TRIBUNALS, COURTS AND ENFORCEMENT BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Tribunals, Courts and Enforcement Bill [HL], which was introduced in the House of Lords on 16th November 2006. They have been prepared by the Department for Constitutional Affairs in order to assist the reader of the draft Bill. The explanatory notes have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given. Where a clause makes a change to the system currently in place, an overview will be given of that system followed by an explanation of the change that the Bill makes.

OVERVIEW

3. The Tribunals, Courts and Enforcement Bill will primarily implement the key recommendations contained in the following reports and papers:

- the White Paper, Transforming Public Services: Complaints, Redress and Tribunals,[1] published in July 2004 ("Transforming Public Services");
- the consultation paper Increasing Diversity in the Judiciary, published in October 2004;
- the Law Commission Report, Landlord and Tenant – Distress for Rent,[2] published in February 1991 ("the Law Commission's Report");

[1] Command paper 6243
[2] February 1991, Report No. 194

- a Report to the Lord Chancellor, Independent Review of Bailiff Law, by Professor J. Beatson QC published in July 2000;
- a White Paper, Effective Enforcement, published in March 2003 ("Effective Enforcement");
- a consultation paper, A Choice of Paths: better options to manage over-indebtedness and multiple debt, published on 20th July 2004 ("the Choice of Paths Consultation");
- a consultation paper, Relief for the indebted, an alternative to bankruptcy, published in March 2005; and
- a consultation on providing immunity from seizure for international works of art on loan in the UK (March 2006).

4. The explanatory notes are divided into parts reflecting the structure of the Bill. For each part, there is a summary of the provisions and commentary on the background to the proposals. Commentary on particular clauses in each part is set out in numerical order, with the commentary on the various schedules included with the clause to which they relate.

5. The Bill is divided into 8 Parts:

Part 1: Tribunals and Inquiries
Part 1 creates a new, simplified statutory framework for tribunals which provides coherence and will enable future reform. It brings tribunal judiciary together under a Senior President. It also replaces the Council on Tribunals, the supervisory body for tribunals, with the Administrative Justice and Tribunals Council, which has been given a broader remit.

Part 2: Judicial Appointments
Part 2 provides for revised minimum eligibility requirements for appointment to judicial office, including provision to enable eligibility to be extended, by order, beyond barristers and solicitors to the holders of other relevant qualifications, such as legal executives. It also contains some detailed amendments about judicial appointments.

Part 3: Enforcement by Taking Control of Goods
Part 3 unifies the existing law relating to enforcement by seizure and sale of goods for most purposes. It also replaces the current law of rent distress with a modified regime for recovering rent arrears in the commercial property sector.

Part 4: Enforcement of Judgments and Orders
Part 4 contains measures to help creditors with claims in the civil court to enforce their judgments, including a new court-based mechanism to help the court gain access to information about the judgment debtor, on behalf of the creditor.

Part 5: Debt Management and Relief
Part 5 makes changes to two statutory debt-management schemes, administration orders and enforcement restriction orders. Part 5 also contains measures which provide debtors who are unable to pay their debts with relief from enforcement and discharge from their debts. In

addition, Part 5 contains non-court based measures to help over-indebted persons and those with multiple debt situations manage their indebtedness.

Part 6: Protection of cultural objects on loan
Part 6 provides immunity from seizure to objects which have been lent to this country from overseas to be included in a temporary exhibition at a museum or gallery.

Part 7: Miscellaneous
Part 7 makes changes to the ability of High Court enforcement officers and the obligation on High Sheriffs to execute writs of possession issued to enforce compulsory purchase orders. Part 7 also amends section 31 of the Supreme Court Act 1981 ("SCA 1981") enabling the High Court to substitute its decision for that of a court or tribunal in certain circumstances. Part 7 additionally provides for enforcement of ACAS-supervised settlements of employment disputes, and for appeals to go to the courts instead of to the tribunal set up by section 28 of the Registered Designs Act 1949.

Part 8: General
Part 8 contains technical provisions including those about implementation.

PART 1: TRIBUNALS AND INQUIRIES

SUMMARY

6. The policy intention underlying Part 1 of the Bill is to create a new, simplified statutory framework for tribunals, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions and new appeal rights.

7. The Bill seeks to provide a new unified structure by creating two new tribunals, the First-tier Tribunal and the Upper Tribunal. It gives the Lord Chancellor power to transfer the jurisdiction of existing tribunals to the two new tribunals. Further, the Lord Chancellor will have the power to transfer to himself certain statutory powers and duties in relation to the administration of tribunals. The Bill places the Lord Chancellor under a general duty to provide administrative support to the new tribunals, and also to the employment tribunals, Employment Appeal Tribunal and Asylum and Immigration Tribunal (AIT).

8. The Bill also creates a new judicial office, the Senior President of Tribunals, to oversee tribunal judiciary. The Senior President will be the judicial leader of the tribunals system. The Senior President of Tribunals holds a distinct statutory office and in carrying out the functions of that office is not subject to the direction of any other judicial office holder. The Bill provides for the membership of the tribunals, rights of appeal from the tribunals, the making of new Tribunal Procedure Rules, and gives the Upper Tribunal the power to exercise a judicial review jurisdiction in certain circumstances. The Bill also replaces the Council on

Tribunals with the Administrative Justice and Tribunals Council, which will have a broader remit over the whole of the administrative justice system.

BACKGROUND

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

10. Until now, most tribunals have been created by individual pieces of primary legislation, without any overarching framework. Many have been administered by the government departments responsible for the policy area in which that tribunal has jurisdiction. Those departments are sometimes responsible for the decisions which are appealable to the tribunal.

11. In the report of his Review of Tribunals, *Tribunals for Users – One System, One Service*, published in August 2001, Sir Andrew Leggatt recommended extensive reform to the tribunals system. He recommended that tribunals should be brought together in a single system and that they should become separate from their current sponsoring departments. He recommended that such a system be administered instead by a single Tribunals Service, in what was then the Lord Chancellor's Department.

12. The Government agreed and published its response to the report in the White Paper *Transforming Public Services: Complaints, Redress and Tribunals* in July 2004.

The new tribunals

13. The Government's response to Sir Andrew Leggatt's recommended single tribunal system is to create two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, into which existing tribunal jurisdictions can be transferred. The Upper Tribunal is primarily, but not exclusively, an appellate tribunal from the First- tier Tribunal.

14. The Bill also provides for the establishment of "chambers" within the two tribunals so that the many jurisdictions that will be transferred into the tribunals can be grouped together appropriately. Each chamber will be headed by a Chamber President and the tribunals' judiciary will be headed by a Senior President of Tribunals.

Membership, deployment and composition

15. A distinctive feature of tribunals in their current form is their membership. Some tribunals consist of a lawyer sitting alone. Others comprise a lawyer sitting with one or more members who may be experts in their field (such as doctors or accountants) who have

experience relevant to the work of the tribunal, or have no relevant experience but have generic skills. A few tribunals have no legal members at all.

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

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

Reviews and appeals and the judicial review jurisdiction of the tribunals

18. Currently there is no single mechanism for appealing against a tribunal decision. Appeal rights differ from tribunal to tribunal. In some cases there is a right of appeal to another tribunal. In other cases there is a right of appeal to the High Court. In some cases there is no right of appeal at all. The Bill provides a unified appeal structure. Under the Bill, in most cases, a decision of the First-tier Tribunal may be appealed to the Upper Tribunal and a decision of the Upper Tribunal may be appealed to a court. The grounds of appeal must relate to a point of law. The rights to appeal may only be exercised with permission from the tribunal being appealed from or the tribunal or court, as the case may, being appealed to.

19. It will also be possible for the Upper Tribunal to deal with some judicial review cases which would otherwise have to be dealt with by the High Court or Court of Session. The Upper Tribunal has this jurisdiction only where a case falls within a class specified in a direction given by the Lord Chief Justice or in certain other cases transferred by the High Court or Court of Session, but it will not generally be possible for cases to be transferred to the Upper Tribunal if they involve immigration or nationality matters.

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

Transfer of tribunal functions

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

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

22. Some tribunals have been excluded from the new structures because of their specialist nature. Tribunals run by local government have for now been excluded, as their funding and sponsorship arrangements are sufficiently different to merit a separate review.

23. There are also tribunals that will share a common administration, and the leadership of the Senior President of Tribunals, but whose jurisdictions will not be transferred to the new tribunals. They are the AIT, the employment tribunals and the Employment Appeal Tribunal. The AIT has a unique single-tier structure, in order to prevent abuse of the system (as prescribed by the Nationality, Immigration and Asylum Act 2002, as amended by the Asylum and Immigration (Treatment of Claimants etc) Act 2004) which would not fit into the new structure envisaged by the Bill. The employment tribunals and the Employment Appeal Tribunal are excluded because of the nature of the cases that come before them, which involve one party against another, unlike most other tribunals which hear appeals from citizens against decisions of the State.

Administrative Support

24. In *Transforming Public Services*, the Government set out its plans to create a single Tribunals Service to provide common administrative support to the main central government tribunals. The new Service, an executive agency of the Department for Constitutional Affairs (DCA), was launched in April 2006. It provides support to a range of tribunals, including the Asylum and Immigration Tribunal, the Social Security and Child Support Tribunals, the employment tribunals, the Employment Appeal Tribunal, and the Mental Health Review Tribunals in England. Most tribunals which are the responsibility of central government are now administered by the Tribunals Service, or will join the Service over the next few years.

25. The Tribunals Service was created by machinery of government changes. Legislation was not required. The Bill does not, therefore, set out a blueprint for the new agency. The Bill does, however, give the Lord Chancellor the power to transfer to himself certain statutory powers and duties that primarily relate to the provision of administrative support for tribunals. It entrenches these powers and duties with the Lord Chancellor so that they can be transferred to another minister only by primary legislation.

26. In developing these proposals the intention has been to follow the principles underlying the evolving constitutional settlement between the executive and the judiciary set out in the concordat agreed between the Lord Chancellor and the Lord Chief Justice for England and Wales in January 2004, and the Constitutional Reform Act 2005 ("CRA 2005").

Oversight of Tribunals and Inquiries

27. The Council on Tribunals ("the Council") operates under the Tribunals and Inquiries Act 1992 ("the 1992 Act"). Its statutory purpose is to keep under review and report on the constitution and working of tribunals under its supervision. The Council has to consider and report on particular matters that may be referred to it under the 1992 Act with respect to tribunals and, where necessary, to consider and report on the administrative procedures of statutory inquiries. The Council is also under a statutory duty to make an annual report about its work, which is to be laid before Parliament. The Council seeks to ensure that tribunals and inquiries meet the needs of users through the provision of an open, fair, impartial, efficient, timely and accessible service.

28. Sir Andrew Leggatt recommended that the Council on Tribunals should play a central role in the new tribunals system (recommendations 168-182). *Transforming Public Services* built on these recommendations in the wider context of the Government's proposals for reforming the Administrative Justice System. Chapter 11 of the White Paper proposed that with the creation of the Tribunals Service in April 2006 it was also necessary for the Council to change. It proposed that the Council should take on a wider remit to become an Administrative Justice and Tribunals Council and in particular to focus on the needs of the public and users. Clauses 42 and 43 of, and Schedule 7 to, the Bill give effect to the new policy.

Administrative Justice and Tribunals Council

29. Under the Bill, the Administrative Justice and Tribunals Council ("the AJTC") will adopt a similar role in relation to the supervision of tribunals as that currently exercised by the Council on Tribunals. But in addition to taking on the Council on Tribunals' current remit, the AJTC will be charged with keeping the administrative justice system as a whole under review. It is tasked with considering how to make the system more accessible, fair and efficient, and advising the Lord Chancellor, the Scottish Ministers, Welsh Ministers and the Senior President accordingly.

30. The AJTC's wider administrative justice role will be concerned with ensuring that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution routes satisfactorily reflect the needs of users.

31. The AJTC will be of a comparable size to the present Council on Tribunals, with between 10 and 15 members appointed by the Lord Chancellor, and by Ministers from the devolved administrations, under an independent Chair. Whereas the Council has just a Scottish Committee, the AJTC will have Scottish and Welsh Committees.

Enforcement

32. Tribunals have no enforcement powers of their own. If a monetary award is not paid then, in England and Wales, the claimant must register it in the county court and use the enforcement methods available there (for example see section 15 of the Employment Tribunals Act 1996). *Transforming Public Services* undertook to simplify the system so that an award of compensation, whether ordered by the tribunal or agreed between the parties (under compromises involving the Advisory, Conciliation and Arbitration Service (ACAS)), can be enforced with the minimum of bureaucracy as if it were an order of the civil courts.

33. The proposed measures will remove the need for registration of unpaid awards in the county court or the High Court and provide that they can be enforced as if they bear the right to a warrant of execution. Claimants will be able to go directly to the county court or High Court for enforcement.

34. Essentially, the legislative changes will (a) allow claimants to proceed immediately to enforcement (levelling the playing field between tribunal users and other civil claimants), and (b) ensure that those owed money as a result of a tribunal hearing can benefit from improvements to the wider civil enforcement system.

35. The Bill proposals will mean that the procedure for enforcing tribunal awards in England and Wales (and Northern Ireland), and ACAS brokered agreements (see Clause 133), will become similar to the Scottish process, in that the award will be treated as enforceable without any intermediate steps being necessary. Part 1 of the Bill does not alter the methods of enforcement either in Scotland or in England and Wales (or Northern Ireland), but allows tribunals to benefit from them.

36. In addition, the Bill (see paragraph 54 of Schedule 8) provides for unpaid awards to be entered on the Register of Judgments, Orders and Fines (which may be searched by banks, building societies, and credit companies when considering applications for credit). The Bill also makes it easier for the courts to obtain information about the debtor, as claimants will be able to make information requests under the provisions contained in Part 4 of the Bill, which will help them to identify what kind of court action it would be appropriate to take to recover the debt.

COMMENTARY ON CLAUSES: PART 1

Clause 1: Independence of tribunal judiciary

37. Clause 1 ensures that the duty imposed on the Lord Chancellor and other Ministers of the Crown (under section 3 of the Constitutional Reform Act 2005), to uphold the continued judicial independence of the judiciary, extends to tribunal judiciary.

Clause 2 and Schedule 1: Senior President of Tribunals

38. Clause 2 creates a new statutory judicial post, that of Senior President of Tribunals. The post is intended to provide unified leadership to the tribunals judiciary. The creation of the post was recommended by Sir Andrew Leggatt in his review.

39. The Bill creates a number of specific powers and duties for the Senior President, including:

- his concurrence in relation to the chambers structure for the First-tier Tribunal and the Upper Tribunal (and any change in it) (clause 7(1));
- he may, with the concurrence of the Lord Chancellor, make provision for the allocation of functions between chambers (clause 7(9));
- his duty to report to the Lord Chancellor on matters which the Senior President wishes to bring to the attention of the Lord Chancellor and matters which the Lord Chancellor has asked the Senior President to cover (clause 41);
- his power to make practice directions (clause 23);
- the right to be consulted on the making of fees orders (clause 40(5));
- his concurrence in relation to the making of orders prescribing the qualifications required for appointment of members of the First-tier Tribunal (Schedule 2, paragraph 2(2)) and the Upper Tribunal (Schedule 3, paragraph 2(2));
- the power to request a judge of the First-tier Tribunal or the Upper Tribunal to act as a member of those tribunals (Schedule 2 paragraph 6(2) ; Schedule 3 paragraph 6(2));
- the duty to maintain appropriate arrangements for training, welfare and guidance of judges and other members (Schedule 2 paragraph 8; Schedule 3 paragraph 9);
- the power to take oaths of allegiance and judicial oaths (or to nominate someone to do so) from judges and other members of the First-tier and Upper Tribunal (Schedule 2 paragraph 9, and Schedule 3 paragraph 10).
- the right to be consulted before the Lord Chancellor appoints a Chamber President from among the ranks of the judiciary (Schedule 4, paragraph 2(1);
- the power to assign judges and other members to chambers (Schedule 4, paragraph 9);
- being or nominating a member of the Tribunal Procedure Committee. (It is expected that the Senior President or his nominee will chair the Committee.) (Schedule 5 paragraph 20);
- the power to request the appointment of additional members of the Tribunal Procedure Committee (Schedule 5 paragraph 24).

40. In exercising these powers the Senior President has to have regard to the principles set out in clause 2(3), namely that tribunals need to be accessible, proceedings need to be fair and handled quickly and efficiently, members need to be expert and innovative methods of dispute resolution need to be developed. These criteria are based on the long-standing principles underlying the jurisdiction of tribunals, as originally articulated by the Report of the Committee on Administrative Tribunals and Inquiries in 1957 (the Franks Report).

41. Schedule 1 sets out the process for appointing a Senior President and the terms of office. This is a judicial appointment. If there is a vacancy, the Lord Chancellor must recommend a person for appointment to the office unless the Lord Chief Justice agrees that it may remain unfilled. (paragraph 1).

42. The appointment is made by Her Majesty the Queen (clause 2(1)), in line with the practice for senior judicial appointments generally. Her Majesty acts on the recommendation of the Lord Chancellor and there are two routes to a recommendation by the Lord Chancellor. The first is where the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland agree on the nomination of a Lord or Lady Justice of Appeal or a member of the Inner House of Court of Session as a suitable candidate for appointment. If there is no agreement the Lord Chancellor must ask the Judicial Appointments Commission to select someone for recommendation for appointment (paragraph 2(5)).

43. The process for selection by the Judicial Appointments Commission is set out in paragraphs 3 to 5. It follows as closely as is appropriate the criteria and process for appointment of Heads of Division of the High Court under sections 67 to 75 of the CRA 2005.

44. The eligibility requirement is the same as the eligibility requirement for a Lord or Lady Justice of Appeal will be once amended by paragraph 16(2) of Schedule 10 to the Bill.

45. Paragraph 4 of Schedule 1 inserts seven new sections into the CRA 2005. These sections create a process for the selection of the Senior President by the Judicial Appointments Commission which is the same as the process for appointment of a Head of Division of the courts, except that the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland are consulted, because the Senior President has United Kingdom-wide responsibilities. The selection panel for the appointment of the Senior President consists of the Lord Chief Justice, or his nominee, a person designated by the Lord Chief Justice, the Chairman of the Commission or his nominee and a lay member of the Commission designated by the third member. The person designated by the Lord Chief Justice is intended to be a present or former office holder in tribunals. This provision is intended to bring to the selection panel direct knowledge or experience of the distinctive nature of tribunals in the justice system.

46. The terms of office for the Senior President are set out in paragraphs 6 to 10 of Schedule 1. The Senior President may be appointed either for a fixed term or for an indefinite period subject only to the retirement provisions of the Judicial Pensions and Retirement Act 1993. The Senior President may only be removed from office by Her Majesty on an address presented to Her by both Houses of Parliament. (paragraph 6).

47. The Senior President may resign at any time. If the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief

Justice of Northern Ireland agree that the holder of the office is disabled by permanent infirmity and is incapacitated from resigning, the Lord Chancellor may instead declare that the holder is to be treated as having vacated the office.

48. On appointment, the Senior President must take the oath of allegiance and the judicial oath (as set out in the Promissory Oaths Act 1868), in the presence of the Lord Chief Justice of England and Wales or another holder of high judicial office nominated by the Lord Chief Justice.

Clause 3: The First-tier Tribunal and the Upper Tribunal

49. Clause 3 provides for the creation of a First-tier Tribunal and an Upper Tribunal, each consisting of judges (i.e. legally qualified members) and other members. It is intended that the Upper Tribunal will primarily, but not exclusively, be an appellate tribunal from the First-tier Tribunal. They are intended to be adaptable institutions, able to take on any existing or new tribunal jurisdictions. So in the future, when Parliament decides to create a new appeal right or jurisdiction, it will not have to create a new tribunal to administer it. The Upper Tribunal is a superior court of record, like the High Court and the Employment Appeal Tribunal.

Clause 4 and Schedule 2: Judges and other members of the First-tier Tribunal

50. Clause 4 and Schedule 2 set out provisions relating to judges and other members of the First-tier Tribunal.

51. At present most tribunals include legally qualified members and members without a legal qualification. The qualification requirements which apply to the lawyers, who often chair the tribunal hearing a case, are varied. The range of non-legal members is very wide and includes members such as medical practitioners, accountants, people with experience of disability issues, people with experience of the armed services and so-called "lay" members. This structure will continue in the new tribunals, with the legally qualified members of the First Tier Tribunal being called judges of the First-tier Tribunal.

52. Judges and other members of the new tribunals will either be transferred in from existing tribunals, appointed as such ("appointed judges/members") or hold their office in the First-tier Tribunal by virtue of another office which they hold. So, for example, a circuit judge will automatically be a member of either the First-tier Tribunal or the Upper Tribunal. This will enable judges who have the appropriate expertise and experience, from holding judicial office in courts or other tribunals, to be brought into the new tribunals to help to deal with the tribunals' work. Similarly, some members of other tribunals without legal qualifications will automatically be members of the new tribunals. The same principle will apply within the structure of the new tribunals, so that, for example, a judge of the Upper Tribunal will automatically be an appointed judge of the First-tier Tribunal.

53. A person is eligible for appointment as a judge of the First-tier Tribunal if he has a legal qualification and 5 years' legal experience since qualifying (Schedule 2, paragraph 1(2)).

54. But in addition, persons may be appointed if, in the Lord Chancellor's opinion, they have legal experience which would make them as suitable for appointment as if they had the relevant legal qualifications. This provision, which is based on current eligibility requirements in relation to the Asylum and Immigration Tribunal and the Mental Health Review Tribunal, recognises that in the specialised fields in which tribunals operate, the necessary skills and knowledge may have been acquired by someone who does not have a professional qualification in the United Kingdom, such as a legal academic or someone qualified in a European or Commonwealth jurisdiction.

55. Appointed judges and members of the First-tier Tribunal are appointed by the Lord Chancellor (Schedule 2, paragraphs 1(1) and 2(1)). Except where a member of an existing tribunal is transferred into the new tribunals under clause 30(2), appointment takes place after selection by the Judicial Appointments Commission.

56. Appointed and transferred-in judges and members of the First-tier Tribunal are protected by a prohibition on removal without the concurrence of the Lord Chief Justice of England and Wales, Lord President of the Court of Session or Lord Chief Justice of Northern Ireland (Schedule 2 paragraph 3). Judges and other members of the First-tier Tribunal and transferred-in judges and members appointed on a salaried basis have the further protection of a provision that they may be removed by the Lord Chancellor only on the ground of inability or misbehaviour (Schedule 2 paragraph 4). These provisions safeguard the independence of the tribunals.

57. As mentioned above, the judges and members of the First-tier Tribunal will be made up partly of ex officio judges and members, i.e. those who hold office in the new tribunals by virtue of other offices they hold in the courts or tribunals. The deployment of those ex officio judges and members is to be under the control of the Senior President of Tribunals, in conjunction, in the case of judges from the courts, with the Lord Chief Justice of England and Wales, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland. Paragraphs 6 and 7 of Schedule 2 deal with the ex officio judges and members: Part 2 of Schedule 4 deals with their deployment.

58. The Senior President of Tribunals has responsibility for maintaining arrangements for the training (on which he may consult as necessary) welfare and guidance of judges and other members of the First-tier Tribunal (Schedule 2, paragraph 8).

59. Schedule 2 paragraph 9 makes provision for judges and members of the First-tier Tribunal to take the oath of allegiance and the judicial oath before the Senior President of Tribunals, or before an eligible person nominated by the Senior President, provided they have not already done so in accepting another office. Judges and members who carry out functions

mainly or wholly in Northern Ireland may be required to take instead the oath, or the affirmation and declaration, set out in section 19 of the Justice (Northern Ireland) Act 2002.

Clause 5 and Schedule 3: Judges and other members of the Upper Tribunal

60. Clause 5 and Schedule 3 set out provisions relating to judges and other members of the Upper Tribunal.

61. A person is eligible for appointment as a judge of the Upper Tribunal if he has 7 years of post qualification experience (this is a standard qualification for judicial office) (Schedule 3, paragraph 1(2)). In addition, a person may be appointed to the Upper Tribunal if, in the Lord Chancellor's opinion, he has gained experience in law which makes him suitable for appointment as if he satisfied the 7 year qualification. Appointed judges of the Upper Tribunal are appointed by the Queen, on the recommendation of the Lord Chancellor. Except where a member of an existing tribunal is transferred into the new tribunals under clause 30(2), appointment takes place after selection by the Judicial Appointments Commission.

62. Appointed and transferred-in judges and members of the Upper Tribunal are protected by a prohibition on removal without the concurrence of the Lord Chief Justice of England and Wales, Lord President of the Court of Session or Lord Chief Justice of Northern Ireland (Schedule 3 paragraph 3). Judges and other members of the Upper Tribunal and transferred-in judges and members appointed on a salaried basis have the further protection of a provision that they may be removed by the Lord Chancellor only on the grounds of inability or misbehaviour (Schedule 3 paragraph 4). These provisions safeguard the independence of the tribunals.

63. Judges and members of the Upper Tribunal will be made up partly of ex officio judges and members. The deployment of those ex officio judges and members is to be under the control of the Senior President of Tribunals, in conjunction, in the case of judges from the courts, with the Lord Chief Justice of England and Wales, the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland. Paragraphs 6 and 8 of Schedule 3 deal with the arrangements for deployment.

<u>Judges of the Upper Tribunal</u>

64. The Lord Chancellor has the power to appoint deputy judges of the Upper Tribunal (Schedule 3 paragraph 7). A person must have the same legal qualifications for appointment as a deputy judge as for appointment as a judge of the Upper Tribunal. The provision will enable the appointment to the Upper Tribunal of members with particular areas of expertise.

65. The Senior President of Tribunals has responsibility for maintaining arrangements for the training, welfare and guidance of judges and other members of the Upper Tribunal (Schedule 3 paragraph 9).

66. Schedule 3 paragraph 10 makes provision for judges and members of the Upper Tribunal to take the oath of allegiance and the judicial oath before the Senior President of Tribunals, or before an eligible person nominated by the Senior President, provided they have not already done so after accepting another office. Judges and members who carry out functions mainly or wholly in Northern Ireland may be required to take instead the oath, or the affirmation and declaration, set out in section 19 of the Justice (Northern Ireland) Act 2002.

Clause 6 Certain Judges who are also judges of First-tier Tribunal and Upper Tribunal

67. Clause 6 lists which judges are to be considered as members of both the First-tier Tribunal and the Upper Tribunal within England, Wales, Scotland and Northern Ireland. Temporary office holders or deputies are not included within the list.

Clause 7: Chambers: Jurisdiction and Presidents and Schedule 4: Chambers and Chamber Presidents: further provision

68. Currently, many separate tribunals deal with different jurisdictions. When these tribunals are replaced by just two tribunals, it will be necessary for the jurisdictions in the new tribunals to have an organisational structure. Clause 7 provides for the establishment of boundaries for the jurisdictions within the First-tier and Upper Tribunal through the creation of chambers. The tribunals will bring together a wide range of specialist jurisdictions. It would dilute expertise and damage the service provided to the public if they were organised on the basis that all judges and members can deal with all kinds of case. Instead, jurisdictions will be grouped so that similar work is dealt with by judges and members best able to deal with it. Initially the division into chambers is intended largely to follow the current jurisdictional boundaries but the chambers system is intended to be flexible so that changes can be made easily as the workload of the tribunals changes.

69. Over time, the structure of each tribunal may change: chambers may be merged and new chambers may be created. The Lord Chancellor, with the concurrence of the Senior President, will have the power to create chambers by order (clause 7(1)). Subsection (9) also provides for the Senior President and the Lord Chancellor to be able to vary by order the distribution of functions between the chambers in either the First-tier Tribunal or the Upper Tribunal.

70. Chambers may be constructed on either a functional or a geographical basis, or a combination of the two.

71. Clause 7(2) states that for each chamber within the First-tier Tribunal and Upper Tribunal there must be a person, or two persons, to preside over that chamber. A person cannot preside over more than one chamber within the First-tier Tribunal at the same time,

and, likewise, cannot preside over more than one chamber within the Upper Tribunal at the same time, although they can preside over one chamber of the First-tier Tribunal and over one chamber of the Upper Tribunal at the same time (clause 7(3)).

72. Clause 7(4) confers the title Chamber President on someone appointed to preside over a chamber. Schedule 4 makes further provision about chambers and Chamber Presidents. Paragraphs 1 and 5(4) provide for the eligibility requirements to be a Chamber President or a Deputy Chamber President to be the same as those for appointment as a judge of the Upper Tribunal under Schedule 3. This is a judicial leadership role, involving particular skills and experience, so is a separate appointment. Chamber Presidents are intended to provide judicial leadership within their chambers and to guarantee levels of expertise within their chambers. To that end, they will have the power to give practice directions (clause 23(2)). The Senior President may appoint a person to preside over a chamber should the office of Chamber President of the First-tier Tribunal or Upper Tribunal remain vacant for a temporary period (Schedule 4, paragraph 6). A person appointed in such a way will be known as an Acting Chamber President.

73. Paragraphs 2 and 3 of Schedule 4 deal with the appointment of Chamber Presidents. While some Chamber Presidents may be appointed directly to that office, others may be drawn from the High Court or the Court of Session in Scotland or Court of Appeal in Northern Ireland. Before making an appointment from amongst the judges of those courts, the Lord Chancellor must first consult the Senior President of Tribunals. If the Lord Chancellor decides that the appointee should be from the senior judiciary, he must seek a nomination from the Lord Chief Justice of England and Wales or Northern Ireland, or the Lord President of the Court of Session. If a suitable candidate is not forthcoming, selection will be made by the JAC. The office of Chamber President will be added to Part 3 of Schedule 14 to the CRA 2005 for this purpose.

74. Paragraph 4 of Schedule 4 permits a Chamber President to delegate his functions to any judge or other member of the First-Tier or Upper Tribunal, or to a member of staff.

75. Paragraphs 5 and 6 of Schedule 4 provide for the appointment of Deputy and Acting Chamber Presidents. Deputy Presidents are intended to be available to take on functions delegated to them by the Senior President or the Chamber President. Acting Presidents are to be appointed by the Senior President to cover a temporary vacancy in the office of Chamber President. The appointment process for Deputy Chamber Presidents mirrors that for Chamber Presidents.

76. Paragraph 7 of Schedule 4 requires the Chamber President to make arrangements for the issuing of guidance to judges, members and users, on the law and practice relating to the jurisdictions assigned to his chamber.

77. Paragraph 8 provides for persons appointed as Chamber Presidents or Deputy Chamber Presidents to take the oath of allegiance and the judicial oath before the Senior President of Tribunals, or before an eligible person nominated by the Senior President.

78. Part 2 of Schedule 4 provides for the Senior President to establish a system for assignment of tribunal judges and members to chambers. It is expected that this system will be designed by the Senior President to allow the flexible and efficient deployment of existing office holders across each of the two new tribunals. Each Chamber President and Deputy Chamber President must be assigned to their own chamber but can be assigned to other chambers as well. Every other judge or member who is appointed under Schedule 2 or 3, or transferred in under clause 30(2), must be assigned to at least one chamber.

79. The process of assignment is intended to be flexible, informal and transparent. It is intended to be based upon the principle of deploying judges and members who have, or are able to acquire, the necessary skills and experience to meet identified business needs of the tribunal.

80. To ensure openness and transparency the Senior President will, under paragraph 13 of Schedule 4, be required to publish his policy on assignments of tribunal judges and members to chambers. The policy must ensure that appropriate use is made of the knowledge and experience of the judges and other members of the new tribunals. The policy must also ensure that a chamber which involves the application of the law of Scotland or Northern Ireland has enough members with knowledge and experience of that law.

81. To ensure appropriate executive accountability to Parliament for the process of assigning members, and to take into account any resource implications, the concurrence of the Lord Chancellor will be required before the policy can be adopted.

82. Under paragraph 14 of Schedule 4, allocation of members to individual hearings is a judicial leadership function and therefore a matter for the Senior President. However, this is subject to the panel composition requirements set by the Lord Chancellor in an order under paragraph 15. These requirements will set, on a jurisdiction by jurisdiction basis, the number of members who should sit on particular appeals. This order is made by the Lord Chancellor in order to take account of resource implications, and to provide parliamentary scrutiny.

Clause 8: Senior President: power to delegate

83. This clause enables the Senior President to delegate any of his functions to any Judge or member of the Upper or First-tier Tribunal or any member of staff.

Clause 9: Review of decision of First-tier Tribunal

84. This clause provides the First-tier Tribunal with the power to review decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter. This is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal. The power has been provided in the form of a discretionary power for the Tribunal so that only appropriate decisions are reviewed. This contrasts with cases where an appeal on a point of law is made, because, for instance, it is important to have an authoritative ruling.

85. The First-tier Tribunal may review a decision made within the tribunal either of its own initiative or on application by any party who has a right of appeal in respect of the decision. The Tribunal will have the power to correct accidental errors in the decision or in a record of the decision, amend the reasons given for the decision or set aside the decision. If a decision of the First-tier Tribunal is set aside by the First-tier Tribunal, it must either re-decide the matter concerned, or refer that matter to the Upper Tribunal. If the latter option is taken, the Upper Tribunal will then be responsible for making the decision which it decides should have been made.

86. No decision of the First-tier Tribunal may be reviewed more than once and a decision of the tribunal not to review a decision is not reviewable. Further challenge of a decision beyond the single review may only be made by appeal on a point of law or by judicial review.

Clause 10: Review of decision of Upper Tribunal

87. This clause provides the Upper Tribunal with the power to review decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter. As in Clause 9 in respect of First-tier Tribunals, this is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal. The power has been provided in the form of a discretionary power for the Tribunal so that only appropriate decisions are reviewed. This contrasts with cases where an appeal on a point of law is made, because, for instance, it is important to have an authoritative ruling.

88. The Upper Tribunal may review a decision made within the tribunal either of its own initiative or on application by any party who has a right of appeal in respect of the decision. The Tribunal will have the power to correct accidental errors in the decision or in a record of the decision, amend the reasons given for the decision or set aside the decision. If the decision is set aside by the Upper Tribunal, it must then re-decide the matter concerned.

89. No decision of the Upper Tribunal may be reviewed more than once and a decision of the tribunal not to review a decision is not reviewable. Further challenge of a decision beyond the single review may only be made by appeal on a point of law or by judicial review.

Clause 11: Right to appeal to Upper Tribunal

90. A party to a case generally has a right of appeal on a point of law from the First-tier Tribunal to the Upper Tribunal. The right of appeal is subject to permission being given, following application by the party, by either the First-tier Tribunal, or the Upper Tribunal. But there is no right of appeal against a decision which is "excluded". Excluded decisions are listed in subsection (5). The Lord Chancellor has a limited power to add to the list by order under subsection (5)(f).

91. Under subsection (7) the Lord Chancellor may by order define who is to be treated as a party to a case for the purposes of an appeal and therefore able to appeal. This is to cover cases where it is appropriate for a person who was neither the person making the original appeal to the First-tier Tribunal, nor the respondent to the original appeal, to make an onward appeal to the Upper Tribunal. This power is subject to affirmative resolution procedure – see clause 46(5) and (6)(a).

Clause 12: Proceedings on appeal to Upper Tribunal

92. This clause provides what the Upper Tribunal can do when it determines that an error has been made on a point of law by the First-tier Tribunal. The Upper Tribunal may set aside the decision of the First-tier Tribunal; if it does it must either remit the case back to the First-tier Tribunal with directions for its reconsideration, or make the decision which it considers should have been made. If it takes the latter option it can make findings of fact. If the Upper Tribunal sends the case back to the First-tier Tribunal they may direct that a different panel reconsiders the case. The Upper Tribunal may also give procedural directions in relation to the case. If the Upper Tribunal decides that the error of law does not invalidate the decision of the First Tier tribunal it can let that decision stand.

Clause 13: Right to appeal to Court of Appeal etc

93. This clause provides the basis on which appeals can be made to the Court of Appeal in England and Wales or Northern Ireland or the Court of Session in Scotland. Appeals may be made on any point of law with permission either from the Upper Tribunal or the relevant appellate court (see subsection (11)). Certain decisions are excluded and the Lord Chancellor can add to the list, but subject to the same constraints as in clause 11.

94. Under subsection (6) the Lord Chancellor may by order restrict appeals to the Court of Appeal to cases where the court or the Upper Tribunal considers that the proposed appeal would raise some important point of principle or practice or that there is some other compelling reason for the appeal to be heard. The intention is to restrict second appeals on the same point unless there is wider public interest i.e. where a prospective appellant has had their case considered by both the First-tier Tribunal and the Upper Tribunal but wishes to pursue

the case to the Court of Appeal. The criteria set out in this subsection are the same as the criteria applied by the Court of Appeal in considering second appeals from the High Court or county court (see Access to Justice Act 1999, section 55(1)).

95. The exercise of this power is subject to the affirmative resolution procedure. It does not apply to Scotland.

96. Subsections (9) to (11) require the Upper Tribunal to specify the relevant appellate court (see subsection (11)). This provision is intended to deal with situations where it is not obvious which is the appropriate appellate court e.g. where an appellant has moved from Scotland to England or vice versa, or in order that linked cases can be dealt with in the same court.

Clause 14: Proceedings on appeal to Court of Appeal etc

97. Where the appellate court determines that the Upper Tribunal has made an error of law, it has power to set aside the decision and either send the case back to the Upper Tribunal to be redecided (or, where the decision of the Upper Tribunal was on an appeal or reference from another tribunal or some other person, to that other tribunal or person, with direction for its reconsideration), or to make the decision which it considers the Upper Tribunal (or the other tribunal or person) should have been made.

"Judicial Review"

98. Tribunals currently have no powers of judicial review. Clauses 15 to 21 create a statutory regime which enables the Upper Tribunal to exercise judicial review powers in appropriate cases. This will allow the parties to have the benefit of the specialist expertise of the Upper Tribunal in cases similar to those which the Upper Tribunal routinely deals with in the exercise of its statutory appellate jurisdiction. These provisions do not alter the inherent or statutory jurisdiction of the High Court (as amended by clause 132) in any other respect.

99. There will be two situations in which the Upper Tribunal will be able to use these powers in cases arising under the law of England and Wales or of Northern Ireland. The first is where a direction has been made by the Lord Chief Justice or his delegate with the agreement of the Lord Chancellor specifying a class of case to be dealt with by the Upper Tribunal rather than the High Court. The second is where the High Court orders the transfer of an individual case because it considers it just and convenient to do so in cases arising under the law of England and Wales or of Northern Ireland (but it will not generally be possible for cases to be transferred to the upper tribunal if they involve immigration or nationality matters.

Clause 15: Upper Tribunal's "judicial review" jurisdiction

100. This clause confers power on the Upper Tribunal to grant certain forms of relief in the same way as the High Court on an application for judicial review. This clause needs to be read alongside clauses 16 and 18, which set out the circumstances in which the Upper Tribunal has jurisdiction.

101. When it has jurisdiction, the Upper Tribunal may grant a mandatory order (an order that the respondent does something); a prohibiting order (an order that the respondent stops doing something); a quashing order (an order setting aside a decision or action as unlawful); a declaration; or an injunction. These remedies have the same effect as if made by the High Court. In determining whether to grant a remedy, the Tribunal must have regard to the principles of judicial review that would apply in the court from which jurisdiction has been delegated. Therefore the Upper Tribunal's powers are similar to those of the High Court.

Clause 16: Application for relief under clause 15(1)

102. Because the Upper Tribunal's powers are similar to the High Court's in judicial review cases, the Upper Tribunal's powers are subject to similar conditions. Therefore it is necessary to have permission to apply to the Upper Tribunal to exercise its "judicial review" jurisdiction which may not be granted if the applicant has insufficient interest in the disputed matter. The Upper Tribunal may also refuse permission, or refuse a remedy, if there has been delay in making an application

103. Awards made by the Upper Tribunal in exercising its 'judicial review' jurisdiction may be enforced as if they were an award of the High Court.

Clause 17: Quashing orders under clause 15(1): supplementary provision

104. This clause makes further provision as to what the Upper Tribunal might do if it decides to grant a quashing order. If it quashes a decision it may also remit the matter for further consideration or substitute its own decision. The Upper Tribunal's powers are similar to the High Court's (see clause 132).

Clause 18: Limits of jurisdiction under clause 15(1)

105. Clause 18 sets out the conditions that need to be met for the Upper Tribunal to have power to deal with an application under clause 16 for relief. The first condition is that the applicant in question is only seeking a remedy that the Upper Tribunal is able to grant. The second condition is that the application does not call into question anything done by the Crown Court. This is because it would be anomalous to give a tribunal, a superior court of

record, supervisory powers over another superior court of record. The third condition is that the application falls within a specified class of case. The class is designated by a direction made by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor.

Clause 19: Transfer of judicial review applications from High Court

106. Clause 19 amends the Supreme Court Act 1981 and the Judicature (Northern Ireland) Act 1978 to complement clauses 15 to 18. As a result, certain applications for judicial review will have to be transferred to the Upper Tribunal. In addition, the High Court may transfer to the Upper Tribunal individual cases that do not fall within a class specified under clause 18(6), but cases relating to immigration and nationality matters cannot be transferred in exercise of this discretionary transfer power unless they fall within a class specified by the Lord Chancellor.

Clause 20: Transfer of judicial review applications from the Court of Session

107. Clause 20 makes provision for the Court of Session to transfer applications for judicial review to the Upper Tribunal. Applications cannot be transferred if they relate to immigration or nationality matters, unless they fall within a class specified by act of sederunt made with the consent of the Lord Chancellor. Applications cannot be transferred if they relate to devolved matters. Also, an application can only be transferred if it does not seek anything other than an exercise of the supervisory jurisdiction of the Court of Session. Subject to those three points, an application will have to be transferred if it falls within a class specified by act of sederunt made with the consent of the Lord Chancellor, and may be transferred even if it does not fall within such a class.

Clause 21: Upper Tribunal's "judicial review" jurisdiction: Scotland

108. Clause 21 confirms that the Upper Tribunal will decide applications transferred to it from the Court of Session under clause 20 and that the Upper Tribunal has the same powers of review in such cases as the Court of Session.

Clause 22 and Schedule 5: Tribunal Procedure Rules

109. At present, each tribunal has its own rules, and in many tribunals there are multiple sets of rules. Rule-making powers usually rest with the Lord Chancellor or the Secretary of State. They are usually subject to parliamentary procedure, and the Council on Tribunals must be consulted, but there is no standard form or approach, and no statutory requirement to consult. In the courts, rules are made by rule committees with judicial and practitioner membership under a unified set of powers, enabling a coherent approach to be taken to the development of procedure. The intention is to replicate this arrangement for the new tribunals.

110. Clause 22 sets out the basis on which procedural rules are to be made for the new tribunals. Schedule 5 makes provision for (a) what the rules may contain, (b) the creation of a Tribunal Procedure Committee, (c) the process for making procedural rules and (d) the power to amend primary legislation in pursuance of a rule change.

111. Tribunal Procedure Rules are subject to an overriding objective: the rules must be made with a view to securing that the tribunal system is accessible and fair, that proceedings before the tribunal are handled quickly and efficiently, that the rules are simple and simply expressed and that appropriate responsibility is conferred on tribunal members for ensuring that proceedings are handled quickly and efficiently. This is similar to the overriding objective governing the Civil Procedure Rules.

112. Matters which may be covered by Tribunal Procedure Rules are set out in clause 22(1) and Schedule 5. It is not intended that each jurisdiction will have rules that cover every aspect listed. Rather, the Tribunal Procedure Committee will exercise its judgement, within the process set out in Part 3 of Schedule 5, to determine which rules are needed in each jurisdiction. In addition, the matters listed in Part 1 of Schedule 5 are not intended to be a comprehensive list of all the matters about which rules may be made.

113. The provisions governing the membership and responsibility for appointing members of the Tribunal Procedure Committee are loosely modelled on those for the rule committees making rules of court but are more flexible because of the diverse nature of tribunals. The Committee is intended to consist of core members and additional members appointed as and when required to provide jurisdiction-specific knowledge. One of the core members is the Senior President, or a person nominated by him. The Lord Chancellor, the Lord Chief Justice of England and Wales and the Lord President of the Court of Session appoint the other core members. The Lord Chief Justice of England and Wales or Northern Ireland or the Lord President of the Court of Session may appoint additional members at the request of the Senior President depending on what need has been identified. It may be, for instance, that the Committee needs to make rules for or affecting a jurisdiction with which its core members are unfamiliar, and then additional members with the appropriate expertise will be appointed.

114. The core membership consists of the Senior President or a person nominated by him, three people with experience of practice in tribunals or giving advice to persons involved in tribunal proceedings, a person nominated by the Administrative Justice and Tribunals Council, a judge from each of the tribunals, a tribunal member and a person with experience in and knowledge of the Scottish legal system. The Lord Chancellor's role is limited to selecting persons with experience of tribunal proceedings or practice and appointing the member selected by the Administrative Justice and Tribunals Council. Consistent with the Concordat, the selection of judicial members falls to either the Lord Chief Justice or the Lord President.

115. Any additional members are appointed (at the request of the Senior President of Tribunals) by the Lord Chief Justice of England and Wales, the Lord President of the Court of

Session or the Lord Chief Justice of Northern Ireland. It is expected that additional members will usually be members of the judiciary. The additional members are intended to bring specialist knowledge to the Committee when discussing particular matters.

116. Under paragraph 25 of Schedule 5, the Lord Chancellor may make changes to the composition of the Committee, but only with the concurrence of the Lord Chief Justice of England and Wales and the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland, where such a change would affect a member appointed to the committee by them.

117. Schedule 5 Part 3 details the process by which Tribunal Procedure Rules are to be made. This is consistent with the process for making Civil, Family and Criminal Procedure Rules. The Committee is required to consult before rules are made. In order for the rules to be submitted to the Lord Chancellor they must be approved by the Committee. The Lord Chancellor's powers once rules are submitted to him are limited to powers to allow or disallow. However, the Lord Chancellor does have the power to specify a purpose which must be achieved by rules. This is to ensure that, although the Tribunal Procedure Committee is independent, the Lord Chancellor is able to set objectives for the rules.

118. Once allowed by the Lord Chancellor, rules made under this process are subject to negative resolution procedure.

119. Schedule 5, Part 4 gives the Lord Chancellor power to amend, repeal or revoke any Act in pursuance of a rule change. This power is based upon the provisions in the Civil Procedure Act 1997. Rules made under this process are subject to affirmative resolution procedure.

Clause 23: Practice directions

120. This clause provides the Senior President with the statutory authority to supplement Tribunal Procedure Rules by means of practice directions. These directions may take the form of guidance, interpretation of the law, matters of precedent or the delegation of judicial functions to senior members. The giving of practice directions is one of the functions that the Senior President may choose to delegate to Chamber Presidents under clause 8. Following the Concordat, practice directions made either by the Senior President or a Chamber President will usually require the Lord Chancellor's approval. There are two exceptions. The first is where practice directions consist of guidance about the application and interpretation of law or the making of decisions. The second exception is where practice directions consist of criteria for determining which members of the tribunals may be chosen to decide particular categories of matter. Practice directions given by a Chamber President in his own right (i.e. as opposed to directions given by him when exercising, under a delegation, the Senior President's power to give practice directions) will always require the Senior President's approval, whether or not they also require the Lord Chancellor's approval.

Clause 24: Supplementary powers of Upper Tribunal

121. This clause provides the Upper Tribunal with the powers of the High Court or Court of Session to require the attendance and examination of witnesses and the production and inspection of documents, and all other matters incidental to the Upper Tribunal's functions. These are similar powers to the Employment Appeal Tribunal's under section 29 of the Employment Tribunals Act 1996.

Clause 25: First-tier Tribunal and Upper Tribunal: sitting places

122. This clause provides for the First-tier Tribunal or the Upper Tribunal to sit anywhere in the United Kingdom irrespective of the law under which a case arises. This will allow the flexible listing of cases for hearing in accordance with the needs of tribunal users. It does not, however, allow a tribunal to decide which law it wants to apply.

Clause 26: Enforcement

123. Subsections (1) to (3) ensure that monetary awards made by the First-tier and Upper Tribunals are enforceable through the courts. These provisions do not alter the methods of enforcement.

124. Many tribunal awards in England and Wales are currently enforced through the county court, but there are some where enforcement is currently through the High Court (e.g. the Lands Tribunal where enforcement may be through either court, and the Transport Tribunal where enforcement is in the High Court). Subsection (1) states that a sum payable following a decision of either the First-tier or Upper Tribunal will be recoverable as if it were payable either under an order of a county court in England and Wales or an order of the High Court in England and Wales. The intention is to retain flexibility as to the venue for enforcement for a particular jurisdiction, on the assumption that any provision made in the Tribunal Procedure Rules will be subject to rules governing the allocation of proceedings between the High Court and the county courts (the rules currently stipulate that judgments for over £5,000 are to be enforced in the High Court).

125. In relation to tribunals where the governing statute does not currently allow for enforcement through the court system, it is not intended to alter the position until the relevant jurisdiction is transferred to the new tribunals.

126. Subsection (2) makes corresponding provision for Scotland. An order for payment made as a result of a decision of either the First-tier or Upper Tribunal made in Scotland (or a copy of such an order certified in accordance with Tribunal Procedure Rules) may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution

issued by the sheriff court of any sheriffdom in Scotland (i.e. without the intermediate step of registering the decision with the Sheriff Court).

127. Subsection (3) makes corresponding provision for Northern Ireland. An order for payment made as a result of a decision of either the First-tier or Upper Tribunal in Northern Ireland will be recoverable as if it were payable under either an order of a county court in Northern Ireland or the High Court in Northern Ireland.

128. Subsection (4) provides that the enforcement provisions in the preceding subsections do not apply to awards of damages, restitution or the recovery of a sum due made to an applicant by the Upper Tribunal exercising its 'judicial review' powers under clause 16(6) or 21(1), because enforcement of such awards is dealt with in clauses 16(7) and 21(4).

129. Subsection (5) empowers the Lord Chancellor to make an order (applying to England and Wales or to Northern Ireland) stipulating that a sum of a description specified in the order (payable in pursuance of a decision of the First Tier or Upper Tribunal) may be recoverable as if it were payable either under an order of a county court, or under an order of the High Court, but not both.

130. Subsection (6) allows for Tribunal Procedure Rules to be made which spell out where for the purposes of the enforcement provisions a decision is to be taken to have been made. This is necessary due to the different enforcement methods that apply to Scotland compared with England and Wales. Rules might, for example, provide that where a tribunal is sitting in Scotland to hear a case arising under the law of England and Wales, any sum payable in pursuance of a decision of the tribunal is recoverable as if the decision had been made in England and Wales. Subsection (6) also allows Rules to provide for some sums not to be recoverable under the provisions of the clause. This might be appropriate where the particular legislation under which a tribunal is acting contains its own procedures for enforcing awards.

Clause 27: Assessors

131. An assessor is an expert who is appointed by a court or tribunal to assist it in dealing with issues within the assessor's area of expertise. Some tribunals already have a power to appoint assessors and clause 27 will allow this practice to continue within the new tribunals. This clause provides the First-tier Tribunal or the Upper Tribunal with the power to appoint an assessor to assist where it is dealing with matters that require a special expertise that the tribunal would otherwise not have available to it. But it will not require the assessor to be used where it is inappropriate to the jurisdiction.

Clause 28: Costs or expenses

132. Many tribunals' powers to award costs are currently limited, either because they have no powers to award costs, or because the scope of any power they have is limited. This clause grants the tribunals the discretion to order costs and expenses in the same way as courts. It is not intended that these provisions will apply in all jurisdictions, rather that there will be flexibility as part of the creation of the new system to determine where a costs regime would be appropriate and whether there should be any limits to such a regime (for example, that costs should be awarded only against a party who has acted vexatiously or unreasonably). This is why subsection (1) is subject to provision made under the Tribunal Procedure Rules.

Clause 29: Transfer of functions of certain tribunals

133. The transfer of jurisdictions to the new tribunals is a central feature of the Bill. This clause provides the Lord Chancellor with the power to transfer jurisdictions from those tribunals listed in the relevant parts of Schedule 6 to either of the two new tribunals or the employment tribunals or the Employment Appeal Tribunal. In this way adjudicative functions which are currently spread across a wide range of tribunals can be consolidated into the new tribunals and the employment tribunals and Employment Appeal Tribunal. The general policy of clause 29(5) to (8) is to restrict devolved functions from being transferred to the new tribunals.

134. Under clause 29(5), the general rule is that functions of tribunals which are within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly (i.e. devolved) may not be transferred to the First-tier Tribunal or Upper Tribunal under clause 29.

135. Clause 29(6) and (7) set out some exceptions. Functions in relation to appeals relating to estate agents and consumer credit, and criminal injury compensation appeals, may be transferred. But transfer of functions relating to criminal injury compensation appeals in Scotland will require the consent of Scottish Ministers.

136. Clause 29(8) provides that if any functions relating to the operation of a tribunal, or expenses for attending the tribunal, are exercisable by the Welsh Ministers, functions of that tribunal may be transferred under clause 29 only with the consent of the Assembly.

Clause 30: Transfers under section 29: supplementary powers

137. Where functions are transferred under clause 29, supplementary powers are needed to give the transfer full effect. Subsection (1) confers power on the Lord Chancellor to provide by order for the abolition of a tribunal whose functions have been transferred under clause 29.

138. Subsection (2) enables the Lord Chancellor, in transferring functions of a tribunal listed under Schedule 6, to provide that members of the tribunal are to, judicial office holders

have a new office within either the First-tier Tribunal or the Upper Tribunal. However, it is not intended to use this power as respects any person whose existing office is that of Commissioner for the general purposes of income tax. That office is abolished by paragraph 1(1) of Schedule 8 to the Bill.

139. Subsection (7) allows the Lord Chancellor to provide by order for the continuation of procedural rules following a transfer of functions.

Clause 31: Power to provide for appeal to Upper Tribunal from tribunals in Wales

140. Where a jurisdiction is exercised by separate tribunals for England and Wales, difficulties could arise if there were different routes of onward appeal for the English and Welsh tribunals. This clause provides for an appeal to the Upper Tribunal from tribunals in Wales in two circumstances. Subsections (1) and (2) deal with a situation where the functions of a tribunal covering both England and Wales are transferred to the First-tier Tribunal in respect of England only. Subsection (3) deals with appeals from tribunals which already have a separate existence in Wales, and which are listed in Part 7 of Schedule 6. Without this power an appeal, if it exists, would continue to lie to the High Court. The intention is that users of these tribunals will have access to the Upper Tribunal for their onward appeals, on the same basis as users in England.

Clause 32: Power to provide for appeal to Upper Tribunal from tribunals in Scotland

141. Where a tribunal jurisdiction is transferred to the new tribunals under clause 29, and such a jurisdiction is not transferred in relation to Scotland, clause 32 creates a power for the Lord Chancellor to provide (by order) for an appeal to the Upper Tribunal against a corresponding Scottish decision.

Clause 33: Transfer of Ministerial responsibilities for certain tribunals

142. This clause makes it possible to transfer administrative functions of other ministers (and functions of the Commissioners for Her Majesty's Revenue and Customs) in relation to tribunals to the Lord Chancellor. The power is similar to the power under section 1 of the Ministers of the Crown Act 1975 which enables transfer of functions between ministers.

143. Subsections (7) and (8) taken together prevent functions transferred to the Lord Chancellor from being transferred to another Minister of the Crown under subsection (1) or under the Ministers of the Crown Act 1975. This will replicate the effect of section 19 of, and Schedule 7 to, the Constitutional Reform Act 2005, entrenching judiciary-related functions in the office of the Lord Chancellor, and so helping to secure the independence of tribunals from the departments formerly responsible for them.

Clause 34: Transfer of powers to make procedural rules for certain tribunals

144. This clause enables the Lord Chancellor by order to transfer power to make procedural rules for certain tribunals to himself or to the Tribunal Rules Procedure Committee. Most of the powers that may be transferred under this clause are currently exercisable by the Secretary of State. This power will allow the Lord Chancellor to:

a) standardise the process for making rules for those tribunals whose functions are not scheduled to transfer into the new tribunal structure; or

b) transfer the responsibility for making rules for particular tribunals to the Tribunal Procedure Committee before their functions are transferred to the First-tier Tribunal or Upper Tribunal.

Clause 35: Power to amend lists of tribunals in Schedule 6

145. Schedule 6 shows which of the powers in the Bill are exercisable in respect of which tribunals. There are three main powers: clause 29 deals with the transfer of tribunals' functions, including adjudicative functions to the new tribunals under the Bill. Clause 33 deals with the transfer of executive functions in relation to tribunals to the Lord Chancellor. Clause 34 deals with the transfer of rule making powers to the Lord Chancellor and the Tribunal Procedure Committee.

146. Because of the number of permutations, there are currently seven lists in Schedule 6:

- Part 1: tribunals where all three types of function are to be transferred.
- Part 2: a tribunal where only the adjudicative and executive functions are to be transferred. There are no rule-making powers to transfer.
- Part 3: tribunals where only the adjudicative and rule-making powers are to be transferred because all executive functions are already with the Lord Chancellor.
- Part 4: tribunals where only the tribunal's functions can be transferred because agreement has not yet been reached as to the transfer of the executive and rule- making functions.
- Part 5: tribunals where executive functions are to be transferred to the Lord Chancellor and rule-making functions to the Tribunal Procedure Committee but no change is intended in the tribunal's functions.
- Part 6: tribunals where only executive functions are to be transferred. No change is intended to the tribunal's functions and rule-making powers are to remain with the Secretary of State, as indicated in *Transforming Public Services.*
- Part 7: tribunals in Wales where appeal is intended to be to the Upper Tribunal.

147. This clause gives flexibility by enabling the Lord Chancellor to add or remove tribunals so that the relevant powers can be exercised (or not exercised) in relation to them. The power is constrained by subsections (2), (3) and (4). Under subsection (2)(a), a tribunal

created otherwise than by or under an enactment (e.g. a private tribunal of some kind) cannot be brought within the new structure. Under subsection (2)(b), tribunals created on or after the last day of the Session in which the Bill is passed may not be added to any of the lists of tribunals in Schedule 6. If the First-tier Tribunal or Upper Tribunal is to have jurisdiction created by later legislation then it will need to be conferred by that later legislation rather than transferred using the machinery of clause 35. As the Tribunals are all-purpose in nature it is not expected that there will be a need to create any new tribunals.

148. Subsections (2)(c) and (3) preserve the position of the Welsh Ministers. Subsection (4) prevents the power being used to bring any of the ordinary courts of law into the new tribunal structure. The terms "tribunal" and "ordinary court of law" are not defined but follow the terminology used in the Tribunals and Inquires Act 1992.

Clause 36: Orders under clauses 29-34: supplementary

149. This clause provides for power to amend, repeal or revoke enactments in connection with orders under clauses 29 to 34.

Clause 37: Administrative support for certain tribunals: The general duty

150. This provision places the Lord Chancellor under a statutory obligation to ensure there is an efficient and effective system of tribunal administration. The duty is framed in respect of the First-tier Tribunal, the Upper Tribunal, the employment tribunals, the Employment Appeal Tribunal and the Asylum and Immigration Tribunal. It mirrors section 1 of the Courts Act 2003, which sets out the Lord Chancellor's duty in respect of the courts in England and Wales. It is intended to show that tribunals are to be treated no less favourably than the courts.

Clause 38: Tribunal staff and services and Clause 39: Provision of accommodation

151. Clauses 38 and 39 are modelled on sections 2 and 3 of the Courts Act 2003 and grant the Lord Chancellor similar powers to provide staff, services and accommodation for tribunals. Clause 38 allows the Lord Chancellor to employ civil servants as tribunal staff, so that he can discharge his duty of administering the courts and providing support services. Like section 2 of the Courts Act 2003, it restricts the Lord Chancellor's ability to contract out services. Clause 39 gives the Lord Chancellor power to provide, equip, maintain and manage tribunal accommodation.

Clause 40: Fees

152. This provision grants the Lord Chancellor the power to prescribe by order fees to be paid for anything done in the new tribunals, in the Asylum and Immigration Tribunal and in any other statutory tribunal added to the list by order subject to the affirmative resolution procedure. Before making such an order, the Lord Chancellor must consult the Senior President and the AJTC. This power has been designed to cover in part those tribunals which currently charge a fee for their services and in part the possibility that at some point in the future it may be appropriate to charge fees in other jurisdictions. Treasury consent will not be required for changes to fee levels. Where a fee is introduced in an area where a fee has not been previously been payable, clause 46(6)(b) requires that the order is subject to the affirmative resolution procedure.

Clause 41: Report by Senior President of Tribunals

153. This clause requires the Senior President to give the Lord Chancellor a report on the cases that have come before: the First-tier Tribunal and the Upper Tribunal in each year. The report will also cover cases coming before the employment tribunals and the Employment Appeal Tribunal. This provision is intended to support improvement both in the workings of the tribunals and the standard of decision-making and review in cases which come before the tribunals. The clause gives the Senior President some flexibility in deciding which matters should be covered in the report, and the Lord Chancellor some flexibility in deciding which cases are a priority for the report.

Clauses 42 and 43: The Administrative Justice and Tribunals Council

154. The existing Council on Tribunals will be replaced by an Administrative Justice and Tribunals Council (AJTC), which is established by clause 42 and Schedule 7. The AJTC, like the Council on Tribunals, will be a non-departmental public body, but will have a wider remit.

155. When the AJTC comes into existence, the Council on Tribunals (and its Scottish Committee) will be abolished. This will be effected by clause 43. If the Council on Tribunals has property, rights or liabilities at the time when it is abolished, clause 43 empowers the Lord Chancellor to make an order transferring them to the new AJTC. The order is to be subject to negative resolution procedure.

Schedule 7: Administrative Justice and Tribunals Council

Members and Committees

156. The Council on Tribunals currently consists of between 10 and 15 members, and it is intended that the size of the AJTC will be comparable. Paragraph 1 stipulates that the AJTC is to consist of not fewer than 10 and not more than 15 appointed members, together with the Parliamentary Commissioner for Administration.

157. The provisions for appointment of the Council differ from the existing arrangements in two ways:

158. First, the Welsh Ministers now have power to appoint one or two members to the AJTC. The National Assembly for Wales has not had power to appoint members to the Council on Tribunals, although section 2(4) of the Tribunals and Inquiries Act 1992 provides that "regard shall be had to the need for representation of the interests of persons in Wales". The increased Welsh representation of the Council fulfils Sir Andrew Leggatt's recommendation (recommendation 254) that there should be a review of whether the Council had enough members representing "the interests of persons in Wales". This is also reflected in the creation of a Welsh committee for the AJTC (see below).

159. Second, while all appointments to the Council must be made with the concurrence of the Lord Chancellor and the Scottish and Welsh devolved administrations, paragraph 1(2) of Schedule 7 to the Bill makes it clear that each of the devolved administrations appoints its own members.

160. Currently, members of the Council on Tribunals are appointed by the Lord Chancellor and Scottish Ministers jointly, under section 2 of the Tribunals and Inquiries Act 1992. For the AJTC under paragraph 1(2) of Schedule 7, Scottish Ministers may appoint two or three members, the Welsh Ministers may appoint one or two members, and the remainder are appointed by the Lord Chancellor. All appointments must therefore be by mutual agreement between the Lord Chancellor, Scottish Ministers and the Welsh Ministers. The appointments made by the devolved administrations form the core of the Scottish and Welsh Committees of the Council.

161. Under paragraph 2, the Chairman of the AJTC is nominated by the Lord Chancellor from among the appointed Council members, after consultation with the Scottish and Welsh devolved administrations. The Chairman is to hold and vacate office in accordance with the terms of his nomination and may resign by giving written notice to the Lord Chancellor. He may not continue as Chairman if his appointment as a Council member expires or is terminated. It is expected that Council members will normally be appointed for a fixed term of 3 to 5 years. Paragraphs 5 and 8 make corresponding arrangements for the Chairmen of the Scottish and Welsh Committees.

162. Paragraph 3 stipulates that appointed members are to hold and vacate office in accordance with their terms of appointment. It is expected that these will usually be for a fixed renewable term. Apart from a fixed term of appointment coming to an end, there are two ways in which a person may cease to be a member: resignation or removal by the Lord Chancellor. In order to safeguard the powers of the devolved administrations the Lord Chancellor may only remove Scottish or Welsh appointees with the concurrence of the relevant devolved administration. Removal may be on the grounds of inability or misbehaviour without cause. In line with Cabinet Office guidance on the establishment of non-departmental public bodies, paragraph 11 gives the Lord Chancellor power to pay compensation to a member removed or without cause.

163. As with the Council on Tribunals, the AJTC has a Scottish Committee in order to deal with interests specific to Scotland (paragraphs 4 to 6). The Scottish Committee is to include the two or three Council members appointed by the Scottish Ministers under paragraph 1(2)(a). One of these members is to be nominated by the Scottish Ministers as chairman of the Committee. In addition, three or four non-Council members may be appointed to the Committee by the Scottish Ministers. The Parliamentary Commissioner for Administration (the UK Parliamentary Ombudsman) and the Scottish Public Services Ombudsman are members of the Committee by virtue of their offices. In essence these provisions mirror existing arrangements under section 2 of the 1992 Act. It is expected that appointments will normally be for 3 to 5 years.

164. Unlike the Council on Tribunals, the AJTC has a Welsh Committee (paragraphs 7 to 9). The Welsh Committee is to include the one or two Council members appointed by the Welsh Ministers under paragraph 1(2)(b). One of these members is to be nominated by the Assembly as chairman of the Committee. In addition, two or three non-Council members may be appointed to the Committee by the Assembly. The Parliamentary Commissioner for Administration and the Public Services Ombudsman for Wales are members of the Committee by virtue of their offices. These provisions ensure that Welsh interests are represented in the same way as Scottish ones.

165. As with the Council on Tribunals, the Lord Chancellor has power to pay remuneration to the Chairmen of the AJTC and its Scottish and Welsh Committees, fees to Council and Committee members other than the Chairmen, and expenses (travel and subsistence) to members of the Council and its Committees (paragraph 10).

166. The AJTC's status as a non-departmental public body, not part of a central government department, is reflected in paragraph 12, which makes it clear that the AJTC and its Scottish and Welsh Committees (like the Council on Tribunals and its Scottish Committee) are independent of the Crown.

Functions

167. The current remit of the Council on Tribunals, under section 1 of the Tribunals and Inquiries Act 1992, is relatively narrow. In particular it does not include review of the administrative justice system. Sir Andrew Leggatt recommended (recommendation 179) that the Council should be made responsible for upholding the system of administrative justice and keeping it under review, for monitoring developments in administrative law, and for making recommendations to the Lord Chancellor about improvements that might be made to that system. Accordingly, paragraph 14 stipulates that the Council is to keep the administrative justice system under review, and consider ways to make it accessible, fair and efficient and make proposals for research. The Council is also to advise the Senior President of Tribunals, the Lord Chancellor and the devolved administrations on the development of the system, and refer proposals for changes to the system.

168. Central to the AJTC's remit is the concept of the 'administrative justice system' from the point of view of the person in respect of whom a decision is made. The administrative justice system means the system by which administrative or executive decisions are taken and, if necessary, re-considered to achieve a fair ("just") result. It is not confined to the tribunal part of the process, and includes the procedures for making decisions, the law under which those decisions were made, as well as the systems for resolving disputes and airing grievances in relation to such decisions. Thus it is not intended that the functions of the AJTC should be limited to the appropriate forums for legal redress, but that they should extend to looking at the design of the whole system and how that system works in practice.

169. The remit of AJTC will therefore cover:

a) The interaction between the state and the individual (including businesses).

b) The way in which different institutions (for example, government departments, ombudsmen, tribunals) interact to produce a decision on how the state and an individual are to interact. It is not intended that this function of the AJTC should involve keeping these institutions under review, but rather the way in which the system functions generally. The only function of review of these institutions is in respect of tribunals (paragraph 15) and statutory inquiries (paragraph 16), which are distinct and separate functions of the AJTC.

170. An example is the social security benefits system. The circumstances where individuals are entitled to social security benefits are set out in legislation. Decisions about whether an individual is entitled to a benefit are made by civil servants in the name of the Secretary of State for Work and Pensions. Within the Department for Work and Pensions (DWP), there is a system whereby some of these decisions are reconsidered by other civil servants. Most of these decisions, whether initial decisions or reconsidered decisions, attract a right of appeal to a tribunal (the appeal tribunal established under section 4 of the Social Security Act 1998). If a decision does not attract such a right of appeal, then it may be subject

to judicial review by the courts. Appeal tribunal decisions can be appealed to the Social Security Commissioners. Onward appeal from the Commissioners on a point of law lies to the Court of Appeal in England and Wales or Court of Session in Scotland.

171. In addition, a social security claimant who is dissatisfied with the way he has been treated, regardless of whether a right of appeal exists against a decision which has been made, can complain to the Secretary of State for Work and Pensions. Also, a claimant's Member of Parliament can ask the Parliamentary Commissioner for Administration (the Ombudsman) to investigate.

172. The AJTC will have power to keep all these processes under review, and consider how the whole system can be made accessible, fair and efficient. Together, all these processes amount to the system of administrative justice in relation to social security. The AJTC exercises its review functions in relation to that system.

173. For each part of the process – the initial decision-makers, those who reconsider decisions, Ombudsmen, the Minister, complaints handlers, the tribunals and the courts – the Council's remit when reviewing the administrative justice system is not to review their working as individual institutions, but to review how the system, which they produce as a result of their individual roles, functions. The AJTC might consider, for example, that the number of judicial reviews can and should be reduced by creating new appeal rights, or that the number of appeals should be reduced by increasing the level, frequency and thoroughness of departmental review and reconsideration of decisions, and advise accordingly. The AJTC might advise the creation of an independent complaints reviewer or expansion of the role of the Ombudsman.

174. It is outside the AJTC's function to review and report on the internal workings of the Department for Work and Pensions or the Ombudsman's office, as would be any views on reform of substantive social security law. The AJTC should be able to review and report on the working of the First-tier Tribunal and the Upper Tribunal (when the jurisdictions relating to social security appeals are transferred to them) by virtue of the distinct powers under paragraph 15.

175. In addition to the review of the administrative justice system, the AJTC has general functions with respect to certain tribunals ("listed tribunals"), and with respect to statutory inquiries. These are set out in paragraphs 15 and 16 respectively. The Council on Tribunals has duties in respect of statutory inquiries, but these duties are not consistent. Although the Council on Tribunals has under section 1(1) of the 1992 Act a duty to keep under review the constitution and working of the tribunals listed in Schedule 1 to that Act, and has a duty to consider and report on such particular matters relating to those tribunals as may be referred to it, the functions of the Council on Tribunals in relation to statutory inquiries are more limited. In particular, the Council on Tribunals is required to review and report on matters in relation to statutory inquiries only if those matters are referred to the Council on Tribunals or they are matters considered by the Council on Tribunals to be of special importance.

176. These anomalies will be absent from the AJTC's general function, which will be to keep under review the constitution and working of tribunals and statutory inquiries. In addition, and in relation to both listed tribunals and to statutory inquiries, the AJTC will be able to consider and report on any other matter that it determines to be of special importance. The AJTC may also consider and report on any particular matter relating to tribunals in general (not just listed tribunals), or to any particular tribunal, which is referred to the AJTC by ministers in accordance with paragraph 17 (see below).

177. Paragraph 15(2) and (3) empower the Council (in accordance with recommendation 178 of the Leggatt Report) to scrutinise and comment on legislation (primary and secondary, including procedural rules), existing or proposed, relating to tribunals in general or to any particular tribunal. Sir Andrew Leggatt recommended that the Council should be given the opportunity to comment on any proposed legislation affecting the constitution or working of tribunals. He also considered (Leggatt Report, paragraph 7.51) that "there should be a general expectation that where the Council has made formal representations to a Government department, it should receive a reasoned and constructive reply, capable of being put in the public domain". This power is not confined to listed tribunals, and "tribunal" in this context includes a tribunal which does not yet exist but is referred to in proposed legislation. Before exercising this power in relation to a tribunal or tribunals with jurisdiction in cases arising in Scotland or Wales, the Council must consult the Scottish or Welsh Committee as appropriate.

178. The aim is to ensure that the Council, like its predecessor, has an early opportunity to bring its expertise (and wider perspective) to bear on legislative proposals, as well as ensuring that government departments take note of the Council's views.

179. Under section 8 of the 1992 Act, the Council on Tribunals must be consulted on draft procedural rules. However, as Sir Andrew Leggatt pointed out (paragraph 7.52 of his Report) there is no requirement to consult it during the preparation of draft Bills for primary legislation. The provisions in paragraph 15 empower the Council to scrutinise and comment on all legislation which relates to any tribunal, other than a court of law. This would include, but is not confined to, legislation that amends existing legislation relating to a tribunal.

180. *Transforming Public Services* made it clear that it was not the Government's intention to place the Department introducing or responsible for such legislation under a statutory duty to consult the Council. Rather, a non-statutory code of practice will be developed, under which government departments will be expected to consult the AJTC on all tribunals legislation, where it is feasible to do so.

181. The AJTC will be able to exercise its power to scrutinise and comment on legislation relating to tribunals whether or not the AJTC has been consulted under the terms of the code of practice. The code of practice will also commit the departments responsible for the legislation to publish their responses to the Council's comments as part of the process of publishing primary or secondary legislation. Since not all legislation is published in draft

form, some consultation may have to be on a confidential basis, with publication of comments where appropriate following publication of the legislation.

182. The AJTC's functions also include particular matters referred to it in relation to tribunals or statutory inquiries (paragraph 17). Matters may be referred jointly by the Lord Chancellor, the Welsh Ministers and the Scottish Ministers. However, matters relating solely to Scotland or Wales may respectively be referred by the Scottish Ministers or by the Welsh Ministers. Matters not relating to Scotland and not relating to Wales alone, may be referred by the Lord Chancellor.

183. At present, there is only a statutory requirement for the annual report of the Council on Tribunals to be laid before Parliament (section 4(7) of the 1992 Act). Paragraph 18 is intended to ensure that, in accordance with the Leggatt Report (recommendation 175), the work of the Council should be reported to the relevant ministers and to an appropriate Parliamentary Select Committee.

184. A report on matters referred to the Council by ministers must be made to the authority or authorities who referred the matter. Any other report (i.e. those made by the Council as part of its review function or on matters which it determines to be of special importance) must be made to the Lord Chancellor, unless it relates to Wales or Scotland, in which case it must also be made to the Welsh Ministers or to the Scottish ministers. The Lord Chancellor must lay before Parliament all reports made to him by the Council. Scottish Ministers must lay reports on matters within the legislative competence of the Scottish Parliament before the Scottish Parliament. Reports made to the Welsh Ministers must be laid by them before the National Assembly for Wales.

185. The arrangements for referring matters to the Scottish and Welsh Committees of the AJTC (paragraphs 19 and 20) are in essence the same as the existing arrangements for the Scottish Committee of the Council on Tribunals, as set out in section 4 of the 1992 Act. The relevant Committee must be consulted, and the Committee's report be considered, before the Council reports on any matter within its remit relating to Scotland or Wales. The Committees may of their own motion make reports to the Council on any aspect of the Council's remit (including matters referred by ministers) as it affects Scotland or Wales. The Committees may submit their reports direct to the Scottish Ministers or Welsh Ministers (as appropriate) if the Council does not make a report on the matters dealt with, or if the Council does not adopt the report made by the relevant Committee without modification. Any such reports must be laid before the Scottish Parliament, or the National Assembly for Wales (as appropriate).

186. The AJTC must formulate a general programme of the work that it plans to undertake in carrying out its functions, and send copies of it to the Lord Chancellor, the Welsh Ministers and Scottish Ministers (paragraph 21). Given the potential breadth of the Council's remit, and to avoid potential areas of overlap with existing statutory bodies, subsection (3) places a duty on the Council, in drawing up its work programme, to have regard to the work of the Civil

Justice Council, the Social Security Advisory Committee and the Industrial Injuries Advisory Council.

187. The Council must make an annual report to the Lord Chancellor, Scottish Ministers and the Welsh Ministers, which must be laid before Parliament and the Scottish Parliament (paragraph 22). In addition, the Scottish and Welsh Committees must make annual reports which, in the case of the Scottish Committee must be laid before the Scottish Parliament, and in the case of the Wales Committee must be laid before the National Assembly for Wales.

188. Members of the AJTC and its Scottish and Welsh Committees have the right to attend as observers the proceedings of any listed tribunal (paragraph 23).

189. Paragraph 24 limits the remit of the AJTC in respect of Northern Ireland, reserving any matter that would be within the legislative competence of the Northern Ireland Assembly. The provision mirrors section 1(2) of the 1992 Act, which similarly limits the remit of the Council on Tribunals.

190. The AJTC must be consulted in relation to procedural rules for listed tribunals (paragraph 25). But this does not apply to rules made by the Tribunal Procedure Committee, whether Tribunal Procedure Rules made for the Upper Tribunal and First Tier Tribunal or procedural rules for any other Tribunal, since the AJTC will be represented on the Tribunal Procedure Committee and will be able to make comments in that forum.

191. The Council must consult the Scottish or Welsh Committee as appropriate with respect to procedural rules for any tribunal, which has jurisdiction in relation to Scotland or Wales.

192. "Listed Tribunals" are defined in paragraph 26. The First-tier Tribunal and the Upper Tribunal are listed tribunals for these purposes, and the Lord Chancellor, the Scottish Ministers and the Welsh Ministers have power to designate tribunals for which they are responsible as "listed tribunals". The definition of tribunals for these purposes extends only to statutory tribunals.

193. Where a tribunal does not have a separate Scottish or Welsh identity but has an identity covering the whole of the United Kingdom or Great Britain, the power to list a tribunal (and thus bring it under the supervision of the Council) resides in the Lord Chancellor. For example, the Social Security Commissioners are the responsibility of the Lord Chancellor on a Great Britain-wide basis, so the power to include the Social Security Commissioners in an order would be exercised by the Lord Chancellor.

194. A tribunal cannot be listed so far as it exercises functions within the legislative competence of the Northern Ireland Assembly. This prevents the AJTC from having any role in relation to tribunals which are devolved in Northern Ireland.

195. Paragraph 26 prohibits the listing of non-statutory tribunals. Such tribunals are not intended to come within the AJTC's remit.

Clause 44: Delegation of Functions by the Lord Chief Justice etc

196. This clause enables the Lord Chief Justice to nominate a judicial office holder (as defined in Section 109(4) of the Constitutional Reform Act 2005) to exercise any of the listed functions given to him under the Bill. These are:

- Concurrence with the removal of a judge or other member of the First-tier Tribunal from office (Schedule 2 paragraph 3(4).
- Concurrence with a request for a court judge to sit in the First-tier Tribunal (Schedule 2 paragraph 6(3)(a)).
- Concurrence in the removal of a judge or other member of the Upper Tribunal from office (Schedule 3 paragraph 3(4).
- Concurrence with a request for a court judge to sit in the Upper Tribunal (Schedule 3 paragraph 6(3)(a)).
- Power to nominate an ordinary judge of the Court of Appeal or a puisne judge of the High Court to preside over a chamber (Schedule 4 paragraph 2(2)).
- Power to nominate an ordinary judge of the Court of Appeal or a puisne judge of the High Court to act as a deputy president (Schedule 4 paragraph 5(5)).
- Power to appoint members to the Tribunal Procedure Committee (Schedule 5 paragraphs 22 and 24).
- Consultation on the Lord Chancellor's appointees to the Committee (Schedule 5, paragraph 21(2)).
- Concurrence in an order changing the composition of the Tribunal Procedure Committee (Schedule 5 paragraph 25).

197. The clause makes similar provision for the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland.

Clause 45: Consequential and other amendments, and transitional provisions

198. Clause 45 gives effect to Schedule 8 (consequential amendments) and Schedule 9 (transitional provisions).

Schedule 8: Tribunals and inquiries: consequential and other amendments

199. Paragraph 1 abolishes the office of General Commissioner (styled in legislation as "Commissioner for the general purposes of income tax) and the offices of clerk, and assistant clerk, to any General Commissioners. This paragraph is intended to be brought into force

when the functions of the General Commissioners are transferred to the new Tribunals. It is not intended to use the power under clause 30(2) so as to cause persons holding the office of General Commissioners to become office-holders in the new tribunals.

200. Paragraph 6 enables litigants in person to obtain costs and expenses under the Litigation in Persons (Costs and Expenses) Act 1975 in tribunal proceedings where costs are awarded.

201. Paragraph 36 confers the title of Employment Judge on members of a panel of chairmen of employment tribunals.

202. Paragraph 38 requires the Secretary of State to act jointly with the Lord Chancellor when exercising his powers under sections 4(4), 18(8) and 40(1) of the Employment Tribunals Act 1996 (powers to amend).

203. Paragraphs 40 to 43 make the Senior President of Tribunals responsible for training, welfare and guidance of Employment Judges and judicial members of the Employment Appeal Tribunal, in the same way that he is for members of the First-tier Tribunal and Upper Tribunal (under paragraph 8 of Schedule 2 and paragraph 9 of Schedule 3).

204. Paragraph 41 confers power to make practice directions in relation to employment tribunals on the Senior President and requires the consent of the Senior President and the Lord Chancellor for practice directions made by Presidents of Employment Tribunals.

205. Paragraph 42 amends section 15(1) of the Employment Tribunals Act 1996 (enforcement in England and Wales as an order of a county court) so that an unpaid employment tribunal award does not need to be registered in the county court before enforcement can take place. This mirrors provisions in relation to the First-tier Tribunal and the Upper Tribunal in clause 26.

206. Paragraph 53 gives the Senior President the power to give practice directions in respect of the Asylum and Immigration Tribunal and responsibility to make arrangements for the training welfare and guidance of its members.

207. Paragraph 54 amends section 98 of the Courts Act 2003 (register of judgments and orders etc) so that monetary decisions or awards of the First-tier Tribunal, the Upper Tribunal, an Employment Tribunal, or the Employment Appeal Tribunal may be included on the Register of Judgments and Orders established under the 2003 Act. Inclusion on the register, which is often consulted by banks, building societies, credit companies etc when considering applications for credit, may make it more difficult for defaulters to obtain credit (and thus provides an incentive to pay the sum due).

208. Paragraph 64 has the effect that most (but not all) of the judges and other members of the First-tier Tribunal and Upper Tribunal can be appointed as the "Tribunals" member of the Judicial Appointments Commission.

209. Paragraph 65 adds offices in the new tribunals to Schedule 14 to the CRA 2005 so that judges and other members who are to be appointed under the Bill by the Lord Chancellor (or, in the case of judges of the Upper Tribunal, by Her Majesty on the recommendation of the Lord Chancellor) are selected by the Judicial Appointments Commission. Such selection will not apply to the transfer in of members of existing tribunals under clause 30(2) or to appointments that fall to be made by a senior judges.

Schedule 9 Tribunals: transitional provision

210. Schedule 9 sets out a number of transitional provisions, including provisions relating to the retirement dates and pensions for judges and other members of the First-tier Tribunal and Upper Tribunal.

Clause 46: Orders and regulations under Part 1: supplemental and procedural provisions

211. This clause sets out the procedure to be followed in respect of the various types of order which can be made under Part 1. These powers are mostly exercisable by the Lord Chancellor. The Scottish Ministers and the Welsh Ministers can make orders in relation to rules for listed tribunals administered by them (Schedule 7, paragraph 26(2)). Under clause 7(9) the Senior President can make an order relating to the jurisdictions assigned to chambers, and subsection (2) provides that this order is to be treated as if it had been made by a Minister of the Crown.

212. Under subsection (6) the following orders are subject to affirmative resolution:

- Clause 11(7): power to determine who is to be treated as a party to a case for the purposes of a right of appeal to the Upper Tribunal;
- Clause 13(6): restrictions on right of appeal to the Court of Appeal.
- Clause 13(12): power to determine who is to be treated as a party to a case for the purposes of a right of appeal to the Court of Appeal;
- Clause 29: power to transfer functions of a tribunal into the new tribunal structure;
- Clause 30(1): power to abolish tribunals when their functions have been transferred;
- Clause 31: appeals from tribunals in Wales to the Upper Tribunal;
- Clause 32 power to provide for appeals to the Upper Tribunal from tribunals in Scotland;
- Clause 33: transfer of Ministerial responsibilities to the Lord Chancellor;
- Clause 34: transfer of powers to make procedural rules;
- Clause 35: power to amend the lists of tribunals in Schedule 6;

- Orders under clause 30(2), (7) and (9), and paragraph 30(1) of Schedule 5, which amend primary legislation;
- Clause 40: fee orders, if no fee has previously been payable.

213. Orders under clause 30(2) and (7) (which relate to the mapping across of existing office holders to new tribunal offices and to transitional preservation of procedural rules) and an order under clause 30(9) where made in connection with 30(2) and (7) are not subject to Parliamentary procedure (unless they amend primary legislation), nor are transitional orders in relation to membership of the Tribunal Procedure Committee.

PART 2: JUDICIAL APPOINTMENTS

SUMMARY

214. Part 2 of the Bill amends the minimum eligibility requirements for judicial appointments in England and Wales (and for some posts where the office-holders may sit in Scotland and Northern Ireland) with the aim of increasing the diversity of the judiciary. The existing eligibility requirements for judicial office are replaced with the requirement that a person must satisfy the "judicial-appointment eligibility condition". The clauses mean that rather than eligibility for office being based on possession of rights of audience for a specified period, a person who wishes to apply for an office under any of the provisions amended by Schedule 10 of the Bill will have to show that he has possessed a relevant legal qualification for the requisite period and that while holding that qualification he has been gaining legal experience. In respect of many of the offices, the number of years for which a person must have held his qualification before he becomes eligible for judicial office is also reduced.

215. Part 2 also enables the Lord Chancellor, following consultation with the Lord Chief Justice and the JAC, to extend by order the list of relevant qualifications for the purpose of the judicial-appointment eligibility condition. This will enable those with relevant qualifications and legal experience to apply for certain offices, which will also be specified in the order.

216. Part 2 of the Bill also makes provision (clauses 50 and 51) about appointments (in the civil courts in England and Wales) of district judges, deputy district judges and deputy, and temporary, masters and registrars. Clause 52 makes provision about appointments to certain Appeals Commissions and clause 53 relates to the Northern Ireland Judicial Appointments Commission.

BACKGROUND

217. Eligibility for appointment to professional judicial office in England and Wales is currently dependent upon applicants possessing particular qualifications (within the meaning of the Courts and Legal Services Act 1990) which are based on possession of "rights of audience" for a prescribed number of years. The precise category of rights of audience required, and the length of time for which they must have been held, vary according to the judicial office concerned. However, the practical effect of the current arrangements is to restrict eligibility for almost all judicial posts to persons who have been qualified as barristers or solicitors in England and Wales for at least seven years (or, for some posts, 10 years). (Barristers, advocates and solicitors who have been qualified in Scotland or Northern Ireland for the required number of years are also eligible for some posts, notably in those tribunals which exercise UK-wide jurisdiction.)

218. A consultation paper, Increasing Diversity in the Judiciary, published by the Department for Constitutional Affairs in October 2004, invited views as to whether these statutory eligibility requirements constituted an obstacle to greater diversity in the judiciary. Responses to consultation indicated that the eligibility requirements were considered an obstacle to greater diversity in several respects. First, because they depended on possession of rights of audience before the courts, they helped to foster the (inaccurate) perception that advocacy experience was a requirement for judicial appointment, deterring eligible individuals from applying. Second, they excluded entirely members of certain legal professional groups (for example, legal executives) who might possess the skills, knowledge and experience needed to perform well in judicial office, and who also tended to be drawn from a wider range of backgrounds than barristers and solicitors. It was also argued that the existing requirements were unsatisfactory in that someone who qualified as a barrister or a solicitor but who then did no more legal work of any kind still became eligible for judicial appointment on the seventh anniversary of their qualification. Finally, respondents considered that the periods of time for which a qualification must have been held were too long, disadvantaging those who had joined the profession later in life but whose career paths might nevertheless render them fitted for consideration.

219. The provisions in this Part of the Bill seek to address these concerns by removing the existing link between eligibility for judicial appointment and possession of advocacy rights; by providing for the extension of eligibility for some appropriate appointments to holders of legal qualifications other than barristers and solicitors; by introducing a requirement that a person with a relevant qualification must also have gained legal experience to be eligible for office; and by reducing the number of years for which it is necessary to have held the relevant qualification and gained legal experience. It is to be noted that these changes attach to the eligibility threshold for appointment. The aim is to increase the pool of those eligible for office, but the current system of merit-based appointment will remain. These changes apply to offices under provisions amended by Schedule 10 to the Bill, which includes a wide range of judicial offices in both mainstream courts and tribunals.

COMMENTARY ON CLAUSES: PART 2

Clause 47 Judicial appointments: "judicial-appointment eligibility condition"

220. This clause sets out the new basis of eligibility for judicial appointment. In order to satisfy the "judicial-appointment eligibility condition", an individual has to hold a "relevant qualification" (i.e. as a barrister, a solicitor or a holder of another specified legal qualification) for a specified minimum number of years (generally five or seven, in place of the seven or ten specified in existing legislation), and has to have gained experience in law for the specified minimum number of years, while holding a relevant qualification. Activities which count as gaining experience in law are set out in clause 49.

221. The clause removes the anomaly identified under current legislation whereby an individual who qualifies as a barrister or a solicitor becomes eligible for judicial appointment simply through the passage of time, without necessarily ever having engaged in legal practice following qualification.

Schedule 10: Amendments relating to judicial appointments

222. The minimum eligibility requirements for judicial offices are contained in a large number of statutory provisions. This Schedule amends those provisions in two main respects. First, the existing requirement of a qualification within the meaning of section 71 of the Courts and Legal Services Act 1990 is replaced by a requirement to satisfy the judicial-appointment eligibility condition on an N-year basis. Second, the period of time for which a qualification should have been held, and experience in law acquired (N years), is reduced. For those judicial appointments which currently require possession of a ten-year qualification under the 1990 Act, the period is reduced to seven years and for those appointments which currently require a seven-year qualification, the period is reduced to five years. Where those with Scottish or Northern Irish qualifications are eligible for appointment, corresponding reductions are made.

Clause 48: "Relevant qualification" in section 47: further provision

223. This clause empowers the Lord Chancellor (after consultation with the Lord Chief Justice and the JAC) to extend the list of relevant qualifications for the purpose of the judicial-appointment eligibility condition in clause 47. The power is exercisable by order made under the affirmative resolution procedure.

224. Orders made under this clause would say which qualifications – other than being a barrister or a solicitor – would be "relevant qualifications" for the purpose of eligibility for particular judicial offices. The only qualifications which it would be permitted to specify in

this way would be those awarded by the Institute of Legal Executives or by other bodies authorised to confer rights of audience or rights to conduct litigation under section 27 and 28 of the Courts and Legal Services Act 1990. This would provide assurance that the bodies concerned had in place approved training and qualification arrangements for their members. The clause also provides for a qualification to cease to be relevant if the body which awarded it ceases to be an authorised body under the procedure set down in the 1990 Act.

225. It is envisaged that the power given to the Lord Chancellor under this clause would be exercised in the first instance to extend eligibility for specified appointments to Fellows of the Institute of Legal Executives and to registered patents agents and trade mark attorneys. It also provides flexibility to extend eligibility to duly qualified members of other authorised bodies, should that become appropriate as a result of future developments in the legal profession.

Clause 49: Meaning of "gain experience in law" in section 47

226. This clause defines various ways in which an individual may gain post- qualification experience in law so as to satisfy the "qualifying period" element of the judicial-appointment eligibility condition in clause 47. Consistent with the aim of encouraging applications from a wide range of suitably qualified people, these include not only those activities traditionally regarded as part of a lawyer's practice (e.g. legal advice and assistance) but also exercising judicial functions in a court or tribunal, arbitration and teaching or researching law. Broadly similar activities are also included. Such work need not be performed full-time or for remuneration.

227. It should be noted that at the same time as gaining experience by undertaking these activities, an individual must also possess a "relevant qualification" – i.e. as a barrister, a solicitor or as a holder of a qualification awarded by one of the bodies to be specified by order under clause 48.

Clause 50: Appointment of deputy district judges, etc

228. Clause 50 gives effect to Schedule 11.

Schedule 11: District judges and deputy district judges

229. District judges and deputy district judges exercise jurisdiction, in England and Wales, in both the High Court and the county courts. For deputy district judges there are parallel appointment provisions in the Supreme Court Act 1981 (for deputy district judges in the High Court) and the County Courts Act 1984 (for deputy district judges in the county courts).

230. Paragraph 2 enables the Lord Chief Justice to delegate to another judicial office holder his powers to assign district judges to one or more district registries of the High Court and his powers to change assignments. Paragraph 6 makes similar provision about the assignment of district judges to county court districts.

231. Paragraph 3 amends the provisions in the Supreme Court Act 1981 about the appointment of deputy district judges. Currently, the powers to appoint deputy district judges for the High Court are vested in the Lord Chancellor.

232. In future, the Lord Chancellor's powers of appointment will be limited to appointing persons who have never held office as a district judge, and will be subject to the Judicial Appointments Commission selection process. A retirement age of 70 will apply to these post-holders (with the possibility of extension up to age 75).

233. Where a person has previously held the office of district judge, the Lord Chief Justice will in future have powers to appoint the person as a deputy district judge. These appointments will not be subject to selection by the Judicial Appointments Commission, and persons may be appointed up to (but will have to retire by) the age of 75.

234. The Lord Chief Justice is also given powers, after consulting the Lord Chancellor, to assign any deputy district judge (whether appointed by the Lord Chancellor or by the Lord Chief Justice) to one or more district registries of the High Court, and to change the assignment. Deputy district judges appointed under the new powers are given powers to act in district registries to which they have not been assigned, but only in accordance with arrangements made by or on behalf of the Lord Chief Justice.

235. Paragraph 4 makes transitional provision about existing deputy district judges: they continue to be deputy district judges, and are treated as having been assigned to the district registries for which they were appointed.

236. Paragraphs 7 and 10 make, for deputy district judges appointed under the County Courts Act 1984, provision similar to that made by paragraphs 3 and 4.

237. Paragraphs 8 and 9 make consequential amendments in the County Courts Act 1984. Paragraphs 11 to 13 make consequential amendments in the County Courts Act 1984 and the Judicial Pensions and Retirement Act 1993 to provide for the retirement ages mentioned above. Paragraphs 14 and 15 consequentially amend references to these appointments in other legislation.

Clause 51: Deputy, and temporary additional, Masters etc.

238. Clause 51 amends the provisions in section 91 of the Supreme Court Act 1981 for appointing deputies and temporary officers to certain posts, including masters and registrars of the Supreme Court. Section 91 of the Supreme Court Act 1981 was amended by paragraph 139 of Schedule 4 to the Constitutional Reform Act 2005 to enable the Lord Chief Justice, after consulting the Lord Chancellor, to make appointments to these posts. Clause 51 further amends the Supreme Court Act 1981, and the Constitutional Reform Act 2005, to provide that where appointments to these posts are of people who have already held certain judicial offices, power to make those appointments remains with the Lord Chief Justice. Where appointments are made of people who have not previously held any of those judicial offices, those appointments are now to be made by the Lord Chancellor, and will subject to the Judicial Appointments Commission process. The clause makes consequential amendments in Schedule 5 to the Judicial Pensions and Retirement Act 1993 in order that a retirement age of 70 will apply to deputy and temporary office-holders appointed by the Lord Chancellor under section 91 of the Supreme Court Act 1981 (with the possibility of extension up to age 75).

Clause 52: Members and chairmen of certain Appeals Commissions

239. Clause 52 amends Part 3 of Schedule 14 to the Constitutional Reform Act 2005 to remove references to the offices of member, and Chairman, of: the Special Immigration Appeals Commission; the Proscribed Organisations Appeal Commission; and the Pathogens Access Appeal Commission. Candidates for these appointments will no longer be required to go through the Judicial Appointments Commission selection process. In practice, the legally qualified members and the Chairmen of these Commissions are appointed only from among serving senior judges. Once clause 52 is in force, appointments will continue to be made by the Lord Chancellor, but it is intended that he will seek nominations for these posts from the Lord Chief Justice. If the Lord Chancellor wishes to be given assistance in making appointments to these Commissions, it will be possible for him to ask for assistance from the Judicial Appointments Commission under section 98 of the Constitutional Reform Act 2005.

Clause 53: Orders permitting disclosures to Judicial Appointments Commission

240. Section 5A of the Justice (Northern Ireland) Act 2002 ('the 2002 Act') confers power to disclose information to the Northern Ireland Judicial Appointments Commission for the purposes of selection for appointment to judicial office in Northern Ireland. Section 5A(1) of the 2002 Act provides that information held by 'permitted persons' may be disclosed to the Commission for the purposes of making any such selection. Section 5A(5) of that Act specifies a number of 'permitted persons' for the purpose of section 5A. Section 5A(6), which has yet to be commenced, provides that the Lord Chancellor may by order designate other persons, who exercise functions which he considers are of a public nature, as 'permitted

persons'. The order-making power contained in section 5A(6) is not, however, currently subject to any Parliamentary control. Clause 53 remedies this anomaly by subjecting the order-making power contained in section 5A(6) to the negative resolution procedure.

PART 3: ENFORCEMENT BY TAKING CONTROL OF GOODS

SUMMARY

241. Part 3 of the Bill unifies the law governing the activities of enforcement agents when taking control of and selling goods, and requires such agents (with certain exceptions) to hold a valid certificate issued by a county court. It also modernises and unifies most of the terminology used in various pieces of legislation where the new unified procedure will apply.

242. Part 3 also abolishes the common law right to distrain for rent arrears and replaces it with a new, more limited right and a modified 'out of court' regime for recovering rent arrears due under a lease of commercial premises.

BACKGROUND

Procedure

243. At present the law relating to enforcement by the seizure and sale of goods is complex and can be unclear and confusing. It is contained in numerous statutes, secondary legislation and common law and its language is old fashioned. There are various terms that describe this enforcement process, for example execution, distress and levy and various different procedures depending on the type of debt which is being recovered. *Effective Enforcement* recommended the terminology should be modernised and the procedure reformed.

244. *Effective Enforcement* also identified that persons who currently take control of goods are not subject to any uniform regulatory system and highlighted anecdotal evidence of some enforcement agents threatening and intimidating vulnerable debtors. *Effective Enforcement* therefore proposed a system to guard against malpractice and to protect debtors. It was initially intended that a licensing regime should be put in place, implemented via a regulatory body. While this remains the Government's long-term aim, as an interim measure the Bill replaces (and extends and modifies) the certification process that currently exists for bailiffs under the Distress for Rent Rules 1998. The extended and modified certification process will apply to persons taking control of goods who are not Crown employees or constables (the justification for such an exclusion being that Crown employees and constables, by virtue of their status, are already subject to adequate systems of control).

Rent Arrears Recovery

245. Distress for rent is a summary remedy which enables landlords to recover rent arrears without going to court, by taking goods from the let premises and either holding them until the arrears are paid or selling them. It is an ancient common law remedy which, over time, has been extended and modified by successive statutes.

246. The Law Commission's Report concluded that distress for rent has a number of features which make it inherently unjust to tenants, to third parties and to other creditors and recommended its abolition.

247. Following a period of consultation, the Government decided to accept the Law Commission's recommendation. However, the consultation revealed that distress for rent is an effective remedy for recovering rent arrears, particularly for commercial properties. If it were to be abolished without any replacement, the Government concluded that there could be disadvantages both to landlords and to tenants of commercial properties.

248. The Bill therefore abolishes the current law on distress for rent and replaces it with a modified regime (called Commercial Rent Arrears Recovery or CRAR) for recovering rent arrears due under leases of commercial premises.

COMMENTARY ON CLAUSES: PART 3

Clause 54: Enforcement by taking control of goods

249. This clause gives effect to Schedules 12 and 13 of the Bill. Certain current powers to seize and sell goods can only be exercised according to the procedure for taking control of and selling goods detailed in Schedule 12.

250. The terminology in the various pieces of primary legislation relating to these powers has been amended, and some of the warrants and writs which give these powers, namely warrants of execution, warrants of distress and writs of fieri facias (except writs of fieri facias de bonis ecclesiasticis), are renamed warrants of control and writs of control.

251. A warrant of execution empowers a district judge to seize and sell a debtor's goods for the purpose of recovering money payable under a county court judgment or order. A warrant of distress may be issued by a magistrates' court for the purpose of recovering a sum adjudged to be paid by a conviction or order of the court. The warrant requires the sum to be recovered by seizure and sale of the debtor's goods. A writ of fieri facias requires a sheriff or enforcement officer to seize and sell a debtor's goods for the purpose of recovering a sum due under a High Court judgment or order. A writ of fieri facias de bonis ecclesiasticis requires the bishop to seize a debtor's ecclesiastical property in order to satisfy a High Court

judgment. As writs of fieri facias de bonis ecclesiasticis are unique and because of the special role of the bishop, they are not renamed (nor are they subject to the new unified procedure detailed in Schedule 12).

252. A writ or warrant of delivery is a writ/warrant to enforce an order for the delivery of particular goods that are identified in the writ/warrant. A writ or warrant of possession is a writ/warrant issued to enforce an order for possession of land.

253. Schedule 13 makes amendments to existing primary legislation, which are necessary to give effect to these changes or as a result of them.

Schedule 12: Taking control of goods

254. This Schedule prescribes a new procedure to be followed by enforcement agents when seizing and selling goods pursuant to powers under High Court writs of execution, county court warrants of execution, certain magistrates' court warrants of distress, High Court writs and county court warrants of delivery and possession which contain a power to seize and sell goods and the following enactments as amended by Schedule 13:

- sections 4 and 16 of the Inclosure Act 1773;
- section 91 of the Land Clauses Consolidation Act 1845;
- sections 151 and 159 of the Inclosure Act 1845;
- section 33 of the Railways Clauses Act 1863;
- section 13 of the Compulsory Purchase Act 1965;
- section 61 of the Taxes Management Act 1970;
- section 76 of the Magistrates' Court Act 1980;
- section 85 of the County Courts Act 1984;
- section 62A of the Local Government Finance Act 1988;
- section 35 of the Child Support Act 1991;
- Schedule 15, paragraph 12 of the Water Resources Act 1991;
- section 54 of the Land Drainage Act 1991;
- section 121A of the Social Security Administration Act 1992;
- section 14 of the Local Government Finance Act 1992;
- section 51 of the Finance Act 1997;
- Schedule 12, paragraph 1A of the Finance Act 2003;
- clause 64 of the Tribunals, Courts and Enforcement Bill.

255. The Schedule prescribes the entire process to be followed by enforcement agents when taking control of and selling goods under the above mentioned powers, from the serving of a notice, to taking control of goods (including which goods may be taken), powers of entry, goods which may be seized, care of goods seized, the sale of goods seized and the distribution of the sale proceeds.

256. On the issue of which goods may be taken, the Schedule provides that all goods of the debtor may be seized other than those which are exempt (as prescribed in regulations) or protected under any other enactment. Examples of protection from seizure are:

- any statutory state or diplomatic immunity;
- personal property of a trustee pursuant to section 23 of the Trade Union and Labour Relations (Consolidation) Act 1992;
- works of art from abroad loaned for temporary exhibitions pursuant to clause 126 of the Tribunals, Courts and Enforcement Bill.

257. The Schedule also enables regulations to specify fees, charges and expenses that can be charged by a person in connection with taking control of goods (by way of example, the fees charged by an enforcement agent for taking control of goods). Such regulations will specify when and how such fees, charges and expenses will be recoverable from the debtor, to include when such amounts can be deducted from the proceeds of sale of any goods. The regulations may also specify that any disputed amount of such fees, costs and expenses is to be assessed in accordance with rules of court.

258. In addition, the Schedule sets out the remedial action and the level of damages available to a debtor against an enforcement agent who breaches the procedure. The Schedule does not make any provision for the debtor's right to bring a claim against an enforcement agent whose actions were not authorised at the outset because this is already covered by the existing law of tort. The Schedule also specifies the circumstances when a creditor can bring a claim against the debtor and it creates an offence if a person intentionally obstructs an enforcement agent in the lawful exercise of his power or if he interferes with goods seized.

Schedule 13: Taking control of goods: amendments

259. This Schedule amends the existing legislation referred to in paragraph 254 under which the unified procedure in Schedule 12 will be used. It also contains amendments that are consequential as a result of the introduction of the new procedure and terminology. So, where appropriate, references to warrants of execution and warrants of distress are amended to warrants of control, references to writs of fieri facias are amended to writs of control, references to distrain and distraint are amended to taking control of goods and references to walking possession agreements are amended to controlled goods agreements.

260. A walking possession agreement is an agreement between the person who has the power to seize the goods ("the distrainor") and the debtor. The distrainor agrees that the debtor can retain possession of the goods without anyone being left on the premises to guard them. In return, the debtor agrees not to remove the goods until he makes payment for the debt and that the distrainor may return to the premises at a later date to remove the goods for sale if payment is not made.

261. In addition, where a power to distrain is not currently set out on the face of an Act, but provision is instead made for secondary legislation to authorise distraint, the Schedule will amend the Act so that the power to distrain is on the face of the Act rather than in secondary legislation.

Clause 55: Enforcement agents

262. The clause specifies the criteria to be met for an individual to act as an enforcement agent. This includes acting under a certificate under clause 56. The clause also creates an offence where an individual acts as an enforcement agent and does not meet the specified criteria.

Clause 56: Certificates to act as an enforcement agent

263. This clause specifies who may issue a certificate under which an enforcement agent can act. The clause also enables regulations to make various provisions about the certificates, for example, conditions which may apply to issued certificates and the suspension and cancellation of certificates.

264. Subsection (3) enables enforcement agents who currently hold a certificate issued under section 7 of the Law of Distress Amendment Act 1888 to continue to operate under that certificate. After the certificate expires, regulations will specify that a certificate will need to be issued in accordance with the new certification provisions under this clause.

Clause 57: Common law rules replaced

265. This clause provides for the replacement of the common law rules about how the powers to take control of and sell goods are exercised. The provisions in Chapter 1, in particular Schedule 12, replace these common law rules. The replacement of the common law rules includes those that relate to remedies that are currently available to debtors (including replevin) and offences by debtors (such as rescuing goods seized). Replevin is a process by which the owner can recover goods seized in return for an undertaking to bring proceedings to determine the right to seize the goods and for tendering sufficient security for the debt and the proceedings. Rescuing goods is where a person interferes with goods seized.

266. Under clause 58 these common law rules will continue to apply in relation to those goods that have been distrained before the new procedure comes into force.

Clause 58: Pre-commencement enforcement not affected

267. This clause provides that the new procedure for taking control of and selling goods does not affect any power to distrain where the goods were distrained against or made subject to a walking possession agreement before the new procedure comes into force.

Clause 59: Transfer of county court enforcement

268. This clause transfers the district judge's responsibility for the execution of warrants of control issued by a county court to any person authorised by or on behalf of the Lord Chancellor. (Section 85(2) of the County Courts Act 1984 refers to the "registrar" but, by virtue of section 74 of the Courts and Legal Services Act 1990, the office of "registrar" is now abolished and replaced by "district judge".) In practice, the warrants will be executed by county court bailiffs.

Clause 60: Magistrates' courts warrants of control

269. This clause creates a new section 125ZA of the Magistrates' Courts Act 1980 so as to provide for the endorsement of warrants of control issued by the magistrates' court in line with the endorsement process for High Court writs under Schedule 7 to the Courts Act 2003 (and in line with clause 61 regarding county court warrants). The new section is referred to in paragraph 4 of Schedule 12.

Clause 61: County court warrants of control etc

270. This clause replaces the existing section 99 of the County Courts Act 1984. It applies to warrants of control issued by a county court and warrants of delivery and warrants of possession which include a power to take control of goods and sell them. It details the procedure for endorsing county court warrants in line with High Court writs. The endorsement of a warrant with the date and time of receipt establishes the priority of a given debt. So, the order of priority in execution is dictated by the date and time of endorsement. The new section is referred to in paragraph 4 of Schedule 12.

Clause 62: Power of High Court to stay execution

271. This clause provides the High Court with the power to stay execution of a writ of control for such period of time and on such conditions as the court determines in line with the county court's power to stay execution. The power may only be exercised where the court is satisfied that the debtor is unable to pay any sum or instalment of any sum recovered against him.

Clause 63: Abolition of common law right

272. This clause abolishes the common law right to distrain for arrears of rent. Statutory repeals are dealt with in Schedule 14 and Part 4 of Schedule 22. Taken together, these provisions will sweep away the existing law on distress for rent.

273. Distress for rent is a summary remedy which enables landlords to recover rent arrears, without going to court, by taking goods from the demised premises and either holding them until the arrears are paid or selling them. At common law, the right of distress for rent arises automatically by virtue of the landlord and tenant relationship. So the remedy is almost always available to the landlord of premises, whether residential or commercial premises, when rent is in arrears. Distress for rent is an ancient common law remedy which, over time, has been extended and modified by statute.

274. The right to distrain has applied to different kinds of rent, including rentcharges. This clause and the statutory repeals will abolish distress for all forms of rent (see, for example, the repeal of section 121(1) of the Law of Property Act 1925, which confers statutory power to distrain for a rentcharge).

Clause 64: Commercial rent arrears recovery (CRAR)

275. This clause creates a new statutory right for a landlord of commercial premises to recover rent arrears by using the procedure in Schedule 12 for taking control of the tenant's goods. This allows the landlord to enter the let premises in order to take goods belonging to the tenant, then sell those goods and recover the rent arrears from the proceeds of sale. The right, which is called CRAR (commercial rent arrears recovery), replaces the existing right of distress for rent. But in contrast to distress, CRAR is available only to landlords of commercial premises.

Clause 65: Landlord

276. This clause defines "landlord" for the purposes of CRAR and accordingly identifies the person to whom CRAR is available. The definition in this clause reflects the position in the current law of distress for rent as to who can distrain for rent arrears.

277. Subsection (1) sets out the general rule that the landlord is the person entitled to the immediate reversion in the property comprised in the lease. This is the person to whom the property will revert at the end of the lease.

278. In most cases it will be clear who is entitled to the immediate reversion of the property. However, subsections (3) to (7) clarify the position in four particular circumstances, each reflecting the current law on distress for rent. The circumstances are:

- (in subsection (3)) where the premises are let under a tenancy by estoppel;
- (in subsection (4)) where the premises are let by joint-landlords;
- (in subsection (5) and (6)) where the let premises have been mortgaged;
- (in subsection (7)) where the court has appointed a receiver to deal with the let premises.

279. In the case of a tenancy by estoppel, the landlord may not have a legal estate in the land comprised in the lease, in which case he will not be entitled to the immediate reversion in that property. Subsection (3) makes it clear that such a person will nevertheless be a "landlord" for the purposes of CRAR and may therefore use CRAR to recover rent arrears from his tenant, provided that all the other conditions are satisfied.

280. Subsection (4) provides that if the premises are let under a joint tenancy, then any one of the persons who hold the legal estate will be the "landlord" for the purposes of CRAR. This means that any one of them may exercise CRAR and may do so to recover the rent due to all of them.

281. Subsections (5) and (6) deal with mortgaged properties. If the premises are let by a person who has taken out a mortgage on the property, then that person (who is the "mortgagor" or borrower) will normally be the "landlord" who is entitled to use CRAR to recover rent due under that lease. But if, at any time, the mortgagee (the lender) gives notice of his intention to repossess the property, then he will become the landlord thereafter in relation to that existing lease.

282. However, similar to the current law on distress for rent, a mortgagee who becomes the landlord in this way will not be able to use CRAR to recover rent due under the existing lease if that lease is not binding on the mortgagee. This is because there will be no relationship of landlord and tenant between the mortgagee and the tenant under the existing lease. A lease will not be binding on the mortgagee if it is made after the mortgage was created, and if it is not made under either:

- an express leasing power contained in the mortgage deed, or
- section 99 of the Law of the Property Act 1925 (leasing powers of mortgagor and mortgagee in possession).

283. By virtue of subsection (7), a receiver who has been appointed by the court in relation to the property that is subject to the lease may exercise CRAR in the name of the landlord.

284. Subsection (8) provides that a landlord who has a right to CRAR will need to authorise a certificated enforcement agent to carry out the procedure for CRAR on his behalf (unless he himself is a certificated enforcement agent; see paragraph 2 of Schedule 12). The landlord will need to instruct the enforcement agent in writing. The form, content, and other requirements in relation to the written instructions from the landlord to the enforcement agent will be prescribed by way of secondary legislation.

285. Subsection (9) provides that any person who has a statutory right under any other legislation to use CRAR, is to be treated as "the landlord" for the purposes of CRAR.

Clause 66: Lease

286. This clause defines the term "lease". A lease means any lease that may exist in law or in equity. This clause makes it clear that a "lease" includes a tenancy at will, but does not include a tenancy at sufferance. So, for the purposes of CRAR, a "lease" includes all forms of lease, including long leases, short tenancies, tenancies by estoppel and other equitable leases.

287. A lease must, however, be evidenced in writing. The intention is to ensure that CRAR can only be used in circumstances where the main terms of the lease
(particularly the rent) are clear and certain to the parties concerned.

Clause 67: Commercial premises

288. This clause defines what is meant by "a lease of commercial premises". A lease (lease A) will not be "a lease of commercial premises" if any part of the let premises is let under lease A (or let under any sublease B) as a dwelling, or occupied as a dwelling. So, for example, a lease of property comprising a shop and a flat will not be a lease of commercial premises if the flat is used, or is required by the lease to be used, as a dwelling. But if that lease does not impose any requirements as to the use of the flat, and the tenant chooses to use it either as a storeroom or office for the shop, then the lease will be one of commercial premises because no part of the demised premises is let or occupied as a dwelling.

289. This clause makes it clear that any occupation as a dwelling will not count if it is in breach of the terms of lease A or any lease that is superior to lease A. Similarly if the property has been sublet then any sub-letting as a dwelling will not count if it is in breach of the terms of a lease that is superior to lease B. The purpose of these provisions is to ensure that a commercial tenant cannot seek to prevent his landlord from using CRAR against him by, for example, allowing a third party to occupy part of the premises as a dwelling. So the landlord can still use CRAR against his tenant in those circumstances, even though there are residential occupiers present. But the provisions are also designed to ensure that a landlord (who is himself a commercial tenant under lease A) cannot rely on his own breach of lease A to use CRAR against the tenants to whom he has sublet the property as a dwelling under lease B. So in those circumstances, the landlord cannot use CRAR because lease B will not be a lease of commercial premises.

Clause 68: Rent

290. This clause defines rent for the purposes of its recovery by CRAR, as the sum payable by the tenant for the possession and use of the premises under the lease, including any interest payable on that sum and any VAT chargeable on the sum or the interest.

291. Any amounts not directly attributable to the tenant's possession and use of the premises do not qualify e.g. council tax. This is the case even if the lease defines them as rent.

292. The rent may be merged with other sums so that it is payable as a combined figure, the individual figure not being known or able to be ascertained. In this situation, the rent will be considered to be that portion of the total sum as reasonably reflects the amount payable for the possession and use of the premises.

293. Rent which is payable under or by virtue of Part 2 of the Landlord and Tenant Act 1954 (c. 56) is deemed to be rent as defined by the clause, and is therefore recoverable by CRAR. Part 2 of the 1954 Act gives security of tenure to business leases, so that they are not ended by the expiry of the contractual term, but continue until terminated in accordance with the provisions of Part 2.

294. The definition of rent given by this clause, however, is not congruent with the meaning of rent at clause 63 (abolition of common law right) because clause 63 relates to a wider range of rents for which the right to the old remedy of distress for rent exists. For that reason, the interpretation of "rent" in this clause does not apply to clause 63 (see clause 79). The definition also does not apply to clause 77 which defines "rent" for its own purposes.

Clause 69: The rent recoverable

295. This clause sets out the conditions that must be met for the right to CRAR to become exercisable. The conditions are:

- the tenant is in arrears of rent before notice of enforcement is given;
- the amount of the arrears owed by the tenant is certain, or capable of being calculated with certainty; and
- the "net unpaid rent" equals or exceeds a set amount to be prescribed in regulations.

296. The requirement that the net unpaid rent must equal or exceed the prescribed minimum is a condition that must be satisfied at two stages: first, before the landlord gives notice of enforcement and, second, before he takes control of goods under Schedule 12. This means that the landlord will need to recalculate the "net unpaid rent" immediately before he takes control of goods. If the recalculated figure is lower than the prescribed minimum, it will not be permissible for the landlord to proceed to take control of goods.

297. The "net unpaid rent" is the amount of unpaid rent less any interest or VAT that may be payable on that amount and less any "permitted deductions". Permitted deductions from rent are deductions that a tenant is presently entitled to make from his rent under statute, at common law and in equity. Examples include sums that may be deducted or recouped from, or set off against, rent:

- under the terms of the lease;
- in respect of damages for the landlord's breach of his obligations to repair (or the cost of repairs, if carried out at the tenant's expense);
- in respect of damages for the landlord's breach of the covenant of quiet enjoyment;
- in respect of statutory compensation for improvements under section 11(2) of the Landlord and Tenant Act 1954.

298. The amount of rent that a landlord is entitled to recover by CRAR is the amount of unpaid rent less any permitted deductions that the tenant is entitled to make against that rent.

Clause 70: Intervention of the court

299. This clause sets out the powers of the High Court or a county court, as rules of court may provide, to intervene in the exercise of CRAR. The court's power arises only where the following conditions are met: firstly, notice of enforcement has been served on the tenant; secondly, the tenant has made an application to the court to intervene; and thirdly, the court is satisfied that the circumstances meet the prescribed grounds for intervening.

300. The court then has two options available to it. It may make an order to set aside the notice of enforcement, which effectively cancels that notice and prevents the landlord from taking any further steps under CRAR in relation to that notice. This would occur for example if the court considered that the preconditions for exercising CRAR had not been met.

301. Alternatively, the court may suspend the use of CRAR, by making an order that no further steps may be taken in exercise of CRAR without further order by the court. This might occur, for example, if there is a genuine dispute about the amount of rent in arrears or the calculation of the net unpaid rent. In those circumstances, the court may suspend the use of CRAR until that dispute is resolved.

Clause 71: Use of CRAR after end of lease

302. This clause deals with the use of CRAR after a lease has ended. The provisions of this clause are intended broadly to reflect the current law governing the availability of distress for rent after a lease has ended. Subsection (1) sets out the general rule that, when the lease ends, CRAR will cease to be available. But that is subject to two exceptions.

303. The first exception is set out in subsection (2). This ensures that a landlord who has taken control of goods under CRAR before the lease comes to an end (or under the second exception, below), is not prevented from completing the process by selling those goods.

304. The second exception is set out in subsections (3) and (4) and this is intended to preserve the effect of sections 6 and 7 of the Landlord and Tenant Act 1709 after those provisions are repealed by this Bill (see Schedule 14). This exception applies where the tenant remains in occupation after the lease comes to an end. It allows the landlord to use CRAR for no more than six months after the lease has come to an end, provided that the lease was not ended by forfeiture, the landlord and tenant remain the same and, if a new lease has been granted to the tenant, it must be a lease of commercial premises. For this purpose it does not matter whether the new lease of commercial premises is in writing or not because the clause only permits the landlord to recover rent due under the expired lease of commercial premises, which must be in writing.

305. Subsection (7) defines when a lease ends for the purposes of this clause.

Clause 72: Agricultural holdings

306. The clause makes a couple of special provisions in relation to the exercise of CRAR where the let premises is an agricultural holding. It is intended to preserve the effect of sections 16 and 17 of the Agricultural Holdings Act 1986 for the purposes of CRAR. (Sections 16 to 19 of that Act will be repealed by this Bill; see Schedule 14).

307. First, there is a limitation on the rent that can be recovered by a landlord of an agricultural holding because CRAR cannot be used to recover rent that became due more than one year before the notice of enforcement is given. Second, any compensation that is due to the tenant under the Agricultural Holdings Act 1986 will be a "permitted deduction" for the purposes of CRAR, provided that the amount of compensation has been ascertained (for the meaning of "permitted deductions", see clause 69(7)).

Clause 73: Right to rent from sub-tenant

308. This clause makes provision for a landlord who is entitled to use CRAR against his immediate tenant to instead serve a notice on any sub-tenant requiring that sub-tenant to pay his rent directly to him, instead of paying it to his own landlord in the usual way. Its purpose is to allow the landlord to recover, from a sub-tenant, arrears of rent that are due to him from the immediate tenant.

309. The clause is intended to preserve the effect of sections 3 and 6 of the Law of Distress Amendment Act 1908 (which will be repealed by this Bill, see Schedule 14) in a form that is consistent with the other provisions of CRAR.

310. Where a notice is given to a sub-tenant under this clause, it must set out the amount of the arrears owed to the landlord (the superior landlord) by the immediate tenant. The notice must also require the sub-tenant to pay his rent directly to the superior landlord instead of paying it to his own landlord, until the amount of arrears specified in the notice have been paid off, or rent ceases to be payable by the sub-tenant (for example, if he moves on), or the notice is replaced or withdrawn by the superior landlord.

311. Subsection (5) enables regulations to determine when a notice given by the landlord on a sub-tenant under this clause takes effect.

312. For as long as the notice has effect, the superior landlord will effectively stand in place of the sub-tenant's landlord for the purpose of recovering, receiving or discharging any rent payable by the sub-tenant under the notice, but only for that purpose. This means that the superior landlord can recover from the sub-tenant the amount stated in the notice by using CRAR. But the superior landlord cannot recover that sum from the sub-tenant by serving another section 73 notice on an inferior sub- tenant (see clause 76).

313. The superior landlord may serve more than one notice under this clause, but any later notice replaces an earlier one and where the landlord serves a later notice on a different sub-tenant he must withdraw the earlier one (see clause 75). This ensures that only one notice has effect at any one time.

Clause 74: Off-setting payments under a notice

314. This clause applies where a landlord has given notice to a sub-tenant under clause 73.

315. Any sums that the sub-tenant pays under the notice to the superior landlord will be deductible from the amount of rent he would otherwise have had to pay to his own landlord. So, if the sub-tenant is required to pay £250 a month to the superior landlord under a notice (i.e., until the stated arrears are paid off), then he is entitled to deduct £250 a month from his own rent for as long as he is required to continue making payments under that notice. If there is a hierarchy of sub-leases and the landlord serves notice on an inferior sub-tenant, then this diversion of rent may be passed up the hierarchy of superior sub-tenants until ultimately it is deducted from rent payable to the (defaulting) immediate tenant. For example, where the notice is served on sub- tenant C, he may deduct any sums paid to the superior landlord from rent due to his own landlord (sub-tenant B). Sub-tenant B may then deduct an equivalent amount from his landlord (sub-tenant A) and sub-tenant A may deduct an equivalent amount from his landlord (the immediate tenant).

316. Payments under a section 73 notice will continue to be deductible from rent in this way, even after the arrears stated in the notice have been paid or the notice has been replaced

by one served on another sub-tenant, unless the subtenant is aware of those facts. So a payment under a section 73 notice will not be deductible from rent if, at the time it is made:

- the landlord has already withdrawn the notice;
- the paying sub-tenant has already made payments under the notice that total an amount at least equal to the arrears stated in that notice;
- the paying sub-tenant knows that the arrears stated in the notice have already been paid off by some other means (e.g., by the immediate tenant).

317. Similarly, part of a payment under a section 73 notice will not be deductible from rent if, at the time it was made, that part of the payment, when added together with earlier payments made by the sub-tenant, at least equal the arrears stated in the notice.

Clause 75: Withdrawal and replacement of notices

318. If a landlord gives a section 73 notice to a sub-tenant, but subsequently gives another section 73 notice to the same or another sub-tenant for the same amount of arrears (or an amount including all or part of it) then the later notice will automatically replace the earlier notice. This ensures that, for any amount of arrears, there is no more than one notice in force at any one time. (There is an exception to this rule as explained in the next paragraph).

319. There may be cases where, for instance, a landlord (A) lets premises to tenant (B) and tenant (B) geographically divides the premises by letting, say, the ground floor to sub-tenant (C) and the first floor to sub-tenant (D). The rent owed to B in respect of the premises is, therefore, shared between C and D. Under the provisions of this Clause, were B to default on rent owed to A, A will be able to serve notices on both C and D since they are not inferior or superior to one another (see sub-clause 75(2)(b)) in the hierarchy of tenancies. However, in the scenario described above, if C and D were superior or inferior to one another in the hierarchy of sub-tenancies, A would have to decide whether to serve a notice either on C or on D but not on both of them.

320. A section 73 notice will cease to have effect when the amount of arrears stated in the notice has been paid off, or when the notice is replaced by a subsequent notice (see clause 73). A paying sub-tenant will always know that a section 73 notice has ceased to have effect when he himself pays an amount equal to the stated amount of arrears. But he may not necessarily know, for example, that the immediate tenant has paid off the arrears, or that the landlord has served a replacement notice on another sub-tenant. For that reason, this clause requires the landlord to withdraw a section 73 notice when that notice is replaced by another one, and when the amount in arrears is paid (unless it is paid wholly by the paying sub-tenant). This will ensure that the paying sub-tenant is fully informed about the status of the notice that has been given to him.

Clause 76: Recovery of sums due and overpayments

321. Subsections (1) and (2) deal with the recovery of sums due from a sub-tenant under a section 73 notice. If a notice has been given to a sub-tenant, but that sub- tenant fails to pay the amount of arrears stated in the notice, then the superior landlord can recover that amount from him and he may use CRAR to do so. But the superior landlord cannot recover that sum from the paying sub-tenant by giving another section 73 notice to an inferior sub-tenant (see clause 76).

322. Subsections (3) and (4) deal with overpayments to the superior landlord under a section 73 notice which has ceased to have effect, for example, because the stated amount of arrears have been paid off or the landlord has given a replacement notice. These provisions ensure that any amount paid to the superior landlord under a section 73 notice will always count as if it were rent paid by the defaulting tenant (the immediate tenant). So any payment towards the stated amount of arrears will reduce those arrears and any overpayment (i.e. in excess of the stated amount of arrears) will constitute a credit against future rent due from the immediate tenant. If the immediate tenant has moved on, such that no future rent is due from him, then any overpayment under the notice will be treated as if it had been paid by him by mistake so that he may recover that payment from the superior landlord. But this does not affect any claim that the paying sub-tenant may have under the general law to recover or set-off the amount that he overpaid.

Clause 77: Contracts for similar rights to be void

323. This clause ensures that any contractual provision which gives a landlord a power to recover rent (or other similar types of payment) by taking control of, or selling, goods or which modifies a landlord's right to commercial rent arrears recovery (CRAR), will be void, i.e., have no legal effect. A contractual provision that seeks to do any of these things will accordingly be unenforceable. But contracts will be valid and enforceable to the extent that they prevent or restrict the use of CRAR. For example, a contract may provide that:

- the landlord may not use CRAR to recover arrears of rent under the lease, whether during a particular period or at all; or
- he may use CRAR, but if he does so he may not take control of certain goods (which he would otherwise be entitled to take control of under paragraph 9 of Schedule 12).

324. This clause is accordingly intended to prevent a landlord from making contracts to enlarge his power to take control of goods by CRAR or side-step the abolition of rent distress. For example, it will prevent a landlord from including any of the following provisions in a contract:

- a provision that gives a power to distrain for rent arrears, e.g., in relation to a lease of residential premises;

- a provision that extends the right to use CRAR, e.g. in relation to payments that are not 'rent' for the purposes of CRAR;
- a provision that modifies the procedures applying to CRAR, e.g., by dispensing with the need to give an enforcement notice.

Clause 78: Amendments

325. This clause introduces the minor and consequential amendments relating to this Chapter that are contained in Schedule 14. These include amendments to abolish statutory powers to distrain for rentcharges (conferred by, for example, section 121(2) of the Law of Property Act 1925).

326. It is not considered necessary to make any amendment to the Lodgers' Goods Protection Act 1871. Although there has been some doubt as to the extent of its repeal under section 8 of the Law of Distress Amendment 1908, it is considered that the Act is now wholly repealed by virtue of that enactment and section 132 of, and Schedule 6 to, the Judgements (Enforcement) Act (Northern Ireland) 1969. In any event, if not wholly repealed, the Lodgers' Goods Protection Act 1871 would now be superseded by the abolition of the common law to distrain for rent arrears under clause 63.

Clause 80: Abolition of Crown preference

327. This clause abolishes the rule that distraint for debts owed to the Crown takes priority over enforcement of other debts by seizure and sale of goods. This builds upon previous similar changes abolishing priority being given to debts owed to the Crown above other debts in matters of bankruptcy and insolvency.

Clause 81: Application to the Crown

328. This clause provides that Part 3 of the Bill applies to the Crown (so that the Crown is able to recover debts due to it by using the new procedure under Part 3, and may not use the old law of distress where Part 3 abolishes it) but that the enforcement powers created by Part 3 cannot be used to recover debts due from the Crown, to take control of or sell Crown goods or to enter premises which the Crown occupies.

Clause 82: Regulations

329. This clause contains definitions for "prescribed" and "regulations", under which powers to make regulations under Part 3 are exercisable by the Lord Chancellor. It sets out the parliamentary scrutiny applying to regulations under this Part, and provides for the power to

make regulations to include power to make supplementary, consequential or transitional provision.

PART 4 ENFORCEMENT OF JUDGMENTS AND ORDERS

SUMMARY

330. Part 4 of the Bill makes a number of changes to existing court-based methods of enforcing debts in the civil courts. Part 4 also contains new provisions, including powers to obtain information about debtors.

BACKGROUND

Attachment of earnings orders

331. An attachment of earnings order (AEO) is a means of securing payment of certain debts by requiring an employer to make deductions direct from an employed debtor's earnings. Currently, the rate of deductions under an AEO made to secure payment of a judgment debt is calculated by a county court using information provided by the debtor.

332. *Effective Enforcement* identified weaknesses in the current system and in particular the fact that information provided by debtors is often unreliable. The Bill tackles this by making provision for a new method of calculation of deductions from earnings based on fixed rates, similar to the system used for council tax AEOs. Another weakness of the AEO system is that if a debtor changes job and does not inform the court of his new employer's details, the AEO lapses. The Bill therefore enables the High Court, county courts, magistrates' courts and fines officers to request the name and address of the debtor's new employer from Her Majesty's Revenue and Customs ("HMRC"), for the purpose of redirecting the AEO.

Charging orders

333. A charging order is a means of securing payment of a sum of money ordered to be paid under a judgment or order of the High Court or a county court by placing a charge onto the debtor's property (usually a house or land or securities such as shares). A charging order can be made absolute or subject to conditions. Once an order is in place, a creditor can subsequently apply to court seeking an order for sale of the charged property.

334. At present, the court cannot make a charging order when payments due under an instalment order made to secure that same sum are not in arrears. In certain instances this can

prejudice the creditor, allowing for example a debtor with large judgment debts, who is meeting his regular instalments, to benefit from the sale of a property without paying off the debt.

335. The Bill removes this restriction and enables access to charging orders in circumstances where a debtor is not yet in arrears with an instalment order. As a safeguard, the Bill allows the Lord Chancellor to set financial thresholds beneath which a court cannot make a charging order or order for sale, in order to ensure that charging orders are not used to secure payment of disproportionately small debts.

Information requests and orders

336. Currently, the only means of creditors to obtain information to assist them in determining how to enforce a civil judgment debt is by way of an Order to Obtain Information. This requires the debtor to attend court, which is problematic if the debtor is not co-operating with the court. The Bill enables the High Court and the county courts to request information from the DWP and Commissioners for HMRC, other government departments and/or prescribed third parties (including banks and credit reference agencies) on a judgment debtor who has failed to respond to the judgment or comply with court-based methods of enforcement to assist with the enforcement of a judgment debt. Such information will include name, address, date of birth, National Insurance number and the name and address of the debtor's employer.

COMMENTARY ON CLAUSES: PART 4

Clause 83: Attachment of earnings orders: deductions at fixed rates

337. This clause and Schedule 15 amend the Attachment of Earnings Act 1971 (the AEA 1971), by making provision for a fixed deductions scheme to introduce deductions from earnings at fixed rates for AEOs made by a county court to secure the payment of a judgment debt.

Schedule 15: Attachment of earnings orders: deductions at fixed rates

338. This Schedule is in two parts. Part 1 contains the main amendments to the AEA 1971 and inserts new sections and a new Schedule to enable a fixed deductions scheme to operate and to allow for a change in the basis upon which deductions from earnings are made under county court AEOs made to secure payment of judgment debts. Part 2 sets out consequential amendments to the AEA 1971.

339. Paragraph 2 amends section 6 of the AEA 1971 (effect and contents of order) by setting out the basis of deductions from earnings under different AEOs, and specifying that where an AEO is made by a county court to secure payment of a judgment debt, the AEO must specify that deductions under the order should be made in accordance with the fixed deductions scheme.

340. Paragraph 3 inserts a new section 6A into the AEA 1971 (the fixed deductions scheme) which defines the fixed deductions scheme and provides for the Lord Chancellor to set out the detail of the scheme in regulations, subject to the affirmative resolution procedure in the first instance. It is intended that such regulations will set out the scheme of deductions in tabular format, in a similar way as is presently used for deductions from earnings for the collection of council tax.

341. Paragraph 4 amends section 9 of the AEA 1971 (variation, lapse and discharge of orders) by specifying that the power of a court to vary an AEO is subject to Schedule 3A inserted by paragraph 7, which specifies circumstances in which a county court may, and circumstances in which a county court must vary an AEO made to secure the payment of a judgment debt.

342. Paragraph 5 inserts a new section 9A into the AEA 1971 (suspension of fixed deductions orders), and obliges a county court, in certain circumstances, to suspend an AEO made under the fixed deductions scheme (a fixed deductions order). Where such a suspension order is made, the employer will not have to make deductions from the debtor's earnings and the debtor will make payments direct to the creditor in the manner specified by the court in the suspension order. Where a county court considers that a fixed deductions order is not appropriate (by way of example, because a county court considers that deductions should be more or less than the deductions specified in the fixed deductions scheme because of the personal circumstances of the debtor), it must make a suspension order. The aim of the suspension provisions is to simplify the position for employers, (who should only ever have to make deductions from earnings for county court AEOs made to secure a judgment debt in accordance with the fixed deductions scheme). Such a suspension order will specify the rate and timings of repayments by the debtor to the creditor, and might specify other terms. If any of the terms of the suspension order are broken (by way of example, if the debtor fails to make payments to the creditor), then the court must revoke the suspension order and reinstate the AEO (requiring the employer to make deductions from the debtor's earnings). Even where the terms of the suspension order have not been broken, the court may revoke the suspension order if it considers it appropriate to do so, and rules of court may specify the circumstances in which a court may make or revoke a suspension order of its own motion.

343. Paragraph 7 inserts a new Schedule 3A into the AEA 1971 (changing the basis of deductions). Part 1 of Schedule 3A provides for variations to the basis of deductions under an AEO made to secure a county court judgment debt, such a variation to be changing the basis of deductions from deductions made in accordance with Schedule 3 of the AEA 1971 (a Schedule 3 judgment debt order), to deductions made in accordance with the fixed deductions

scheme, (a fixed deductions order), (therefore, varying an AEO so that the scheme of deductions changes from the current scheme to the new fixed tables scheme). Part 2 of Schedule 3A provides for an AEO made to secure a county court judgment debt to be changed from a fixed deductions order to a Schedule 3 judgment debt order.

344. Part 1 of Schedule 3A provides that a Schedule 3 judgment debt order can be varied to become a fixed deductions order, either on an application to the county court or of the courts own motion. The court must vary a Schedule 3 judgment debt order by way of changing it to a fixed deductions order if a Schedule 3 judgment debt order lapses (because the debtor has changed employment) and is then re-directed to the debtor's new employer (such a variation to take effect at the time of re-direction). Paragraph 6 of Schedule 3A enables the Lord Chancellor to specify by order a "changeover date" when all existing Schedule 3 judgment debt orders should become fixed deductions orders. Paragraph 7 of Schedule 3A provides that where an AEO is varied pursuant to Part 1 of Schedule 3A, the employer must comply with the varied order (but will not incur liability for non compliance until 7 days have elapsed since service of the order as varied).

345. Part 2 of Schedule 3A deals with changing the basis of deductions under an AEO from a fixed deductions order to a Schedule 3 judgment debt order. Paragraph 10 provides that such a variation can only be made in accordance with Part 2 of Schedule 3A. Paragraph 11 of Schedule 3A specifies that where a county court directs that an existing fixed deductions order should take effect to secure payments under an administration order in accordance with section 5 of the AEA 1971, the AEO must be varied at the same time to specify that deductions under the AEO should be made in accordance with Schedule 3 to the AEA 1971. This is because, for an AEO made to secure payments under an administration order, the county court should retain the flexibility to specify different levels of deductions, and deductions at fixed rates are insufficiently flexible. Therefore, the Schedule 3 existing scheme of deductions should apply to AEOs made to secure payments under an administration order. Paragraph 8 of the Schedule makes a consequential amendment to section 5 of the AEA 1971 to this effect.

346. Part 2 of the Schedule makes consequential amendments to the AEA 1971 to enable operation of the fixed deductions scheme.

347. Paragraphs 9 to 15 amend section 14 of the AEA 1971, (power of the court to order the debtor and employer to provide specified information), in connection with the operation of fixed deductions orders to specify that unlike the position in connection with Schedule 3 deductions orders, the court will not need to order the debtor and/or the employer to provide particulars of the debtor's earnings and anticipated earnings, and as to his resources and needs (as the court will not need to be made aware of such facts when it is not setting the level of deductions under the AEO as deductions are to be made in accordance with the fixed deductions scheme). Similarly, paragraph 16 amends section 15 of the AEA 1971 (obligation of debtor and employer to notify changes) to specify that for fixed deductions orders, the

debtor and/or the employer are not obliged to notify the court of particulars of earnings or anticipated earnings.

348. Paragraph 17 makes various consequential amendments in connection with the operation of consolidated attachment orders and paragraph 18 specifies that the fixed deductions scheme should apply to a consolidated order where, before the consolidated order is made, one of the AEOs to be consolidated is a Schedule 3 judgment debt order.

Clause 84: Attachment of earnings orders: finding the debtor's current employer

349. This clause inserts sections 15A to 15D into the AEA 1971 to enable HMRC information to be provided to the courts for the purpose of re-directing a lapsed AEO.

350. Section 15A enables the High Court, county courts, magistrates' courts and fines officers, where an AEO has lapsed (where the debtor has changed employment but has failed to notify the court in accordance with his obligations in section 15(a) of the AEA 1971), to request HMRC to provide the name and address of the debtor's current employer for the purpose of re-directing the AEO. However, no request may be made under this section unless regulations governing the use and supply of debtor information are in force, having been made under section 15B(5) and (8). Section 15A enables HMRC to provide information to comply with a request, disapplies any legal restrictions that might otherwise apply in relation to the disclosure and also enables contractors who hold information on behalf of HMRC to disclose information pursuant to such a request.

351. Section 15B creates an offence where information obtained pursuant to section 15A is used or disclosed other than for a purpose connected with enforcement of the relevant AEO. Section 15C enables the Lord Chancellor to make regulations under section 15B, with the agreement of the Commissioners and subject to the affirmative resolution procedure. Section 15D sets out various definitions of terms used in sections 15A to 15C.

Clause 85: Payment by instalments: making and enforcing charging orders

352. This clause amends the Charging Orders Act 1979 ("the COA 1979") enabling the High Court and county courts to make a charging order where an instalments order has been made in relation to the sum of money to be secured by the charging order and the judgment debtor is not in default under that instalments order.

353. Subsection (3) provides that such a charge may not be enforced, (for example, by way order for sale), unless there has been a default in payment under the instalments order, and enables rules of court to specify limitations upon enforcement of a charging order after there has been default under an instalments order.

354. Subsection (5) provides that any restrictions on enforcement of a charge set out in the inserted subsections 3(4A) to (4E) of the COA 1979 will not apply to any charge put on a bankrupt's home under section 313 of the Insolvency Act 1986.

Clause 86: Charging orders: power to set financial thresholds

355. This clause inserts a new section 3A into the COA 1979 to provide a power for the Lord Chancellor to specify financial thresholds below which a court cannot make i) a charging order and/or ii) an order for sale, the first such regulations to be subject to the affirmative resolution procedure, and thereafter, any subsequent regulations to be subject to the negative resolution procedure.

Clause 87: Application for information about action to recover judgment debt

356. This clause enables a judgment creditor to apply to the High Court or a county court for information about what type of court based action it would be appropriate to take to recover his debt (an information application), such court-based methods being, for example, a warrant of control, a third party debt order or an AEO.

Clause 88: Action by the court

357. This clause enables the High Court or a county court, where the creditor has made an information application, to either make a departmental information request or an information order, requesting or ordering a person to provide information to the court to assist with the creditor's information application. The debtor will be notified that the court intends to make an information request or order to give him an opportunity to object. However, the court may not make a departmental information request to HMRC unless regulations are in force governing the use and disclosure of information disclosed by HMRC, having been made under section 90(4) and (7). Subsection (6) enables the court to disclose information about the debtor to a recipient of an information order or request to enable that recipient to identify the debtor in his records (such information being, for example, the known name and address of the debtor). Subsection (7) disapplies any legal restrictions that might otherwise apply in relation to a disclosure under subsection (6).

Clause 89: Departmental information requests

358. This clause specifies the information that may be requested by the court from government departments. Subsection (3) specifies information that may be requested from "the designated Secretary of State" (the Secretary of State for Work and Pensions will be designated for this purpose) and subsection (4) specifies the information that may be requested from HMRC. Subsection (5) enables the court to request prescribed information from other government departments. Such government departments will be requested rather than ordered to provide information and non-legislative agreements will set out arrangements for the respective government departments to deal with such requests.

Clause 90: Information orders

359. This clause enables the court to make information orders requiring prescribed third parties to provide prescribed information about the debtor. It is envisaged that the recipients of such information orders are likely to be persons such as credit reference agencies and banks.

Clause 91: Responding to a departmental information request

360. This clause enables a government department in receipt of an information request to disclose information that it considers is necessary to comply with the request and also enables disclosure of information where such information is held by a government contractor. The clause disapplies any legal restrictions that might otherwise apply to such a disclosure. Arrangements concerning compliance with such requests will be set out in non-legislative agreements between DCA and the respective departments.

Clause 92: Information order: required information not held etc

361. This clause enables a recipient of an information order (the "information discloser") to avoid liability for failure to comply with the order where the information discloser:

- does not hold the relevant information and it is not being held on his behalf;
- is unable to ascertain whether he holds the information (by way of example, where the information supplied by the court to the recipient of the information order is not sufficient to enable the recipient of the order to identify information that relates to the debtor in its records); or
- would incur an unreasonable effort or expense if he complied with the order.

362. The information discloser is required to comply with the information order, but may produce a certificate to the relevant court showing that one of the three bullet-points above applies.

Clause 93: Using the information about the debtor

363. This clause specifies how information obtained via an information order or departmental information request can be used by the court. Such information can be used by the court:

- to enable it to make a further department information request or information order in relation to the debtor, (by way of example to further disclose information to enable a recipient of an order or request to better identify the debtor from records, such as date of birth information);
- to provide the creditor with information about what court based action he could take to seek to recover his judgment debt;
- to enable a court to take any such action that is initiated by the creditor, by way of example, to enable the court to make and enforce an AEO in relation to the debtor, (and to enable information to be disclosed between courts for the purpose of enforcement).

364. Regulations will further restrict how information obtained via an information order or request can be further used or disclosed by the court to ensure protection of the debtor's rights and to prevent use of information that is not proportionate.

Clause 94: Offence of unauthorised use or disclosure

365. This clause creates an offence where information obtained pursuant to an information order or request is used or disclosed otherwise than in accordance with the purposes intended.

Clause 95: Regulations

366. This clause creates a power for the Lord Chancellor to make regulations relating to sections 87 to 94, with some requirement to seek the agreement of HMRC in relation to any regulations governing the use and disclosure of information disclosed by that Department.

Clause 96: Interpretation

367. This clause defines terms used in sections 87 to 95.

Clause 97: Application and transitional provision

368. This clause establishes the application of the provisions and sets out the transitional provision.

PART 5: DEBT MANAGEMENT AND RELIEF

SUMMARY

369. Part 5 of the Bill makes changes to two statutory debt-management schemes, Administration Orders (Chapter 1) and Enforcement Restriction Orders (Chapter 2).

370. Part 5, Chapter 3, also amends the Insolvency Act 1986 to allow for the introduction of a new form of personal insolvency procedure that entails the making, administratively by the official receiver, of a debt relief order (DRO) on the application of an individual debtor who meets specified criteria as regards his assets, income and liabilities. The effect of the order is to stay enforcement of the debts by creditors, the debts being discharged after a period of one year. While the order is in force, the debtor will be subject to similar restrictions and obligations as if he had been adjudged bankrupt.

371. Chapter 4 of Part 5 of the Bill empowers the Lord Chancellor (or his delegate) to approve Debt Management Schemes ("DMSs") operated by any body of persons. Approved schemes will be able to arrange Debt Repayment Plans ("DRPs") for individual debtors. Subject to prescribed restrictions, schemes will in effect be able to compel creditor participation and plans will be able to compose (i.e. reduce or partially write off) debts. These schemes could be operated by a variety of service providers. Existing providers of debt management advice and assistance do not have the power of compulsion and composition. In future, they will be able to choose whether to offer an 'approved scheme' as part of their service.

372. It is intended that DRPs will sit alongside and complement statutory schemes, such as Administration Orders ("AOs"), DROs and Individual Voluntary Arrangements ("IVAs"). The intention is to provide a range of options giving more choice and flexibility to assist the rehabilitation of over-indebted people. The most appropriate scheme to use will depend on the particular circumstances.

BACKGROUND

Administration Orders and Enforcement Restriction Orders

373. Administration Orders ("AOs") are a court-administered debt management scheme for those with multiple debts totaling no more than £5,000, one of which must be a judgment debt. The provisions governing AOs are set out in sections 112-117 of the County Courts Act 1984.

374. The 1985 Civil Justice Review recommended a number of changes to the AO scheme and these were taken forward in section 13 of the Courts and Legal Services Act 1990 ("the CLSA 1990"). The changes included removal of the need for a judgment debt, an increase in the debt limit and the introduction of a strict three-year limit to the order. Section 13 also included, for the first time, an explicit power for the court to grant an order restricting enforcement where it considered that this would be more appropriate than an AO. Such an order, once made, would provide temporary relief from enforcement for those unable to meet their commitments for a period to be defined by each order. However, as concerns were raised about the viability of section 13, it has never been brought into force.

375. So, in July 2004 the Government consulted on a range of targeted options to offer better assistance to people with multiple debts (the Choice of Paths Consultation), including reform to the existing AO scheme and a revised and targeted Enforcement Restriction Order ("ERO") scheme. The Government's response paper on the consultation, published in March 2005, committed to a number of changes to the AO scheme including an increase in the debt ceiling and a time limit to orders. The paper also committed to a revised and more workable version of the ERO to address the deficiencies identified in section 13 of the CLSA 1990. Part 5 of the Bill takes forward these changes.

Debt Relief Orders

376. At present if an individual encounters difficulty paying his debts, the remedies that are available to him either require him to have assets or funds available to distribute to his creditors on a regular basis (for example IVA, county court AO or a non statutory debt management plan) or, as with bankruptcy, there is a fee to access the remedy. This means that the procedures that are currently available are inaccessible to some people, since they do not have the financial means to use them.

377. Such people often have relatively low levels of liabilities, no assets over and above a nominal amount and no surplus income with which to come to an arrangement with their creditors.

378. The DRO has been devised following the Choice of Paths consultation, which determined that there was a perceived need for a remedy for people who are financially excluded from the current debt solution procedures, and a further consultation by The Insolvency Service in 2005 ("Relief for the Indebted – an Alternative to Bankruptcy?") on the detail of how it might operate. It is a procedure that will enable some individuals, who meet specified criteria as regards liabilities, assets and income, to seek relief from certain debts.

379. The DRO will be made administratively by official receivers (who will operate the scheme) and will not routinely require any judicial or other court intervention. The effect of the order will be to prevent creditors from enforcing their debts and the debtor will be discharged from the debts after a period of one year. Creditors will be notified of the making of an order and will have a right to make objections on certain grounds if they believe the order should not have been made.

380. The debtor will need to pay an up front entry fee to cover the administration costs but this will be significantly less than the deposit required for bankruptcy proceedings to be initiated. In order to keep costs to as low a level as possible, approved intermediaries from the debt advice sector will help an applicant decide if the DRO procedure is right for him before he applies to the official receiver, and assist the debtor in making his application. Again to maintain a low level of administrative costs (and therefore entry fee) the facility to apply for a DRO will be available only online.

381. To be eligible for an order the debtor will need to meet criteria as regards the level of liabilities, the level of assets and the level of surplus income, and these levels will be set in secondary legislation to enable them to be updated when necessary.

382. While the order is in force the debtor will be subject to the same restrictions and obligations as in bankruptcy, and will be subject to a similar regime of restrictions orders or prosecution if his conduct in relation to the insolvency is found to be culpable. There will be a right of appeal to the court for both the debtor and creditors who are dissatisfied with the way the official receiver has dealt with the case.

383. There is a facility to account for windfalls and increases in income during the period when the order is in force.

Debt Management Schemes

384. Many organisations currently offer advice and assistance to debtors. This can include negotiation with creditors to agree an acceptable schedule of repayments and drawing up plans to help debtors manage their finances and make those repayments. It is estimated that over 25,000 such debt repayment plans were arranged in 2004 and there are currently around 70,000 active plans.

385. Such schemes depend on the voluntary participation of the debtor and creditors, and operate without any form of regulation. There is currently no power to compel creditors to adhere to the terms of a debt repayment plan (that is to accept the planned repayments without taking enforcement action). Therefore a single uncooperative creditor can effectively block the creation of a repayment plan that would benefit the debtor and all the other creditors in the long run. Nor is there any power to compose debts that cannot be repaid within a reasonable period as an incentive for the debtor to maintain the required repayments.

386. Measures in Part 5 of the Bill make it clear that business and secured debts cannot be included in these schemes. The measures also enable scheme operators to exercise powers to compel creditor participation, by preventing enforcement action, and to write off a proportion of the debts where a debtor complies with a DRP but simply cannot repay the full amount in a reasonable timescale. Additionally, the measures give the Lord Chancellor power to prescribe in regulations the circumstances in and the extent to which these powers may be exercised. For example, regulations might define the minimum and total repayments for which plans must provide, thereby defining the maximum proportion of the total debts that could be written off. Within these limits, individual schemes could make greater or lesser use of such powers.

387. The Bill also provides creditors with a right of appeal to a county court against the making, their inclusion and terms of a DRP.

388. Before making regulations to bring this Chapter into effect, the Government intends to undertake further research into existing statutory and non-statutory schemes for assisting the over-indebted and those in multiple debt situations (including the working of the reformed AO scheme). This would inform detailed proposals that would then be subject to a full public consultation exercise and regulatory impact assessment to confirm their benefits and cost effectiveness.

389. The Choice of Paths consultation sought views on whether it would be desirable in principle for a scheme similar to the court-based AO scheme to be operated in the private and voluntary sectors. A majority of respondents thought that a non-court scheme could offer advantages over the AO scheme. The paper did not discuss the details of such a scheme. The provisions in this Chapter are intended to take powers to give effect to such a scheme or schemes through regulations, subject to further consultation on the details.

COMMENTARY ON CLAUSES: PART 5

Clause 98: Administration orders

390. Subsection (1) of this clause replaces the existing Part 6 of the County Court Act 1984 ("CCA 1984").

Section 112A – Administration orders

391. Section 112A provides that an administration order ("AO") is an order to which certain debts are scheduled, which imposes a requirement on the debtor and which imposes requirements on certain creditors. Debts are to be scheduled to the order in accordance with the provisions in sections 112C, 112D, 112Y(3) and 112Y(4). The requirement which must be imposed on the debtor is set out in section 112E and this is a requirement to make repayments towards scheduled debts whilst the AO is in force. The requirements which must be imposed on certain creditors are set out in sections 112F to 112I and these are all requirements which restrict the ability of those creditors to take enforcement action whilst an AO is in force.

Section 112B – Power to make order

392. This section sets out the conditions that must be met before the court can make an AO in relation to a debtor. This is a new test for making AOs which introduces the concept of "qualifying debts" together with other new requirements that must be met before an AO can be obtained. Section 112AB provides that a "qualifying debt" is any debt, except for a debt that is secured against an asset, such as a mortgage, or a debt that falls within a description specified in regulations. The conditions which must be met before an AO can be made are:

- the debtor must have at least two qualifying debts, and he must be unable to pay at least one of them;
- the debtor must not have any business debts;
- the debtor must not be excluded by the AO, voluntary arrangement or bankruptcy exclusions as defined by section 112AH;
- the debtor's total qualifying debts must be less than the amount prescribed in regulations ("the prescribed maximum");
- the debtor's surplus income must be more than the amount prescribed in regulations ("the prescribed minimum").

393. Section 112AE sets out how "surplus income" is to be calculated. It is to be calculated in accordance with regulations. Before making an AO, the court must have regard to any objections. The Civil Procedure Rules 1998 will govern the procedure for making the order.

Section 112C – Scheduling declared debts

394. Debtors will be required to declare all qualifying debts, including those which are not due at the time of applying for an order, to ensure that the court has a true picture of their indebtedness. This section provides that when making an AO, the court must schedule to the order all declared debts already due. Declared debts that become due after an AO is made must be scheduled to the order following an application by the debtor or creditor and after considering any objections made to the debt being scheduled (in accordance with section 112AG(5)).

Section 112D – Scheduling new debts

395. This section gives the court the power to schedule to an existing AO qualifying debts arising after an order is made and becoming due during the life of the order, on the application of the debtor or a qualifying creditor. A "qualifying creditor" is a creditor under a qualifying debt (see section 112AA(1)). However, this power is dependent on the total debt figure (including the new debt) not exceeding the prescribed maximum.

Section 112E – Repayment Requirement

396. This section imposes a requirement on the debtor to make repayments towards scheduled debts during the life of an AO. Debts may either be repaid in full or to the extent decided by the court and different debts may be repaid to different extents.

397. Subsection (5) provides the court with the option to order that repayments are not to be made on debts arising after an order is made and scheduled to the order under section 112D, until all of the repayments required in respect of previously declared debts have been made. This provision is designed to discourage irresponsible lending and borrowing.

398. The section also provides that repayments must be made by instalments and the amount of instalments must be determined in accordance with regulations. The regulations must make provision for instalments to be determined by reference to the debtor's surplus income. The section also allows the court to order repayments to be made by other means, such as by lump sums, in addition to the regular instalments, for example, where the debtor disposes of property.

Section 112F – Presentation of bankruptcy petition

399. Sections 112F to 112I set out the requirements that must be imposed by an AO on certain creditors for as long as the AO is in force.

400. The first requirement, in section 112F, provides that any qualifying creditor of the debtor is to be prohibited from presenting a bankruptcy petition against that debtor, unless he has the court's permission. This is similar to the current provision under section 112(4) of the CCA 1984. However, unlike section 112(4), this new section does not include a prohibition on a creditor joining in a bankruptcy petition that has been presented by another creditor. So, if a qualifying creditor obtains the court's permission to present a bankruptcy petition (or if a non-qualifying creditor presents a petition without the court's permission), then all of the debtor's creditors will be able to join in those bankruptcy proceedings. If this leads to the making of a bankruptcy order against the debtor, then the court which made the AO will be required to revoke that AO (see section 112U(4)(b)).

Section 112G – Remedies other than bankruptcy

401. This section sets out the second requirement that must be imposed by an AO on certain creditors. This is similar to the current provision under section 114 of the CCA 1984. It prohibits qualifying creditors from seeking to recover their debt by pursuing any other remedy (that is, other than bankruptcy) without the court's permission. However, regulations may be made under this section to exempt certain creditors from this requirement in appropriate circumstances. For example, exemptions will apply in respect of debts that are a criminal fine, a student loan or that are due under an order made in family proceedings or maintenance assessments made under the Child Support Act 1991. In relation to these particular types of debt, it is appropriate that the creditor should be free to recover the debt from the debtor, even though an AO is in force. These exceptions will be in line with those categories of debt which are non provable in bankruptcy proceedings. The revised ERO scheme and the new DRO and DRP schemes will have similar exemptions. This ensures a consistent approach, which is essential to facilitate movement between these schemes for those debtors who need it.

Section 112H – Charging of interest etc.

402. This section sets out the third requirement that must be imposed by an AO on certain creditors. Any creditor under a scheduled debt is prevented from charging any interest, fee or charge in respect of the scheduled debt during the life of an order.

Section 112I – Stopping supplies of gas or electricity

403. This section sets out the fourth requirement that must be imposed by an AO on certain creditors – in this case, creditors who are domestic utility suppliers. This largely replicates what would have been section 112A of the CCA 1984, had section 13(5) of the CLSA 1990 been commenced. However, these provisions are limited to imposing restrictions on electricity and gas suppliers because the Water Industry Act 1991 already restricts the powers of water suppliers in relation to domestic supply of water.

Section 112J – Application for an order

404. Unlike the current provisions, which allow the court to make an order on its own initiative, this new section provides that an AO can only be made on the application of the debtor. It also removes the current need for the debtor to have at least one court judgment in respect of any of his debts. This will ensure that a debtor who needs the protection of an AO is able to obtain an AO without first having to wait for one of his creditors to take him to court.

Section 112K – Duration

405. This section differs from the current legislation by setting a maximum overall limit of 5 years on the duration of an AO. At present, AOs are not time limited. Section 112(9) of the CCA 1984, which was to be inserted into that Act by section 13(4) of the CLSA 1990 had it been commenced, limited AOs to a maximum period of 3 years. An order will cease to have effect 5 years after the date on which it was made, unless the court has specified an earlier date in the order. If the court specifies an earlier date when it makes the AO, then it may subsequently extend the length of that order under section 112S (variation of duration), provided that the overall length remains within the 5 year time limit from the making of the order. The court may also revoke an AO before it is due to expire, under section 112U or section 112V (duty and power to revoke order), and in those cases the order will cease to have effect in accordance with the revocation.

406. The intention is to make the AO scheme more effective by providing certainty about the length of the order, as well as an opportunity for a debtor's rehabilitation (because of the fixed term), a reasonable return to creditors and an incentive to maintain the repayments.

Section 112L – Effect on other debt management arrangements

407. This new section defines the relationship between an AO and the other debt management arrangements set out in subsection (6), which are EROs, DROs and DRPs. It provides that when an AO is made, any other debt management arrangement which had effect in relation to the same debtor immediately before it was made will cease to have effect automatically when the AO is made. Provision is also made for the court to notify the provider of the other arrangements as soon as practicable, or as soon as it becomes aware of their existence, of the making of the AO. Similar provisions are incorporated into the revised ERO scheme and the new DRO and DRP schemes This will ensure that no more than one debt management arrangement has effect in respect of the same debtor at the same time.

Section 112M – Duty to provide information

408. This new section applies as long as an AO is in force and requires a debtor, who is the subject of an AO, to supply information about his earnings and income (including, for example, any cash that he might win or receive as a gift) and his assets and expenditure at intervals to be specified in regulations. The information to be provided must include details of any anticipated changes that are likely to occur before the next statement is due, for example if the debtor knows that he is due to receive a bonus in his next pay. Additionally, debtors will be required to notify the court within a period, again to be specified in regulations (probably 7 – 14 days), before he disposes of any property (including cash) that is above a set value, to be specified in regulations.

409. This new provision is intended to facilitate the court's role in actively managing an AO, for example by exercising its powers to vary or revoke the order where appropriate.

Section 112N – Offence if information not provided

410. This section provides that any failure to provide information, as required under section 112M, is an offence which is punishable by a county court judge who may impose a fine of not more than £250 or imprisonment for not more than 14 days. This offence is not a criminal offence; instead it is treated as if it were a contempt of court. The penalty is equivalent to that which applies to a debtor who fails to provide the information required by section 15 of the Attachment of Earnings Act 1971 (see section 23 of that Act).

Section 112O – Existing county court proceedings to be stayed

411. This section provides that any county court proceedings that were pending against the debtor when the AO was made, must be stayed if the following conditions apply:

- the proceedings relate to one of the debtor's qualifying debts and they are not bankruptcy proceedings;
- following the making of the AO, the creditor under that debt is unable to enforce it because of the prohibition referred to in section 112G (remedies other than bankruptcy); and
- the county court, in the proceedings which are to be stayed, has notice of the AO.

412. Where proceedings are stayed under this section, the county court has discretion to allow the creditor any costs incurred in the stayed proceedings. Those costs may be added to the qualifying debt or, if the debt is scheduled to the AO, to the amount scheduled in respect of the debt but only if the court is not under a duty to revoke the order because the total qualifying debts, including the costs, exceeds the prescribed maximum (see section 112U(6)(b)).

Section 112P – Appropriation of money paid

413. This section provides that monies paid by a debtor under an AO will first be appropriated towards court fees and then towards the debts scheduled to the order. So, a debtor need not pay the court fees up front; instead, they can be paid from the monies the debtor pays to the court under the AO.

Section 112Q – Discharge from debts

414. This section places a duty on the court to discharge the debtor from a scheduled debt and to de-schedule the debt where the debt is repaid to the extent provided in the order, even if the debt is not repaid to its full extent. Once all of the scheduled debts have been repaid to the extent required by the order, then the court must revoke that order.

Section 112R – Variation

415. This section provides that the court may vary an AO on its own initiative or on the application of either the debtor or a qualifying creditor. This provision allows the court to take a more pro-active role in the management of the order by being able to react to information received from the debtor under section 112M.

Section 112S – Variation of duration

416. This section makes provision to allow the court to vary the duration of an AO. So, for example, an AO that was due to come to an end after 5 years from the day it was made can be shortened so that instead it comes to an end after 4 years from the day it was made. Similarly, an AO that was due to come to an end after 3 years, can be extended so that it continues to have effect for a further 2 years. But the overall duration of an AO (including any extensions under this section) must not exceed a period of 5 years from the day it was made.

Section 112T – De-scheduling debts

417. This new section enables the court to use its power of variation under section 112R to vary an administration order by de-scheduling the debt, if it appears to the court that it is just and equitable to do so. This will normally be when debts have been incorrectly scheduled to an order.

Section 112U – Duty to revoke order

418. This section makes provision for the revocation of an order on specified grounds. It places a duty on the court to revoke an AO if it becomes apparent that at the time the order was made, or subsequently, the entry criteria in section 112B were not or are no longer met. That is where the debtor:

- did not have two or more qualifying debts/does not have any qualifying debts;
- had/has a business debt and in either case he is still a debtor under that debt;
- was excluded under the AO, voluntary arrangement or insolvency exclusions (as defined in section 112AH), is now excluded under the voluntary arrangement exclusion or is now the subject of a bankruptcy order;
- was/is now able to pay all of his qualifying debts;
- had/has total qualifying debts exceeding the prescribed maximum; and
- had/has surplus income less than or the same as the prescribed minimum.

Section 112V – Power to revoke order

419. This section gives the court, on its own motion or on the application of either the debtor or a qualifying creditor, a general power to revoke an AO in circumstances where it does not have a duty to do so. This power may be used particularly where a debtor fails to

make two payments (whether consecutive or not) required by the order under section 112E or fails to provide information required under section 112M.

Section 112W – Effect of Revocation

420. This section confirms that if an order is revoked under a duty or power in this Part, then it ceases to have effect in accordance with the terms of the revocation.

Section 112X – Notice when order made, varied, revoked etc

421. This section imposes a duty on the court to send notice to all creditors with scheduled debts if and when the following things happen:

- when an AO is made, varied or revoked;
- when a debt is scheduled to the order at any time after it is made;
- when the court itself is given notice that another debt management arrangement has been made (with the consequence that the AO has ceased to have effect automatically).

Section 112Y – Failure to take account of all qualifying debts

422. This section places a duty on the court to schedule an undeclared debt to an AO if the following conditions apply:

- an AO has been made but because of an undeclared debt, the total amount of the debtor's qualifying debts was not properly calculated;
- the undeclared debt is due, whether or not it became due before or after the AO was made; and
- the total debt is less than or the same as the prescribed maximum.

423. If the undeclared debt is not yet due, the court must schedule the debt to the order when it becomes due. Where the inclusion of the debt would result in the total debt exceeding the prescribed maximum, the court must instead revoke the order.

424. Under this section, the court must take account of any representations (including representations about why a debt should not be scheduled) in accordance with section 112AG(5)).

Section 112AA – Main definitions

425. This section explains the meaning of key expressions used in this Part. In particular, it confirms that the terms "administration order" and "debtor" have the meanings given to them in new sections 112A and 112B, respectively. It also defines "qualifying creditor" as a creditor under a qualifying debt and confirms that, subject to the normal rules of court, "proper county court" refers to the court that made the order.

Section 112AB – Expressions relating to debts

426. This section defines a "qualifying debt" as any debt that is not secured against an asset or specified in regulations. A "business debt" is defined as a debt incurred in the course of a business. This section confirms that references to debts include only those debts that have arisen and therefore contingent debts are not included.

Section 112AC – Inability to pay debts

427. This section specifies that a debtor is considered to be unable to repay a debt if, when the debt is due, he fails to pay it (if the debt is repayable by a single payment) or, he fails to make one or more payments (if the debt is repayable by a number of instalments) and is unable to pay the single payment or all of the missed payments.

Section 112AD – Calculating the debtor's qualifying debts

428. This section requires the court to calculate the total amount of a debtor's qualifying debts by taking into account all qualifying debts that have arisen before the calculation, including those which are not due to be paid at the time of the calculation (that is, where payment is deferred). This ensures that the court is aware of the true extent of a debtor's indebtedness. In addition, the section requires regulations to make further provision about how the total amount of a debtor's qualifying debts is to be calculated and enables regulations to make provision about how the amount of any particular qualifying debt is to be calculated.

Section 112AE – Calculating the debtor's surplus income

429. This section requires the debtor's surplus income to be calculated in accordance with regulations which must make provision about what is surplus income (this is likely to be the difference between average income, over a specific period, and justifiable expenditure) and the period by reference to which the debtor's surplus income is to be calculated. The regulations may allow the court to take into account the debtor's assets, such as his savings, when calculating his surplus income.

Section 112AF – Debts becoming due

430. This section specifies when a debt, which is repayable by a single repayment or by a number of payments, becomes due. The debt becomes due when the time for making the single payment or the first of the payments is reached.

Section 112AG – Scheduling and de-scheduling debts

431. This section explains when a debt is scheduled to and de-scheduled from an AO. If the amount of the debt and the name of the creditor under the debt is included in a schedule to the order, the debt is scheduled to the order. The debt is de-scheduled when this information is

removed from the schedule. The court must not schedule or de-schedule a debt without having regard to any representations from any person about why the debt should not be scheduled or de-scheduled. However, where an undeclared debt is scheduled under section 112Y, the court need not have regard to any representations made by a debtor about the scheduling of that debt. Also, where a debt is de-scheduled because a debtor is discharged from his debt under section 112Q, the court need not have regard to any representations made by any person.

Section 112AH – The AO, voluntary arrangement and bankruptcy exclusions

432. This section defines the AO, voluntary arrangement and bankruptcy exclusions, which are relevant to the court's power to make an AO (see section 112B(4)). It specifies that a debtor is excluded under the:

- ***AO Exclusion*** if he currently has an AO, or he previously had an AO within the last 12 months. For this purpose, the 12-month period begins on the day that the previous AO ceased to have effect. But a debtor who has had an AO within the last 12 months is not excluded under this provision if the previous AO (a) ceased to have effect by virtue of another debt management arrangement listed in section 112K(7) coming into force, or (b) was revoked for the reason that the debtor no longer had any qualifying debts (see section 112U(1)(b));

- ***Voluntary Arrangement Exclusion*** if the debtor is the subject of an interim order under section 252 of the Insolvency Act 1986 (interim court order pending an individual voluntary arrangement) or where he is bound by an individual voluntary arrangement approved under Part 8 of that Act;

- ***Bankruptcy Exclusion*** if a petition under Part 9 of the Insolvency Act 1986 has been presented in respect of the debtor but has not yet been decided, or if the debtor is an undischarged bankrupt.

Section 112AI – Regulations under this Part

433. This section provides the Lord Chancellor with powers to make regulations under this Part.

434. Subsection (2) of this clause enacts Schedule 16.

Schedule 16: Administration orders: consequential amendments

435. This Schedule contains a number of amendments to numerous Acts which are consequential as result of the new provisions in Part 6 of the CCA 1984.

436. Subsection (3) of this clause specifies that the application of the new provisions do not apply where an AO was made or an application for an AO was made before the day on which the new provisions come into force.

Clause 99: Enforcement restriction orders

437. Subsection (1) of this clause inserts a new Part 6A into the CCA 1984.

Section 117A – Enforcement Restriction Orders

438. Section 117A provides that an enforcement restriction order ("ERO") is an order which imposes requirements on certain creditors and which may also impose a requirement on the debtor. The requirements which must be imposed on certain creditors are set out in sections 117C to 117E and these are all requirements which restrict the ability of those creditors to take enforcement action whilst an ERO is in force. The requirement which may be imposed on the debtor is set out in section 117F and this is a requirement to make repayments towards certain debts whilst the ERO is in force.

Section 117B – Power to make order

439. This section sets out the conditions that must be met before the court can make an enforcement restriction order in relation to a debtor. This is a new test for making EROs, which introduces the concept of "qualifying debts" together with other new requirements that must be met before an ERO can be obtained. Section 117T provides that a "qualifying debt" is any debt, except for a debt that is secured against an asset, such as a mortgage, or a debt that falls within a description specified in regulations. The conditions which must be met before an ERO can be made are:

- the debtor must have at least two qualifying debts, and he must be unable to pay at least one of them;
- the debtor must not have any business debts;
- the debtor must not be excluded by the ERO, voluntary arrangement or bankruptcy exclusions as defined by section 117W;
- the debtor must be suffering from a sudden and unforeseen deterioration in his financial circumstances from which there must be a realistic prospect of improvement in financial terms within 6 months from when the order is made.

440. The Civil Procedure Rules 1998 ("CPR") will govern the procedure for making the order. It is intended that the court should be able to make the order without first giving notice to the creditors. For that reason, section 117B(10) allows the CPR to disapply the requirement for the court to consider any objections before making an order. However, the court will be required to have regard to any objections that a creditor may have after the order has been made and may vary or revoke the order if appropriate, in the light of those objections.

Section 117C – Presentation of bankruptcy petition

441. Sections 117C to 117E set out the requirements that must be imposed by an ERO on certain creditors for as long as the ERO is in force. The first requirement, in section 117C, provides that any qualifying creditor of the debtor is to be prohibited from presenting a bankruptcy petition against that debtor, unless he has the court's permission. This is similar to the current provision under section 112(4) of the CCA 1984 which applies to administration orders ("AOs"). However, unlike section 112(4), this new section does not include a prohibition on a creditor joining in a bankruptcy petition that has been presented by another creditor. So if a qualifying creditor obtains the court's permission to present a bankruptcy petition (or if a non-qualifying creditor presents a petition without the court's permission), then all of the debtor's creditors will be able to join in those bankruptcy proceedings. If this leads to the making of a bankruptcy order against the debtor, then the court which made the ERO will be required to revoke that ERO (see section 117O(4)(b)). A "qualifying creditor" is a creditor under a qualifying debt (see section 117T(1)).

Section 117D – Remedies other than bankruptcy

442. This section sets out the second requirement that must be imposed by an ERO on certain creditors. It re-enacts in part what would have been section 112A(2) of the CCA 1984, which was to be inserted by section 13(5) of the CLSA 1990 had it been commenced. This second requirement prohibits qualifying creditors from seeking to recover their debt by pursuing any other remedy (that is, other than bankruptcy) without the court's permission. However, in contrast to section 112(4) of the CCA 1984, regulations may be made under this section to exempt certain creditors from this requirement in appropriate circumstances. For example, exemptions will apply in respect of debts that are a criminal fine, a student loan or that are due under an order made in family proceedings or maintenance assessments made under the Child Support Act 1991. In relation to these particular types of debt, it is appropriate that the creditor should be free to recover the debt from the debtor, even though an ERO is in force. These exceptions will be in line with those categories of debt which are non provable in bankruptcy proceedings. The revised AO scheme and the new DRO and DRP schemes will have similar exemptions. This ensures a consistent approach, which is essential to facilitate movement between these schemes for those debtors who need it.

Section 117E – Stopping supplies of gas or electricity

443. This section sets out the third requirement that must be imposed by an ERO on certain creditors, in this case creditors who are domestic utility suppliers. Again this largely replicates what would have been section 112A of the County Court Act 1984, had section 13(5) of the CLSA 1990 been commenced. However, these provisions are limited to imposing restrictions on electricity and gas suppliers because the Water Industry Act 1991 already restricts the powers of water suppliers in relation to domestic supply of water.

Section 117F – Repayment requirement

444. This section sets out the requirement that may be imposed by an ERO on the debtor. This gives the court discretion to order the debtor to make payments towards one or more of his qualifying debts, whilst the ERO is in force, provided that the debtor has sufficient surplus income. Regulations will make provision about what is surplus income (which is likely to be the difference between average income and justifiable expenditure, in common with the AO provisions) and specifies that assets, such as the debtor's savings, may be taken into account when making this calculation. It also allows the court to vary the repayment requirement of its own initiative or on the application of the debtor or a qualifying creditor.

Section 117G – Application for an order

445. This section specifies that only a debtor can apply for an ERO and that a debtor can make an application regardless of whether any of his creditors has obtained a court judgment in respect of any of his debts. (Under the current provisions in the CCA 1984, a judgment debt is a precondition to the court making an AO or ERO). This will ensure that a debtor who needs the protection of an ERO is able to obtain an ERO without first having to wait for one of his creditors to take him to court.

Section 117H – Duration

446. This section provides for a maximum overall time limit of 12 months on the duration of an ERO. An order will cease to have effect 12 months after the date on which it was made, unless the court has specified an earlier date in the order. If the court specifies an earlier date when it makes the ERO, then it may subsequently extend the length of that order under section 117N (variation of duration), provided that the overall length remains within the 12 month time limit from the making of the order. The court may also revoke an ERO before it was due to expire, under section 117O or section 117P (duty and power to revoke order), and in those cases the order will cease to have effect in accordance with the revocation.

Section 117I – Effect on other debt management arrangements

447. This new section defines the relationship between an ERO and the other debt management arrangements set out in subsection (6), which are AOs, DROs and DRPs. It provides that, when an ERO is made, any other debt management arrangement which had effect in relation to the same debtor immediately before it was made will cease to have effect automatically when the ERO is made. Provision is also made for the court to notify the provider of the other arrangements as soon as practicable, or as soon as it becomes aware of their existence, of the making of the ERO. Similar provisions are incorporated into the revised AO scheme and the new DRO and DRP schemes. This will ensure that no more than one debt management arrangement has effect in respect of the same debtor at the same time.

Section 117J – Duty to provide information

448. This new section applies as long as an ERO is in force and requires a debtor, who is the subject of an ERO, to supply information about his earnings and income (including, for example, any cash that he might win or receive as a gift) and his assets and expenditure at intervals to be specified in regulations. The information to be provided must include details of any anticipated changes that are likely to occur before the next statement is due, for example if the debtor knows that he is due to receive a bonus in his next pay. Additionally, debtors will be required to notify the court within a period, again to be specified in regulations (probably 7 – 14 days), before he disposes of any property (including cash) that is above a set value, to be specified in regulations.

449. This new provision is intended to facilitate the court's role in actively managing an ERO, for example by exercising its powers to vary or revoke the order where appropriate.

Section 117K Offence if information not provided

450. This section provides that any failure to provide information, as required under section 117J, is an offence which is punishable by a county court judge who may impose a fine of not more than £250 or imprisonment for not more than 14 days. This offence is not a criminal offence; instead it is treated as if it were a contempt of court. The penalty is equivalent to that which applies to a debtor who fails to provide the information required by section 15 of the Attachment of Earnings Act 1971 (see section 23 of that Act).

Section 117L – Existing county court proceedings to be stayed

451. This section provides that any county court proceedings, that were pending against the debtor when the ERO was made, must be stayed if the following conditions apply:

- the proceedings relate to one of the debtor's qualifying debts and they are not bankruptcy proceedings;
- following the making of the ERO, the creditor under that debt is unable to enforce it because of the prohibition referred to in section 117D (remedies other than bankruptcy); and
- the county court, in the proceedings which are to be stayed, has notice of the ERO.

452. Where proceedings are stayed under this section, the county court has discretion to allow the creditor any costs incurred in the stayed proceedings and those costs may be added to the qualifying debt.

Section 117M – Charges

453. This new provision prohibits qualifying creditors from making any charge, other than interest or charges relating to issues before an ERO came into existence, for the period while

an ERO is or was in force. So the prohibition remains in place even after the ERO has ceased to have effect. This provision is designed to prevent creditors, who are prohibited from enforcing their debts whilst an ERO has effect, from penalising the debtor under the ERO by imposing additional penalty charges or interest for his late payment of the relevant debt. If the creditor tries to impose any such charge, in breach of this section, then that charge will be unenforceable.

Section 117N – Variation of duration

454. This section makes provision to allow the court, on its own initiative or on the application of the debtor or a qualifying creditor, to vary the duration of an ERO. So, for example, an ERO that was due to come to an end after 12 months can be shortened so that instead it comes to an end after 8 months from the day it was made. Similarly, an ERO that was due to come to an end after 6 months, can be extended so that it continues to have effect for a further 3 months. But the overall duration of an ERO (including any extensions under this section) must not exceed a period of 12 months from the day it was made.

Section 117O – Duty to revoke order

455. This section makes provision for the revocation of an order on specified grounds. It places a duty on the court to revoke an ERO if it becomes apparent that at the time that the order was made, or subsequently, the entry criteria in section 117B were not or are no longer met. That is where the debtor:

- did not have two or more qualifying debts/does not have any qualifying debts;
- had/has a business debt and in either case he is still a debtor under that debt;
- was excluded under the ERO, voluntary arrangement or insolvency exclusions (as defined in section 117W), is now excluded under the voluntary arrangement exclusion or is now the subject of a bankruptcy order;
- was/ is now able to pay all of his qualifying debts;
- was not/is no longer suffering from a sudden and unforeseen deterioration in his financial circumstances; and
- did not have/no longer has realistic prospects of improvement in his financial circumstances.

456. Additionally, the court must revoke an ERO if it becomes apparent that at the time the order was made it was not in fact fair and equitable to make the order or where it is not now fair and equitable for the order to continue to have effect.

Section 117P – Power to revoke order

457. This section gives the court, on its own motion or on the application of either the debtor or a qualifying creditor, a general power to revoke an ERO in circumstances where it does not have a duty to do so. This power may be used particularly where a debtor fails to

comply with a repayment requirement that is (or was) included in the order under section 117F or fails to provide information required under section 117J.

Section 117Q – Effect of revocation

458. This section confirms that if an order is revoked under a duty or power in this Part, then it ceases to have effect in accordance with the terms of the revocation.

Section 117R – Notice of order

459. This section imposes a duty on the court to send notice to all qualifying creditors if and when the following things happen:

- when an ERO is made, varied or revoked;
- when the court itself is given notice that another debt management arrangement has been made (with the consequence that the ERO has ceased to have effect automatically).

Section 117T – Main definitions

460. This section explains the meaning of key expressions used in this Part. In particular, it confirms that the terms "enforcement restriction order" and "debtor" have the meanings given to them in new sections 117A and 117B, respectively. It also defines "qualifying creditor" as a creditor under a qualifying debt and confirms that, subject to the normal rules of court, "proper county court" refers to the court that made the order.

Section 117U – Expressions relating to debts

461. This section defines a "qualifying debt" as any debt that is not secured against an asset or specified in regulations. A "business debt" is defined as a debt incurred in the course of a business. This section confirms that references to debts include only those debts that have arisen and therefore contingent debts are not included.

Section 117V – Inability to pay debts

462. This section specifies that a debtor is considered to be unable to repay a debt if, when the debt is due, he fails to pay it (if the debt is repayable by a single payment) or, he fails to make one or more payments (if the debt is repayable by a number of instalments) and is unable to pay the single payment or all of the missed payments.

Section 117W – The ERO, voluntary arrangement and bankruptcy exclusions

463. This section defines the ERO, voluntary arrangement and bankruptcy exclusions, which are relevant to the court's power to make an ERO (see section 117B(4)). It specifies that a debtor is excluded under the:

- ***ERO Exclusion*** if he currently has an ERO, or he previously had an ERO within the last 12 months. For this purpose, the 12-month period begins on the day that the previous ERO ceased to have effect. But a debtor who has had an ERO within the last 12 months is not excluded under this provision if the previous ERO (a) ceased to have effect by virtue of another debt management arrangement listed in section 117H(7) coming into force, or (b) was revoked for the reason that the debtor no longer had any qualifying debts (see section 117O(1)(b));

- ***Voluntary Arrangement Exclusion*** if the debtor is the subject of an interim order under section 252 of the Insolvency Act 1986 (interim court order pending an individual voluntary arrangement) or where he is bound by an individual voluntary arrangement approved under Part 8 of that Act;

- ***Bankruptcy Exclusion*** if a petition under Part 9 of the Insolvency Act 1986 has been presented in respect of the debtor but has not yet been decided, or if the debtor is an undischarged bankrupt.

Section 117X – Power to make regulations

464. This section empowers the Lord Chancellor to make regulations under this Part.

Clause 100: Debt relief orders and debt relief restrictions orders etc

465. Clause 100 gives effect to Schedules 17, 18 and 19 and makes provision for the addition of a new Part 7A of the Insolvency Act 1986 and additional Schedules (Schedule 4ZA on the conditions to be met for a DRO and Schedule 4ZB relating to debt relief restrictions orders) to that Act. These provisions relate to the operation of a new individual insolvency procedure, the debt relief order ("DRO").

Schedule 17 – Part 7A to the Insolvency Act 1986

466. Schedule 17 contains the text of new Part 7A to be inserted into the Insolvency Act 1986.

Section 251A: Debt Relief Orders

467. Only individuals who are unable to pay their debts may apply for a debt relief order. The section also identifies the debts to which a DRO may apply - which are called "qualifying debts" in the Bill. The debts must be for an identifiable amount of money and must not be secured or within any description of debt that may be prescribed by order as being excluded from being a qualifying debt.

Section 251B: Making of application

468. Section 251B provides for the way in which the debtor must apply to the official receiver for an order. The application must be made through an approved intermediary. The term "approved intermediary" is defined later in section 251U. The section sets out some of the detail about the individual's affairs that must be included in an application for a DRO, and makes provision for the individual insolvency rules made under section 412 to prescribe the form and manner in which the application should be made and the information that must be supplied in support of the application.

Section 251C: Duty of official receiver to consider and determine application

469. Once an application has been made the official receiver must decide whether to make, refuse or stay the application pending further enquiries. This section describes the steps the official receiver should take when an application for a DRO has been made. It allows the official receiver to stay his consideration of the application until he receives answers to any queries raised by him with the debtor.

470. The section sets out the circumstances in which the official receiver must refuse the application (if he is not satisfied that the debtor meets the criteria for a DRO) and also that he may refuse it if the application does not satisfy the requirements imposed by section 251B or if queries raised with the debtor have not been answered to the official receiver's satisfaction. If the official receiver refuses the application he must give reasons to the debtor. If he does not refuse the application then he must make the order.

Section 251D: Presumptions applicable to the determination of an application

471. In order to ensure that there is a uniform approach to the order making process and that the great majority of applications can be decided quickly, the official receiver must apply certain presumptions when determining an application for a DRO. This section requires him to presume that the debtor meets the requirements for a DRO if it appears to be the case from information supplied in the application and he has no reason to believe that the information supplied is inaccurate or that the debtor's circumstances have changed since the application date.

472. The official receiver must also presume that the debtor meets the conditions as to eligibility as set out in Schedule 4ZA providing he has no reason to believe that incomplete or inaccurate information has been supplied in the application or in support of it. The official receiver may also presume that the debts specified at the date of the application are qualifying debts unless he has reason to believe otherwise. It is expected that the involvement of authorised intermediaries in filling in and submitting application forms means that most applications are well-founded. This section allows the official receiver to make orders where the application appears to be in order without considering the case in any more detail. However, where an objection is made to the order or for any reason the official receiver

discovers that the order arguably should not have been made, the official receiver will be expected to look into the case in far more detail. That is thought to provide adequate protection for creditors and will ensure that the administrative costs, and hence the application fees, can be kept as low as possible.

Section 251E: Making of debt relief orders

473. This section makes provision for the form of the DRO, including some of the matters that must be included in the order, for example a list of the debtor's qualifying debts and entry of its details on the individual insolvency register provided for by the Insolvency Act 1986. It also makes provision for the steps that the official receiver must take once the order has been made, including providing a copy of the order to the debtor, and allows for rules to prescribe other steps he must take in particular with regard to notifying creditors and informing them of the grounds on which they may object.

Section 251F: Effect of debt relief order on other debt management arrangements

474. This section provides that where a DRO is made, any debt management arrangements, as defined, that were in place at the time will cease to be in force.

Section 251G: Moratorium from qualifying debts

475. Section 251G further sets out the effect of a DRO. Once the order is entered onto the register, a moratorium in respect of the debts specified in the order takes effect. During the moratorium creditors specified in the order are prohibited from taking proceedings to enforce the debt or present a bankruptcy petition in relation to that debt, except with leave of the court.

Section 251H: The moratorium period

476. In most cases, the moratorium period is one year from the date of entry on the register. However, the order may be terminated early for example if the debtor's financial circumstances change such that he can make arrangements to pay his creditors, or if he has been found to have provided misleading information on his application.

477. The section makes provision for the moratorium period to be extended by the official receiver or the court and the circumstances in which an extension is permitted. Such circumstances include carrying out or completing an investigation into the debtor's affairs (only with the permission of the court) or providing the debtor with the opportunity to make arrangements to pay his creditors before revoking the order.

Section 251I Discharge from qualifying debts

478. Section 251I provides for the debtor to be discharged from his qualifying debts specified in the order at the end of the moratorium period, and the circumstances in which the debtor will not be discharged from the debts – in particular if the moratorium period is terminated early. The debtor will not be discharged from any debts listed in the order that were incurred through fraud. The section also specifies that discharge of the debtor from the debts does not release any other person from their liability for the debts.

Section 251J Providing assistance to official receiver etc

479. This section sets out the requirements imposed on the debtor with regard to assisting the official receiver in carrying out his functions. It requires the debtor to provide the official receiver with information about his affairs and attend on the official receiver. The requirement extends so far as the official receiver may reasonably require in order to carry out his functions in relation to the application or the debt relief order made as a result of it. The debtor is also under a duty to notify the official receiver of changes in his circumstances during and before the moratorium period. He must also notify the official receiver if he becomes aware of any errors or omissions in his application.

Section 251K Objections and Investigations

480. Creditors are permitted to object to the making of the order on specified grounds and this section makes provision for that. In particular, the section makes provision for any person specified in the order as a creditor to object to the making of the order or his inclusion in the order or to details of the debt specified. It also gives details of how the objection must be made and requires the official receiver to consider the objection. It allows the official receiver to carry out an investigation if it seems appropriate and gives a power to the official receiver to require any person to give him information and assistance.

Section 251L Power of official receiver to revoke or amend a Debt Relief Order

481. This section sets out the circumstances in which the official receiver may revoke the order and gives him a power to amend the order during the moratorium period to correct errors and omissions. Revocation may take place when information provided by the debtor to the official receiver turns out to be incomplete or misleading, or where the debtor fails to comply with his duties to provide information or attend on the official receiver. The order may also be revoked if the official receiver ought not have made the order because he ought not have been satisfied the criteria were met and also if the debtor's income and property levels change (for example following a windfall) after the order has been made and the debtor would no longer meet the criteria for obtaining an order.

Section 251M Powers of court in relation to debt relief orders

482. This section enables persons who are dissatisfied with the actions of the official receiver to apply to the court and for the court to give directions or make any order it thinks fit. It also enables the official receiver to make an application for directions or an order in relation to any matter arising in connection with the DRO or an application for a DRO. An application to the court may, subject to anything contained in the rules, be made at any time.

Section 251N: Inquiry into debtor's dealings and property

483. This section enables the court, on the application of the official receiver, to require the debtor, the debtor's spouse, former spouse, civil partner or former civil partner or any person appearing to be able to give information or assistance to the court to appear before the court. There are sanctions for failure to appear without reasonable excuse – the court may issue a warrant for the person's arrest or order the seizure of books, papers and other items. It is not expected that there will be a frequent use of this power, which is aimed at a very small number of cases where misconduct – for example the hiding of assets – is suspected and the debtor has refused to provide information to the official receiver.

Section 251O: False representations and omissions

484. In order that the official receiver can determine whether a DRO should be made, the debtor must provide complete and accurate information about his affairs. Similarly, the debtor remains under an obligation to provide information to the Official Receiver once the DRO is made. This section provides that a debtor who deliberately provides false information or omits pertinent information commits an offence.

Section 251P: Concealment or falsification of documents

485. This section provides that a failure to produce books, papers or other documents to the official receiver is an offence. Similarly, preventing such records being produced, or their concealment, destruction or falsification will also be an offence. The offence may be committed before the application for the DRO has been made, and during both the application process and the moratorium period, and it is irrelevant that the order may have been revoked subsequent to an offence being committed.

Section 251Q: Fraudulent disposal of property

486. In order to meet the eligibility criteria for a DRO, the debtor must meet various conditions including a limit on the value of property he owns. A debtor who disposes of property, whether in an attempt to meet the eligibility criteria or to deny creditors access to that property, is clearly acting in an inappropriate manner. The section ensures that a debtor, who fraudulently disposes of property, commits an offence. The offence may be committed before the application for the DRO has been made, and during both the application process

and the moratorium period, and it is irrelevant that the order may have been revoked subsequent to an offence being committed.

Section 251R: Fraudulent dealing with property obtained on credit

487. This section makes it an offence if the debtor disposes of property obtained on credit for which he has not paid, and similarly penalises the knowing recipient of such property. No offence is committed if the disposal or acquisition was in the ordinary course of the debtor's business, but particular attention will be paid to the price paid for the property. The offence may be committed before the application for the DRO has been made, and during the application process.

Section 251S: Obtaining credit or engaging in business

488. This section makes it an offence for the debtor to obtain credit (either alone or jointly with another person) to the extent of a prescribed amount, or to trade in a name other than that which the DRO was made, without disclosing his status. His status is that there is a moratorium in force in relation to a DRO or that there is a debt relief restrictions order in force. The section also includes an explanation of the expression "obtaining credit".

Section 251T: Offences: supplementary

489. This section sets out who may institute proceedings for an offence under this Part and the penalties imposed on a person who commits such an offence. The section also makes it clear it is not a defence that the conduct complained of was done outside England and Wales.

Section 251U: Approved intermediaries

490. In order to obtain a debt relief order, the debtor must make his application to the official receiver through an approved intermediary. This section defines an approved intermediary and makes provision for rules to specify the types of activities that should be undertaken by an intermediary.

491. It also states that authorisation will be granted by a competent authority designated by the Secretary of State to grant authorisations, and allows for rules to make provision as to the procedure for designating persons to be competent authorities, the types of persons who may not be authorised to act as approved intermediaries, the procedure for dealing with applications to competent authorities for authorisation and the withdrawal of designation to act as a competent authority.

Section 251V Debt relief restrictions orders and undertakings

492. This section gives effect to Schedule 4ZB, which makes provision about debt relief restrictions orders. Such orders will be very similar in operation and effect as the existing bankruptcy restriction orders.

Section 251W Register of debt relief orders etc

493. Section 251W requires the Secretary of State to establish and maintain a register of DROs, debt relief restrictions orders and debt relief restriction undertakings.

Section 251X Interpretation

494. This section defines the meaning of various expressions used in this Part of the Insolvency Act 1986.

Schedule 18: Schedule 4ZA to the Insolvency Act 1986

495. Schedule 18 contains the text of new Schedule 4ZA to be inserted into the Insolvency Act 1986. Schedule 4ZA sets out the conditions for making a debt relief order.

Part 1 Conditions which must be met

496. This part of the schedule sets out conditions that the debtor must meet in order to obtain a DRO. The debtor must be domiciled in England and Wales on the application date or at any time during the period of three years ending with that date have been ordinarily resident or carried on business in England and Wales. He must not be an undischarged bankrupt, subject to an individual voluntary arrangement or a bankruptcy restrictions order. Neither must he be subject to a debt relief restrictions order or have had a debt relief order made within the 6 years prior to the determination date. If the debtor is subject to a bankruptcy petition that petition must be disposed of before a debt relief order can be made. The schedule imposes limits on the permitted level of overall indebtedness (the amount of which is prescribed in an order), a limit on the debtor's permitted surplus monthly income (also prescribed in an order) and a limit on the value of the debtor's property (also to be prescribed in an order).

Part 2 Other grounds for refusing an application

497. This part of the schedule sets out other conditions which the debtor must meet in order to obtain a DRO, specifically that he must not have entered into a transaction at an undervalue or given a preference to another person within the two years prior to the application date, and

the determination date. This is in order to avoid a situation where the debtor has disposed of his assets in order to meet the permitted criteria for obtaining a debt relief order, and to protect the position of creditors.

Schedule 19: Schedule 4ZB to the Insolvency Act 1986

498. Debtors who are guilty of misconduct that has in some way contributed to their insolvency will be subject to an enforcement regime that encompasses restrictions orders in the same way as bankruptcy. Schedule 19 sets out who may apply for a debt relief restrictions order or undertaking, possible grounds for obtaining one and gives details as to the timing of an application, the duration of the order or undertaking. Such orders may last from 2-15 years and will serve to protect the public from the culpable debtor. Whilst subject to a restrictions order, the debtor will remain subject the same disabilities as those imposed by the original order – for example he will not be able to obtain credit beyond the prescribed amount without disclosing his status.

Clause 101: Debt management schemes

499. This clause defines "debt management scheme" as used in this Chapter.

500. Subsections (2-4) set out conditions that must be met by all schemes that are seeking approval. Schemes must apply only to individual debtors (i.e. not companies or partnerships) who do not have any debts incurred in the course of business. Schemes may be open to all such individuals or to particular categories (as defined by the particular scheme). Schemes must also allow any debtor to whom the scheme applies to ask that a DRP be arranged. Where such a request is made, the scheme operator, (or an authorised person under the scheme), must decide whether a DRP is appropriate for the debtor (in accordance with the terms of the scheme, some of which may be prescribed under clause 103), and if so, arrange the plan.

501. Subsection (5) specifies that the operator of an approved scheme must be a body of persons, (for example, a company or a partnership rather than an individual). Therefore it would be possible for a body such as Citizens Advice, or an existing repayment scheme provider such as the Consumer Credit Counselling Service or Payplan, or for a private company, to operate an approved scheme. But it would not be possible for an individual to do so.

Clause 102: Debt repayment plans

502. This clause defines "debt repayment plan" as used in this Chapter. Subsections (2) to (4) outline conditions that must be satisfied by a plan.

503. Subsection (2) introduces the concept of "qualifying debts" and provides that the plan must specify all of the debtors "qualifying debts". Clause 125 provides that a "qualifying debt" is any debt, except for a debt that is secured against an asset, such as a mortgage, or which cannot, by virtue of the terms of the DMS (i.e. terms set by the scheme operator), be included in the plan. (Regulations under clause 103 could have the effect of prescribing other classes of debt that may not be included by any scheme, by making such terms a condition of approval).

504. Subsection (3) requires the plan to provide for full or partial payment of the debts specified in accordance with the plan.

505. Subsection (4) makes it clear that it does not matter if a plan requires different amounts to be paid in respect of a specified debt at different times or the payments are insufficient to satisfy the debt in full. (Clause 106 provides that in these circumstances the remainder of the debt would be written off provided that the debtor had complied with the terms of the plan.)

Clause 103: Approval by supervising authority

506. This clause enables a supervising authority, (see clause 121) to approve DMSs. It also permits the Lord Chancellor to make regulations prescribing both the conditions that must be satisfied for a scheme to be approved and any considerations that the authority must or must not take into account when considering a request for approval. These conditions and considerations may, in particular, relate to any of the matters listed in Schedule 21. These include the constitution, governance, size and financial standing of the scheme operator, and the terms and operation of the DMS. Regulations could, for example, specify minimum levels or periods of repayment.

Schedule 21 – Regulations under sections 103 and 105

507. This Schedule specifies provisions that may be made in regulations as to conditions or considerations about the approval of a scheme under clause 103, and as to the terms of approval of a DMS under clause 105.

Clause 104: Applications for approval

508. This clause allows the Lord Chancellor to make regulations specifying an application procedure for the approval of DMSs, and provides that such regulations may enable a fee to be charged for an approval application.

Clause 105: Terms of approval

509. This clause provides that an approval will be subject to terms that may be specified in regulations or in the terms of the approval itself. Such terms might include the duration of the approval, (which could be given for a defined period, for example, for 5 years). Different types of schemes might be approved for different periods. On the expiry of an approval, a fresh approval could be sought. Such regulations might also make provision as to termination of an approval other than by expiry, (for example, termination of an approval if terms of the approval are breached). Other terms to be specified in regulations could include particular requirements that may be imposed on the scheme operator covering such matters as the continued operation of the scheme, and the provision of reports relating to the operation of a scheme.

Clause 106: Discharge from specified debts

510. This clause specifies that a debtor is discharged from the debts specified in the plan only when all of the payments required under the plan have been made. This allows debts to be partially written off, providing the terms of the plan have been complied with and all the necessary repayments made.

Clause 107: Presentation of bankruptcy petition

511. Clauses 107 to 110 impose requirements on certain creditors during the currency of a DRP or during a period of protection. (Period of protection is defined at clause 126). These clauses are based on similar provisions for AOs and EROs (set out at Chapters 1 and 2 of Part 5 of the Bill respectively).

512. The first requirement, in clause 107, provides that any qualifying creditor of the debtor (clause 124 defines "qualifying creditor") is to be prohibited from presenting a bankruptcy petition against that debtor, during the currency of a DRP, unless regulations provide otherwise or he has the permission of a county court to do so. This clause also defines the currency of the plan as beginning when the plan first has effect and ending when the plan ceases to have effect.

Clause 108: Remedies other than bankruptcy

513. This clause sets out the second requirement. It prohibits, during a period of protection, qualifying creditors from seeking to recover their debt by pursuing any other remedy (that is, other than bankruptcy), unless regulations provide otherwise or the creditor has permission of a county court.

Clause 109: Charging of interest etc.

514. This clause sets out the third requirement; during a period of protection, qualifying creditors are prohibited from charging any interest, fee or other charge in respect of a qualifying debt unless regulations provide otherwise or the creditor has permission of a county court.

Clause 110: Stopping supplies of gas or electricity

515. This clause sets out the fourth requirement. In this case, during a period of protection, domestic utility creditors (as defined in subsection (2)) must not stop the supply of gas or electricity or the supply of any associated services other than where the exemptions set out in subsections (4) to (7) apply.

Clause 111: Existing county court proceedings to be stayed

516. This clause provides that any county court proceedings that were pending against the debtor when the DRP was arranged, must be stayed if the following conditions are met:

- the proceedings relate to a qualifying debt of the debtor's and they are not bankruptcy proceedings;
- the creditor under the debt is unable to enforce it because of the prohibition referred to in clause 108 (remedies other than bankruptcy); and
- the county court, in the proceedings which are to be stayed) has notice of the DRP.

517. Where proceedings are stayed under this clause, the county court has discretion to allow the creditor any costs incurred in the stayed proceedings. A scheme operator may, if asked to do so by the debtor or creditor, add those costs to the amount specified in the plan in respect of that debt so long as the operator is not under a duty to terminate the plan (for example, because the new total debt exceeds the scheme's maximum).

Clause 112: Registration of plans

518. This permits regulations to provide for the registration of either an application for a plan to be made or a plan coming into existence in the register of judgments, orders and fines, and enables section 98 of the Courts Act 2003 to be amended by such regulations for this purpose. Registration would provide a mechanism by which potential lenders could check whether a person had applied for a DRP or was currently subject to a DRP.

Clause 113: Other debt management arrangements in force

519. This clause defines the relationship between DRPs and the other debt management arrangements set out in subsection (7), which are AOs, EROs and DROs. It provides that when a DRP is arranged, it cannot come into effect unless any other debt management arrangement which had effect in relation to the same debtor immediately before the plan was arranged ceases to have effect.

520. Subsection (3) provides that any provision (whether in the plan or elsewhere) about when the plan is to come into effect is subject to the provisions of this clause.

521. Provision is also made for the scheme operator to notify the provider of the other arrangements as soon as practicable, or as soon as it becomes aware of their existence, of the approval of the plan. Similar provisions are incorporated in the revised AO and ERO schemes and in the new DRO scheme. This will ensure that no more than one debt management arrangement has effect in respect of the same debtor at the same time.

Clause 114: Right of appeal

522. This clause introduces the term "affected creditor" which is defined in clause 123(1) as the creditor with a debt that has been included in the DRP.

523. Subsection (2) allows affected creditors to appeal to a county court against the fact that a plan has been arranged, that their debt has been included in the plan or the terms of the plan but subsection (3) makes it clear that affected creditors may not appeal against the inclusion, in a DRP, of a debt owed to another creditor.

Clause 115: Dealing with appeals

524. This clause applies if an appeal is made to a county court under clause 114. It provides that the court may order the scheme operator to:

- reconsider the decision to arrange a plan;
- reconsider the terms of the plan;
- modify the plan; or
- revoke the plan.

525. Additionally, this clause allows the court to make interim provisions in respect of the period before the appeal is determined.

Clause 116: Charges by operator of approved schemes

526. This clause allows the operator of an approved scheme to recover its costs from either debtors or affected creditors (defined in clause 23(1)) or both. The definition of "costs" in subsection (2) will ensure that only reasonable costs are charged.

Clause 117: Procedure for termination

527. This clause allows regulations to specify a procedure for terminating the approval of a scheme. This procedure may require the supervising authority to give notice and reasons, conditions that must be met and a period that must elapse before the termination takes effect.

Clause 118: Terminating an approval

528. This clause provides that a scheme may only be terminated in accordance with the following:

- any terms which the approval is subject to under clause 105;
- any provisions made in regulations under clause 117; or
- any other provisions made under this Chapter.

Clause 119: Alternatives to termination

529. This clause allows regulations to provide for alternatives to termination of an approval. Such regulations may provide for the transfer of the operation of a scheme to another body, (to include transfer of the scheme from the scheme operator to the supervising authority itself). Such a transfer might be appropriate in order to protect debtors and creditors where, for example, the operator of the scheme no longer meets the terms of approval, but the scheme itself does comply with any relevant terms.

Clause 120: Effects of end of approval

530. Where the approval of a scheme comes to an end, (for whatever reason), this clause enables regulations to specify what effect this will have on existing DRPs under that scheme. The clause provides an important safeguard for debtors by allowing such regulations to specify that plans can continue to operate, where appropriate, as though the scheme is still approved or as though the plan had been made under a different approved scheme.

Clause 121: The supervising authority

531. This clause defines the "supervising authority", (the person who approves DMSs), and specifies that that the supervising authority can be either the Lord Chancellor or a person authorised by the Lord Chancellor. This clause therefore enables the Lord Chancellor to delegate his approval powers (for example, such powers might be delegated to a judicial or existing national advice body).

Clause 122: Regulations

532. This clause empowers the Lord Chancellor to make regulations under this Chapter. Regulations will be subject to the affirmative resolution parliamentary procedure on the first occasion they are made under any section (or if regulations under clause 112 amend primary legislation). Otherwise they will be subject to the negative procedure

Clause 123 – Main definitions

533. The clause sets out the main definitions for this Chapter.

Clause 124 – Expressions relating to debts

534. This clause defines a "qualifying debt" as any debt that is not secured against an asset or which cannot, by virtue of the terms of the DMS, be included in the plan. A "business debt" is defined as a debt incurred in the course of a business.

Clause 125 – Periods of protection

535. This clause defines a "period of protection" as a period beginning when a debtor asks for a plan to be arranged and, if a plan is not arranged, ending when the decision not to arrange the plan is made. Where a plan is made, the period of protection ends when the plan ceases to have effect. The definition is however subject to subsection (4) which provides that where other debt management arrangements are in force immediately proceeding a debtor's request for a plan to be arranged, the period of protection does not begin until the plan is both arranged and comes into effect. This prevents debtors being simultaneously subject to different schemes.

PART 6: PROTECTION OF CULTURAL OBJECTS ON LOAN

SUMMARY

536. Part 6 provides immunity from seizure to objects which have been lent to this country from overseas to be included in a temporary exhibition at a museum or gallery. Immunity will be given from any form of seizure ordered in civil or criminal proceedings, and from any seizure by law enforcement authorities. It will apply to objects of any description which are owned by a person or an institution which is not resident in this country which are lent for temporary exhibitions to the public at any museum or gallery within the United Kingdom.

BACKGROUND

537. Under the previous law, the United Kingdom has only given immunity to objects which are covered by the provisions of the State Immunity Act 1978. The absence of a more general immunity for works of art and other cultural objects which are lent to temporary exhibitions in this country has made museums and private owners in other countries increasingly reluctant to lend to such exhibitions without a guarantee that their art treasures will be returned. Provisions in Part 6 will enable such a guarantee to be given.

COMMENTARY ON CLAUSES: PART 6

Clause 126: Protected objects

538. Clause 126 defines the conditions that need to be met for an object to be protected from seizure and specify where and for how long the protection will be given.

539. *Subsection (2)* provides that an object will only be protected if three conditions are satisfied: the object must usually be kept outside the United Kingdom; it must not be owned by anyone resident in the United Kingdom, and it must be brought to the United Kingdom to be displayed to the public in a temporary exhibition at a museum or gallery.

540. *Subsection (4)* provides for the extent of the protection. An object must only be in the United Kingdom for the permitted purposes (defined further in subsection (7)) and, with one exception, the protection will only last for twelve months. It is only intended to protect from seizure objects which are being lent for the purposes of a temporary exhibition. Objects on long term loans to museums will not be protected.

541. *Subsection (5)* provides for the single exception to this rule. Where an object has been damaged since coming to the United Kingdom, and is being repaired, conserved or restored in

this country, it will continue to be protected until it has left the United Kingdom following the completion of the repair, conservation or restoration.

542. *Subsection (7)* ensures that objects will only be protected if they are on display in a temporary exhibition at museums, undergoing related repair, conservation or restoration, or travelling to or from the place where they are being displayed or repaired/restored. *Subsection (8)* defines the repairs, conservation or restoration which will be considered to be related for these purposes.

Clause 127: Effect of protection

543. Clause 127 defines the effect of the protection and sets out the limited circumstances under which it will not be given.

544. *Subsection (1)* ensures that where seizure or forfeiture of an object is required to enable the UK to comply with its obligations under EU or international law, the object concerned will not be protected. This could apply where, for example, the court is asked to enforce an order for the seizure of an object made by the courts of another country to confiscate proceeds of crime.

545. *Subsection (2)* ensures that the protection given to an object loaned to an exhibition does not give any protection from prosecution to those dealing with the object, where the dealing in question constitutes an offence.

546. *Subsection (3)* clarifies the extent of the protection which will be given to objects under this Bill. It includes immunity against all forms of execution which might be made against an object protected under the Bill, any order made in civil proceedings and any measure taken in criminal proceedings (or for the purposes of a criminal investigation) which might affect the control or custody of an object. The protection given is intended to exclude any form of seizure or detention of an object lent to an exhibition in this country whether by a claimant to the object, a creditor or by law enforcement authorities.

Clause 128: Interpretation

547. Clause 128 contains interpretation provisions for Part 6 of the Bill. In particular, "Museum or gallery" is defined as any institution which has been approved by the Secretary of State. It is intended that the institutions initially approved by the Secretary of State will include, for example, any museums accredited under the Museum Accreditation Scheme administered by the Museums, Libraries and Archives Council, and other institutions which regularly put on exhibitions of material of historic, artistic, cultural or scientific interest for the public. It would also be possible for an institution which would not otherwise fall within these categories but which wishes to arrange an exhibition to mark a particular occasion to

apply to the Secretary of State for approval as a museum or gallery. As a result, any object which is lent to the institution for that exhibition would also receive protection.

548. "Public display" is defined to include any display to which the public have admission, except displays with a view to sale. The immunity will not apply to any objects which are included in an exhibition organised by art and antiques dealers or auctioneers to advertise works for sale, or to publicise an auction.

549. This clause also sets out the rules for determining whether an individual, the trustees of a settlement, a partnership or a body corporate should be considered to be resident in the United Kingdom.

Clause 129: Crown application

550. This clause ensures that Part 6 of the Bill applies to the Crown, and agents of the Crown, in the same way as to all other persons and institutions.

PART 7: MISCELLANEOUS

SUMMARY

551. Part 7 enables High Court enforcement officers to execute writs of possession issued to enforce compulsory purchase orders, and removes the obligation for enforcement of such writs from High Sheriffs. This Part also amends subsection 31(5) of the SCA 1981, reproducing and extending the effect of the existing judicial review provision. In particular, it provides that where the decision maker in question is a court or tribunal and the decision is quashed on the ground that there has been an error in law, the High Court will be able to substitute its own decision where, without that error, it is satisfied that there would have been only one decision which the court or tribunal could have reached. Part 7 also changes the way in which ACAS negotiated settlements are enforced and reforms the process for hearing design right appeals.

BACKGROUND

Compulsory purchase

552. Currently, there is an anomaly as regards the execution of High Court writs in that High Court enforcement officers and High Sheriffs are able to execute High Court writs of

execution, but only High Sheriffs are able to enforce writs of possession issued to enforce compulsory purchase orders. The proposed changes will align the enforcement of compulsory purchase orders with the regime for enforcing High Court writs of execution contained in section 99 of and Schedule 7 to the Courts Act 2003.

Judicial review

553. Section 31(5) of the SCA 1981 currently provides that where the High Court quashes a decision, it can return the matter to the relevant body with a direction that it reach a decision in accordance with the findings of the High Court. In its 1994 Report, Administrative Law: Judicial Review and Statutory Appeals[3] the Law Commission confirmed that there was significant support for the High Court to alternatively have the power to substitute its own decision for that of an inferior court or tribunal provided that it was restricted to situations where the decision to remit was a mere formality.

554. This recommendation was partly implemented in October 2000 as Rule 54.19(3) of the CPR. However, as this provision was introduced by way of rules only, its scope is limited to those situations where statute does not give the power to take decisions in a particular area to a specific person or body. Therefore, it is unclear whether it would be available in respect of all inferior courts or tribunals. In addition, it is not defined as proposed by the Law Commission in that it is not currently limited to either: decisions of inferior courts and tribunals only; or, situations where the court is satisfied that there was only one decision that could be arrived at and the decision arose out of an error of law. As a result, the scope of the current power is unclear and anecdotal evidence suggests that the power has not, in fact, been used since its introduction.

555. The Law Commission's recommendation was fully endorsed in Sir Jeffrey Bowman's Review of the Crown Office List, which was published in March 2000. The government subsequently consulted on the Law Commission's proposal during summer 2001. A response paper in October 2003, summarising the responses received, confirmed that the introduction of a primary power for the High Court to substitute its own decision as proposed by the Law Commission was both necessary and welcome.

Enforcement of ACAS brokered agreements

556. ACAS has no enforcement powers of its own. *Transforming Public Services* undertook to simplify the system so that an award of compensation, whether ordered by an employment tribunal or agreed between the parties (under compromises involving the Advisory, Conciliation and Arbitration Service (ACAS)), can be enforced with the minimum of bureaucracy as if it were an order of the civil courts. The Bill makes such agreements enforceable in England and Wales as if they were sums payable under a county court order,

[3] Report No.226

and in Scotland by diligence as if the certificate were an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court.

Appeal in relation to design rights

557. The Registered Designs Appeal Tribunal (RDAT) was created by section 28 of the Registered Designs Act 1949. Any appeal from the registrar (the Comptroller-General of Patents, Designs and Trade Marks) under that Act lies to the RDAT. The tribunal consists of one or more judges of the High Court nominated for the purpose by the Lord Chief Justice of England and Wales after consulting the Lord Chancellor or one of the judges of the Court of Session nominated by the Lord President of the Court. It is not part of the High Court, but is a tribunal subject to control through the prerogative orders obtained on judicial review. Fees may be charged, and costs may be awarded, in relation to proceedings before the tribunal as if it were part of the High Court.

558. The Patents County Court was established in 1993 to litigate patents, registered designs and certain other cases involving similar rights. The Bill transfers the jurisdiction of the RDAT to the Patents County Court and the High Court in England and Wales, and the Court of Session in Scotland.

COMMENTARY ON CLAUSES: PART 7

Clause 130: Enforcement by enforcement officers

559. This clause amends the Land Clauses Consolidation Act 1845 and the Compulsory Purchase Act 1965 to enable writs of possession issued to enforce compulsory purchase orders to be executed by High Court enforcement officers.

560. This change aligns the enforcement of compulsory purchase orders with the regime for enforcing High Court writs of execution contained in section 99 of and Schedule 7 to the Courts Act 2003. We are not removing the right of a sheriff to
enforce a writ of possession issued to enforce a compulsory purchase order, should one be directed to him and should he wish to enforce it. The clause removes the obligation, with the attendant legal responsibilities and liabilities, to enforce such writs of possession (High Sheriffs being unpaid volunteers who are appointed annually).

Clause 131: Supplementary and Schedule 22: Compulsory purchase: consequential amendments

561. Clause 131 amends Schedule 7 to the Courts Act 2003 to enable the arrangements that are currently in place for enforcement officers executing High Court writs of execution, (identifying enforcement districts, providing for administrative arrangements for enforcement of such writs and extending to enforcement officers powers and obligations that sheriffs have under common law), to be extended to High Court enforcement officers executing writs of possession issued to enforce compulsory purchase orders.

562. Schedule 22 makes consequential amendments in connection with the above.

Clause 132: Judicial review: power to substitute decisions

563. This clause replaces the existing section 31(5) of the SCA 1981 and extends the power of the High Court in respect of quashing orders. The High Court will still have the power to return a matter to a decision maker with a direction that it reach a decision in accordance with its findings. However, where the decision maker is a court or tribunal and the decision is quashed on the ground that there has been an error of law, the court will, alternatively, be able to substitute its own decision for that decision if it is satisfied that without the error there would have been only one decision that the court or tribunal could have reached.

564. Unless the High Court directs otherwise, a substitute decision will have effect as if it were a decision of the relevant court or tribunal.

Clause 133: Recovery of sums payable under compromises involving ACAS

565. This clause amends the Employment Tribunals Act 1996 to provide that sums payable under ACAS negotiated settlements are enforceable in England and Wales as if they were sums payable under a county court order, and in Scotland by diligence as if the certificate were an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court. In each case, the sum is not recoverable if the person by whom it is payable applies for a declaration in the relevant jurisdiction that the sum would not be recoverable from him under the general law of contract.

Clause 134: Appeals in relation to design rights

566. Clause 134 abolishes the Registered Designs Appeals Tribunal and diverts its jurisdiction in England and Wales to the Patents County Court and the High Court concurrently. The Patents County Court is one with which users are familiar, the present judge is highly experienced in design matters, and its rules allow for affordable representation

by patent agents and efficient procedures. While the Patents County Court and the High Court have concurrent jurisdiction, it is intended that appeals must first come to the Patents County Court which can then decide whether the appeal should be transferred to the High Court. The RDAT's Scottish jurisdiction is transferred to the Court of Session.

567. The RDAT also has the power to deal with some appeals on (unregistered) design rights pursuant to section 249 of the Copyright, Designs and Patents Act 1988. Design rights are rather different in nature to registered designs and are more complex, as they raise issues that are much more akin to copyright than registered designs. Clause 134(3) therefore provides that in England and Wales and Northern Ireland, appeals to the High Court and that, in Scotland, appeals will lie to the Court of Session to High Court; in Scotland to the Court of Session. For Scotland and Northern Ireland, clause 134 abolishes the RDAT and diverts its jurisdiction to, respectively, the Court of Session and the High Court in Northern Ireland.

PART 8: GENERAL

SUMMARY

568. Part 8 provides for the territorial extent of the provisions of the Bill. It also provides for provisions of the Bill to come into force in accordance with orders made by the Lord Chancellor (or by the Secretary of State in relation to Chapter 3 of Part 5 only), and confers power on the Lord Chancellor (or on the Secretary of State in relation to Chapter 3 of Part 5 only) to make transitional and consequential provision by order.

COMMENTARY ON CLAUSES: PART 8

Clause 135 Protected functions of the Lord Chancellor

569. Clause 135 makes all the Lord Chancellor's functions under (or under amendments made by) Part 1, clauses 48 and 51, Parts 3 and 4, Chapters 1 and 2 of Part 5 and certain functions under part 2 protected functions for the purposes of section 19(5) of the CRA 2005, so that they cannot be transferred to another Minister without primary legislation.

Clause 136: Power to make supplementary or other provision

570. Subsection (1) allows the Lord Chancellor (or the Secretary of State in relation to Chapter 3 of Part 5 only) to make an order for supplementary, consequential and transitional provisions, while subsection (2) makes it clear that such an order can amend or repeal other enactments. This type of clause is not unusual in Bills which reform existing statutory

schemes and therefore require transitional provisions and/or which have a large number of consequential amendments, see for example the Courts Act 2003.

Clause 137: Repeals

571. Clause 137 introduces Schedule 23. Schedule 23 lists repeals arising from, among other things, the new statutory framework for tribunals and the new, unified law on enforcement.

Clause 138: Extent
Clause 139: Commencement
Clause 140: Short Title

572. By virtue of clause 138, Parts 1, 2, 6 and 8 of the Bill extend to England and Wales, Scotland and Northern Ireland and Parts 3, 4, 5 and 7 extend only to England and Wales. This is subject to subsection (4), which allows for amendments to other Acts to extend to the same extent as those other Acts. For example, the amendments to other Acts in clauses 133 and 134 will extend to Scotland. Clause 139 provides for the Lord Chancellor (or the Secretary of State in relation to Chapter 3 of Part 5 only) to specify commencement dates for provisions in the Bill by order.

EFFECTS OF THE BILL ON PUBLIC EXPENDITURE

573. The main impact of implementation of this legislation will be felt across the DCA.

Tribunals

574. It is estimated that it will cost around £50,000 to implement the new tribunal arrangements, with additional annual running costs of approximately £160,000. (These costs stem principally from support for the Senior President of Tribunals and the new Tribunal Procedure Committee.)

Judicial Appointments

575. The changes to judicial eligibility requirements are expected to result in additional annual costs of up to £250,000. These costs will stem from the JAC having to process an increased number of applications for judicial posts and the time it will take JAC staff to consider whether an applicant has obtained the necessary legal experience post-qualification.

Enforcement by Taking Control of Goods

576. The new, unified law on enforcement is expected to result in one-off implementation costs of approximately £300,000. These costs will be incurred through training and publicity for the new regime.

Enforcement of Judgments and Orders

577. The main costs flowing from Part 4 will arise from a new IT system to implement the data-sharing powers. The system is expected to cost around £1.5M. Annual running costs will be met through the fees creditors will be charged to use the service.

578. Other costs arising under this part of the Bill include £250,000 for the Attachment of Earnings fixed rate deductions provisions, which will cover changes to IT systems, training and publicity.

Debt Management and Relief

579. Costs of £200,000 will also arise for changes to IT systems, training and publicity for Enforcement Restriction Orders. The Debt Relief Order proposals are likely to cost around £190,000 to implement. These costs will arise from training and publicity material.

EFFECT ON PUBLIC SECTOR MANPOWER

580. The Tribunals, Courts and Enforcement Bill necessitates only minor changes to public service manpower. The Judicial Appointments proposals are likely to lead to an increased number of applications for judicial posts and it is estimated that an additional six members of staff at the JAC would be required to process these. The remainder of the proposals should be met from within existing resources.

COST TO BUSINESS AND REGULATORY IMPACT

581. The provisions in the Bill relating to judicial diversity will have no significant or disproportionate impact on business, charities or the voluntary sector. Separate Regulatory Impact Assessments have been completed for the following provisions: tribunal reform (public sector impact only); regulation of enforcement services; reform of court-based enforcement processes; Administration Orders, Enforcement Restriction Orders and Non-Court Based Debt Management Schemes; Debt Relief Orders; and protection of cultural property on loan. The RIAs have been prepared in consultation with the Better Regulation Executive.

582. The Regulatory Impact Assessments concluded that the Bill will not significantly affect business. The main cost to business would be the requirement that persons taking control of goods who are not Crown employees or constables and who do not hold a county court certificate must obtain one (assuming that businesses pay the fee on behalf of their employees). There would also be some associated training costs. These would be offset by other proposals in the Bill to introduce a simplified and consolidated piece of enforcement agent law (which will be easier for agents to use) and a new, unified fee structure that will reward their activity more proportionately.

583. The Regulatory Impact Assessments for this Bill are being placed in the libraries of both Houses and on the web-site of the Department for Constitutional Affairs and (for Debt Relief Orders) the web-site of the Department for Trade and Industry.

COMMENCEMENT

584. The provisions in the Bill will come into force on days appointed by the Lord Chancellor (or by the Secretary of State in relation to Chapter 3 of Part 5 only) by order, with the exception of Part 6, which t will automatically come into force two months after Royal Assent.

EXTENT

585. Clause 138 provides for the territorial extent of the provisions of the Bill.

586. Some of the provisions in Part 1 make special provision for Northern Ireland, Scotland and Wales, as set out in the following paragraphs.

Territorial application – Northern Ireland

587. Clause 29(5) prohibits the transfer to the First-tier Tribunal or Upper Tribunal of functions of a tribunal where the provision conferring that function is within the legislative competence of the Northern Ireland Assembly. But by virtue of clause 29(6), appellate functions of the Secretary of State under the following provisions may be transferred:

a) section 41 of the Consumer Credit Act 1974; and
b) section 7(1) of the Estate Agents Act 1979.

588. Clause 34(2) prohibits the transfer to the Lord Chancellor or Tribunal Procedure Committee, under clause 34(1), of rule-making powers where the provision conferring those powers is within the legislative competence of the Northern Ireland Assembly.

Territorial Application – Scotland

589. Clause 29(5) prohibits the transfer to the First-tier Tribunal or Upper Tribunal of functions of a tribunal where the provision conferring that function is within the legislative competence of the Scottish Parliament. But by virtue of clause 29(6) and (7), functions of an adjudicator under section 5 of the Criminal Injuries Compensation Act 1995 may be transferred with the concurrence of Scottish Ministers. However, clauses 20 and 21 provide for the transfer to the Upper tribunal from the Court of Session of certain applications made to the Court of Session for an exercise of its supervisory jurisdiction.

590. Clause 34(2) prohibits the transfer to the Lord Chancellor or Tribunal Procedure Committee, under clause 34(1), of rule-making powers where the provision conferring those powers is within the legislative competence of the Scottish Parliament.

591. Clause 40(8), which provides for tribunal fees prescribed by an order under clause 40 to be recoverable summarily as a civil debt, does not apply to recovery of fees in Scotland.

592. Paragraph 1(2)(a) of Schedule 7 provides for Scottish Ministers to appoint either two or three members to the AJTC, with the concurrence of the Lord Chancellor and the Welsh Ministers.

593. Paragraph 4 of Schedule 7 creates a Scottish Committee of the Administrative Justice and Tribunals Council.

Territorial Application – Wales

594. Clause 29(8) prohibits the transfer to the First-tier Tribunal or Upper Tribunal of functions of a tribunal without the consent of the Welsh Ministers, where any functions relating to the operation of the tribunal or to expenses for attending the tribunal's proceedings are exercised by the Welsh Ministers.

595. Clause 31 contains special provisions which apply where a tribunal's functions are transferred to the First-tier Tribunal in respect of England but not Wales. This could have the effect that onward appeals in respect of the same jurisdiction lie to the Upper Tribunal in relation to England and (for example) to the High Court in relation to Wales. In those situations the Lord Chancellor may by order provide for the onward appeals in Welsh proceedings to be to the Upper Tribunal. Clause 31(3) also gives the Lord Chancellor power to provide by order for appeals from a number of Wales-only tribunals to be to the Upper Tribunal instead of to the court.

596. Clause 35(2)(c) restricts the Lord Chancellor's power to add a tribunal to any of the lists of tribunals in Schedule 6 to the Act (which would enable the Lord Chancellor's powers to transfer functions to be exercised in relation to that tribunal) where any functions relating to

the operation of the tribunal or to expenses for attending the tribunal's proceedings are exercised by the Welsh Ministers. That power may be exercised only with the Welsh Minister's consent.

597. Paragraph 1(2)(b) of Schedule 7 provides for the Welsh Ministers to appoint either two or three members to the Administrative Justice and Tribunals Council, with the concurrence of the Lord Chancellor and Scottish Ministers.

598. Paragraph 7 of Schedule 7 creates a Welsh Committee of the Administrative Justice and Tribunals Council.

Consent of the Scottish Parliament

599. At Introduction, this Bill contains the following provisions that require the consent of the Scottish Parliament:

- the transfer of the Criminal Injuries Compensation Appeals Panel to the First-tier Tribunal;
- the abolition of the Council on Tribunals and its replacement by the Administrative Justice and Tribunals Council; and
- the protection of cultural objects on loan to the UK.

600. Should further provisions be included by amendment that require the consent of the Scottish Parliament, this consent will be sought in line with the Sewel Convention. The Convention states that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

EUROPEAN CONVENTION ON HUMAN RIGHTS

601. Part 1 of the Bill raises issues as to article 6 (right to fair trial) and First Protocol, article 1 (protection of property) but the Department is of the view that the provisions of Part 1 are compatible with the Convention.

602. Article 6 will be engaged in most of the proceedings before the First-tier Tribunal and Upper Tribunal, and there will therefore be a requirement that the tribunal be independent and impartial. The Department's view is that the Bill secures independence and impartiality, in particular through:

a) the procedure for appointing and selecting judges and other members of the First-tier Tribunal and Upper Tribunal, which involves the JAC;

b) the security of tenure enjoyed by judges and other members of the First-tier Tribunal and Upper Tribunal;
c) the extension of the obligation in section 3 of the CRA 2005 to uphold the independence of the judiciary to include the judges and other members of the First-tier Tribunal and Upper Tribunal.

603. The new tribunals' procedures will also need to comply with article 6 (where it is engaged). Since the jurisdictions which the new tribunals will exercise are so diverse, there is little procedural detail in the Bill. That detail will be contained in Tribunal Procedure Rules made by the Tribunal Procedure Committee, which will be obliged to act compatibly with the Convention.

604. The Bill provides for the abolition of the General Commissioners under the Taxes Management Act 1970 and the office of clerk to the Commissioners. It does not make any provision for the compensation of clerks. But the Department takes the view that this does not breach article 1 of the First Protocol because neither the office of clerk nor the possible expectations of remuneration or pensions associated with the office constitute possessions for the purposes of that Article.

605. The Parts of the Bill that deal with the enforcement of debts and with debt relief engage the Convention rights of debtors and creditors to a fair trial (ECHR Article 6), to respect for private life (ECHR Article 8) and to the protection of property (ECHR First Protocol, Article 1). A creditor is entitled to the effective recovery of money lawfully due to him or her. A debtor is entitled to no greater intrusion on his or her property or privacy than is needed to achieve that. The provisions in those Parts all involve striking a balance between those sometimes competing rights.

606. The provisions that deal with obtaining information about a debtor from someone else depend on there being a court judgment for the debt or a court order for the information. And the information can only be sought and used for the specific purpose of enforcing the judgment.

607. The provisions that deal with enforcing a court judgment for a debt by entering a debtor's or other premises, if necessary searching them, and then taking control of the debtor's goods in order to pay the creditor depend on there being a judgment in the creditor's favour in the first place. The enforcement procedure is under the ultimate control of the court and the debtor can ask the court to stop it if there is a good reason. If someone enforcing a judgment abuses the power to do so, there are sanctions. And if a debtor obstructs the enforcement without a lawful reason, there are sanctions against that debtor.

608. The provisions that impose limitations on the enforcement of debts (administration orders, enforcement restriction orders and debt management schemes) all involve a court order or access to a court. They require or allow the participation of debtors and creditors.

Their purpose is to achieve a managed discharge of debts so that creditors will receive as much as possible of what they are owed.

609. The provisions that deal with the recovery of commercial rent arrears are in response to concerns that the present law is insufficiently clear to be compatible with the Convention rights of either debtors or creditors. Landlords and tenants of commercial premises deal with each other on commercial terms. It is right that each should discharge his or her obligations to the other promptly, including the tenant's obligation to pay the rent. So it is fair and in the interests of the economic well-being of the country to allow landlords to recover unpaid commercial rent by taking control of the tenant's goods without first going to court. But if they do then the Bill imposes the same procedures and safeguards as apply to the enforcement of a court judgment, including intervention by the court, and any abuse of those powers is subject to sanctions.

610. Finally, where in the general public interest other legislation already allows the recovery of certain debts by taking control of goods without a court judgment – for example, the collection of some taxes – the Bill again imposes the same procedures and safeguards as apply to the enforcement of a judgment. So it enhances the compatibility of that other legislation with the rights of everyone concerned.

611. The provisions governing protection of cultural property on loan also engage Convention rights to access to court (ECHR Article 6) and protection of property (ECHR First Protocol, Article 1). The right of access to court under Article 6 is not an absolute right, but subject to limitations, provided that any limitations imposed serve a legitimate aim, are proportionate to that aim and do not restrict or reduce the access left to the individual in such a way, or to such an extent that the very essence of the right is impaired. In this case, we are considering a temporary limitation on one form of relief available to a claimant in this jurisdiction. This limitation would serve the legitimate aims of assisting museums and galleries, and so protecting the welfare of an important sector of the UK economy, and of facilitating public access to works of art and cultural objects from other countries through major exhibitions. We consider that the restriction is proportionate to these aims, and that it does not impair the essence of the rights guaranteed under Article 6.

612. Interference with property is justified under Article 1, Protocol 1 of the European Convention on Human Rights if it is lawful, proportionate and strikes a fair balance between the demands of the community and the protection of the individual's interests. Where a claimant seeks to pursue a substantive claim to a work of art which is being loaned to this country for a temporary exhibition, his claim may be considered to be "property" for the purposes of the Article. However the limitation we are considering would not extinguish those rights, but only imposes a limited control over their use. We consider that preventing a potential claimant from seeking a particular form of relief in this jurisdiction for a limited period of time does strike a fair balance between the rights of the claimant and the public interest in promoting cultural exchanges and enhancing understanding of other cultures by

facilitating public access to works of arts and cultural objects from other countries through major exhibitions.

613. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act). The statement has to be made before Second Reading. The Baroness Ashton of Upholland has made the following statement:

> "In my view, the provisions of the Tribunals, Courts and Enforcement Bill [HL] are compatible with the Convention rights".

GLOSSARY OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
AIT	Asylum and Immigration Tribunal
AJTC	Administrative Justice and Tribunals Council
AO	Administration Order
AEA 1971	Attachment of Earnings Act 1971
AEO	Attachment of Earnings Order
CCA 1984	County Courts Act 1984
COA	Charging Orders Act 1979
CLSA 1990	Courts and Legal Services Act 1990
CPR 1998	Civil Procedure Rules
CRA 2005	Constitutional Reform Act 2005
CRAR	Commercial Rent Arrears Recovery
DAC	Discipline and Appeals Committee
DCA	Department for Constitutional Affairs
DMS	Debt Management Scheme
DRO	Debt Relief Order
DRP	Debt Repayment Plan
DTI	Department for Trade and Industry
DWP	Department for Work and Pensions
ERO	Enforcement Restriction Order
HMRC	Her Majesty's Revenue and Customs
IVA	Individual Voluntary Arrangement
JAC	Judicial Appointments Commission
RDAT	Registered Designs Appeals Tribunal
SCA 1981	Supreme Court Act 1981

TRIBUNALS, COURTS

AND ENFORCEMENT BILL [HL]

EXPLANATORY NOTES

These notes refer to the Tribunals, Courts and Enforcement Bill [HL] as introduced in the House of Lords on 16th November 2006 [HL Bill 5]

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