the office of the appellate tribunal* containing-

(a) the name and address of the appellant;

(b) the date on which permission to appeal was granted;

(c) the reasons on which the appellant intends to rely; and

(d) the name and address of the representative, if any, of the appellant and whether *the appellate tribunal* should send notices concerning the appeal to the representative instead of the appellant,

and must be accompanied by-

(e) a copy of the decision against which the appeal is made; and

(f) a copy of the decision by which permission to appeal has been granted.

An approved form for making an appeal may be obtained from the offices of [*the relevant department*] or the offices of the appellate tribunal. If a copy of the approved form is for any reason not used, the notice of appeal may be in any form acceptable to the appellate tribunal.

(2) No notice of appeal is needed when an application for permission to appeal has been made to, and granted by, *the appellate tribunal.*

(3) A notice of appeal shall not be valid unless it is delivered to *the office of the appellate tribunal* not later than [… days] after the date on which-

(a) the disputed decision was received by the appellant; or

(b) where permission to appeal is required, the appellant received notice from *the first instance tribunal* in writing of the granting of permission to appeal,

except in the circumstances specified in paragraph (4) below.

Purpose of rule: To provide for the form and content of the notice of appeal and specify when a notice is required, to set a time limit for notice of appeal and provide for extension of that time limit in exceptional circumstances.

Paragraph (1): 'written notice'. See note on 'written notice' to draft rule 5A(1).

Paragraph (1): 'approved form ... may be obtained'. Approved forms are as important for appellate tribunals as they are for first instance tribunals; see draft rule 5A.

Paragraph (3): 'unless it is delivered'. As to 'delivered' and 'deliver' see draft rule 106.

(4) The tribunal may extend the time in which the appellant may deliver a notice of appeal to *the office of the appellate tribunal,* whether or not the time has already expired, if-

(a) it would not be reasonable to expect the appellant to comply or, as the case may be, to have complied with the time limit; or

(b) not to extend the time limit would result in substantial injustice.

(5) If it is likely that a notice of appeal will be delivered to *the office of the appellate tribunal* after the expiry of the time limit the appellant may include with the notice of appeal a statement of reasons for the delay and *the appellate tribunal* must treat this as an application for an extension of the time limit.

(6) Before deciding whether or not to extend the time limit *the appellate tribunal* must give persons whose interests might be affected by the extension an opportunity to be heard and, in addition to their representations and those of the appellant, must consider-

(a) whether the receipt of the disputed decision by the appellant was sufficient to notify the appellant properly and effectively of the disputed decision; and

(b) whether the existence of the right of appeal to *the appellate tribunal* and the time limit were notified to the appellant, in the disputed decision or otherwise.

Paragraph (4): 'if ... it would not be reasonable'. This provision goes to jurisdiction. See notes on paragraph (3)(a) of draft rule 32. There may be circumstances in which a strict time limit, not admitting of exceptions, could operate contrary to the right of access to the tribunal contained in Article 6(1) of the ECHR. For this reason, it is advisable for appellate tribunals to include in their procedural rules a discretion to extend the time for the delivery of a notice of appeal.

Tribunals must apply the principle of proportionality in exercising this discretion: *Golder v United Kingdom* (1975) 1 EHRR 524, para 38; *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 57; *Stubbings v United Kingdom* (1996) 23 EHRR 213, para 48 and *National and Provincial Building Society v United Kingdom* (1997) 25 EHRR 127, para 105. The application of the time limit must not impair the very essence of the right: *Perez de Rada Cavanilles v Spain* (2000) 29 EHRR 109, para 43-50.

Rule 87

Written representations

(1) *The office of the appellate tribunal* must send a copy of the notice of appeal (and of every application for permission to appeal which is deemed to be a notice of appeal) to every party other than the appellant and must invite that party to inform *the appellate tribunal* whether or not he or she wishes to submit written representations on the appeal. Any written representations must be delivered to *the appellate tribunal* not later than [… days] after the date on which the notice of appeal was received by the party and must include

(a) the party's name and address and address for service;

(b) the name and address of the representative, if any, of the party and whether the appellate tribunal should send notices concerning the appeal to the representative instead of the party;

(c) a statement as to whether or not the party opposes the appeal; and

(d) if the party opposes the appeal, the reasons on which the party proposes to rely.

(2) Any party may, not later than [… days] after receiving such written representations from *the appellate tribunal,* deliver to *the appellate tribunal* written representations in reply.

(3) A copy of any written representations delivered by a party in accordance with this rule must be sent by *the office of the appellate tribunal* to the other parties.

Rule 88

Withdrawal of applications for permission to appeal and appeals

(1) An application for permission to appeal may be withdrawn by the applicant at any time before it is decided, by giving written notice of withdrawal to *the appellate tribunal.*

(2) An appeal to *the appellate tribunal* may be withdrawn by the appellant at any time before the decision is made, with the permission of the appellate tribunal.

(3) *The appellate tribunal* may, on application by the party concerned, give permission to reinstate any application or appeal which has been withdrawn in accordance with paragraphs (1) and (2) of this rule and, if it gives permission, may give such directions as to the future conduct of the proceedings as it thinks fit.

Purpose of rule: To provide for notice to the other party or parties and for written representations on the subject matter of the appeal.

Paragraph (1): 'written representations'. See note on 'written notice' to draft rule 5A(1).

Paragraph (1): 'must be delivered'. As to 'delivered' and 'deliver' see draft rule 106.

Purpose of rule: To allow applications for permission to appeal and appeals to be withdrawn and provide for the reinstatement of any application or appeal that has been withdrawn.

Paragraph (1): 'written notice'. See note on 'written notice' to draft rule 5A(1).

Paragraph (2): 'with the permission of the appellate tribunal'. Unlike an appeal or application to a first instance tribunal, which may usually be withdrawn on the application of the appellant/applicant, it is considered that there may be reasons, whether affecting the appellant or the respondent, why an appeal to an appellate tribunal should continue. The appellate tribunal should therefore consider whether, in the circumstances, the appeal may be withdrawn. See Social Security Commissioners Decision R(1) 3/64.

Rule 89

Directions

(1) At any stage of the proceedings, *the appellate tribunal* may, either on its own initiative or on the application of a party, give such directions as it considers necessary or desirable to further the overriding objective in the conduct of the appeal, and may in particular-

(a) direct any party to provide any further particulars or to produce any documents which may reasonably be required;

(b) where a party has access to information which is not reasonably available to the other party, direct the party who has access to the information to prepare and file a document recording the information; or

(c) summon any person to attend as a witness, at the time and place specified in the summons, at an oral hearing of an application for permission to appeal or of any appeal and to answer any questions or produce any documents in that person's custody or under that person's control which relate to any matter in question in the proceedings:

but no person is required to attend in obedience to the summons unless he or she has been given at least [... days] notice of the hearing or, if less than [... days], has informed *the appellate tribunal* that he or she accepts the notice given.

(2) *The appellate tribunal* may on the application of a person summoned as a witness under this rule set the summons aside.

(3) When the document required under paragraph (1)(b) has been filed *the appellate tribunal* must send a copy of it to the other party.

(4) An application under paragraph (1) must be made to *the appellate tribunal* in writing or by any other means the tribunal may accept and must set out the direction which the applicant is seeking to have made and the reasons for the application.

(5) Unless *the appellate tribunal* decides otherwise, an application made under paragraph (1) must be copied by *the office of the appellate tribunal* to the other parties; and if *the appellate tribunal* considers it desirable for deciding the application, the tribunal must give the parties an opportunity of appearing before it.

Purpose of rule: To enable the appellate tribunal to manage the appeal proceedings by giving directions, in particular as to evidence.

Paragraph (1)(a): 'to provide any further particulars' etc. As to the exercise of this power see note on paragraph (1) of draft rule 27A.

Paragraph (1)(c): 'summon any person to attend as a witness'. If provision is made for witnesses, it will be desirable to incorporate in the relevant rule the appropriate provisions of draft rules 37(5) and 48 to 55.

Rule 90

Hearings

(1) The *appellate tribunal* may decide an appeal without an oral hearing if-

(a) all the parties so agree in writing and the tribunal has considered any representations made by them;

(b) having regard to the material before it and the nature of the issues arising on the appeal, to do so would not prejudice the administration of justice; and

(c) there is no important public interest consideration that requires a hearing in public.

(2) Any oral hearing before *the appellate tribunal* for deciding or finally disposing of an appeal, must be in public except-

(a) where *the appellate tribunal* is satisfied that the hearing, or part of it, must be in private in the interests of morals, public order or national security in a democratic society, the interests of juveniles or the protection of the private lives of the parties, or to the extent necessary in the opinion of the Tribunal in special circumstances where publicity would prejudice the interests of justice; or

(b) where a party to the appeal has requested in writing that the hearing be in private if *the appellate tribunal* is satisfied that there is no important public interest consideration that calls for the public to be present.

(3) The *appellate tribunal* may decide under paragraph (2) that part only of the hearing shall be in private or that information about the proceedings before the tribunal, the names and identifying characteristics of persons concerned in the proceedings or specified evidence given in the proceedings shall not be made public or disclosed to a party or parties.

(4) If any party fails to be present or represented at the hearing, *the appellate tribunal* may, if it was satisfied that the party was duly notified of the hearing and that there is no sufficient reason for the party's absence-

(a) hear and decide the appeal in the party's absence; or

(b) adjourn the hearing, and

may give such directions as it thinks fit (including orders for the payment of costs and expenses).

Purpose of rule: To enable the appellate tribunal in specified circumstances to decide an appeal without an oral hearing or to hold a hearing in private and provide for the deciding of an appeal in the absence of the party.

An appellate tribunal can only proceed on the basis of the case presented to it; it cannot be expected to conjure up possible contentions which a party has not presented: *Commissioners of Customs and Excise v A & D Goddard (a firm)* [2001] STC 725, [2001] BTC 5206, [2001] BVC 295, [2001] STI 597, (2001) 98(20) LSG 44, (2001) The Times, 27 March, DC.

Paragraph (2): 'must be in public'. The exceptional circumstances in which an oral hearing may be held in private may be expanded or varied as appropriate. See notes to draft rule 69.

Paragraph (4): 'fails to be present or represented'. For the circumstances in which an appellate tribunal may proceed in the absence of a party, see notes to draft rule 73.

Rule 91

Evidence

(1) In any proceedings on an appeal, *the appellate tribunal* must receive as evidence the summary or record taken or kept of any evidence received in the *first instance tribunal.*

(2) If any party to the appeal wishes to present to *the appellate tribunal* evidence further to that received in accordance with paragraph (1), that party must give notice in writing to that effect to *the appellate tribunal* indicating the nature of the evidence; and the notice must

(a) in the case of the appellant, be delivered with the notice of appeal or as soon as practicable after the appeal is made; or

(b) in the case of any other party, be delivered as soon as practicable after that other party has been notified of the appeal.

(3) In any proceedings on an appeal *the appellate tribunal* may

(a) in its discretion, receive or decline to receive such further evidence of which no notice has been given; or

(b) if it considers it necessary to decide the appeal properly, request and receive further evidence; and such further evidence must be given either orally or in writing, as *the appellate tribunal* may direct.

Purpose of rule: To provide for the evidence to be received by the appellate tribunal.

Paragraph (2): 'evidence further to that to be received in accordance with paragraph (1)'. The enabling Act should make provision for the appellate tribunal to receive fresh evidence and should state whether or not its jurisdiction is to rehear the proceedings before the first instance tribunal; see Annex A2 (h) and (i) and B3 (d).

For fresh evidence, see *International Aviation Services (UK) Ltd v Jones* [1979] ICR 371, EAT.

Rule 92

Application for permission to appeal to the courts

(1) This rule concerns applications to the [*appellate*] tribunal for permission to appeal, on a question of law, to the Court of Appeal or, in Scotland, to the Court of Session from decisions of the [*appellate*] tribunal on appeals/applications.

(2) An application to the [*appellate*] tribunal for permission to appeal may be made-

(a) orally at the hearing at which the decision on the appeal/application is made by the [*appellate*] tribunal; or

(b) in writing to the Registrar within [… days] of the receipt of the decision by the applicant.

(3) Where an application for permission to appeal is made in writing, it must be signed by the applicant or any representative of the applicant and must-

(a) state the name and address of the applicant or of any representative of the applicant;

(b) identify the decision of the [*appellate*] tribunal to which the application relates; and

(c) state the point of law on which the applicant seeks a ruling of the Court of Appeal or, as the case may be, the Court of Session.

(4) An application for permission to appeal must be decided by a legally qualified member of the [*appellate*] tribunal without a hearing.

(5) Where the [*appellate*] tribunal intends to grant permission to appeal, it may, having given every party an opportunity to make representations, instead, set aside the decision and direct that the appeal/application to the [*appellate*] tribunal be reheard.

(6) A decision of the [*appellate*] tribunal on an application for permission to appeal must be recorded in writing together with the reasons for any refusal and the Registrar must notify the applicant of the decision and reasons.

(7) A notification of a decision under this rule must include a statement of any relevant statutory provision, rule or guidance relating to any further application for permission to appeal.

Purpose of rule: To provide the procedure for applications for permission to appeal to the Court of Appeal or, in Scotland, the Court of Session on questions of law. This draft rule will require provision in the enabling Act and the square brackets in '[appellate] tribunal' are because in the case of some jurisdictions the enabling Act may provide for appeals to the courts from first instance tribunals.

Paragraph (1): ' in Scotland, to the Court of Session'. See *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 1560, [2002] 1 WLR 3282, [2002] INLR 557, (2002) 99(45) LSG 35, (2002) The Times, 25 October, CA and *R (Majead) v Immigration Appeal Tribunal* [2003] EWCA Civ 615, (2003) 147 SJLB 539, (2003) The Times, 24 April, CA.

Paragraph (2)(b): 'in writing'. See note on 'written notice' to draft rule 5A(1).

Rule 93

[*Appellate*] tribunal's power to suspend its decision pending appeal to the courts

When an appeal to the [Court of Appeal] [Court of Session] is lodged, the [*appellate*] tribunal may, on application or on its own initiative, suspend its decision which is the subject of the appeal until a decision on the appeal has been given.

Purpose of rule: To enable the [appellate] tribunal to suspend its decision pending an appeal to the courts. For the reference to '[appellate] tribunal' see note to draft rule 92.

Miscellaneous and Definitions

Rules 94 – 110

(this page left blank intentionally)

Rule 94

Disqualification

Without prejudice to the application of any rule of natural justice, a person must not act as a member of a tribunal in considering any case referred to it if that person-

[(a) is a medical practitioner who has regularly attended the disabled person or whose opinion has been sought on any matter in connection with the case;] or

[(b) is a member or officer of the authority whose decision is being appealed against/is the object of the proceedings.]

Purpose of rule: To supplement the general rules of law against bias and presumptive bias (common law) and partiality (article 6 of ECHR). This draft rule will therefore only be necessary where it is desired to prescribe special reasons for disqualification.

For a wider range of disqualification (bankruptcy etc), see section 146 of the Copyright, Designs and Patents Act 1988 and regulation 9 of the Valuation and Community Charge Tribunals Regulations 1989 (S.I. 439).

Paragraphs (a) and (b) are in square brackets because there may be other reasons for disqualification which should be mentioned in respect of a particular tribunal.

'Without prejudice to the application of any rule of natural justice'. A tribunal must be "impartial" in order to comply with Article 6(1) of the ECHR. This means that there must be an absence of prejudice and bias; the European Court of Human Rights confirmed in *Findlay v UK* (1997) 24 EHRR 221, (1997) The Times, 27 February, that there are two aspects to the requirement of "impartiality". There must also be the appearance of impartiality: 'what is at stake is the confidence which the courts ... must inspire in the public': *Academy Trading Ltd and Others v Greece* (2001) 33 EHRR 44; *R v Chief Constable of Merseyside Police, ex parte Bennion* [2000] IRLR 821, [2001] (2000) The Times, 18 July, DC.

'First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.'

In *R (Beeson) v Dorset County* Council [2001] EWHC Admin 986, [2002] HRLR 15, [2002] ACD 20, (2001) NPC 175, (2001) The Times, 21 December, DC only one member of the panel was independent of the council and the decision was effectively taken by the council's director of social services - decision quashed, but on appeal to the Court of Appeal ([2002] EWCA Civ 1812, [2002] HRLR 11, [2003] UKhrr 353, (2003) 100(10) LSG 30, (2003) The Times, 2 January) it was decided that despite the appearance the fact that judicial review was available satisfied the requirement of article 6 of the ECHR.

A corridor discussion between the judge and counsel did not give rise to a suspicion of bias or a breach of article 6: *Hart and Another v Relentless Records Ltd and Others* [2002] EWCA Civ 1984, (2002) 152 NLJ 1562, (2002) The Times, 8 October, DC.

When a judge issued his draft judgment before receiving the final submissions of the parties' counsel but when he realised his mistake recalled it for reconsideration there was not real or apparent bias: *Taylor v Williamsons* [2002] EWCA Civ 1380, (2002) 99(36) LSG 39, (2002) The Times, 9 August, CA. The test for perceived bias was objective: *In re Medicaments and Related Classes of Goods, Director General of Fair Trading v Proprietary Association of Great Britain* [2001] 1 WLR 700, [2001] UKCLR 550, [2001] ICR 564, [2001] HRLR 17, [2001] UKHRR 429, (2001) 3 LGLR 32, (2001) 98(7) LSG 40, (2001) 151 NLJ 17, (2001) 145 SJLB 29, (2001) The Times, 2 February, CA.

Tribunals should also have regard to the guidance given by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 2) [1999] 2 WLR 272. The fundamental principle is that a man may not be a judge in his own cause. There are two strands to this principle. First, it may be applied literally to disqualify automatically a tribunal member who has a financial or proprietary interest in the outcome of the case, or, as in the Pinochet case, a non-pecuniary interest in the outcome. Secondly, where a tribunal member is not a party and does not have a financial interest in the outcome of the case (or a long-standing interest in the cause, such as in Pinochet), a tribunal member's conduct or behaviour may give rise to a suspicion that he or she is not impartial, for example because of friendship with a party. In the second type of case the English courts have applied the test of whether there is a 'real danger' of bias. This test may require the applicant to justify his or her suspicion more than the Strasbourg jurisprudence would require.

In *Kingsley v United Kingdom* (2001) 33 EHRR 13, (2001) The Times, 9 January, the Court said that since the Gaming Board had already decided that the applicant was not a fit and proper person to hold a gaming licence, it was not an impartial tribunal and this was not cured by the existence of a right to judicial review because the court had no jurisdiction to substitute its own decision or to order the matter to be reconsidered by the same or another tribunal.

As to the constitution of a tribunal so that it has the appearance of independence and impartiality, see the introductory note to the Annex.

'a person must not act as a member of a tribunal'. See *Metropolitan Properties Co (FGC) Ltd v Lannon and Ors* [1969] QB 577; [1968] 3 All ER 304, CA; *University of Swansea v Cornelius* [1988] ICR 735, EAT.

Rule 95

Assessors and advocate to the Tribunal

(1) The President [Chair] may-

(a) in relation to the subject matter of an appeal/application, if he or she thinks fit, appoint a person (an 'assessor') to assist the tribunal in dealing with a matter in which that person has special knowledge, skill and experience to sit with the Tribunal as assessor; or

(b) if he or she thinks that a question of law arises, or is likely to arise, in relation to an appeal/application, appoint a solicitor or barrister (or, for Scottish proceedings, an advocate) as advocate to the Tribunal to advise it or appear before it and present argument in respect of that question.

(2) An assessor shall take such part in the proceedings as the Tribunal may direct and in particular the Tribunal may direct the assessor-

(a) to prepare a report for the Tribunal on any matter in issue in the proceedings; and

(b) to attend the whole or any part of a hearing to advise the Tribunal on any matter in issue.

(3) If the assessor prepares a report for the Tribunal before the hearing has begun-

(a) the Tribunal must send a copy to each of the parties; and

(b) the parties may use it at the hearing.

(4) The Tribunal must pay to a person appointed under paragraph (1) the fees and expenses for his or her services agreed with that person.

Where a legitimate doubt as to a tribunal member's impartiality can be objectively justified, he or she must withdraw from the case: *Hauschildt v Denmark* (1989) 12 EHRR 266, paras 46, 48; *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288, para 58; *Incal v Turkey* (2000) 29 EHRR 449. In considering whether there is a legitimate doubt, tribunals should bear in mind the emphasis that the Strasbourg Court has placed on avoiding the appearance of bias in order to maintain public confidence: *Fey v Austria* (1993) 16 EHRR 387, para 30.

'is a medical practitioner'. Specific provision may, however, be necessary or desirable where there are only a limited number of persons qualified for a particular category of membership of a tribunal (see Social Security and Child Support (Decisions and Appeals) Regulations 1999 (S.I.991) and Mental Health Review Tribunal Rules 1983 (S.I. 942)) or where it is necessary to extend the range of disqualifying interests (regulation 23 of the Valuation and Community Charge Tribunals Regulations 1989 (S.I. 439).

Purpose of rule: To enable the President (in the case of a system of tribunals) or the Chair to appoint an assessor to sit with the tribunal or a lawyer to advise the tribunal, or appear before it and present argument.

This draft rule requires special provision in the rule-making powers of the Act as well as provision for the payment of fees and expenses; see paragraphs 1(d) and 3(k) of Part B of the Annex.

Paragraph (1)(a): 'that person has special knowledge, skill and experience'. The role of assessors was considered in *Ahmed v University of Oxford and Another* [2002] EWCA Civ 1907, [2003] 1 All ER 915, [2003] 1 WLR 995, (2003) 100(10) LSG 27, (2003) The Times, 17 January, CA and *Walker v General Medical Council* [2002] UKPC 57, (2002) The Times, 16 December, PC.

Rule 96

Power of the Chair to exercise powers of the Tribunal etc.

(1) Any act required or authorised by these Rules may be done by [the President or] the Chair of the Tribunal [or any chair being a member of the panel of chairs] except-

(a) the deciding of an appeal/initiating application (not being an unopposed appeal/initiating application);

(b) the deciding of any question on a preliminary hearing other than the giving of a direction for such a hearing to be held; or

(c) the making of an order disposing of the appeal/application following a review under Rule 78:

but where a direction is given by [the President or] a chair under Rule 29(1) or paragraph (3)(h) of Rule 32, it shall not have effect unless it is confirmed by the Tribunal.

(2) In the event of the death or incapacity of the Chair following the decision of the Tribunal in any matter, the functions of the Chair for the completion of the proceedings, including any review of the decision, may be exercised by any other chair or person acting as chair of [the Tribunal] [a tribunal of like jurisdiction].

Rule 97

Performance of Registrar's functions

Any functions of the Registrar may be performed by an Assistant Registrar of [the Tribunal] [Tribunals] or, save as regards the functions referred to in Rules 24, 28, 32 or 37 by some other member of the staff of the Tribunal authorised for the purpose by the [President] [a chair] [the Registrar].

Purpose of rule: To provide for the prompt and economical disposal of interim proceedings and unopposed appeals and applications and the completion of proceedings, in the event of the death or incapacity of the Chair, following the decision of the tribunal. This draft rule will require provision in the enabling Act: *Post Office v Howell* [2000] ICR 913, [2000] IRLR 224, (1999) The Times, 11 November, EAT.

Paragraph (1): 'may be done by ... the Chair'. A note of caution was sounded by Morrison J in *Sutcliffe v Big C's Marine* [1998] IRLR 428 at 430-43, EAT; although a matter may be within the Chair's powers it may not be in the interests of justice for the Chair to take a decision sitting alone when the advice of lay members would be useful.

Purpose of rule: To provide for the performance of any of the Registrar's functions by an Assistant Registrar or, with specified exceptions, by some other member of the tribunal's staff.

'the Registrar'. In these draft rules, the title 'Registrar' is used throughout and irrespective of the function conferred, be it the registration of appeals and decisions or the preparation of the hearing. Other titles than Registrar may be used – e.g. Secretary or Clerk – for the principal administrator of a tribunal or series of tribunals of the same jurisdiction and a distinction may be made between such a principal administrator and his or her senior staff (Registrar and Assistant Registrar; Secretary and Deputy Secretary) and those whose main junction is to act as clerk for particular sittings. The expression 'appropriate officer' could be used to embrace all levels of the staff, but, as with this draft rule, some provision needs to be made for providing which member of staff is to perform which function.
'functions of the Registrar'. Consideration needs to be given to the extent, if any, to which functions in interim proceedings are to be conferred on a Registrar. Such functions should only be conferred when it is intended that those who will be appointed to that office will be suitably qualified or experienced.

'or ... by some other member of the staff'. Similar considerations apply as regards the delegation of functions to other members of the staff of a tribunal. This draft rule permits only a limited delegation as regards interim proceedings.
'staff of the Tribunal'. Although it is more usual for provision for the appointment of the staff of a tribunal to be made in the enabling Act itself, it may be left to subordinate legislation. This may be most appropriate where a series of tribunals serve a local government function-see regulations 11 to 14 of the Valuation and Community Charge Tribunals Regulations 1989 (S.I. 439), which also include provision for administration.

Rule 98

The register

(1) A register must be kept at the [principal] office of the Tribunal(s) and must be open to the inspection of any person without charge or on payment of a reasonable charge at all reasonable hours.

(2) Details of all decisions of the Tribunal must be included in the register including [the full][a summary of the] reasons for the decisions.

(3) Where a correction or entry is made in the register as a consequence of a decision by *the appellate tribunal,* the Registrar must send copies of the correction or entry to all persons to whom copies of the original entry have been sent.

(4) The Registrar must include in the register a list of all appeals/applications giving the names and addresses of the parties, brief details of the subject matter of the appeal/application, if an oral hearing is to be held, the date, time and place fixed for the hearing and, if not, the date the appeal/application is to be decided without a hearing.

(5) Subject to paragraph (6), the Registrar must make provision for inspection at all reasonable hours of the list referred to in paragraph (4) by any person without charge or on payment of a reasonable charge.

(6) The [Chair][President] of the Tribunal may exclude from inspection under paragraphs (1) and (5) particulars of any decision or appeal/application in the interests of morals, public order or national security in a democratic society, the interests of juveniles or the protection of the private lives of the parties, or to the extent strictly necessary in the opinion of the Tribunal in special circumstances where publicity would prejudice the interests of justice.

Purpose of rule: This draft rule is designed to serve a similar purpose to draft rule 77 in providing public awareness of and access to the decisions of tribunals. Paragraphs (4) and (5) are intended to give interested persons information about proceedings pending before the tribunal whether or not there is to be a public hearing. This sort of provision is arguably required by article 6 of the ECHR to enable a person to trigger access to a tribunal.

Paragraphs (1) and (5): 'on payment of a reasonable charge'. This will require provision in the enabling Act for charges to be made.

Paragraph (2): 'Details of all decisions'. For this provision and the provision in paragraph (4) about 'brief details of the subject matter of the appeal/application' see *Regina v Secretary of the Central Office of Employment Tribunals (England and Wales), Ex parte Public Concern at Work* [2000] IRLR 658, [2000] COD 302, (2000) The Times, 9 May.

Paragraph (6): 'may exclude from inspection'. Although publicity for hearings is, in general, desirable, there may be jurisdictions where the opposite is the case: see rule 21(5) of the Mental Health Review Tribunal Rules 1983 (S.I. 942): 'Except in so far as the Tribunal may direct, information about proceedings before the Tribunal and the names of any persons concerned in the proceedings must not be made public'.

Rule 99

References to the Court of Justice of the European Communities

(1) The Tribunal may give a direction requiring any question arising in proceedings before the Tribunal to be referred to the Court of Justice of the European Communities ('the European Court') for a preliminary ruling in accordance with the relevant Treaty article.

(2) A direction under paragraph (1) may be given by the Tribunal on its own initiative or on the application of any party and at any stage in the proceedings before or at the hearing.

(3) The direction must set out in an annex the request for a preliminary ruling of the European Court and the Tribunal may give directions as to the manner and form in which the annex is to be prepared.

(4) The proceedings in which the direction is given shall, unless the Tribunal otherwise directs, be suspended until the European Court has given a preliminary ruling on the question referred to it.

(5) When a direction has been given under paragraph (1), unless the Tribunal otherwise directs, the Registrar must send a copy of it to the Registrar of the European Court when the time for appealing against the direction has expired, or, if there is an appeal against the direction, only if *the appellate tribunal* so directs.

(6) It is the responsibility of the Registrar not the parties to settle the terms of the reference.

(7) This rule shall apply to questions arising in appeals to *appellate tribunals* with the necessary adaptations.

(8) In this rule 'the relevant Treaty article' means article 234 of the Treaty establishing the European Community or article 150 of the Treaty establishing the European Atomic Energy Community.

Purpose of rule: To establish the procedure for references to the Court of Justice of the European Communities for preliminary rulings. Questions of Community law could arise before almost any tribunal but are more likely before some such as the Value Added Tax Tribunals or the Employment Tribunals. Guidance on the formulation of a reference is in *Holdijk* (a reference from the Kantongerecht, Apeldorn) [1982] ECR 1299. The European Court of Justice has jurisdiction to give preliminary rulings concerning questions of EC law emanating from the domestic courts and tribunals of the Member States. Article 234 provides:-

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the European Investment Bank;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, the court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice.'

The relevant procedure for the High Court is now in Part 68 of the Civil Procedure Rules.

Paragraph (1): 'The Tribunal may give a direction ...'. A question may be referred to the ECJ even though already decided because the ECJ is not bound by its own decisions: *Trent Taverns Ltd v Sykes* [1999] Eu LR 492, (1999) 11 Admin LR 548, [1999] NPC 9, (1999) Times 5 March, CA.

Paragraph (6): 'the responsibility of the Registrar'. In preparing a reference the Registrar should consider the practice direction to Part 68 of the CPR and the Guidance of the European Court of Justice on References by National Courts for Preliminary Rulings attached to it.

Rule 100

Reference by the Tribunal to *the appellate tribunal* of question of law

(1) Where any question of law arises in a case before a … Tribunal and the Tribunal decides to refer that question to *the appellate tribunal* for its decision in accordance with section … of the Act, the Tribunal must cause to be sent to *the appellate tribunal* and to every party to the proceedings, a submission in writing signed by the Chair of the Tribunal, which must include a statement of the question and the facts on which it arises.

(2) If the case is remitted to the … Tribunal following a reference to *the appellate tribunal,* the … Tribunal, whether or not consisting of the same members who constituted the … Tribunal when the reference was made-

(a) must proceed upon the facts stated in the submission made to *the appellate tribunal;* and

(b) may receive such further evidence and find such further facts as, having regard to the decision of *the appellate tribunal,* are necessary for the purpose of giving its decision on the case.

Rule 101

Investigatory Tribunals: appointment of solicitors and counsel: methods of inquiry

(1) At any time after the case has been referred to it, the Tribunal may appoint the Treasury Solicitor and counsel, or, in Scottish cases, may request the Solicitor to the Advocate General for Scotland in respect of a reserved matter (within the meaning of the Scotland Act 1998) or the Solicitor to the Scottish Executive in respect of a devolved matter (within the meaning of that Act), or in Welsh cases which concern a function of the National Assembly for Wales, the Counsel General for the Assembly, to appoint a solicitor, and may appoint counsel to exercise the functions of-

(a) assisting the Tribunal in seeking and presenting evidence in accordance with the requirements of the Tribunal; and

(b) representing the public interest in relation to the matters before the Tribunal.

Purpose of rule: Such a rule may be considered where a technical tribunal is constituted with an appeal to a tribunal more suited to decide questions of law. Appropriate provision would be required supplemental to draft rules 85 to 91 to provide for the appeal tribunal deciding the point of law and remitting the case with its decision to the first instance tribunal.

Purpose of rule: To provide for the appointment of solicitors and counsel to assist investigatory tribunals and to represent the public interest, and to regulate the procedure of those tribunals.

Paragraph (1): 'appoint the Treasury Solicitor ... appoint counsel'. Tribunals established for the purpose of making inquiries may require the assistance of solicitors and counsel and may have to adopt different procedures for different cases. This draft rule is based on rules 4, 6 and 8 of the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986 (S.I. 952) to which further reference should be made.

For a provision whereby a "nominated" solicitor is charged with the presentation of a case against a medical practitioner before a tribunal, see rule 3 of the Misuse of Drugs Tribunal (England and Wales) Rules 1974 (S.I. 85).

(2) As soon as practicable after the Tribunal has considered the subject matter of the investigation, it must notify *the Authority* and the applicant of the manner in which it proposes to conduct its inquiries and in particular whether oral evidence is to be taken.

(3) The Tribunal must give *the Authority* and the applicant a reasonable opportunity of making representations on the manner in which it proposes to conduct its inquiries and such representations may be made orally or in writing at the option of *the Authority* or the applicant as the case may be.

(4) After considering any representations that may be made under paragraph (3) above, the Tribunal must notify *the Authority* and the applicant whether and, if so, in what respects, it has decided to alter the manner in which it proposes to carry out its inquiries.

(5) If at any subsequent stage in the investigation the Tribunal proposes to make any material change in the manner in which its inquiries are to be carried out, it must notify *the Authority* and the applicant and the provisions of paragraphs (3) and (4) above shall apply accordingly.

(6) After the Tribunal has completed the taking of evidence as it considers necessary for the purpose of the investigation, it must give the applicant and *the Authority* a reasonable opportunity of making representations on the evidence and on the subject matter of the investigation generally. The representations may be made orally or in writing at the option of the applicant or, as the case may be, of *the Authority.*

(7) In this rule-

'a Scottish case' means a case in which at the time of the reference to the Tribunal the applicant is either habitually resident in, or has his or her principal place of business in, Scotland; and

'a Welsh case' means a case in which at the time of the reference to the Tribunal the applicant is either habitually resident in, or has his or her principal place of business in, Wales.

(this page left blank intentionally)

Rule 102

Irregularities

(1) Any irregularity resulting from failure to comply with any provision of these Rules or of any direction of the Tribunal before the Tribunal has reached its decision shall not of itself render the proceedings void.

(2) Where any such irregularity comes to the attention of the Tribunal, the Tribunal may give any directions it thinks just before reaching its decision to cure or waive the irregularity.

(3) Clerical mistakes in any document recording a direction or decision of the Chair or Tribunal, or errors arising in such a document from an accidental slip or omission, may be corrected by the Chair by certificate in writing.

Rule 103

Complaints

The Tribunal must establish a policy and procedure for the prompt handling of complaints from users and take the steps necessary to ensure that it is brought to the attention of users.

Rule 104

Signature of documents

Where any of these Rules requires a document to be signed, that requirement shall be satisfied if the signature is written (including being produced by computer or other mechanical means), and, in any case, the name of the signatory appears beneath the signature in such a way that he or she may be identified.

Rule 105

Proof of documents and decisions

(1) Any document purporting to be a document duly executed or issued by … on behalf of the Tribunal shall, unless the contrary is proved, be deemed to be a document so executed or issued as the case may be.

(2) A document purporting to be certified by the Registrar to be a true copy of any entry of a decision in the register shall, unless the contrary is proved, be sufficient evidence of the entry and of the matters contained in it.

Purpose of rule: To deal with procedural and clerical defects, not matters of substance which can only be corrected by an appellate body or, subject to the relevant conditions, on review. As to the effect of errors see *Ravenscroft Properties v Hall* [2001] EWCA Civ 2034, [2002] HLR 33, [2002] L & TR 25, [2002] 1 EGLR 9, [2002] 11 EG 156, [2002] 3 EGCS 125, 126, 127, [2001] NPC 188, [2002] 1 P & CR D22, (2002) The Times, 15 January, CA.

Paragraph (2): 'directions it thinks just'. This power to correct an error should not be exercised in a case which affects the interests of a party without giving that party an opportunity to be heard: *Times Newspapers Ltd v Fitt* [1981] ICR 637, EAT.

Purpose of rule: To implement the recommendation in the Council on Tribunals' Framework of Standards (2002) that tribunals establish a complaints policy and procedure in relation to the performance of both judiciary and administration and publicise them to users.

Purpose of rule: To specify the conditions for the acceptance of the signature of documents in writing or by computer or other mechanical means.

'is written'. 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are to be construed accordingly: Schedule 1 to the Interpretation Act 1978. This would include signatures produced by a computer. See note to draft rule 5A(1).

Purpose of rule: To provide for the proof of documents executed or issued on behalf of the tribunal and of decisions in the register.

Rule 106

Method of delivering and receipt of documents

(1) Any document required or authorised by these Rules to be delivered to any person, body or authority shall be duly delivered to that person, body or authority-

(a) if it is sent to the proper address of that person, body or authority by post by special delivery, recorded delivery or otherwise with proof of posting;

(b) if it is sent to that person, body or authority at that address by fax or telex or other means of electronic communication which produces a text when the text of it is received in legible form; or

(c) if it is delivered to or left at the proper address of that person, body or authority:

but it will only be duly sent by fax or other means of electronic communication if the recipient consents in writing to the use of that means.

(2) For the purposes of the proviso to paragraph (1) a legal representative shall be deemed to consent in writing if the reference or address for the means of electronic communication is shown on the legal representative's notepaper.

(3) If a document required or authorised to be delivered to any person, body or authority is sent by special delivery or recorded delivery or otherwise with proof of posting, it shall be taken to have been delivered on the date on which it is received for despatch by the Royal Mail.

(4) Any document required or authorised to be delivered may-

(a) in the case of an incorporated company or other body registered in the United Kingdom, be delivered to the secretary or clerk of the company or body;

(b) in the case of a company or other body incorporated outside the United Kingdom, be delivered to the person authorised to accept it;

(c) in the case of a partnership, be delivered to any partner; or

(d) in the case of an unincorporated association other than a partnership, be sent or delivered to any member of the governing body of the association.

Purpose of rule: This draft rule deals with delivering documents. This expression is used in these draft rules, which are more particularly addressed to the parties, as being less technical than "service" and "served", and is defined so as to include sending by post and electronically.

Paragraph (1)(b): 'if it is sent ... by fax'. For sending by fax or other electronic means such as email to be valid, the receiving person, body or authority or the legal representative of the person, body or authority must previously have indicated in writing that they are willing to accept delivery by that means and have provided the fax number or the reference or address for another electronic means such as email to be used.

The mere fact that a fax number or other electronic reference or address is included on the notepaper of a person, body or authority will not be sufficient consent for these purposes (proviso to paragraph (1)). The position is different in relation to a fax number or other electronic reference or address included on a legal representative's notepaper (paragraph (2)). As to sending by fax see *Molins v G D Spa* [2000] 1 WLR 1741, [2000] 2 Lloyd Rep 234, [2000] CP Rep 54, [2000] CLC 1027, [2000] FSR 893, (2000) The Times, 1 March.

Paragraph (1): 'in writing'. 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly: Interpretation Act 1978, Schedule 1.

Paragraph (3): 'the date on which it is received for despatch'. In the case of an appeal, provision is made elsewhere in these rules not only that the notice of appeal must be delivered to the tribunal, but that it must be delivered to the office of the Tribunal within a specific period. Compliance with that provision is especially significant where the jurisdiction of the tribunal depends on the notice of appeal being delivered in time.

The time factor may also be significant for initiating applications. Accordingly this paragraph provides that receipt by the Royal Mail of any document sent by special delivery, recorded delivery or otherwise with proof of posting is to be taken as delivery to the office of the tribunal. This presumption is irrebuttable. A note about the effect of this paragraph should appear on any approved form of notice of appeal/initiating application or reply and appellants/applicants and respondents should be advised if they do not deliver documents electronically or by hand to use recorded delivery or obtain and preserve other proof of posting; see *R (on the application of Katie Lester) v London Rent Assessment Committee* [2003] EWCA Civ 319, [2003] 1 WLR 1445, [2003] EGCS 115, [2003] NPC 35, (2003) The Times, 25 March, CA and *Peters v Sat Katar Co Ltd (in liquidation)* (2003) The Times, 1 July, CA. In *Webber (Transport) Ltd V Network Rail Infrastructure Ltd (formerly Railtrack plc)* (unreported) it was held that a provision (section 23 of the Landlord and Tenant Act 1927) corresponding to paragraph (3) was compatible with article 6 of the ECHR.

An additional provision which may be appropriate when documents are of a particular character so that specialist carriers are employed is as follows:

'Any document to be delivered from a place in the United Kingdom by means of a postal or other delivery service (whether provided by the Royal Mail or otherwise) which is certified by the Registrar for the purpose of this paragraph shall be taken to have been delivered at the time when it (or the letter containing it) was accepted for delivery by the person providing the service.

The Registrar must only certify a service for the purpose of this paragraph if that service both certifies the date on which an item is accepted for delivery and, at the time of delivery, informs the person to whom it is delivered that the date has been certified and what that date is, but the Registrar shall not be obliged to certify a service which satisfies these criteria. In respect of any particular document a service shall be regarded as certified by the Registrar if a certificate of the Registrar was subsisting at the time at which the document was accepted for delivery by the person providing the service.'

Paragraph (3): 'it shall be taken to have been delivered'. See *Webber (Transport) Ltd v Network Rail Infrastructure Ltd* above. This provision will avoid the difficulty which arose in *R (on the application of Katie Lester) v The London Rent Assessment Committee* above; see note on this case to draft rule 7(1). Appellants/applicants should be advised that if they post rather than deliver their forms electronically or by hand they should use recorded delivery or obtain and preserve other proof of posting. Although this will reduce the risk as noted by Sedley LJ in *Katie Lester's* case it will not be unproblematic if the document is lost in the post, but the document will be presumed to have been delivered for the purposes of the time limit and a copy of it can be furnished to

(5) The proper address of any person, body or authority to whom any document is required or authorised to be delivered is-

(a) in the case of a secretary or clerk of an incorporated company or other body registered in the United Kingdom, that of the registered or principal office of the company or body;

(b) in the case of the person authorised to accept it on behalf of a company or other body incorporated outside the United Kingdom, the address of the principal office or place of business of that company or other body in the United Kingdom;

(c) in the case of the Registrar or the Tribunal/*the appellate tribunal,* the address of the office of the Tribunal/*the appellate tribunal;* or

(d) in the case of any other person, the usual or last known address of that person.

Rule 107

Substituted delivery of documents

If any person to whom any document is required to be delivered for the purpose of these Rules cannot be found or has died and has no known personal representative, or is out of the United Kingdom, or if for any other reason delivery to that person cannot be readily effected, the Chair may dispense with the delivery to that person or may give a direction for substituted delivery to another person or in any other form (whether by advertisement in a newspaper or otherwise) which the Chair may think fit.

the tribunal; the Council considers that it would be compatible with article 6 that the risk of this should fall on the tribunal or authority rather than the individual seeking access to the tribunal as in *Katie Lester's* case.

Purpose of rule: To cater for the delivery of documents when the person concerned cannot be found or has died and has no known personal representative, or is out of the United Kingdom or if for any other reason delivery cannot be readily effected.

'required to be delivered'. As to 'delivered' and 'delivery' see draft rule 106.
'may dispense with delivery'. As to the proper use of the power to dispense with the delivery of any document see *Cranfield and Another v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] NPC 66, (2003) The Times, 16 May, CA, concerning the corresponding provision of the CPR.

Rule 108

Supply of documents from Tribunal records

(1) Any party to proceedings may be supplied from the records of the Tribunal with a copy of any document relating to those proceedings (including documents filed before the proceedings were commenced), if the party seeking the document-

(a) makes a written request for the document; and

(b) pays any prescribed fee.

(2) Any person who pays the prescribed fee may, during office hours, search for, inspect and take a copy of the following documents:-

(a) a notice of appeal/initiating application;

(b) any direction given, or order or decision made, by the Tribunal in public;

(c) any other document if the Tribunal gives permission.

(3) An application for permission under paragraph (2)(c) may be made without notice to the parties to the proceedings in which the document was filed.

(4) Where a person makes a search for the documents mentioned in paragraph (2), that search may be conducted by means of a computer, if the Tribunal office has a computer with the appropriate search facility, and, when the document searched for is identified and on payment of the prescribed fee, the document must be produced for inspection by a member of the Tribunal staff.

(5) If, in the course of a computer search, the computer identifies documents held on the Tribunal file, other than those which the person searching is entitled to inspect, that person may not, without the Tribunal's permission, inspect, take a copy or make any note of, or relating to, those documents.

(6) The Tribunal may exclude from the application of paragraph (2) any document in the interests of morals, public order or national security in a democratic society, the interests of juveniles or the protection of the private lives of the parties to the proceedings in which the document was filed or created, or to the extent strictly necessary in the opinion of the Tribunal in special circumstances where publicity would prejudice the interests of justice.

Purpose of rule: To specify the conditions for the supply by the tribunal of copies of documents relating to proceedings, and for any person to search for, inspect and take copies of certain documents from the records of the tribunal.

'copy of any document'. See the definition of 'document' in draft rule 110.

Rule 109

Sanction for disregard of safeguards on confidential information

If otherwise than [with the consent in writing of …. or] for the purpose of any appeal/application to a Tribunal, any person to whom the Tribunal has provided any document or other information in confidence discloses the document or information or any information contained in the document to any other person, that person shall be liable, as provided in section …. of the Act, on summary conviction to a fine not exceeding the …. level on the standard scale.

Rule 110

Interpretation

(a) Definitions

"the Act"	means the [*enabling Act or Acts conferring jurisdiction*] Act 20..;
"ADR procedure"	means an alternative procedure for the resolution of a dispute, that is an arbitration procedure, or a mediation or other form of conciliation procedure;
"appellant"	means (i) a person who makes an appeal to the Tribunal under section … of the Act, and includes a person acting on behalf of another under Rule 19 or a person appointed to initiate or continue proceedings or substituted for an appellant under Rule 20; (ii) in the case of an appeal to *the appellate tribunal* against the decision of *the original tribunal,* the person or the Authority by whom that appeal is made;
"applicant"	means (i) a person who makes an application to the Tribunal under section… of the Act, and includes a person acting on behalf of another under Rule 19 or a person appointed to initiate or continue proceedings or substituted for an applicant under Rule 20; (ii) in relation to an application in interim proceedings, or for permission to appeal to the appellate tribunal, the applicant in those proceedings;
"approved form"	means a form approved by, or under the authority of, in the case of a system of tribunals, the President or, in the case of a single tribunal for a jurisdiction, the Chair;
"the Authority"	means …

Purpose of rule: To draw attention to a penal sanction for a failure to comply with rules or directions protecting confidential information which may be found in the principal legislation cf. section 28 (10) of the Betting, Gaming & Lotteries Act 1963. Alternatively, the necessary authority may be included in the rule-making power of the Act.

Draft rules can only make limited provision for definitions, which are likely to be particularly dependent on the particular jurisdiction of the tribunal. In providing definitions regard should be had to section 11 of the Interpretation Act 1978 which provides that expressions used in subordinate legislation have, unless the contrary intention appears, the meanings which they bear in the Act. However, it may be appropriate in certain cases to repeat a definition contained in the enabling Act in order to provide a more complete picture in the rules. In adapting earlier precedents, regard should also be had to section 23 of the Interpretation Act 1978 which applies certain other provisions of that Act to subordinate legislation.

These common form definitions and general provisions may be of assistance.

'the Act'. If two or more Acts are relevant, it may be convenient to differentiate them by some short description e.g. "the Employment Act" or the "1990 Act".

'appellant'. Element (ii) will be appropriate both for 'appeals rules' and for 'applications rules'.

'applicant'. Element (ii) will be appropriate both for 'applications rules' and for 'appeals rules'.

"Chair"	means the Chair of the Tribunal, or a person nominated or appointed to act as chair at any hearing [and, includes in the absence or inability to act of the Chair, [the President or] any member of the panel of chairs];
"decision"	(except in the expression "disputed decision") means a decision of the Tribunal on the appeal/application or on any substantive issue that arises in it, but does not include any direction in interim proceedings;
"direction"	means any order or other determination by a Tribunal other than a decision, and in relation to interim proceedings includes an order and a witness summons;
"disputed decision"	means a decision of *the Authority* against which an appeal is brought under these Rules;
"document"	includes, unless the context otherwise requires, other material containing information capable of extraction from it;
"expert"	means an expert who has been instructed to give or prepare evidence for the purpose of Tribunal proceedings;
"hearing"	means a sitting of the Tribunal for the purpose of enabling the Tribunal to take a decision on an appeal/initiating application or on any question or matter at which the parties are entitled to attend and be heard;
"initiating application"	means an application to the Tribunal under rule 5B;
"the management tribunal"	means, if there is a system of tribunals, the tribunal specified under Rule 43(3)(c);
"office of the tribunal"	means, where there is more than one tribunal for the same jurisdiction, the office of the Tribunal established for the area in which [the appellant resides] [the land which is the subject of the application, or the greater part of it, is situated], and includes, when an appeal is transferred from one tribunal to another, the office of the latter;
"the overriding objective"	means the overriding objective specified in Rule 2;

'document'. In *Victor Chandler International v Commissioners of Customs and Excise and Another* (1999) The Times, 17 August, DC it was held that a 'document' was a 'material object which contained information capable of extraction from it'; so it would not cover an advertisement sent by teletext. Equally it seems that it would not cover an email even though the recipient could print a document from it. So this definition extends the meaning of 'document' to cover in formation sent by such means.

'office of the Tribunal'. Such a provision will be desirable if there are a number of tribunals each with its own territorial or other separate jurisdiction. See also the definition of "Tribunal".

"party"	in rules concerning appeals, includes the appellant, the Authority and any person joined to the proceedings as a respondent; in rules concerning applications, includes the applicant, and, subject to Rules 14B(5) and 18, any person or Authority named or joined to the proceedings as a respondent;
"pre-hearing reveiew"	means a review of the [appeal] [application] as provided in Rule 28 in preparation for a hearing;
"preliminary hearing"	means a hearing as defined in this rule for taking a decision on any question of fact or law as provided in Rule 29;
"the President"	means the President of the Tribunals;
"register"	means the register of [appeals]/[applications] and decisions kept in accordance with Rule 98;
"Registrar"	means the ... person for the time being acting as Registrar of [the Tribunal] [Tribunals established by section of the Act], and includes any Assistant Registrar or other member of the staff of the Tribunal authorised to perform the relevant function as provided by Rule 97;
"reply"	means a reply by a respondent as provided in rule 14B of these Rules;
"respondent"	means [the Authority or any other] [a] party to the proceedings before the Tribunal other than the [appellant] [applicant], and includes a person acting on behalf of another under Rule 19 or a person appointed to defend proceedings or substituted for a respondent under Rule 20;
"Tribunal"	means a ... Tribunal and "the Tribunal" means the ... Tribunal to which an appeal is made or transferred;
	[Alternative]
"the Tribunal"	means the Tribunal [for the area in which the appellant/applicant resides] [for the area in which the land which is the subject of the application, or the greater part of it, is situated] [appointed by the President/Chair for the hearing of [appeals] [applications] of that category coming from the relevant area], or such other Tribunal to which the [appeal] [application] may be transferred.
"appellate tribunal"	means the ... established by section ... of the Act.

'Tribunal/the Tribunal/appellate tribunal'. Any second instance tribunal should be referred to by a name easily distinguishable from the first instance tribunal.

(b) Common Form Provisions

( ) In these Rules, any reference to a rule [or a schedule] is a reference to a rule [or schedule] in these Rules, and in any rule a reference to a paragraph or subparagraph is, unless the context requires otherwise, a reference to a paragraph or subparagraph in the rule.

( ) Where the time prescribed by these Rules for doing any act expires on a Sunday or public holiday, the act shall be in time if done on the next following day which is not a Sunday or public holiday.

(this page left blank intentionally)

Annex

Checklist of Matters to be Considered when Preparing Legislation Establishing a Tribunal or other Adjudicative Body

1. This Annex lists common form elements relating to the establishment, functioning and procedure of tribunals and other bodies with adjudicative functions. It is divided for convenience into two parts; part A lists those matters which in many cases are to be found substantively in the principal legislation; part B lists those matters which are frequently the subject of rule-making powers. There is no hard and fast practice as to whether matters fall into part A or part B. There is a great variety of practice in particular as to which elements of items A1 and A4 are included in the principal legislation and which fall within a rule-making power. There are, for example, precedents for the establishment of tribunals to be effected under a rule-making power (see Schedule 11 to the Local Government Finance Act 1988, which provides for the establishment of valuation and community charge tribunals) though it is more usual for provision to be made in the principal legislation itself for a nationwide system of tribunals the members of which are to be centrally appointed. The checklist should therefore be looked at, and used, as a whole and decisions taken as to the placing of the various elements according to the requirements of the particular subject matter of a tribunal's jurisdiction, the political interest in particular issues and the need to respond to that interest.

2. Where an administrative decision determines the civil rights and obligations (within the meaning of article 6 of the Convention) of an individual or corporate body an appeal against the decision to an independent and impartial tribunal must be available: a right of judicial review alone is insuf-

ficient: Kingsley v United Kingdom (2001) 33 EHRR 13, (2001) The Times, 9 January, ECtHR. The Court recalled that 'in order to establish whether a body could be considered 'independent' regard had to be had, inter alia, to the existence of guarantees against outside pressure and the question whether the body presented an appearance of independence. As to impartiality, a distinction had to be drawn between a subjective test, whereby it is sought to establish the personal conviction of a given adjudicator in a given case and an objective test, aimed at ascertaining whether the adjudicator offered guarantees sufficient to exclude any legitimate doubt in that respect': see Langborger v Sweden (1990) 12 EHRR 416.

The Council considers that in order to ensure the appearance of independence and impartiality the members of a tribunal should not be appointed by the Minister whose decisions are likely to be the subject of appeals/applications to the tribunal nor should the tribunal be funded by the Minister: Findlay v United Kingdom (1997) 24 EHRR 221, (1997) The Times, 27 February, ECtHR; Hood v United Kingdom (2000) 29 EHRR 365, (1999) The Times, 11 March, ECtHR; Cable and Others v United Kingdom (2000) 30 EHRR 1032, (1999) The Times, 11 March, ECtHR; Smith v Secretary of State for Trade and Industry [2000] ICR 69, [2000] IRLR 6, [2000] HRLR 83, (1999) The Times, 15 October, EAT; Scanfuture UK Ltd v Secretary of State for Trade and Industry [2001] ICR 1096, [2001] IRLR 416, [2001] Emp LR 590, (2001) The Times, 26 April, EAT; R v Spear [2001] EWCA Crim 2, [2001] QB 804, [2001] 2 WLR 1692, [2001] Crim LR 485, (2001) 98(12) LSG 43, (2001) 145 SJLB 38, (2001) The Times, 30 January, Courts-Martial Appeal Court

3. Even where matters are to be left to a rule-making power, the principal legislation may be drafted in such a way as to require the power, or jurisdiction conferred under the power, to be exercised in a particular way. See section 106(2) of the Nationality, Immigration and Asylum Act 2002:

   "(a) [rules] must entitle an appellant to be legally represented at any hearing of his appeal".

   It is also usual to provide for the making of procedural rules to be subject to the negative resolution procedure.

A. Matters customarily included in the principal legislation (either the Act itself or a Schedule)

1. Establishment of Tribunal

(a) The establishment of the tribunal or other adjudicative body-
- as a single continuing body, whether or not sitting in one or more divisions
- as a number of tribunals having the same jurisdiction
- as an ad hoc tribunal.

(b) Provision for a tribunal to hear appeals from the tribunal of first instance:
appeal on law and fact or on law only.

(c) Finality of decision of a tribunal.

(d) Appeal to the courts (High Court or Court of Appeal in the case of England and Wales, the sheriff, sheriff principal or Court of Session in the case of Scotland) on question of law and fact or on law only from first instanc or appellate tribunal; power of tribunal to refer question of law to the courts.

(e) Alternatively, further procedure involving a minister. (The Council on Tribunals considers that a tribunal should be empowered to reach a binding decision rather than a recommendation).

2. Jurisdiction and principal powers

(a) Which issues may be referred to the tribunal (in the case of appeals from administrative authorities, which decisions may be appealed).

(b) The persons eligible to appeal or apply to the first instance tribunal; the persons eligible to appeal to an appellate tribunal or from a tribunal to a court.

(c) The respondent and third parties.

(d) Time limits for appealing or applying. Do they go to the jurisdiction of the tribunal (e.g. "an appeal must only be entertained by the Tribunal") or are they procedural? In either event, should provision be made for the tribunal to extend time limits?

(e) The powers of the first instance tribunal on an appeal or application; rehearing or decision on correctness in the case of an appeal; original decision in case of an application. Can the tribunal vary, as distinct from dismiss an appeal or quash, an administrative decision? Provision for requiring administrative authority to reconsider the matter in the light of a decision to quash. Other limitations on powers of the tribunal.

(f) Powers of the tribunal to make investigations and to appoint counsel and solicitors to assist it.

(g) Power for good reason to refuse to allow a particular person to assist or represent a party.

(h) The powers of the appellate tribunal.

(i) Jurisdiction of appellate tribunal (review or rehearing)

3. Restrictions on rights to appeal/apply; consequences of appealing/ making application

(a) Prior conditions for appealing/making an application.

(b) Provision for suspension of an administrative decision – automatically or at discretion of tribunal.

(c) Other interim relief.

4. Composition of Tribunal (see also item 1(a) above)

(a) Presidential system.

(b) Chairs, regional chairs-panels; deputy-chairs.

(c) Members-different categories of members-panels.

(d) Appointment, qualifications, tenure, removal, remuneration (including superannuation of full-time appointees) of President, chairs and members; ignoring defects in appointments.

(e) Disqualifications, exemptions (e.g. disqualifications by interest, House of Commons Disqualification Act; exemption from jury service).

(f) Composition of tribunal for hearings; quorum including power of legally qualified chairs to sit alone and absence of a member; majority for, and casting votes on, decisions.

(g) Provision for the composition of the tribunal in special cases or when exercising a special jurisdiction.

(h) Provision for transfer of cases between tribunals having the same jurisdiction.

(i) Similar considerations in respect of the appellate tribunal.

5. Staff

(a) Staff.

(b) Who provides the staff.

(c) Provision for remuneration and superannuation.

6. Finance

(a) Who provides for the costs and expenses of the various tribunals. Fees and expenses for experts, inspectors, assessors and interpreters.

(b) Provision for accounting for receipts.

(c) Provision for legal aid or other assistance for appellants/applicants.

(d) Provision for charges for the provision of documents or services.

7. Alternative Dispute Resolution

8. Tribunal as arbitrator

Provision corresponding to section 3(8) of the Lands Tribunal Act 1949 applying provisions of Part I of the Arbitration Act 1996 only in so far as specified in rules of procedure of the Tribunal.

9. Decisions

Provision to require tribunals to decide questions "in accordance with equity and the substantial merits of the case" (Section 98(4) of the Employment Rights Act 1996).

10. Provision for notification, when communicating administrative decisions, or to make such decisions, when they adversely affect interests

Provision for automatic review by decision-making authority of decision appealed against.

11. Penal sanctions for failure to comply with procedural requirements

(a) failure to comply with direction (including order) of the Tribunal.
(b) failure to produce documents or make them available for inspection or copying; failure to provide information sought by a tribunal in exercise of an investigatory power.
(c) suppressing or destroying material.
(d) failure to attend as a witness.
(e) obstruction of right of entry or inspection.
(f) failure to observe confidentiality.
(g) breach of condition on use or further disclosure of medical evidence.

12. Enforcement of awards of Tribunals by other bodies such as the County Court

13. Council on Tribunals

Are the tribunals/adjudicative bodies to be placed under the supervision of the Council on Tribunals (Schedule to Tribunals and Inquiries Act 1992)

14. Variations in respect of Scotland, Wales and Northern Ireland

(a) Extension/restriction of jurisdiction in Scotland, Wales and Northern Ireland.
(b) Separate tribunal/series of tribunals.
(c) Separate Presidential/administrative system.
(d) Separate rule-making powers.
(e) Variations in procedure.

B. Matters for consideration for inclusion in rule-making powers

1. **Matters relating to the establishment, composition and sittings of the Tribunals** (which, apart from subhead (b) below, should be explicitly provided for in the rule-making power).

   (a) Any matters referred to in items AI to A6 not provided for in the principal legislation. (This may be particularly relevant where some authority other than the central government is to be responsible for establishing or providing for the composition or appointment of a tribunal or tribunals - see Schedule 11 to the Local Government Finance Act 1988 for the extensive provision that it may be prudent to make in such a case).
   (b) Place and time of sittings of a tribunal.
   (c) Transfer of cases.
   (d) Appointment of an assessor or assessors and an advocate to the Tribunal.

2. **General provision for practice and procedure**

   (a) Rules for regulating the exercise of the rights of appeal.
   (b) Rules for regulating practice and procedure (paragraph 7 of Schedule 6 to the Data Protection Act 1998 uses both forms: "... may make rules for regulating the exercise of the rights of appeal conferred by sections 28(4) or (6) and 48 of this Act and the practice and procedure of the Tribunal").

3. **Specific matters** which may be the subject of rules expanding ("without prejudice to the generality of") a general provision such as item 2 above. Those items marked with an asterisk in particular are likely to fall outside any general provision and, if required, should be expressly mentioned.

   (a) Time
   Provision with respect to the time limits, in particular within which an appeal/application may be brought and for extending any such time* including, where necessary, any period prescribed by the principal legislation.

   (b) Parties
   - who may apply, agents, representatives of persons under a disability
   - provision relating to who or what Authority or person may/must be joined as a respondent
   - third parties
   - succession on death.

(c) Preliminary questions

- ►* whether any matter may be decided by arbitration, the parties to the arbitration and the application of provisions of the Arbitration Act 1996
- ►* powers to suspend administrative decisions against which an appeal is brought
- ►* other interim relief.

(d) Evidence

- ► power of tribunal to decide what evidence it will require, burden of proof, standard of proof
- ► provision for securing documentary evidence and witnesses-inspection-copying-oaths and affirmations
- ►* power for tribunal or experts to enter on land and buildings to inspect
- ► medical examinations.
- ► power of appellate tribunal to receive fresh evidence.

(e)* Penal sanctions for failure to comply with procedural requirements

- ► any matters referred to in item A10 not provided for in the principal legislation
- ► requirement to state penalties in directions, orders, summonses, etc.

(f) Appearance/representation

- ► restrictions on presence of a party at certain part of hearing
- ► representatives of parties-restriction on representation.

(g) Hearing

- ► power to decide procedure
- ► hearings to be public-power to hold hearings or hear particular issues or evidence in private
- ► presence of member of Council on Tribunals at hearings and deliberations
- ► power to decide particular appeals/applications/issues without an oral hearing
- ► consolidation of appeals/applications; test cases.

(h) Decisions

- ► reasons for decisions
- ► power to review decisions
- ► registration of decisions
- ► proof of decisions.

(i) Powers of Chairs

- to exercise powers of tribunal in preliminary, incidental or uncontested matters
- to correct errors.

(j)* Delegation of powers of Tribunal to Registrar and powers of Registrar to staff

(k)* Fees, Costs, etc.

- Fees
- Costs, taxation, enforceability in county court
- Expenses.

(l)* Awards

- enforcement in county court
- interest.

(m) Publicity

- advertisement of applications
- notice of hearings
- notice of decisions
- access of public to register of applications and decisions
- publication of reports.

(n) Notices

- service of documents.

(o) Ancillary provision

- "for conferring on the Tribunal such ancillary powers as the [rule-making authority] thinks necessary for the proper discharge of its functions".

For examples of a number of such provisions see, in addition to section 106 of the Nationality Immigration and Asylum Act 2002 and Schedule 11 of the Local Government Finance Act 1988 quoted above, the following enactments:

- Section 3 of the Lands Tribunal Act 1949;
- Section 7 of the Employment Tribunals Act 1996;
- Section 82 of, and paragraph 9 of Schedule 12 to, the Value Added Tax Act 1994;
- Schedule 6 to the Data Protection Act 1998;
- Sections 145 to 151 of the Copyright, Designs and Patents Act 1988;
- Schedule 6 to the Courts and Legal Services Act 1990.