



HOUSE OF LORDS

Select Committee on the Constitution

1st Report of Session 2006–07

Tribunals, Courts and Enforcement Bill

Report with Evidence

Ordered to be printed 6 December and published 11 December 2006

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 13

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Viscount Bledisloe
Lord Carter
Lord Goodlad
Lord Holme of Cheltenham (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Baroness O’Cathain
Lord Peston
Lord Rowlands
Lord Smith of Clifton
Lord Windlesham
Lord Woolf

Declaration of Interests

A full list of Members’ interests can be found in the Register of Lords’ Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

Publications

The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee are available on the internet at:
http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm

Parliament Live

Live coverage of debates and public sessions of the Committee’s meetings are available at www.parliamentlive.tv

General Information

General Information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:
http://www.parliament.uk/parliamentary_committees/parliamentary_committees26.cfm

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.
The telephone number for general enquiries is 020 7219 1228/5960
The Committee’s email address is: constitution@parliament.uk

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Background	3	5
The Accountability Issue	8	6
The Rule of Law Issue	10	7
Access to Justice	14	8
Appendix 1: Correspondence with the Lord Chancellor and Baroness Ashton of Upholland		9
Appendix 2: Clause 23 of the Draft Tribunals, Courts and Enforcement Bill		14

Tribunals, Courts and Enforcement Bill

1. The Constitution Committee is appointed “to examine the constitutional implications of all bills coming before the House; and to keep under review the operation of the constitution”. We have raised several matters with Baroness Ashton of Upholland, Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (DCA), during the course of our scrutiny of the Tribunals, Courts and Enforcement Bill and with the Lord Chancellor in relation to the draft bill that was published during the summer recess. This correspondence is reproduced at Appendix 1.
2. This report has one aim: to draw to the attention of the House the absence in the bill of a sufficiently firm legal basis for one of the Government’s main aims in reforming the tribunal system, namely to encourage the widespread use of mediation and other alternative dispute resolution (ADR) techniques. It is beyond the scope of our terms of reference to pass comment on the merits of this policy, as these are for the House as a whole to consider. Our concern is that this lacuna has implications for the constitutional principles of accountability, the rule of law and access to justice.

Background

3. The Tribunals, Courts and Enforcement Bill was introduced to this House on 16 November 2006 and had its Second Reading on 29 November. This report is concerned only with Part 1 of the bill, which deals with tribunals and inquiries. A review of the tribunal system conducted by Sir Andrew Leggatt reported in August 2001 and recommended a package of reforms.¹ The Government’s detailed response to the Leggatt review came in the White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243) in July 2004. The Government made it clear that it wished to introduce reforms that in some respects were even more radical than those contained in the Leggatt review. The Government wished to see a shift away from tribunals focusing on formal hearings to a much greater use of ADR techniques. Indeed, we understand that there have been pilot studies in several tribunals, ahead of the bill coming into force, to test various approaches to informal dispute resolution.
4. There is a broad consensus that ADR is a useful method for resolving disputes between parties who might otherwise have to resort to formal litigation. In 1999, following Lord Woolf’s *Access to Justice* inquiry, the civil procedure rules—which in England and Wales govern the conduct of litigation in the county courts, High Court and Court of Appeal—encouraged the use of mediation and other ADR in place of trials before a judge.
5. The Draft Tribunals, Courts and Enforcement Bill (Cm 6885), published in July 2006, contained clause 23 which provided:

¹ Lord Chancellor’s Department, *Tribunals for Users: One System, One Service—Report of the Review of Tribunals by Sir Andrew Leggatt*, March 2001. See <http://www.tribunals-review.org.uk/>.

“23(1) A person exercising power to make Tribunal Procedure Rules or give practice directions must, when making provision in relation to mediation, have regard to the following principles—

(a) mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties;

(b) where parties to proceedings fail to mediate, or where mediation between parties to proceedings fails to resolve disputed matters, the failure is not to effect the outcome of the proceedings.”²

6. The bill as introduced to the House now contains only a terse and passing reference to ADR. The Senior President of Tribunals—the senior judicial figure responsible for leadership in this field—is to have regard to “the need to develop innovative methods for resolving disputes that are of a type that may be brought before tribunals”.³
7. **We saw much to commend in clause 23 of the draft bill. It provided a clear statutory basis for the use of mediation. Moreover, it provided guarantees for citizens against undue pressure to use ADR rather than seek access to justice more formally at a tribunal hearing. When challenges are made to the merits or lawfulness of a public authority’s decision, there is more often than not a considerable imbalance of power. It is therefore appropriate that ADR should take place in a proper legal and constitutional framework.**

The Accountability Issue

8. The first issue we draw to the attention of the House relates to the constitutional principle of the Government’s accountability to Parliament. **When a Government introduces a bill to create a major new scheme and establish important public authorities, the provisions of the bill ought to reflect the Government’s underlying policy goals. If a bill fails to do this, not only is Parliament denied an opportunity to scrutinise that policy during the bill’s passage through Parliament, but in years hence Parliament may be restricted in the scope of any post-legislative scrutiny it wishes to conduct.**⁴ The omission from the bill of a clause dealing fully with mediation creates a significant mismatch between the legislative scheme put before Parliament and the Government’s avowed policy goals in establishing the new tribunal system.
9. There can be no doubt that the use of mediation and other ADR techniques is at the very centre of the Government’s aims for the new tribunal system. Baroness Ashton spells this out in her letter to our Chairman, reproduced at Appendix 1. The aforementioned White Paper, which informed the framing of the bill, describes a wish for “radical new approaches to dispute resolution”.⁵ The White Paper states:

² The full text of draft clause 23 is reproduced at Appendix 2 below.

³ Clause 2(3)(d).

⁴ On post-legislative scrutiny see the recent report by the Law Commission, *Post-Legislative Scrutiny* (Law Com No 302, Cm 6945).

⁵ Paragraph 6.41.

“What we need to do is to create the unified tribunal system recommended by Sir Andrew Leggatt but transform it into a new type of organisation which will not only provide formal hearings and authoritative rulings where these are needed but will have as well a mission to resolve disputes fairly and informally either by itself or in partnership with the decision-making department, other institutions and the advice sector”.⁶

“Telephone and video conferencing already makes it possible to have virtual hearings but we need to go further and to re-engineer processes radically so that just solutions can be found without formal hearings at all. We expect this new organisation to innovate”.⁷

The Rule of Law Issue

10. Baroness Ashton told us that “tribunal members and staff (like their counterparts in the courts) do not need express statutory power to mediate disputes” (see Appendix 1). We do not share the Government’s confidence about this, either as a matter of strict law or broad constitutional principle.
11. It is accepted that the superior courts, such as the High Court of England and Wales, have an “inherent jurisdiction”—powers derived from the common law rather than statute. The position of tribunals is, however, far from settled. Even if it is accepted that tribunals do have such inherent powers, their scope is not certain.⁸
12. The broad constitutional question is whether it is desirable that public authorities established by Act of Parliament ought to derive their principal powers from express legal provisions. The answer is in the affirmative. This is an aspect of the rule of law, captured well by Mr Justice Laws (as he then was) in *R v Somerset County Council ex parte Fewings* [1995] 1 *All England Reports* 513 at page 524, a case to do with whether a local authority could lawfully ban stag hunting on its own land:

“Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose ... Under our law, this is true of every public body. The rule is necessary in order to protect people from arbitrary interference by those set in power over them.”

⁶ Paragraph 4.21.

⁷ Paragraph 6.20.

⁸ See Sir Jack Jacob “The Inherent Jurisdiction of the Court” (1970) vol 23 *Current Legal Problems* 23 and M.S. Dockray “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) vol 113 *Law Quarterly Review* 120.

13. The tribunal system, established by statute, is not in the same position as banks, businesses and other commercial enterprises which have chosen to set up dispute-resolution schemes for dealing with customers' complaints. **If the new tribunal system is going to engage in widespread use of ADR, that should be done on the basis of express legal authority contained in primary legislation.**

Access to Justice

14. A further constitutional principle at stake is that of access to justice. The use of ADR is said by the Government to be a measure to increase access to justice. We acknowledge the consensus that mediation and other ADR methods are capable of providing speedy, relatively cheap and less intimidating approaches to resolving complaints about public authorities. But as Baroness Ashton told the Committee, "of course the fundamentals of access to justice, such as the right to a fair hearing under article 6 of the ECHR, cannot be affected" (see Appendix 1).
15. We leave to one side article 6 of the European Convention on Human Rights, as in the context of tribunals that raises a number of technical legal issues of some complexity.⁹ There is no doubt, however, that access to justice is a principle of the British constitution. In this context, we draw to the attention of the House two sets of distinctions: between a grievance dealt with by a mediator or staff lawyer at a tribunal and one dealt with by a tribunal judge, whose independence and impartiality is guaranteed by the statutory framework; and between ADR in the form of a voluntary service offered to the aggrieved citizen and ADR as a compulsory requirement.
16. The House has long been alive to the constitutional dangers of ouster clauses—provisions in bills which seek to hinder a citizen's access to an independent and impartial tribunal or court. **Ouster clauses are not the only way in which access to a fair hearing by an independent tribunal can be impeded. Clause 23 in the draft bill provided some assurance that appellants, who will often be vulnerable by reason of poverty, age or ill-health, will not be or feel pressurised by officials into using ADR when what they seek is a hearing before an independent tribunal judge.**

⁹ Article 6 guarantees a fair hearing before an independent and impartial tribunal for all "civil rights and obligations". The category of civil rights and obligations has yet to be defined with clarity and may—as a matter of European Convention law—exclude some type of welfare benefits. Decisions that involve a large measure of official discretion may also fall outside the protective ambit of article 6.

APPENDIX 1: CORRESPONDENCE WITH THE LORD CHANCELLOR AND BARONESS ASHTON OF UPHOLLAND

Letter from the Chairman to the Lord Chancellor, 6 September 2006

As you know, the terms of reference of the Constitution Committee, which I chair, require us “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.” In performing our scrutiny function, which includes consideration of draft bills, we ask ourselves whether proposed legislation raises issues of principle affecting a principal part of the constitution. The subject matter of the draft Tribunals, Courts and Enforcement Bill clearly does affect important constitutional arrangements, most notably the administration of justice through tribunals (which provides a system for accountability over government decisions as well as practical remedies in particular cases), judicial review and appointments of judges.

On more than one occasion in the recent past the Committee has expressed disappointment that Government proposals affecting important constitutional issues have not been published in draft before formal introduction to Parliament. The current draft bill is therefore welcome. What is less encouraging is your Department’s choice of the consultation period (25 July to 22 September 2006). As the Cabinet Office’s *Guide to Legislative Practice* makes clear, one of the main purposes of draft bills is to elicit potential parliamentary objections (paragraph 18.4). The draft of this bill was published on the same day that this House rose for the summer recess and the consultation period ends more than two weeks before the House resumes. As could readily have been anticipated, this has prevented any effective scrutiny and deliberation on the draft bill by the Committee. Our substantive comments on the proposals will therefore have to wait until the bill is introduced to the House. You may however find it helpful if I were to provide a preliminary summary of three broad areas of constitutional concern.

The first relates to the need to encourage diversity in the range of persons available for selection for appointments to the judiciary, which is now of course a statutory duty enshrined in the Constitutional Reform Act 2005, and one that commands widespread support. The policy of the draft bill, in clause 41 and schedule 10, to reduce the qualifying periods for eligibility for appointment to a wide range of judicial posts from 10 to 7 years, or 7 to 5 years, is of a different type. It is not obvious that allowing people with less experience than is currently the case to be appointed as judges is a satisfactory trade-off to achieve the goal of a judiciary that is more reflective of the society it serves. Indeed, I understand that the Judges’ Council is opposed to this proposal and fears that shortening the qualification period may have an adverse effect on public perceptions of and confidence in the judiciary. When the bill is introduced, I am sure the Committee will wish to examine this aspect of the bill with care and weigh up the competing arguments.

Secondly, the draft bill also introduces a number of innovations in relation to judicial review of tribunal decisions, including a judicial review role for the newly established Upper Tribunal. When the bill comes before the Committee, we will be concerned to ensure that these new arrangements do not have any unintended impact on the robust upholding of the rule of law.

Thirdly, the consequences of asymmetric devolution are apparent in the arrangements for the composition of and appointment to the proposed Administrative Justice and Tribunals Council (in schedule 7 to the draft bill). I

note that while express provision is made for the inclusion of the Scottish Public Services Ombudsman in the Scottish Committee, and the Public Services Ombudsman for Wales in the Welsh Committee of the AJTC, there appears to be no guaranteed place for the Local Government Ombudsman (the Local Commissioners for Administration in England) on the Council. I am sure that the Committee will in due course consider any constitutional issues arising from the Council's proposed composition and role.

Reply from the Lord Chancellor, 5 October 2006

Thank you for your letter of 6 September about the constitutional implications of the Tribunals, Courts and Enforcement Bill.

I am sorry that you feel that the time limit for commenting on the Bill has prevented any effective scrutiny by the Committee at this stage, and I am grateful that you have been able to comment, notwithstanding that Parliament is in recess. I had hoped to publish the Bill well before the summer recess, as with the other two draft Bills I published this Session, but this was not possible. While the formal deadline for comments has now passed, if the Committee wishes to feed in any further points on the drafting before the Bill is introduced to Parliament, then I would of course be happy to consider them, time permitting.

On the preliminary points you have raised. I disagree that reducing the qualifying periods for eligibility for appointment to judicial office is a trade-off to achieve a more diverse judiciary at the expense of the requisite experience for judicial office. The current eligibility criteria, which merely require an applicant for judicial office to have held rights of audience for a particular period of time, do not provide a meaningful measure of experience or expertise as there is no necessity to have exercised these rights during that period.

The Bill introduces a requirement that a person with a relevant qualification must also have gained legal experience to be eligible for office. Requiring a candidate to have gained real post-qualification experience in law in order to become eligible is a much better indicator of suitability and justifies the reduction of the qualifying time period. This, coupled with other measures in the Bill, will in fact enable candidates with a wider range of skills and experience, who have previously been excluded from consideration, to apply for judicial office.

Ensuring that public confidence in the judiciary is maintained is of critical importance, but there is no indication that opening up judicial appointments to a wider range of applicants would diminish this. Indeed extending eligibility and creating a broader and more diverse pool of potential candidates is likely to lead to a judiciary that is, and is perceived to be, more representative and in touch with the society it serves.

Regardless of any changes to the statutory eligibility requirements, all applicants will continue to be rigorously assessed and have to meet the demanding criteria set by the Judicial Appointments Commission in order to be recommended for appointment. There will be no compromise on ensuring the existing high standards of our judiciary are maintained.

I note your concerns about the provisions governing judicial review of tribunal decisions. These provisions are designed to give tribunal users the benefit of the specialist expertise of the new Upper Tribunal in certain judicial review cases. This will be limited to types of cases specified in a direction to be made by the Lord Chief Justice of England and Wales, or where the High Court orders the transfer of an individual case, because it considers it just and convenient to do so. The idea

for this change came from the judiciary and it does not in any way reduce the availability of judicial review.

On your final point about the composition of the Administrative Justice and Tribunals Council, I am keen to keep the size of the new Council manageable and to ensure that its composition means that members can devote a reasonable amount of their time to its work. I do not want to increase the *ex officio* membership any further for that reason. I have in the past year appointed a recently-retired Local Government Ombudsman to the Council on Tribunals and I believe that will prove to be a more effective way of bringing that kind of expertise to both the existing and the future Council.

I hope this letter allays your concerns. But if the Clerk to your Committee would like further information on these or any other points raised by the Bill, then members from the Bill Team stand ready to assist.

Letter from the Chairman to Baroness Ashton of Upholland, 23 November 2006

On behalf of the Committee, which I chair, in September I wrote to the Lord Chancellor about the draft Tribunals, Courts and Enforcement Bill; our exchange of correspondence was published in the Committee's Sixteenth Report: Final Progress Report (2005–06, HL Paper 255, Appendix 3).

At its meeting on 22 November, the Committee was able to consider the bill in the form it was introduced to the House on 16 November and have asked me to write to you to seek clarification on several aspects. I should welcome your views on them, if possible before Second Reading of the bill next week. I should perhaps add that a copy of this letter will be put on our website in the next day or so. Naturally, so too will your reply when it is received.

Outcome of the consultation exercise on the draft bill

The first point is whether the Department for Constitutional Affairs proposes to publish an analysis of the responses to the consultation on the draft bill, carried out over the summer. In my letter to the Lord Chancellor about the draft bill, I expressed concern that publication of a draft bill during the parliamentary summer recess undermined one of the main purposes of draft bills, namely to elicit potential objections to the bill from within Parliament. That is now a matter for the past, though the Committee hopes that lessons have been learnt. In the immediate future, the Committee's concern is for parliamentary consideration of the bill to be enhanced by timely access to information about the responses to the consultation exercise. You will not need to be reminded that one of the six consultation criteria laid out in the *Code of Practice on Consultation* is "Give feedback regarding the responses received and how the consultation process influenced the policy".

Delay in publishing Explanatory Notes

I would also register disappointment that the Explanatory Notes for the bill were not published on the parliamentary website, or that of your Department, on the day the bill was published. Indeed, they were not published until some four days after the bill. Our Committee seeks to report to the House before a bill's Second Reading and so time is of the essence. Access to Explanatory Notes is a vital part of the scrutiny process. Again, you will not need to be reminded that the *Guide to*

Legislative Procedures states that Explanatory Notes “should be published at the same time as Bills” (p 35).

Safeguards relating to the use of ADR

We seek clarification on provision in the bill relating to alternative dispute resolution (ADR) procedures associated with tribunal appeals. In several ministerial speeches and departmental publications, the DCA has emphasised the importance that will be attached to the use of mediation, early neutral evaluation, conciliation and other techniques to resolve disputes between the citizen and public authorities. The White Paper *Transforming Public Services: Complaints, Redress and Tribunals* described an ambition “to re-engineer processes radically so that just solutions can be found without formal hearings at all” (para 6.20). While we have no doubt that ADR has a useful role to play as an adjunct to formal tribunal proceedings, citizens are entitled to assurances that such procedures will be fair, that they will not hamper the right to a formal hearing and that they take place within an appropriate constitutional setting.

There seemed much to commend about clause 23 of the draft bill which made express provision for mediation, including the following principles:

“(a) mediation in matters in dispute between parties is to take place only by agreement between those parties; (b) where parties to proceedings fail to mediate, or where mediation between parties to proceedings fails to resolve disputed matters, the failure is not to affect the outcome of the proceedings”.

Any equivalent of clause 23 of the draft bill appears to have been removed from the bill as introduced to the House. In its place is a terse reference in clause 2(3)(d) to the effect that the Senior President of Tribunals must have regard to “the need to develop innovative methods for resolving disputes that are of a type that may be brought before tribunals”. We would like to know why clause 23 of the draft bill was removed from the bill as introduced and whether there may be some circumstances in which mediation or other ADR procedures may be compulsory or a failure to use ADR made subject to sanction.

Delegation of functions by the Senior President of Tribunals

A further aspect of the bill on which we would welcome clarification is clause 8(1)(b), which provides that the Senior President of Tribunals may delegate “any function” to “staff”. On its face, this appears to be a surprisingly broad power to delegate and we would welcome an explanation as to what functions may appropriately be delegated to staff (as opposed to a judge under clause 8(1)(a)). The Senior President of Tribunals has a number of functions which seem inherently unsuited to delegation to staff, for example laying before Parliament written representations (schedule 1, para 13).

Reply from Baroness Ashton of Upholland, 28 November 2006

Thank you for your letter of 23 November and to the Committee for taking the time to consider the Bill.

Outcome of the consultation exercise on the draft Bill

The Department has not published an analysis of the responses to the draft Bill because publication was not part of a formal consultation exercise. We simply published the Bill and invited comments on it. (The reasoning for this is that we

had already consulted extensively on the underlying policy in the Bill through a series of White Papers and consultation papers.)

In view of this, we did not inform respondents that an analysis of their replies would be published and would need to seek their approval before doing so.

Delay in publishing the Explanatory Notes

I am sorry that it was not possible to publish the Explanatory Notes on the same day as the Bill. I introduced the Bill in the afternoon of Thursday 16 November. It was published on Friday 17 November. The Explanatory Notes were published on Tuesday 21 November. I hope that this did not hamper the Committee's work in any way. Unfortunately in the case of this Bill, there was a certain amount of last-minute drafting and I am sure you appreciate that Explanatory Notes cannot be finalised until the text is finalised.

Safeguards relating to the use of ADR

On the substantive points you raise on the Bill, the clause on mediation (which was clause 23 of the draft Bill) did not appear in the Bill as introduced on 16 November because we concluded that it was unnecessary, and might have given the impression that existing mediation schemes in the courts and tribunals needed some kind of statutory cover. Tribunal members and staff (like their counterparts in the courts) do not need express statutory power to mediate disputes. Clause 23 was mainly about restrictions and principles and on reflection we do not think it is necessary or desirable for Government and Parliament to be instructing tribunals as to what they should or should not do in this area in order for them to be fair to its users.

I note the Committee's view that "... ADR has a useful role to play as an adjunct to formal tribunal proceedings, [but] citizens are entitled to assurances that such procedures will be fair, that they will not hamper the right to a formal hearing and that they take place within an appropriate constitutional setting." My starting point is different. In the tribunal context, I do not see "ADR" as an "adjunct" to formal proceedings. The tribunals have a duty to be accessible. Formal proceedings may well hamper that objective. I see "ADR" not as an alternative but as potential ways of providing justice in a more practical and effective manner, although of course the fundamentals of access to justice, such as the right to a fair hearing under article 6 of the ECHR, cannot be affected.

Delegation of functions by the Senior President of Tribunals

You also asked for clarification of clause 8(1)(b), which allows the Senior President to delegate any of his functions to a member of staff. We anticipate that the Senior President will work closely with the Tribunals Service (as the Senior President designate does now) and it is for the Senior President to determine which functions he or she chooses to delegate. I will draw your observations to his attention.

APPENDIX 2: CLAUSE 23 OF THE DRAFT TRIBUNALS, COURTS AND ENFORCEMENT BILL

23 Mediation

(1) A person exercising power to make Tribunal Procedure Rules or give practice directions must, when making provision in relation to mediation, have regard to the following principles—

- (a) mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties;
- (b) where parties to proceedings fail to mediate, or where mediation between parties to proceedings fails to resolve disputed matters, the failure is not to affect the outcome of the proceedings.

(2) Practice directions may provide for members to act as mediators in relation to disputed matters in a case that is the subject of proceedings.

(3) The provision that may be made by virtue of subsection (2) includes provision for a member to act as mediator in relation to disputed matters in a case even though the member has been chosen to decide matters in the case.

(4) Once a member has begun to act as a mediator in relation to a disputed matter in a case that is the subject of proceedings, the member may decide matters in the case only with the consent of the parties.

(5) Staff of the First-tier Tribunal or the Upper Tribunal may, subject to their terms of appointment, act as mediators in relation to disputed matters in a case that is the subject of proceedings.

(6) Before giving a practice direction that makes provision in relation to mediation, the person giving the direction must consult the Advisory, Conciliation or Arbitration Service.

(7) The Lord Chancellor may by order prescribe fees payable in respect of mediation conducted by staff of the First-tier Tribunal or the Upper Tribunal.

(8) Fees payable under subsection (7) are recoverable summarily as a civil debt.

(9) Subsection (8) does not apply to the recovery in Scotland of fees payable under subsection (7).

(10) In this section—

“member” means a judge or other member of the First-tier Tribunal or a judge or other member of the Upper Tribunal;

“practice direction” means a direction under section 18(1) or (2);

“proceedings” means proceedings before the First-tier Tribunal or proceedings before the Upper Tribunal.