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The *Tribunals, Courts and Enforcement Bill* [HL]

Bill 65 of 2006-07

This paper discusses the *Tribunals, Courts and Enforcement Bill*, which was introduced into the House of Lords on 16 November 2006.

The *Tribunals, Courts and Enforcement Bill* is a broad measure designed to implement a number of very different proposals. These include the establishment of a new tribunals system, reforming the criteria for judicial appointment and the introduction of new rules to ensure the protection of cultural items on loan within the United Kingdom. The Bill would also introduce measures to change the system of enforcing judgements and includes provisions to vary the regime applicable to enforcement agents and bailiffs. The miscellaneous provisions of the Bill contain a proposal to alter the powers of the High Court in judicial review applications.

Parts 1, 2, 6 and 8 of the Bill extend to England and Wales, Scotland and Northern Ireland, while the other provisions of the Bill extend only to England and Wales.

The Bill was introduced in the House of Commons on 21 February 2007 and is due to have its Second Reading on 5 March.

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Summary of main points

The *Tribunals, Courts and Enforcement Bill* contains a number of unconnected measures, relating to a wide range of matters. These include:

- proposals to reform the tribunals system and create an Administrative Justice and Tribunals Council (Part 1 of the Bill);
- measures to reform the criteria for judicial appointment (Part 2);
- a scheme to change rules relating to the enforcement of judgments and the current regime relating to enforcement by taking control of goods by bailiffs and enforcement agents (Parts 3-4);
- the introduction of new debt management and relief schemes (Part 5); and
- measures designed to ensure the protection of cultural objects on loan in the United Kingdom (Part 6).
- miscellaneous provisions including measures to alter the powers of the High Court in judicial review applications (Part 7).

The proposals on tribunals in Part 1 of the Bill, which adopt many of the recommendations of the Leggatt Report in 2001, amount to the most fundamental change to the tribunals system for almost 50 years. During that time the number and caseload of tribunals has increased significantly. Many more cases are heard in tribunals than in the courts. There are currently over 70 different administrative tribunals in existence, many of which have been created on an ad-hoc basis. The lack of a coordinated approach to the establishment and operating of these tribunals has contributed to a fragmented and complex administrative and judicial landscape without common standards for performance or accountability.

The White Paper, T*ransforming Public Services: Complaints, Redress and Tribunals*, was published in July 2004.[1] Part 1 of the Bill creates a new, simplified statutory framework for tribunals aimed at providing coherence and to enable future reform, bringing the tribunal judiciary together under a Senior President. The Council on Tribunals, the supervisory body for tribunals, will be replaced with an Administrative Justice and Tribunals Council, which will have a broader remit to include oversight of administrative justice more generally.

In approaching the detailed provisions of Par 1 of the Bill a distinction needs to be kept in mind between three separate issues:

- **The day to day administration of the services**: This is an executive function concerned not so much with judging cases but mainly with the practical arrangements. For example the Court Service provides administrative support for the court system. In the case of Tribunals a unified administration, called the Tribunals Service was set up in April 2006. This was something that did not require primary legislation.

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1 Command paper 6243

- **Supervision of how the system is working:** This has been done by the advisory Non-departmental Public Body, the Council on Tribunals. The Bill will replace this body with the Administrative Justice and Tribunals Council.

- **The judicial system**: This is the main focus of Part 1 of the Bill and concerns the structure of the legal system of tribunals itself, such as: (a) the status and position of the judiciary; (b) members of the tribunal who will decide cases and; (c) the routes for appealing those decisions.

The proposals contained in Part 2 of the Bill would revise the minimum eligibility requirement for appointment to judicial office and would also allow eligibility to be extended (by order) to holders of other qualifications, such as legal executives.

There has been some controversy over the provisions relating to bailiffs and enforcement agents contained in Part 3 of the Bill. In January 2007, the Government unexpectedly introduced a consultation paper on the regulation of enforcement agents, with proposals that they should be regulated by the Security Industry Authority.

The measures in Part 4 are designed to help creditors with claims in the civil court to enforce their judgments and include a new court-based mechanism to help the court gain access to information about the judgment debtor, on behalf of the creditor.

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, which provides immunity from seizure to objects which have been lent to UK museums and galleries for temporary exhibitions, proved contentious when introduced in the Lords. Fears were expressed that the UK could become a haven for illegally acquired works of art. The clauses were subsequently amended to ensure that this immunity will only be available to institutions which meet criteria and follow procedures to be laid down in regulations.

The single clause on judicial review at Part 7 of the Bill has also attracted some attention as it would amend s 31 of the *Supreme Court Act 1981* so as to provide for an amended power where the High Court quashes a decision on an application for judicial review. The power would allow the court (in specific circumstances) to be able to substitute its own decision, rather than to remit a matter back to the original decision maker.

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I Introduction

The *Tribunals, Courts and Enforcement Bill* was first published as a draft Bill in July 2006. The Government stated that the draft Bill was designed to implement policies on a diverse range of issues including:

- the creation of a simplified statutory framework for tribunals (aimed at providing coherence and bringing the tribunal judiciary together under a Senior President);
- replacing the Council on Tribunals (the supervisory body for tribunals) with an Administrative Justice and Tribunals Council;
- revising minimum eligibility requirements for appointment to judicial office;
- unifying the existing law relating to enforcement by seizure and sale of goods by bailiffs and other enforcement officers;
- measures to help creditors with claims in the civil court to enforce their judgments and also proposed two new statutory debt management schemes.

In particular, the Government emphasised that the draft Bill would implement a number of earlier White Papers and reports, including the Government's response to Sir Andrew Leggatt's review of tribunals *('Transforming Public Services: Complaints, Redress and Tribunals'*) and the Government's consultation paper *'Increasing Diversity in the Judiciary*'. The Bill did not receive any scrutiny by Parliamentary Select Committees, but was instead subject to a consultation exercise which ended on 22 September.

A Library Standard Note entitled the *Draft Tribunals, Courts and Enforcement Bill*, which considered much of the background, is available on the Library Intranet, as is a second Standard Note which considered the proposals as introduced in the Lords.[2] The draft Bill procedure was strongly criticised by the Lords Constitution Committee, which sought access to the consultation responses. Lord Holme of Cheltenham wrote to Baroness Ashton on 23 November 2006 stating that:

> […] 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".[3]

In response, on 28 November, Baroness Ashton indicated:

> 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

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2 SN/HA/4124 *Draft Tribunal Courts and Enforcement Bill* and SN/HA/4205 *Tribunals, Courts and Enforcement Bill*

3 http://www.parliament.uk/documents/upload/Letter%20to%20Minister.doc

> 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 […][4]

The allegation of inadequate consultation was again raised by the Constitution Committee in November 2006, in an oral evidence session with the Lord Chancellor. In response, Lord Falconer said that:

> I was very keen that we published a draft copy of the bill. The bill was ready in July. It was important to publish a draft copy of the bill so that it would have been available for pre-legislative scrutiny before it was introduced into Parliament. […] We have had a period from July to November in which it has been available publicly. I was extremely keen that a parliamentary committee should take it up for pre-legislative scrutiny and none would. I am as deeply regretful as you are that it was not subject to pre-legislative scrutiny, but could I throw the ball straight back into your court and say, "Find a committee that will do it and I would welcome it" but it is too late now unfortunately [...] There were other bills that my department were doing that, for reasons I cannot adequately explain to you, people found more interesting to look at. For example, the Constitutional Affairs Select Committee looked at the Coroners Bill which is now not in the Queen's speech; for example, a joint committee of both Houses was set up to look at the Legal Services Bill. It is a parliamentary matter and not an executive matter that they did not decide to take up the Tribunals Bill and it may be because the people who make these decisions decided they were not interested enough in the Tribunals, Courts and Enforcement Bill, but it is certainly not through any want of enthusiasm on our part for there to be pre-legislative scrutiny.[5]

The Bill was introduced in the Lords on the 16 November 2006 and had its second reading in the Lords on the 29 November 2006.[6] The text of the Bill was not identical to that of the draft Bill and in fact added an entirely new section on the protection of cultural items on loan, which is addressed as part VII of this paper. On 21 December 2006, the Department for Constitutional Affairs (DCA) published a detailed policy statement on delegated powers that will be created under the Bill.[7]

The Bill spent two days in Lords Committee: 13 and 14 December 2006.[8] Report stage followed on 31 December 2006[9] and the Bill was given its Third Reading in the Lords on 20 February 2007.[10]

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[4] http://www.parliament.uk/documents/upload/Letter%20from%20Baroness%20Ashton%20to%20the%20Chairman%2028%2011%2006.doc

[5] Constitution Committee, *Short Inquiry into Executive Judiciary relations*, 22 November 2006, available at: http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/999/const221106.pdf

[6] cc759-805

[7] http://www.dca.gov.uk/legist/delegated-powers.pdf

[8] cc43-80GC and cc81-138GC respectively

[9] cc238-305

[10] cc1006-24

Due to the breadth of the Bill, this paper does not seek to provide a clause by clause analysis of the provisions, but instead considers the main provisions and identified any potential issues arising from them. The paper generally follows the structure of the Bill.

Parts 1, 2, 6 and 8 of the Bill extend to England and Wales, Scotland and Northern Ireland, while the other provisions of the Bill extend only to England and Wales

II Tribunals

A. Background

In May 2000 the then Lord Chancellor, Lord Irvine, appointed Sir Andrew Leggatt to undertake a review of the tribunals system. The Leggatt Report on the Review of Tribunals was published in August 2001. Sir Andrew made a number of recommendations for improvement with the objective of creating a system that would be independent, coherent, professional, cost effective and user friendly.

In March 2003 Lord Irvine announced the government's intention to create a new unified tribunals system. In July 2004 the Department for Constitutional Affairs (DCA) published a White Paper entitled *Transforming Public Services: Complaints, Redress and Tribunals* in line with the Leggatt Report's central recommendations for a unified system. [11]

The *Constitutional Reform Act 2005* which received Royal Assent on 24 March 2005 established a Judicial Appointments Commission (JAC) which became operative in April 2006. The JAC makes recommendations to the Lord Chancellor in relation to the appointment of judges and tribunal members. The Lord Chancellor may then accept or reject the recommendations or require the JAC to reconsider the recommendation made. Under the Act the Lord Chancellor consults with Scottish Ministers about the appointment of tribunal members sitting in Scotland.

The Government's tribunal reforms comprise both provisions contained in the Bill and a new executive agency of the DCA to provide a more efficient service to tribunal users. Primary legislation was not needed to create the new administrative Tribunals Service which was established in April 2006, but its remit will be enhanced by the Bill. The Service provides support to a range of tribunals. Contact details of the main tribunals within the service are given in Annex 2 to this paper. 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.

The Bill will create a new flexible overarching structure and establish the position of Senior President of Tribunals who will be the judicial leader of the unified system. This structure will complement the constitutional reforms, bringing appointments under the auspices of the JAC, insofar as not already done. The Bill will clarify the relationship of tribunals to the courts including both onward appeals and the supervisory jurisdiction of the courts.

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[11] Department for Constitutional Affairs, *Transforming Public Services*, July 2004, Cm 6243: http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf

The new unified judicial system will be comprised of the First Tier Tribunals and Upper Tier Tribunals. The judicial functions of many, but not all, existing tribunals will be transferred into the new system. A list of these is given in Annex 3. In understanding the detailed provisions of the Bill it is important to bear in mind the distinction between administrative and judicial functions. For example, some tribunals that currently receive administrative support under the new Tribunals Service will not necessarily transfer into the new unified tribunals system under the Bill. A case in point would be the employment tribunals and Employment Appeal Tribunal which are both already under the administration of the Tribunals Service but the Bill will not transfer them into the new unified judicial system. Delegated powers allow for this to be done at a later date.

1. Overview of the Tribunals

In the introduction to Report of the Review of Tribunals by Sir Andrew Leggatt in 2001, the tribunals system was described as follows:[12]

> 1.1 The last 50 years have brought an accelerating accumulation of tribunals as bodies whose function it is to decide disputes that would otherwise have to go to the courts. Together they form the largest part of the civil justice system in England and Wales, hearing about a million cases each year. That number of cases alone makes their work of great importance to our society, since more of us bring a case before a tribunal than go to any other part of the justice system. Their collective impact is immense.
>
> 1.2 Choosing a tribunal to decide disputes should bring two distinctive advantages for users. First, tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills. Secondly, tribunals' procedures and approach to overseeing the preparation of cases and their hearing can be simpler and more informal than the courts, even after the civil justice reforms. Most users ought therefore to be capable of preparing and presenting their cases to the tribunal themselves, providing they have the right kind of help. Enabling that kind of direct participation is an important justification for establishing tribunals at all.
>
> 1.3 What we have found, however, is that the present collection of tribunals has grown up in an almost entirely haphazard way. Individual tribunals were set up, and usually administered by departments, as they developed new statutory schemes and procedures. The result is a collection of tribunals, mostly administered by departments, with wide variations of practice and approach, and almost no coherence. The current arrangements seem to us to have been developed to meet the needs and conveniences of the departments and other bodies which run tribunals, rather than the needs of the user. That levels of dissatisfaction are not higher is largely due to the commitment and resourcefulness of tribunal members, and of those who work for them; and everything which follows must be read in the light of the important public service that they render.

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[12] *Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users - One System, One Service*, 16 August 2001: http://www.tribunals-review.org.uk/

> 1.4 We do not believe that the current arrangements meet what the modern user needs and expects from an appeal system running in parallel to the courts. First, users need to be sure, as they currently cannot be, that decisions in their cases are being taken by people with no links with the body they are appealing against. Secondly, a more coherent framework for tribunals would create real opportunities for improvement in the quality of services than can be achieved by tribunals acting separately. Thirdly, that framework will enable them to develop a more coherent approach to the services which users must receive if they are to be enabled to prepare and present cases themselves. Fourthly, a user-oriented service needs to be much clearer than it is now in telling users what services they can expect, and what to do if the standards of these services are not met.

2. The Leggatt Report: A Unified Tribunal Service

The Leggatt Report looked at the entire system of tribunals. It recommended a unified tribunals service. In August 2001, the Lord Chancellor's Department published a consultation paper.[13] In March 2003 the responses to the consultation were published.[14] At the same time the Lord Chancellor's Department issued a press release which announced the government's intention to create a unified tribunals service with the top 10 non-devolved tribunals which currently exist throughout departments in Whitehall at its core:

> The Government's proposals will be the biggest change to the tribunal system in over 40 years. They are part of a larger Government strategy of modernisation which has included reforms in the civil and criminal justice systems.
>
> The Government's announcement today will form the foundation for policy proposals to be outlined in a forthcoming White Paper which will:
>
> - increase accessibility to tribunals;
> - raise customer service standards and;
> - improve administration.
>
> Lord Irvine said, "I want to ensure that the three great pillars of the justice system are reformed and the reforms are brought into effect successfully and efficiently. We have substantially reformed the civil justice pillar and are embarking on major reform of the criminal pillar; the third is the administrative justice pillar, tribunals justice."[15]

The White Paper, T*ransforming Public Services: Complaints, Redress and Tribunals*, was published in July 2004.[16]

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13 Consultation Paper on Leggatt Report, August 2001: http://www.dca.gov.uk/consult/leggatt/leggatt.htm
14 http://www.dca.gov.uk/consult/leggatt/leggattresp.htm
15 LCD Press Notice: Review of Tribunals, 11 March 2003
16 Command paper 6243

3. Council on Tribunals

The Council on Tribunals supervises the constitution and working of Tribunals and Inquiries in England, Scotland and Wales as listed in the *Tribunals and Inquiries Act 1992*. The website gives the following summary:

> The Council was set up by the Tribunals and Inquiries Act 1958 and now operates under the Tribunals and Inquiries Act 1992.
>
> The Council is to consist of not more than 15 or less than 10 members appointed by the Lord Chancellor and the Scottish Ministers. In addition, the Parliamentary Commissioner for Administration (the Parliamentary Ombudsman) and the Scottish Public Services Ombudsman are members by virtue of their office. In appointing members, regard is to be had to the need for representation of the interests of persons in Wales.
>
> The Scottish Committee of the Council is to consist of two or three members of the Council designated by the Scottish Ministers, and three or four non-members of the Council appointed by them. The Parliamentary Ombudsman and the Scottish Public Services Ombudsman are also ex-officio members of the Committee.
>
> The principal functions of the Council as laid down in the Tribunals and Inquiries Act 1992 are:
>
> - to keep under review the constitution and working of the tribunals specified in Schedule 1 to the Act, and, from time to time, to report on their constitution and working;
> - to consider and report on matters referred to the Council under the Act with respect to tribunals other than the ordinary courts of law, whether or not specified in Schedule 1 to the Act; and
> - to consider and report on matters referred to the Council, or matters the Council may consider to be of special importance, with respect to administrative procedures which involve or may involve the holding of a statutory inquiry by or on behalf of a Minister.
>
> The term "statutory inquiry" means (i) an inquiry or hearing held in pursuance of a statutory duty, or (ii) a discretionary inquiry or hearing designated by an order under section 16(2) of the Act. The relevant order is the Tribunals and Inquiries (Discretionary Inquiries) Order 1975 (S.I. 1975/1379) as amended.
>
> The Council must be consulted before procedural rules are made for any tribunal specified in Schedule 1 to the 1992 Act, and on procedural rules made by the Lord Chancellor or the Scottish Ministers in connection with statutory inquiries. It must also be consulted before any exemption is granted from the requirement in section 10 of the Act to give reasons for decisions. It may make general recommendations to Ministers about appointments to membership of the scheduled tribunals.
>
> The jurisdiction of the Council extends over the whole of Great Britain but it has no authority to deal with any matter in respect of which the Parliament of Northern Ireland had power to make laws.

The Council is required to make an annual report which must be laid before Parliament and the Scottish Parliament and may, at any time, make a special report on its own initiative under points (a) or (c) listed above.

References to the Council or reports by it are made by or to the Lord Chancellor and the Scottish Ministers, either both or one or other of them according as the matter in question relates to Great Britain as a whole, to England and Wales or to Scotland.

Certain tribunals operating in Scotland, which are specified in Part II of Schedule 1 to the 1992 Act, come under the particular supervision of the Scottish Committee. Before making any reports in regard to these, or on any matter referred by the Scottish Ministers, the Council must consult the Scottish Committee. In addition, the Scottish Committee has the right in certain circumstances to report directly to the Scottish Ministers.[17]

4. Tribunals Caseload

At Second Reading of the Bill Lord Newton, who is the chairman of the current Council on Tribunals, raised the issue of tribunal caseloads. He said that tribunals have six times the caseload of courts.[18] The *Tribunals Service Business Plan 2006 – 07* gives caseload details of some of the main tribunal jurisdictions:[19]

- Criminal Injuries Compensation Appeals Panel (CICAP) has 3,700 cases per year
- The Appeals Service (Social Security and Child Support Appeals) handles approximately 250,000 cases a year.
- Employment Tribunals Service (ETS) has a caseload of 89,000 cases a year, with 1,100 proceeding to the Employment Appeals Tribunal (EAT).
- Asylum and Immigration Tribunal (superseding the former Immigration Appellate Authority) handled 173,000 cases in its first year (April 2005 – 2006)
- Mental Health Review Tribunal (MHRT) has seen the number of applications to the tribunal increasing from just over 20,000 in the year 2001-02 to nearly 22,000 in 2004-05, while the number of applications which have lead to hearings also increased over this period by about 1,000 to just under 12,000.
- Special Educational Needs and Disability Tribunal (SENDIST) handles over 3,000 cases a year.

5. Representation

A Citizen's Advice Bureau briefing for Second Reading in the Lords raised the question of legal advice and representation in tribunals. Currently public funding for legal representation is not generally available in tribunals. This is because many are intended to be less formal than a court in terms of procedure. However, they do determine questions of law and so in many cases can involve complex legal issues which may be daunting for the lay person:

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17 http://www.council-on-tribunals.gov.uk/about_functions.htm
18 HL Deb 29 November 2006 c767
19 http://www.tribunals.gov.uk/publications/documents/tribunals_service_business_plan.pdf

The need for legal advice and representation

In our view, the legislative proposals and the preceding White Paper, like the Leggatt report, underestimate the difficulties for appellants and applicants, and ignore a considerable body of research on this subject. All tribunals are tribunals of law – not just facts and process. The literature review of "Tribunal Users' Experiences, Perceptions and Expectations", commissioned by the then Lord Chancellor's Department, concluded as follows:

"Most of the research concludes that appellants find it difficult to represent themselves. When people have the opportunity to be represented (because they are able to afford legal representation, because they are able to obtain legal aid, or because free lay representation is available) they tend to make use of it. Although some appellants choose to represent themselves, they often find that the process is more complex and legalistic than they had imagined and regret their decision afterwards. There is little research-based support for one of the central tenets of the Leggatt Report, namely that 'a combination of good quality information and advice, effective procedures and well-conducted hearings, and competent and well-trained tribunal members' would make it possible for 'the vast majority of appellants to put their cases properly themselves', i.e. without representation."

We therefore consider that for both the first tier and upper tribunals, the Access to Justice Act Funding Code should be amended so that representation can be included within the scope of Legal Services Commission contracts.[20]

These issues were taken up by Lord Clinton-Davis at Second Reading:

There is the vexed question of funding for representations before most tribunals. Is proper consideration to be given to the difficulties posed by the increased complexity of the law? Dealing with representations before tribunals by the funding code is absolutely inadequate, and too uncertain at the moment. Why should legal aid for representation before tribunals not be considered where it is deemed likely to be helpful to the tribunal, for example, by saving time? I raised that point with the noble and learned Lord the Lord Chancellor today, but I was not convinced by his answer. It is vital for the functioning of the tribunals, and to create confidence in what they have to say, that legal aid should be available for representation before them.

(…)

I am all too aware of the draconian attitude towards the provision of legal aid at the moment. It is not a process of which I approve. Perhaps I am old-fashioned. As a practising solicitor, I did legal aid cases along with private work, and there were not too many difficulties for my colleagues and me in that. The situation now is profoundly unsatisfactory, and I am talking about something wider than tribunals. Legal aid, properly administered and applied by those who practise, would be an advantage to the public. Too many practitioners are prevented from rendering an invaluable service to the public, and too many members of the public are denied that vital service.

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[20] http://www.citizensadvice.org.uk/tce_bill_2nd_reading_lords_nov_06.doc

> Meanwhile, citizens advice bureaux, debt relief agencies and law centres should all be given increased financial help in providing their relevant expertise. The ordinary man and woman on the street often need to obtain legal advice on the complex issues that are at stake and that vitally affect their daily lives. To deny that is to be purblind to the problems confronting people and to the solutions that can sometimes be found. I therefore hope that we will improve the Bill, particularly on this point, when we consider it in Committee and later in the House. [21]

The Government's response to this issue when it was raised in Committee can be summarised as follows:[22]

- The proposal to make legal aid widely available in tribunals risks changing the informal nature of tribunals. However, services that help unassisted parties understand what is going on may be considered at some point in the future.

- There are limited funds available for legal aid in both criminal and civil cases and a balance will need to be struck between competing demands. This requires an overarching consideration which the Government has not yet completed.

B. The Bill

1. Tribunal Judiciary

The main feature that distinguishes tribunals from courts is the range of people who sit on them. A tribunal may consist of a lawyer sitting alone, or a lawyer sitting with one or more non-legal members. A few tribunals have no legal members at all. Non-legal members may be chosen for their relevant expertise or experience.

The Bill seeks to give coherence to the way tribunal members are deployed. This will make matters easier for those who sit in more than one tribunal jurisdiction, since a single appointments process will apply. The Explanatory Notes set out the new arrangement as follows:

> 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.

In Grand Committee in the Lords, proposals to call legal members "judges" were debated.[23] Lord Kingsland suggested that this militated against the important informality of tribunal proceedings and would give the wrong impression to users.

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21 HL Deb 29 November 2006 c781
22 HL Deb 13 December 2006 cc74-80GC

2. First Tier Tribunals and Upper Tribunals

The explanatory notes summarise the new structure as follows:

> 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 be, 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 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.

In the course of debates in the Lords, concerns were raised about the seniority of the judge dealing with judicial review cases that will be heard in the Upper Tribunal. It was argued that a High Court Judge should always hear such cases because only High Court judges have a sufficient degree of constitutional independence from government. This is because they can only be removed on a resolution of both houses of Parliament. Since judicial review cases involve challenges to administrative decisions of government, this independence is seen as being of fundamental importance.

The Government's response to these concerns was to explain that the assignment of cases or a class of cases to the Upper Tribunal would be within the control of the independent judiciary in any event. Also, the purpose of the provisions is to allow flexibility in cases where the particular expertise of members of the Upper Tribunal would be of value.[24] Not all judicial review cases are high profile interventions concerning the abuse of administrative powers. Some applications for judicial review relate to highly technical points about which legal uncertainty has arisen.

In terms of the costs of establishing the new system the Regulatory Impact Assessment does not anticipate these to be very large:

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[23] HL Deb 13 December 2006 cc43-48GC

[24] HL Deb 31 January 2007 cc243-248

> It is estimated that it will cost in the region of £50,000 to set up the new arrangements, and result in additional annual running costs of approximately £160,000 overall. This is minimal against running costs of around £280m per annum for those tribunals that make up the Tribunals Service. It is expected that this simplified structure will give rise to savings that will easily outstrip the costs. [25]

3. Administrative Justice and Tribunals Council

The Bill will establish Administrative Justice and Tribunals Council (AJTC) which will be an advisory Non-Departmental Public Body (NDPB) as is the current Council on Tribunals which it will supercede. Existing members of the Council on Tribunals will be "grandfathered" onto the new body.[26] It is important to note that, like the Council on Tribunals, the new body will not be a tribunal itself, as are some other NDPBs. In addition to taking on the Council on Tribunals' current remit, the AJTC will have the expanded role of keeping the administrative justice system as a whole under review, in terms of making the system more accessible, fair and efficient, and advising the Government the Senior President accordingly. The wider administrative justice role will focus on the relationships between the courts, tribunals, ombudsmen and the routes to Alternative Dispute Resolution (ADR) ensuring that the needs of users are met.

The new Council will be around the same size as the present Council on Tribunals. It will have 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. According to the Regulatory Impact Assessment "the size and general function of the Council will not change sufficiently to generate any extra cost beyond the current running cost of the Council on Tribunals." [27]

4. Delegated Powers

The Government has published a *Detailed Policy Statement on Delegated Powers* explaining the purpose of the many delegated powers in the Bill.[28] The broad approach was summarised as follows:

> 8. The order-making powers will be used to provide the detail for principles set out in the Bill and this statement concentrates on those areas. However, the detail is inevitably limited as the structures created by the Bill are designed to be flexible. It is also envisaged that the specific proposals and the detail will be underpinned by extensive consultation with tribunal office holders as well as users of the Tribunals Service. Until that consultation is completed and considered it is not possible to give firm and detailed undertakings in relation to the final form of policies.

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25 DCA, *Tribunals, Courts and Enforcement Bill: Regulatory Impact Assessments*: http://www.dca.gov.uk/risk/tribenforce_ria.pdf

26 HL Deb 14 December 2006 cc82-87GC

27 DCA, *Tribunals, Courts and Enforcement Bill: Regulatory Impact Assessments*: http://www.dca.gov.uk/risk/tribenforce_ria.pdf

28 DCA, *Detailed Policy Statement on Delegated Powers, Tribunals, Courts and Enforcement Bill*, December 2006: http://www.dca.gov.uk/legist/tribenforce.htm

> 9. Many of the order making powers in this Part of the Bill are to give effect to the transfer of a body or functions. They are expressed as delegated powers to provide for the future growth of the First –tier and Upper Tribunals, or the transfer of administration or powers to make rules to the Lord Chancellor or the Tribunal Procedure Committee. Again, those powers are not explained further in the text below as there is as yet no detailed policy to be expressed in delegated legislation. They are there to provide for future contingencies.

The House of Lords Select Committee on Delegated Powers and Regulatory Reform in its second report of session made various recommendations to the Government.[29] The Committee reviewed the many powers subject to the affirmative procedure and found that "for the most part, however, each of these powers is appropriate and subject to an appropriate level of scrutiny". The recommendations relating to tribunals concerned:

- Powers for the Lord Chancellor and the Senior President of Tribunals, with the concurrence of the other, to make orders subject to negative procedure about the allocation of functions between the chambers of the First-tier and Upper Tribunals appeals

- Powers for the Lord Chancellor, by order subject to negative procedure, to provide for the number and type (i.e. whether a judge or other member of a tribunal) of members who are to decide matters

- The powers in clause 13 that could be used to limit a right of appeal otherwise given by the Act. These were detailed as follows:

  Appeals — Clauses 11 and 13

  23. Clause 13 gives a right of appeal from the Upper Tribunal to the Court of Appeal (or other UK equivalent), but the right may be exercised only with permission of the Upper Tribunal or the appellate court. Clause 13(6) enables the Lord Chancellor, by order subject to affirmative procedure, to provide (for England and Wales and Northern Ireland appeals) that permission should not be given unless there is an important point of principle at stake or some other compelling reason. This power can therefore be used to limit a right of appeal otherwise given by the Act. Its exercise is intended (memorandum paragraph 25) to bring the position for appeals from the Upper Tribunal in line with the position for appeals from the High Court and the County Court under section 55(1) of the Access to Justice Act 1999, i.e. to limit second appeals on the same point. but the power applies equally to first appeals from the Upper Tribunal exercising an original jurisdiction. **In view of the affirmative procedure provided, this delegation is not inappropriate. We recommend however that, in accordance with the memorandum's statement of the intended use of this power, that the bill should limit the Lord Chancellor to making such orders in respect only of the Upper Tribunal's appellate jurisdiction and not its original jurisdiction.**

[29] Select Committee on Delegated Powers and Regulatory Reform Second Report of 2006-07: http://www.publications.parliament.uk/pa/ld200607/ldselect/lddelreg/10/1009.htm

> 24. Clause 13(7)(f) enables the Lord Chancellor by order to specify descriptions of decisions of the First-tier and Upper Tribunals that are not appealable under clause 13(1). The power is subject to negative procedure, but we believe that the effect of clause 13(8) is that the power can be used only to provide wider rights of appeal than exist now or to specify a description of a decision from which there is currently no right of appeal. If our interpretation of this complex clause is correct, we accept this is generally reasonable in principle. But the power can be exercised at any time and we are concerned that it could be used to remove a (by then) established right to appeal long after a function had been transferred, simply because there had been no right of appeal at the time of the transfer. **This power would be more appropriately delegated if the bill restricted the time within which the Lord Chancellor might make such an order to the time of the transfer of the function itself. Thus a right of appeal could be excluded by order at that time but not if the Lord Chancellor later considered the additional right inappropriate. The same considerations apply to clause 11(5)(f) in respect of the First-tier Tribunal.**

These recommendations were accepted by the Government and amendments were accordingly tabled in Grand Committee.[30]

5. Alternative Dispute Resolution

In its *First Report of 2006-07* the House of Lords Constitution Committee focused on the question of Alternative Dispute Resolution (ADR) and Mediation.[31] Clause 23 of the Draft Bill which was published for pre-legislative scrutiny contained various provisions in this regard. This clause did not appear in the Bill as introduced in the Lords which contained what the Committee regarded as "only a terse and passing reference to ADR":

> 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:
>
> "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—

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30 HL Deb 13 December 2006 cc58-60GC

31 House of Lords Select Committee on the Constitution, *1st Report of Session 2006–07*, 11 December 2006, HL13: http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/13/1302.htm

> (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."
>
> 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".
>
> 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. 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.**

This issue was taken up by Lord Goodlad at Report in the Lords who tabled an amendment making detailed provision for mediation which was accepted by the Government.[32]

6. Scotland

There are two public bodies which are currently cross-border public authorities designated under orders made at devolution by virtue of the *Scotland Act 1998*. They are the Council on Tribunals and the Criminal Injuries Compensation Appeals Panel. A Legislative Consent Memorandum sets out how the Bill interacts with devolved areas in Scotland and covers the specific issues related to these two bodies. [33]

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[32] HL Deb 31 January 2007 cc254-258

[33] Scottish Parliament, *Legislative Consent Memorandum, Tribunals, Courts and enforcement Bill*, Session 2, 2006: http://www.scottish.parliament.uk/business/legConMem/LCM-2006-2007/pdf/j2_TCM_Bill_LCM.pdf

III Judicial Appointments

A. Background

In 1987, the lawyer and commentator David Pannick wrote that:

> Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid: make decisions. They carry out this function in public […] The reasons which judges must give to justify their decisions can be gnawed over at their leisure by the teams of lawyers trained (and generously paid) to extract for the purpose of an appeal every morsel of error.[34]

Twenty years later and while little about the judicial role may have changed, the judicial appointments system has been subjected to a seismic shift. Following the enactment of the *Constitutional Reform Act 2005* (considered further below), the Judicial Appointments Commission was officially launched on 3 April 2006. The Commission is an independent Non Departmental Public Body (a "quango") set up to select judicial office holders. It selects candidates for office on merit, independently of government through fair and open competition. It is expected to encourage a wide range of applicants.

There are 15 members who serve on the JAC. The JAC website indicates that:

> Our 15 commissioners are drawn from the judiciary, the legal professions, tribunals, the lay magistracy and the lay public.
>
> 12 commissioners, including the Chairman are appointed through open competition with the other three selected by the Judges' Council.
>
> The Chairman of the Commission must always be a lay member. Of the 14 other Commissioners:
>
> - 5 must be judicial members
> - 2 must be professional members (1 barrister and 1 solicitor)
> - 5 must be lay members
> - 1 must be a tribunal member
> - 1 must be a lay justice member.[35]

Baroness Usha Prashar CBE was appointed Chairman of the JAC in October 2005. In January 2006, Rt Hon Lord Justice Auld was appointed Vice-Chairman of the JAC.

In October 2006, the JAC indicated that it had set out its new processes for selecting judges, and a new definition of merit by which judicial applicants will be assessed.[36] In particular, it stated that it had identified five core qualities and abilities which were required for judicial office:

> **1. Intellectual capacity**

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34 D Pannick, *Judges*, Oxford University Press, 1987
35 http://www.judicialappointments.gov.uk/about/chair.htm
36 http://www.judicialappointments.gov.uk/press_release_high_ct_judges_311006.htm

- High level of expertise in your chosen area or profession;
- Ability quickly to absorb and analyse information;
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

2. Personal qualities

- Integrity and independence of mind;
- Sound judgement;
- Decisiveness;
- Objectivity;
- Ability and willingness to learn and develop professionally.

3. An ability to understand and deal fairly

- Ability to treat everyone with respect and sensitivity whatever their background;
- Willingness to listen with patience and courtesy.

4. Authority and communication skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved;
- Ability to inspire respect and confidence;
- Ability to maintain authority when challenged.

5. Efficiency

- Ability to work at speed and under pressure;
- Ability to organise time effectively and produce clear reasoned judgments expeditiously;
- Ability to work constructively with others (including leadership and managerial skills where appropriate).[37]

Detailed statistics about judicial appointments between 1998 and 2007 can be found at **Annex 1** to this paper. In particular, these statistics demonstrate the number of female and ethnic minority appointments at various judicial tiers.

B. Proposals to change the criteria for appointments

The eligibility requirements for holding a judicial appointment did not change at the same time as reforms were made to the appointments system. At present, eligibility for appointment to professional judicial office in England and Wales is 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

[37] http://www.judicialappointments.gov.uk/select/qualities.htm

length of time for which they must have been held, vary according to the judicial office concerned. 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 (and for many posts, ten years).

Proposals to reform the system of judicial appointments were first suggested in a DCA consultation paper entitled *Constitutional Reform: A new way of appointing judges*[38] published in July 2003. The proposals coincided with the Government's attempt to abolish the office of Lord Chancellor. The reforms were considered by the Constitutional Affairs Select Committee, which produced a report, *Judicial appointments and a Supreme Court (final court of appeal),*[39] in February 2004. The Committee recommended that:

> We accept that the judiciary as a whole will be improved by the recruitment of judges from a wider section of society. The problem relates to individual appointments, rather than how the judiciary as a whole should be composed. Any committed approach to increasing diversity will involve very much more than a new method of scrutinising appointments […] Flexibility in the system of selecting candidates and encouraging people to apply must not threaten—or seem to threaten—judicial independence. A career structure that involves an expectation of promotion makes it even more vital that the current freedom from partisan interference in appointing and promoting judges is maintained. […] Merit will remain the key criterion for appointment.[40]

In October 2004, the DCA published a further consultation paper entitled *Increasing diversity in the judiciary.*[41] The paper invited views as to whether the current statutory eligibility requirements constituted an obstacle to greater diversity in the judiciary. The DCA indicated that:

> 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

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38 Department for Constitutional Affairs (DCA) Consultation Paper CP 10/03, *Constitutional reform: a new way of appointing judges*

39 http://pubs1.tso.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf

40 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)* First Report Session 2003-4, HC 48-I, paras 146, 158-159

41 Department for Constitutional Affairs Consultation Paper CP 25/04, *Increasing diversity in the judiciary*.

> qualification must have been held were too long, disadvantaging those who had joined the profession later in life.[42]

In its response to the DCA Consultation Paper, *Increasing diversity in the judiciary* the Institute of Legal Executives (ILEX) was strongly critical of the current arrangements (which preclude legal executives from judicial appointments). It argued that:

> [The current requirements] unnecessarily limit the range of individuals who can access the appointments process. They do not inevitably identify suitable candidates for judicial appointment as they enable individuals with no experience whatsoever of contentious areas of law, court practice or appropriate law to access the appointments process. The current statutory approach puts solicitors and barristers in different positions, and excludes other lawyers.[43]

This approach did not appear to win the support of the Judges Council, which considered it essential that qualification as a barrister or solicitor was retained, saying that:

> There should be a statutory requirement that qualification should have been held continuously for a number of years before an applicant can be considered for any judicial appointment. The requisite period for all appointments should be 10 years. Shortening the qualification period might have an adverse effect on public perception of and confidence in the judiciary.[44]

The 10 year qualification period was also supported by the UK Association of Women Judges.[45]

The current proposals envisage opening up some appointments to legal executives. This has been welcomed by ILEX, which in its 2005 Annual Report indicated that:

> A very significant development during the year was the Lord Chancellor's decision that ILEX Fellows should become eligible to apply for judicial appointments – an enormous step forward for ILEX, and recognition for the validity of the arguments we had made about the appointments procedures for judges during previous years. We continued to press for a suitable legislative opportunity to be found to give effect to the Lord Chancellor's commitment.[46]

This proposal may cause some controversy. The Constitutional Affairs Committee raised the issue at an evidence session with the recently appointed Judicial Appointments Commission:

> **Jeremy Wright MP**: […] Presumably it is right to say that the definition of merit will include an aspect of legal experience and more general experience. In the case of the Lord Chancellor's remarks about legal executives being encouraged to apply for judicial office, do you have any concerns as a Commission that legal executives may not have sufficient legal experience or indeed legal training? If

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42 http://www.dca.gov.uk/legist/tribenforce_explanatorynotes.pdf
43 http://www.dca.gov.uk/consult/judiciary/responsecp25-04.pdf
44 *ibid*, pg 26
45 *ibid*, pg 27
46 http://www.ilex.org.uk/about_ilex/pdf_files/accounts_report_2005.pdf

> you do, is the answer to that going to be, 'Well, we can plug that gap with some form of additional training or additional professional learning which will enable them to meet the required standard'?
>
> **Baroness Prashar**: Changing the legislative criteria is very much for the Lord Chancellor and, as you know, last year he did make a statement to that effect. Of course, they are waiting for legislative time to bring about that change, and as and when that happens and legal executives become eligible to apply they will be treated like any other candidate.
>
> **Jeremy Wright**: But in treating them as any other candidate I am assuming that one of the criteria that you would apply is, "Do you have enough experience, do you have enough legal training, to be able to deal with a judicial appointment?" We all know that legal executives do not have a similar degree of formal legal training at the beginning of their careers to that of solicitors and barristers. Presumably this must cause you some concern because you will want to apply that merit criterion to all of the applicants who apply for judicial office. Is that something that is worrying you at this stage? Are you talking to the Lord Chancellor about that aspect of it, because clearly he has indicated the Government's intention to widen the field of potential applicants to include legal executives?
>
> **Baroness Prashar**: It will depend on how we assess the legal knowledge and the experience, and the other thing which I think we would want to encourage is people doing fee-paid work and expanding that area of experience. I know that Robin has some views on this.
>
> **Lord Justice Auld**: If the statutory rules of eligibility are changed then the Judicial Studies Board, which is there for this purpose, will have to do what it does for other people working in unfamiliar areas of the law who are considering application to be recorders: it will have to train them, and it will undertake that function and we shall have to assess the products of their training in the same way as we would any other newcomer to a judicial life.[47]

1. Merit and Diversity

It is almost universally accepted that appointments to the bench should continue to be made only on the basis of merit, however there have been some disagreements on how exactly merit can be defined.[48]

Sir Thomas Legg, a former Permanent Secretary at the Department for Constitutional Affairs, has argued that:

> Selection on merit can have one of at least two quite separate meanings. One of these meanings is what I have elsewhere called maximal merit. On this approach, there is only one candidate who is fit for appointment, namely the single

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47 Constitutional Affair Committee, *Judicial Appointments Commission*, 18 July 2006, HC 1554-i

48 See for example KE Malleson, *The New Judiciary*, Ashgate 1999 and *Rethinking the Merit Principle in Judicial Selection*, Journal of Law and Society Vol 33, No 1, March 2006 and also the evidence of Sir Thomas Legg to the Constitutional Affairs Committee report *Judicial Appointments and a Supreme Court (final court of appeal)*, 10 February 2004, HC 48-II 2003-04

> candidate who is judged to be the best available. This approach leaves no room at the point of decision for supplementary policies about the social and professional make-up of the judiciary. That is the approach which has been adopted up to now. It is sometimes difficult to apply, but it has represented the underlying, and usually achievable, principle.
>
> The other approach, which I have called minimal merit, is where all candidates who are judged to reach an agreed minimum standard are treated as equally suitable for appointment, and you are then entitled to select among them in accordance with any supplementary policy you happen to have, for example about a need to have more women or ethnic judges. Both of these approaches can genuinely claim to be appointment on merit, but they can lead to very different results. The concern must be that the policy implied by the paper will generate so much pressure to diversify the composition of the judiciary that it will in practice lead to numerous appointments on a basis of minimal merit.[49]

In contrast, Professor Kate Malleson has observed that in circumstances where a comparison was required between candidates who were similarly qualified in a narrow field:

> […] the maximalist approach may be modified to allow for the possibility of the application of a 'tie-break' approach to merit. This arises where two or more candidates are identified as equally qualified and one is from an under-represented group such as a women; the latter's disadvantaged status then serves as a 'tie-breaker' giving her the advantage.[50]

She has also argued that 'proactive polices' might be used to encourage a more diverse judiciary:

> The development of proactive policies to encourage a more diverse range of candidates into a recruitment or promotion pool is intended to increase the chances that candidates from under-represented groups can compete equally in the selection process, but ultimately they will be measured against all other candidates on the basis of merit. For this reason the application of proactive policies poses no threat to the fairness of the selection system as between individual candidates because they do no more than put unfairly disadvantaged candidates in the same position as advantaged candidates. Nor do they run the risk of undermining the merit principle by reducing the quality of those appointed. Indeed, by encouraging more qualified applicants to come forward and so expanding the recruitment pool, such policies should increase the competition for places and thus the quality of those ultimately appointed.[51]

In evidence to the Constitutional Affairs Committee, however, Mr Oba Nsugbe QC suggested that it would be a concern to candidates to think that minority groups could be

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[49] Sir Thomas Legg QC, *Judicial Reform: Function, Appointment and Structure*, Speech delivered at the Cambridge Centre for Public Law, 17 October 2003 and see also Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, HC 48-I 2003-04, para 149

[50] Kate Malleson, "Rethinking the Merit Principle in Judicial Selection", *Journal of Law and Society*, Vol 33, No 1, March 2006, pp126-40

[51] Kate Malleson, *Rethinking the Merit Principle in Judicial Selection*, *Journal of Law and Society*, Vol 33, No 1, March 2006, pp126-40

appointed who were not of sufficient merit.[52] He also suggested that candidates who might be well qualified might not fall within the pool in any event, due to a lack of good quality work – leading to a lack of visibility:

> I am anxious that merit is kept to the forefront […] but where I think the problems lie is where you are taking the merit from, and for me there are issues about encouraging in all four corners of the appointment constituency […] Therefore, for me you have got to get there much earlier, to people coming out of college, coming out of Bar school, coming out of law school. This means workshops, it means lecturing, it means mentoring and it means supporting those people who have got through the system so that they can play an important role in encouraging other people much, much earlier. I was fortunate. I was in a set of Chambers where we had plenty of information and there was a track record of appointments. There were lots of recorders and circuit judges, and Judge Brodrick was from our Chambers, so I got information pretty much after three or four years. I think the other issue […] is the issue of access to work because if you do not get access to the quality work and you are not tested where it really matters, with responsibility, you will not get appointed because you will not be able to point to having been through the mill, so these are all key areas that I think before you get to the issue of how wide is the pool and where is the pool, we have got to get earlier to the difficulties.
>
> […]I think targets and encouragement towards targets, yes, but positive discrimination, no, because so far as I am concerned, it would raise question marks about the credibility of an appointment if there was some suggestion that I was appointed just to make up a number.[53]

It has been argued that the current lack of diversity in the judiciary has a damaging effect on public confidence and leads to the loss of potentially talented judges.[54]

In a speech in February 2007, the Lord Chancellor stated that progress on diversity was being made. In particular, he indicated that:

> We are making progress in terms of gender and ethnic diversity. Year on year the statistics are pointing in the right direction. In 1999 only 24% of judicial appointments to courts and tribunals were women. By September 2005 this had increased to 46%. Positive trends; with the total number of female judges in courts rising from 14-18% in the last 5 years alone. More and more women are applying for and taking up judicial office, and I hope that increasing the profile of women in the judiciary, promoting more flexible working arrangements, and highlighting the new open, transparent selection procedure will encourage more women to consider a career on the bench.
>
> A similar picture emerges with those from ethnic minority backgrounds with the percentage of appointments to courts and tribunals increasing from 5% to 17% in

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52 Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, 10 February 2004, HC 48-II, Qq420-424

53 *ibid*

54 C. Banner and A. Deane, *Off with their wigs*, 2003, pp129-139

> that same period. While the percentage of judges in courts from ethnic minority backgrounds has doubled since 2001 to nearly 4% by April last year.[55]

C. Proposed changes

Part 2 of the Bill proposes to change the eligibility requirements for judicial appointments by

- removing the existing link between eligibility for judicial appointment and possession of advocacy rights;
- providing for the extension of eligibility for some appropriate appointments to holders of legal qualifications other than barristers and solicitors;
- introducing a requirement that a person with a relevant qualification must also have gained legal experience to be eligible for office; and
- reducing the number of years for which it is necessary to have held the relevant qualification and gained legal experience.

The Explanatory Note to the Bill indicates that this is being done "with the aim of increasing the diversity of the judiciary". It goes on to state that:

> 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 to 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.[56]

The relevant provisions are found between **clauses 50-56** and **Schedules 10** and **11** to the Bill**.**

In particular, **clause 50** taken in conjunction with **Schedule 10,** amends the judicial appointment eligibility conditions to allow for a reduction in the qualifying periods for appointment to certain judicial offices from ten and seven years to seven and five years respectively.

Clause 50 also sets out the "relevant qualifications" a person has to hold. **Clause 51** allows the Lord Chancellor to make an order which would "provide for a qualification specified in the order to be a relevant qualification".

That power is limited by **clause 51(2)** which restricts the qualifications which could be specified to those awarded:

- (a) by the Institute of Legal Executives, or

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55 Department for Constitutional Affairs, *Speech by Lord Chancellor and Secretary of State for Constitutional Affairs Lord Falconer of Thoroton at Wragge and Co (Birmingham)*, 1 February 2007, available at: http://www.dca.gov.uk/speeches/2007/sp070201.htm

56 Explanatory Note (Bill 65-EN)

- (b) by a body other than the Institute of Legal Executives that, when the qualification is specified, is designated by Order in Council as an authorised body for the purposes of section 27 or 28 of the *Courts and Legal Services Act 1990* (bodies authorised to confer rights of audience or rights to conduct litigation.

Clause 52 defines the meaning of "gain experience in law" for the purposes of clause 50. It states that a person "gains experience in law during a period if the period is one during which the person is engaged in law-related activities." It goes on to set out a number of broadly defined "law related activities" including:

- the carrying out of judicial functions of any court or tribunal;
- acting as an arbitrator;
- practice or employment as a lawyer;
- advising (whether or not in the course of practice or employment as a lawyer) on the application of the law;
- assisting (whether or not in the course of such practice) persons involved in proceedings for the resolution of issues arising under the law;
- acting as a mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of proceedings;
- teaching or researching law;
- any activity that, in the relevant decision-maker's opinion, is of a broadly similar nature to one of the other activities described above.

IV Enforcement by Taking Control of Goods (Bailiffs)

A. Background

The current law relating to the seizure and sale of goods is varied and complex. The seizure and sale of goods is carried out by bailiffs or enforcement officers, depending on the type of debt and method of enforcement. The Library standard note on bailiffs and enforcement officers sets out the current legal position.[57]

The Department for Constitutional Affairs (DCA) has estimated that there are currently 5,200 enforcement agents operating within England and Wales – made up of about 600 County Court bailiffs, 1,600 other state employed agents (such as tax collectors, customs officials etc), 200 local authority employed enforcement agents, 1,600 certificated private bailiffs and 1,200 non-certificated private bailiffs. It has also suggested that there are approximately 150 firms operating within the industry – many of these operating without any formal or statutory regulation.[58]

The complexity of the current law has sparked numerous calls for reform. In March 1998 the Government announced a review of civil enforcement mechanisms. *The Report of the First Phase of the Enforcement Review* was published in July 2000. It contained 40

[57] Library SN/HA 4103, *Bailiffs*
[58] DCA and Home Office, *Regulation of Enforcement Agents*, 30 January 2007, CP2/07

proposals: split into those requiring primary legislation, those requiring secondary legislation, those requiring updated guidance, and areas where change was not recommended. Secondary legislative changes, delivered through the *Civil Procedure Rules*, came into effect in March 2002. They included new rules that provide unified procedures for the High Court and County Court and aim to achieve more effective enforcement.

The Second Phase of the Review has focused on proposals for primary legislation. As part of the Review, Professor Jack Beatson QC of Cambridge University provided a report to the Lord Chancellor, *Independent Review of Bailiff Law*, which was published in July 2000. The report made 46 recommendations and called for a single new piece of legislation to regulate bailiffs. It set out the rights and remedies for creditors and debtors, recommending that debtors receive written warnings, and that guidance was provided on forcible entry.

Around the time that this report was being compiled, Citizens Advice produced a report entitled *Undue distress*[59] (in May 2000) which highlighted difficulties around the current system of enforcement.

On 6 March 2001, the Lord Chancellor broadened the scope of the Government Review enabling it to look at structures for, and the regulation of, all civil enforcement agents, meaning that bailiffs, sheriffs' officers and approved enforcement agencies could come within a new system of regulation common to all types of warrant enforcement. In July 2001, the Lord Chancellor's Department (as the Department for Constitutional Affairs was then known) produced a Green Paper entitled *A single piece of bailiff law and a regulatory structure for enforcement.* In the foreword to that document, the then Lord Chancellor, Lord Irvine of Lairg indicated that:

> This Green Paper considers proposals for the structure and regulation of enforcement and a single piece of bailiff law setting out possible new powers for enforcement agents and principles for their fees. To enable more effective enforcement it is proposed to implement data sharing arrangements analogous to those already in place in the magistrates' courts that assist in the enforcement of fines and breaches of community sentences. One of the options proposed is a regulatory framework which could encompass not just civil court warrant enforcement agents, but other private sector enforcement agents collecting money for central and local government. This represents an important step forward for the Enforcement Review and the opportunity to achieve a fundamental improvement in our enforcement system rather than a series of disparate and incomplete measures.[60]

The Green Paper invited comments on structure for the regulation of enforcement services, a single piece of bailiff law, fees, information and data sharing, and the partial regulatory impact assessment which was published as an Annex to the document.

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[59] http://www.citizensadvice.org.uk/pdfs/distress.pdf

[60] Lord Chancellor's Department, *A single piece of bailiff law and a regulatory structure for enforcement*, July 2001

In May 2002, the LCD published the responses to the Green Paper in a document entitled *Towards Effective Enforcement: A single piece of bailiff law and a regulatory structure for enforcement*.[61]

A number of other documents were presented by or to the LCD between 2002 and 2003 including *High Court Enforcement: The Compelling Need for Change*[62] and *High Court Enforcement, The enforcement review: Writs of Fieri Facias and Possession*.[63]

In March 2003, the DCA published a White Paper entitled *Effective enforcement*[64] setting out Government proposals designed to improve methods of recovery for civil court debt and commercial rent and create a single regulatory regime for warrant enforcement agents. In June 2005, following the substantial delays in implementing the reforms, Oliver Heald MP asked the Minister of State for Constitutional Affairs, Harriet Harman MP, if she would make a statement on the Department's plans to reform the law relating to bailiffs and the enforcement of fines. He received the following reply:

> **Ms Harman:** Proposals to reform the law relating to bailiffs were published in the Government White Paper 'Effective Enforcement' in March 2003.
>
> The collection of fines is a priority in increasing confidence in the Criminal Justice System (CJS). Progress has been made through a combination of legislative and non-legislative measures. The payment rate for financial impositions in 2004–05 was 80 per cent. compared to a baseline of 69 per cent. at the end of the first quarter of 2003–04.
>
> The Courts Act 2003 is being implemented during 2005–06.[65]

When the draft Bill was published in July 2006, the DCA made clear that the proposals contained within the draft Bill were, in effect, interim measures which did not fully implement the proposals to regulate enforcement agents contained within the *Effective Enforcement* paper:

> Effective Enforcement […] 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.[66]

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61 http://www.dca.gov.uk/enforcement/teeresp.htm

62 Lord Chancellor's Advisory Group on Enforcement Service Delivery, *High Court Enforcement: The Compelling Need For Change, A report to the Lord Chancellor*, October 2002

63 Department for Constitutional Affairs, *High Court Enforcement, The Enforcement Review: Writs of Fieri Facias and Possession*, July 2003, CP 12/03

64 Cm5744 available at: http://www.dca.gov.uk/enforcement/wp/index.htm

65 HC Deb 9 June 2006, c635-6W

66 http://www.dca.gov.uk/legist/tribenforce_explanatorynotes.pdf

B. Reaction

When the Bill was introduced in the Lords, a number of concerns were expressed about the provisions in relation to bailiffs, both by legal practitioners[67] and by other groups.

Citizens Advice (CAB) has been particularly critical about the proposed reforms. In a press release of 29 November 2006, David Harker, the Chief Executive, indicated that:

> We were deeply disappointed that the new Tribunals, Courts and Enforcement Bill, dropped any plans to regulate the activities of bailiffs, even though the bill will give them added powers to use reasonable force to enter premises. […] Reports from clients of intimidation, unreasonable demands and excessive charges by bailiffs are commonplace, but the system for people to complain to the county court is not working. This sort or bailiff behaviour is driving already vulnerable people deeper into poverty and debt. The new bill must be amended to include regulation to end these unacceptable bailiff practices.[68]

In a separate briefing before the second reading of the Bill in the Lords, CAB has stated that:

> Citizens Advice have long been concerned about the practices of private bailiff firms collecting and enforcing debts. Our 2000 evidence report, Undue Distress, highlighted the need to modernise and clarify the law, ensure that distress and execution for domestic debts is a last resort and set common rules for bailiffs. Citizens Advice therefore welcomes the introduction of the unified system for taking control of goods. We also welcome the abolition of the common law right to distress for rent arrears.
>
> However Citizens Advice has three key concerns about the provisions of the draft Bill in respect of bailiffs:
>
> - There are no requirements in the Bill to regulate bailiffs, as promised in the Effective Enforcement White Paper in 2003;
> - Bailiffs will have powers to force entry both to third party premises and the debtor's premises and;
> - The Bill will make it an offence to obstruct a bailiff, punishable by up to 12 months in prison.[69]

C. The Joint Committee on Human Rights

The Joint Committee on Human Rights (JCHR) expressed some concerns about the measures relating to bailiffs and enforcement. On 19 December 2006, the JCHR wrote to Baroness Ashton about a number of points. These included whether there was a risk that allowing third parties to assist enforcement agents in the execution of forced entry created a risk that debt recovery agencies might exercise their powers in a manner

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[67] See for example John Kruse, "Unwarranted Trespass", *New Law Journal*, 24 November 2006, Alan Murdie, "Don't Take the Cat, or My Rent Money!", *Justice of the Peace*, 16 September 2006, "Enforcement Bill turns 400 years of English law upside down", *Solicitor's Journal*, 21 November 2006

[68] Citizens Advice, Press Release, 28 November 2006

[69] http://www.citizensadvice.org.uk/tce_bill_2nd_reading_lords_nov_06.doc

which posed a disproportionate interference with the Convention rights of debtors and the safeguards that would be granted to debtors. The JCHR also posed questions about a number of details in the Bill that are left to delegated legislation – including the definition of property exempt from seizure.[70]

In reply, the Minister indicated, *inter alia*, that:

> I believe there are justifications for allowing third parties to assist the enforcement agent, for instance by providing assistance at large premises and preparing detailed inventories. In addition, the enforcement agent will be personally responsible for actions taken, which will include actions taken by those assisting him (other than offences against the person committed by those assisting him, in which case the assistant will be personally liable), in the enforcement of the writ, warrant or statutory debt concerned. The fact that steps can be taken personally against the enforcement agent (by way of the remedies previously outlined) should ensure that the behaviour, by both the agent and those assisting him, is not a disproportionate interference with the rights of debtors, their families or third parties under Article 8 [European Convention on Human Rights] and Article 1, Protocol 1 ECHR.
>
> […]
>
> Limits on the actions of enforcement agents will be set out in regulations, and will include the following:
>
> - certain goods will be exempt from seizure in accordance with a prescribed list;
> - there will be restrictions as to the times at which an enforcement agent will be permitted to attend a debtor's premises;
> - access to premises will be restricted to 'normal' methods (i.e. doors or French windows, and not, for example, via open windows, skylights, or by putting a foot in the door); and
> - force will only be permitted in order to restrain debtors who are actively physically obstructing or threatening the enforcement agent or resisting the taking into control of goods.[71]

Subsequently in February 2007, the Joint Committee published a report entitled *Legislative Scrutiny: Third Progress Report.*[72] The report reached a number of conclusions and recommendations about the proposals, including:

> **Certification of Enforcement Agents**
>
> 2.7 […] **We consider that the introduction of a clear regulatory framework for enforcement agents would be a valuable additional safeguard for the Convention rights of debtors and third parties affected by search and**

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[70] The full text of the letter is available at: http://www.parliament.uk/documents/upload/Letter%20to%20DCA%20Tribunals%20etc%20191206.pdf

[71] http://www.parliament.uk/documents/upload/BILLS%20%5F06%2D07%5F%2055%2D%20TCE%20Bill%20Dismore%20JCHR%20letter%2012%2D01%2D07.pdf

[72] Joint Committee on Human Rights, *Legislative Scrutiny: Third Progress Report*, Fifth Report Session 2006-7, 12 February 2007, available at: http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/46/46.pdf

seizure. We consider that, without an effective means of monitoring and regulating the execution of the invasive powers provided by the Bill, there will be a greater risk that these powers may be used in a way which leads to a breach of Article 8 ECHR. We draw this to the attention of both Houses.

2.9 The Minister explains that the Government intend that the new enhanced and extended certification process will include a requirement for Enforcement agents to undergo training in certain key areas. Enforcement agents will need a through knowledge of enforcement law and will be required to undergo training in fields such as diversity awareness, dealing with conflict (including restraint techniques) and identifying vulnerable or potentially vulnerable debtor groups. The Government consider that this training will ensure that enforcement agents are fully aware of the Convention rights of all parties with whom they come into contact. They argue that judicial oversight will ensure that, without the requisite training, certificates will not be awarded. It is intended that regulations will require that Enforcement agents will be required to meet certain conditions before being granted a certificate. These include:

• Educational qualifications;
• The level of approved training that has to be undertaken;
• Compulsory criminal records checks;
• References;
• That the applicant is not an undischarged bankrupt or involved in certain trades (such as the buying and selling of debt).

2.10 Regulations are expected to require a security bond of £10,000 to be lodged and will provide for a complaints system which will be administered by the court which issues certificates. The court will have the power to impose sanctions on a certified enforcement agent and will be able to award compensation to the complainant.[73] The Minister explains that although these provisions will provide valuable safeguards for the rights of debtors and third parties, that "for reasons of flexibility" she would prefer to leave such details to secondary legislation.92 The possible condition for certification mentioned by the Bill is the requirement for fees to be paid and for security to be provided.

2.11 **We consider that the conditions which the Government intend to place on applicants for certification to act as an enforcement agent will provide valuable safeguards for the rights of debtors and third parties to respect for their private life and their rights to peaceful enjoyment of their property. The requirement that individuals exercising powers of entry, search and seizure will be subject to supervision will be a significant factor in ensuring that the powers in the Bill are exercised in a manner which is proportionate. However, none of these safeguards are on the face of the Bill. We draw this to the attention of both Houses.**

2.13 […] **We recommend that the Bill be amended to provide that no certificate will be issued unless each of the criteria identified by the Government in their response is satisfied, including the requirement that an individual applicant satisfy training and educational requirements (which may be further elaborated in Regulations) and that the Court shall have the**

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[73] DCA, *Detailed Policy Statement on Delegated Powers*, p29.

power to determine complaints against certified enforcement agents, including the power to impose sanctions and to award compensation. We draw this to the attention of both Houses.

2.15 We note that an individual may act as an enforcement agent – including in the exercise of forced entry – if he acts in the presence, and under the direction of, a person who is a certified enforcement agent.[74] […] **We recommend that Clause 55 [Now Clause 58] of the Bill be amended to provide that only certified enforcement agents (or those specifically exempted from certification by the Bill) are to be treated as enforcement agents for the purposes of the statutory powers created by the Bill. We draw this to the attention of both Houses.**

Powers of Entry Search and Seizure

2.16 […] **If powers of entry without a warrant are intended to be limited to the premises identified by the information in the relevant judgment, warrant or writ, we consider that this should be clearly expressed on the face of the Bill. We recommend that the Bill be amended accordingly.**

2.17 **In any event, we recommend that the Bill should require the Secretary of State to issue statutory guidance to enforcement agents on the bounds of their powers, and if necessary, that guidance should specifically address the evidence needed to form a "reasonable belief" that a debtor "usually lives" at a property or "carries on a trade or business" there. We consider that it is important to ensure that these new statutory powers are not misunderstood, or misrepresented, in order to protect the rights of debtors' families and third parties against unnecessary or disproportionate invasions of their right to respect for their private life. We draw this to the attention of both Houses.**

Use of reasonable force

2.19 […] The Government proposed an amendment to this effect for consideration at Report stage in the House of Lords. After representations by both the enforcement industry and the debt advice sector, the Minister withdrew this amendment. There was some concern that restricting the right to use force to effect re-entry would encourage enforcement agents to seize goods on a first visit, rather than enter into a walking possession agreement. The Minister was concerned that vulnerable debtors would still need protection in domestic premises. She undertook to think again, and suggested that further protection could be offered in secondary legislation. **We welcome the Government's proposed amendment to clarify that the use of force to gain re-entry to premises used to carry out a trade or business without a warrant does not extend to the use of force to enter a dwelling or to do anything in a dwelling. We consider that this amendment will ensure that reasonable force is not used by any certified enforcement agent to access any premises used in whole, or in part, as a residential property, without prior judicial authorisation. We consider that this amendment would provide a valuable safeguard for the rights of debtors and third parties to respect for**

[74] Clause 55 [Now Clause 58]

> **private life and home, as guaranteed by Article 8 ECHR. We draw this to the attention of both Houses.**
>
> 2.22 […] **We consider that the authorisation of the use of force against persons by statute is a particularly serious matter which requires clear conditions and close Parliamentary scrutiny. We note the Minister's reassurance that any enforcement agents and their assistants "remain subject to the law when carrying out their duties" and that, for example, they may be prosecuted for assault. We recommend that the Bill be amended to limit the Secretary of State's power to extend the use of force to include the use of force against persons, to circumstances where that force is necessary and used in a "restraining capacity to enable an enforcement agent to carry out his lawful duties without threat of physical interference or harm" and to prevent the use of force by anyone other than a certified enforcement agent. We consider that these limitations will reduce the risk that the provisions may be exercised in a manner which may lead to a risk of incompatibility with the individual right to physical integrity guaranteed by the right to be free from inhuman and degrading treatment and the right to respect for private life (Articles 3 and 8 ECHR). We draw this to the attention of both Houses.**
>
> Other safeguards
>
> 2.31 **We reiterate our view that where safeguards are necessary to ensure the protection of Convention rights, those safeguards ought to be clearly identified on the face of the Bill. In cases where the State is using, or authorising the use of, intrusive powers such as entry, search and seizure, we consider that the case for including minimum safeguards (such as the requirement that an enforcement agent should identify himself and the authority for his entry the premises to an occupier without need for a request; the minimum period of notice required; the requirement that entry take place at a "reasonable" time, and protection for material subject to legal professional privilege) on the face of primary legislation is particularly strong. We draw this to the attention of both Houses.** [75]

D. Other Provisions

The relevant provisions relating to enforcement officers and bailiffs can be found at **clauses 57-65** of the Bill, while **Schedules 12** contains details provisions about taking control of goods – including entry to a debtor's premises (with or without a warrant), re-entry and powers to use reasonable force.

The Schedule prescribes the entire process to be followed by enforcement agents when taking control of goods and selling goods.

In respect of the latter, Schedule 12 provides that an enforcement agent would be obliged to "provide the debtor with an inventory" of the items he has taken control of and that he would have to "take reasonable care of the controlled goods" that he removes.

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[75] *ibid*

The Schedule contains some safeguards in relation to the sale of goods that have been removed (at Schedule 12, paragraphs 37-43).

Clauses 66-82 relate specifically to commercial rent arrears recovery (CRAR). The Explanatory Note to the Bill states that:

> 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.[76]

The Explanatory Note goes on to say that the while the Government agrees with the Law Commission that distress for rent has a number of features which make it inherently unjust to tenants, third parties and other creditors, the Government accepts that distress for rent has been "an effective remedy for recovering rent arrears, particularly for commercial properties".

Clause 66 would abolish the common law right to distrain[77] for rent arrears. Instead the procedure (set out at **Schedule 12**) could be used by a landlord leasing commercial premises to recover from the tenant the rent payable. Commercial premises are tightly defined at **Clause 70** and requires that none of the premises is occupied or sublet as a dwelling.[78]

E. The *Regulation of Enforcement Agents* Consultation Paper

On 30 January 2007, the DCA and Home Office unexpectedly published a consultation paper on the regulation of enforcement agents.[79] The consultation is scheduled to end on the 25 April 2007. The paper proposes a number of different methods of regulating enforcement agents and bailiffs than are currently contained in the Bill (which has been described as an "interim measure" – see above). Whilst three separate options are suggested, the Government makes clear that its preferred option is that civil enforcement agents will in the future be regulated by the Security Industry Authority (SIA).

The consultation paper states that:

> At the time of the White Paper *Effective Enforcement* published in March 2003, the Security Industry Authority (SIA) was considered as a means of establishing a regulatory regime. However, it was at that time a new organisation, still establishing its position and dealing with those security sectors for which it was already responsible, so it was not then well placed to regulate this sector. Now, as a well established regulator, we consider the SIA is better placed to regulate in this area, and it has contributed to the development of this consultation document.[80]

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76 Explanatory note (Bill 65-EN)

77 Distrain means to seize someone's property to obtain payment of rent (OED)

78 As long as the relevant sublease is not a breach of the superior lease

79 Department for Constitutional Affairs and Home Office, *Regulation of Enforcement Agents*, 30 January 2007, CP2/07

80 *ibid*, pg 3

The inter-relationship between the provisions in the Bill and the proposals contained in the consultation paper was raised at Report Stage in the Lords. Baroness Ashton indicated that:

> After the consultation ends on 25 April 2007, and after the work that will ensue as a consequence, the Home Office will lay before the House, before the Summer Recess, the necessary affirmative order. Following the making of that order, the Home Office and the SIA will take the regulation forward towards implementation, and we will be consulting with the stakeholders. I have made sure that the wheels are in motion. The Bill currently provides and interim solution while we work towards this through the enhanced and extended certification process.[81]

This was discussed at Third Reading of the Bill in the Lords, where Lord Lucas stated that:

> Perhaps I may start by being nice and saying that the Minister and her whole team have been immensely helpful in dealing with bailiff regulation since the Bill first appeared. I am grateful to them for their time and effort. However, I think that they have taken a severe wrong turning in trying to cobble together a regulator out of the Security Industry Authority and various other bits of legislation that they happen to have lying around. […] The Government have chosen to go for a mix of Security Industry Authority and existing DCA powers to try between them to provide for a regulator that will come up to scratch in regulating bailiffs. It will clearly take a long time to get there. Today I am aiming, not to impose on the noble Baroness my own idea of what a regulator should be – I hope that this is a fight that will carry on into the Commons and that they might do that – but to obtain from the Government a commitment to see the matter through to the end.[82]

In reply, Baroness Ashton said:

> What I cannot commit to is a 12-month timescale because I do not yet know what the timetable will be. However, I can make a commitment to lay the regulations before Parliament. That in itself will give us another opportunity to consider and debate in more detail what is to happen. […] Our proposal means that all enforcement agents who are not Crown employees will be licensed by the SIA and that there will be no exceptions. […] I should add that licensing will also apply to managers and supervisors in companies directing enforcement activity. […] On punishment for failure to comply with standards and redress, as I said on Report, a whole range of offences is set out in the Private Security Industry Act and specified penalties where any person contravenes a condition of the licence granted to him. The penalty for this is a term of imprisonment not exceeding six months, a fine not exceeding £5,000, or both. The SIA also has the power to revoke or modify licences. These sanctions represent the most serious end of the scale, of course, and I understand that the SIA also uses sanctions such as written warnings and improvement notices as part of its compliance activity.[83]

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81 HL Deb, 31 January 2007, cc287-288
82 HL Deb, 20 February 2007, c1013
83 HL Deb, 20 February 2007, c1016

V Enforcement of Judgments and Orders

A. Current difficulties in enforcing judgments

The need for additional enforcement measures to enable successful litigants to enforce civil judgments has been an issue for some time. A number of these issues were addressed by the *Effective Enforcement* White Paper, and many of the proposals in it were considered by the Constitutional Affairs Committee in its inquiry into the small claims procedure in the county court.[84]

The Committee indicated that:

> The enforcement of judgments has been identified as a problem by almost all our witnesses.
>
> Professor John Baldwin was a strong critic of the current procedure, stating that:
>
> "In my own research on this question, only a minority of the claimants who succeeded at small claims hearings received payment from the other party in full and in the time specified in the court order. A substantial minority received nothing at all. Nor are the court-based enforcement options very effective in securing payment. In my view, ineffective enforcement procedures undermine the credibility and integrity of the civil courts—and the credibility and integrity of small claims—more than any other factor."
>
> Moreover, the extent of the problem could also be underestimated, since certain categories of defendant, such as insurers, almost certainly pay 100% of the time. This gives the impression that there is a core of individuals or companies who either cannot, or will not, pay judgments which have been entered against them.[85]

The Committee indicated that it had considered the Department's Civil Enforcement Review (discussed above), which commenced in 1998 and the various proposals which followed, including:

- Widening access to charging orders (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);
- The introduction of fixed tables for attachment of earnings (AEO) orders (where county court fixed tables would specify, given the debtor's net pay over a certain pay period, a percentage of their salary that would be deducted each period to pay for the debt);
- An Attachment of Earnings Orders Information Gateway (which would open a legislative link between the civil courts and Her Majesty's Revenue and Customs (HMRC)) so that where a debtor was subject to an AEO and failed to inform the

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84 Constitutional Affairs Committee, *The courts: small claims*, First Report Session 2005-6, HC 519
85 *ibid*, paras 29-30

court that they had moved to another employer, this would allow the debtor to be traced to their new job;

- The Data Disclosure Order (DDO), which would be a new mechanism enabling the court to seek information on a judgment debtor who had failed either to respond to the judgement or to comply with court-based methods of enforcement. Information would be sought from relevant third parties in both the public (HMRC and Department for Work and Pensions) and private (banks and credit reference agencies) sectors, to help the creditor make an informed choice about how to enforce a judgment.

The Committee concluded that:

> We are pleased that the Department is coming forward with new ways for successful litigants to enforce their judgments. It is obvious that this has been an area of substantial weakness in the past and therefore the new measures should be introduced as expeditiously as possible.
>
> Given the considerable criticism of the current procedures, it is essential that the Department monitors the success of the new proposals once they have been introduced, to ensure that litigants gain proper access to justice and not simply unenforceable judgments which must reduce confidence in the entire civil justice system.[86]

When the Government produced the *Draft Tribunals, Courts and Enforcement Bill*, it indicated that it would allow "creditors with claims in the civil court [to] enforce their judgments more effectively."[87]

B. Proposals to enhance current enforcement powers

1. Charging Orders

Some concerns have been expressed about the Government's proposals in relation to charging orders.

Much of the law relating to charging orders can be found in the *Civil Procedure Rules* (CPR). CPR Pt 73 came into force in March 2002 and replaced Schedule 1 to the *Rules of the Supreme Court*, Order 50 and certain other provisions. It contains the necessary procedural rules to give effect to the *Charging Orders Act 1979*.

Section 1 of the 1979 Act provides that where a judgment debtor is required to pay a sum of money to a judgment creditor then for the purpose of enforcing that judgment or order, the "appropriate court" may make an order imposing on any property of the debtor specified in the order, a charge for securing the payment of any money dues under the judgment or order. Such an order must be in accordance with the provision of the 1979 Act.[88]

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86 *ibid*, paras 38-39

87 http://www.commonsleader.gov.uk/OutPut/Page813.asp

88 For further information about the procedures, see p1854 of *The White Book*, *(Civil Procedure Volume 1)* Sweet and Maxwell, 2006.

Under section 2 of the *Charging Orders Act 1979* a charge may be imposed by a charging order only on—

> (a) any interest held by the debtor beneficially […]
> or
> (b) any interest held by a person as trustee of a trust ("the trust"), if the interest is in such an asset or is an interest under another trust and—
> (i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust, or
> (ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit….

The *White Book* on Civil Procedure advises that:

> The use of the word "may" clearly imports a discretion, though of course a judicial one. The order is likely to be refused if it would be oppressive for example if the debt appears too small to justify the remedy [...][89]

The purpose of a charging order is not to secure immediate repayment but to safeguard the money for the future. It means that if the property is sold, the charge has usually to be paid first before any of the proceeds of the sale can be given to the debtor. However, if there is already a charge on the property, for example, arising from a mortgage, then that charge will be paid first. It should also be noted that a charging order does not compel the judgment debtor to sell the property.

Under CPR 73.10, it is open to the person who has obtained the charging order to return to court and seek to enforce the sale of the property. This requires a separate application and the *White Book* provides the following information:

> It is one thing to make a charging order giving security to the judgment creditor and quite another thing to order a sale of the judgment debtor's property. Just as the Court has discretion whether or not to make the charging order so it has discretion whether or not to order the sale. It would be an extreme sanction and all circumstances would have to be considered. Where the property is the debtor's home the Court will have to consider the provisions of Art. 8 of the European Convention on Human Rights [Right to Privacy, Family Life, Home and Correspondence] […]To order sale is a draconian step to satisfy a simple debt and is likely to be ordered for example in a case of the judgment debtor's contumelious[90] neglect or refusal to pay or in a case where in reality without a sale the judgment debt will not be paid […] Even where a sale is ordered the Court could suspend the order on terms as to payment by instalments or postpone the sale until a specified future date […][91]

As can be seen from the above, a creditor who has not sought security for a loan is therefore not in the same position as the holder of a secured loan, such as a mortgage.

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89 *The White Book, (Civil Procedure Volume 1)* Sweet and Maxwell, 2006, p1858, para 73.4.2
90 Scornful or insulting (OED)
91 *The White Book, (Civil Procedure Volume 1)* Sweet and Maxwell, 2006. pp1863-4, para 73.10.1

In particular, he would have to make a number of applications to the courts, which would then consider the debtor's circumstances and proportionality of the orders sought.

2. Debate

The Lord Chancellor, Lord Falconer, set out some of the Government's rationale for enhancing enforcement powers at the second reading debate in the Lords, indicating that:

> Part 4 [of the Bill] aims to ensure that creditors receive the money to which they are properly entitled. Clause 83 [now **Clause 86**] will simplify and streamline the arrangements for deducting payment of a judgment debt direct from a debtor's salary. In future, deductions from salary will be made according to fixed rates, as they are for council tax debtors, rather than on an individual case-by-case basis. A further difficulty which Part 4 seeks to address is the lapse of these orders where debtors change employers. Currently, the court depends on the debtor to provide up-to-date information. This is unsatisfactory, so Clause 84 will allow Her Majesty's Revenue and Customs to provide the court with the new employer's details in such cases.
>
> Clauses 85 and 86 [now **Clauses 88-89**] in Part 4 also make changes to the law governing charging orders. In particular, they close a loophole in the current law that prevents the sale of a charged property if the debtor is maintaining payments under an instalment order. Part 4 will also help the civil courts track missing judgment debtors. It cannot be right for those who owe money and have a judgment made against them to avoid payment by going to ground. Clauses 87 to 94 [now **Clauses 90-97**] therefore include measures to allow the courts to seek information about a debtor from Her Majesty's Revenue and Customs and a designated Secretary of State. The Secretary of State for Work and Pensions is likely to be designated for those purposes. The courts will also be empowered to request information from other bodies designated in regulations made by me to assist in the enforcement of judgments. We anticipate that banks and credit reference agencies will be designated for those purposes. Safeguards are built into the process in Clause 94 [now **Clause 96**] in the form of new offences to ensure that information collected in this way is not abused.[92]

In response, Lord Kingsland indicated that:

> On the enforcement of judgments to the attachment of earnings orders, as I understand it, the experience in magistrates' courts has been very good. Deducting fixed sums has been an innovation which, rightly now, should be used more widely. But it is a bewildering area because it is extremely difficult to find out exactly the financial circumstances of any individual. Therefore, inevitably, deciding on the fixed sum that is paid over any given period will always be a bit of a stab in the dark, which we have to accept as perhaps an adverse consequence of an otherwise very good system.
>
> I note that there is a related issue of charging orders. As I understand it, under current law, if a court has made an order for an instalment payment, that

[92] HL Deb, 29 November 2006, cc765-766

> precludes, at the moment, the making of a charging order, because a charging order is a form of execution. Under the *County Courts Act*, I think that I am right in saying that if someone is up to date with their instalment payments, they are free of execution. The Government have changed that. However, that will probably work provided the threshold level is right. There should be a threshold before a charging order is made, which is the safeguard that we would like to see to deal with that problem.[93]

Citizens Advice has expressed concerns about the proposals to amend the charging order regime. It has stated, *inter alia*, that:

> Citizens Advice is concerned that making Charging Orders much easier to obtain will encourage more creditors to take court action rather than accept an affordable repayment offer from a person in financial difficulties. We believe that the importance of this approach is recognised by current best practice in the credit industry. For instance, The Banking Code (a voluntary code governing the practices of most UK banks, building societies and card issuers) states that people in financial difficulties should be treated 'sympathetically and positively'. The code states that where a person in such circumstances makes an offer of payment based on certain industry agreed figures (known as the common financial statement trigger figures) then this should be accepted by a banking code subscriber as the basis for drawing up a debt repayment plan.
>
> The Department for Constitutional Affairs (DCA) has itself been recently piloting an initiative (known as a Pre Action Notice) that is aimed at getting debtors and creditors to negotiate a settlement (such as repayment instalments on a debt) rather than using the county court where this is possible. The practices and initiatives outlined above are all aimed at reducing the financial and emotional costs of debt through good practice and creditor/debtor dialogue where this is possible. Our concern is that this reform of the Charging Order provisions will undermine this good work by making court action look far more attractive as an alternative to good practice in arrears management.
>
> In the White Paper preceding this Bill, the Government argues that this reform should 'result in debtors making reasonable yet affordable offers, because creditors are more likely to accept them if they will have access to security to back it up'. Our argument is that lenders following industry standards of good practice should be accepting these offers in any event. In this respect the reform could favour those lenders who do not wish to follow good practice and who will seek to secure their debt first. By rewarding bad practice, this reform could actually result in an increase in the sort of unnecessary court action that the DCA is trying to address elsewhere. In such an environment, what sensible creditor would stand by and see their good practice undermined; a rush of creditors scrambling to take their place in the Charging Order queue could follow.
>
> Therefore Citizens Advice believes that the Bill should be amended to add safeguards against unnecessary or overly aggressive court action by creditors.

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93 *ibid*, cc796-7

> As the barriers to enforcement action are being lowered by the Bill, these safeguards will need to be placed at a pre-court stage.[94]

The issue of charging orders was also raised at Grand Committee by Lord Thomas of Gresford. He raised a number of points:

> The issue which arises is the possibility that this Bill permits an unsecured creditor to obtain a security for his debt. When an unsecured creditor lends money or provides goods, he incorporates in the price the concept that they are unsecured. If a secured debt were created, no doubt the cost of it to the debtor would be cheaper. The Bill gives to an unsecured creditor the value of security. Generally speaking, for people who are not very well off it means a charging order on their home. Clause 85 [now **Clause 88**] introduces changes to the *Charging Orders Act 1979* which provides creditors with a way of enforcing a court judgment by placing a charge on the debtor's property […] So the creditor who uses this procedure can secure a previously unsecured debt. A creditor who obtains a charging order can obtain a court order to sell off the assets subject to the charge, although such sale orders are comparatively rare. The Bill proposes that even though there is an agreement between the creditor and the debtor for the repayment of the debt by agreed instalments, and even though the debtor is keeping up those instalments, nevertheless the creditor can obtain a charging order and thereby ultimately, if necessary, sell off the debtor's home.[95]

In response, Baroness Ashton indicated that:

> A judge would determine that an order should be made absolute. Very few, if any, examples occur of a judge deciding that a home will be sold. We have charging orders to enable us to recognise different circumstances. Not all debtors are the poorest of people. Different debtors have different assets. An order for sale will not be permitted under regulations in the Bill if the instalment arrangements are kept up to date. That must be somewhere in the policy statement. If it is not, I shall make sure that it is added […] The charging order secures the judgment, but not the debt. We are not seeking to allow people who have unsecured debts and who have made their own charging arrangements to bring in another arrangement through the back door. There is no conflict with the *Consumer Credit Act*. Under the charging orders the court will have the power to grant a timed order, although it does not have to. […] We are trying to prevent a situation arising where once the asset is sold, it is too late. You cannot get a charging order against something that does not exist. Although there are people for whom this might not be appropriate, there are also people who are paying off debts who have assets, and it might be appropriate to make sure that if they moved to sell those assets the debt would be recognised. That is all we are seeking to do.[96]

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[94] http://www.citizensadvice.org.uk/index/campaigns/social_policy/parliamentary_briefings/pb_consumerandebt/tribunals__courts_and_enforcement_bill__charging_orders_

[95] HL Deb 14 December 2006, c120GC

[96] *ibid*, cc121-122

VI Debt Management Schemes

Part 5 of the *Tribunals, Courts and Enforcement Bill* would make changes to two statutory debt-management schemes (administration orders and enforcement restriction orders). Part 5 also contains measures which would provide debtors who are unable to pay their debts with relief from enforcement and discharge from their debts. In addition, Part 5 contains provision for certain non-court based measures to help over-indebted persons and those with multiple debt situations manage their indebtedness. This paper will only consider the proposed introduction of new "Debt Relief Orders" (DROs).

The explanatory note to the Bill set out some background to the proposal:

> 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.
>
> 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.
>
> 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.[97]

A. The 2005 Consultation Paper

As mentioned above, the proposals in relation to debt relief orders originate from a 2005 consultation paper entitled *Relief for the indebted – An alternative to bankruptcy*, which was published in March 2005 by the Department for Trade and Industry.[98] The paper followed an earlier paper by the DCA entitled *A Choice of Paths – Better Options to manage over-indebtedness and multiple debt*. The DTI indicated that following the DCA consultation, it had come to believe that:

> […] for some people who get into debt, the solutions that are available are not appropriate. Such people have a relatively low level of liabilities, no assets over and above a nominal amount and no surplus income with which to come to an arrangement with their creditors.

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[97] http://www.publications.parliament.uk/pa/ld200607/ldbills/005/en/07005x-b.htm#index_link2_122

[98] http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/consultationpaperwithnewannex1.pdf

> We believe that there is a perceived need to offer a remedy for such people. This paper looks at one way in which this could be achieved by presenting proposals for a non court based scheme of debt relief aimed at people who have no assets, a relatively low level of liabilities and no surplus income with which to pay creditors.[99]

The DTI paper set out details of a proposed No Income, No Assets (NINA) debt relief scheme, stating that it would entail the making (administratively) of a Debt Relief Order which would ultimately result in the debtor being discharged from his debts after a period of one year – without any routine judicial or court intervention. Instead official receivers (ORs) attached to the court would administer the scheme. The Official Receiver would only carry out an investigation into the debtor's affairs if a creditor made a *prima facie* valid objection to the making of an order on specified grounds (such as failure to disclose assets, income or debts). The entry criterion suggested was debts of less than £15,000 – where the debtor had surplus income of no more than £50 per month after meeting necessary daily living expenses and no realisable assets over £300. The DTI stated that:

> The proposed "NINA" scheme is aimed at people who have no assets, very little income and a relatively low level of liabilities – that is those people who, because of their financial position, cannot access any of the debt solutions that are currently available (i.e. bankruptcy, individual voluntary arrangement, county court administration order or debt management plan). Some of these people manage to apply for a bankruptcy order, and thus obtain debt relief, by obtaining a grant from a charity or by getting the money from friends or family.[100]

It suggested that from a creditor's point of view, while the proposed scheme did not seem to offer very much, the type of debtor who would be able to use a debt relief order would "realistically be extremely unlikely to be able to pay even a portion of his debt within a realistic timescale".[101]

It went on to suggest certain safeguards be implemented where there was suspected misconduct on the part of a debtor (such as the imposition of bankruptcy restriction orders – a civil remedy imposing restrictions as regards the conduct of the bankrupt, such as restrictions on obtaining credit, that apply for between 2 and 15 years). The paper also indicated that where a debtor obtained an increase in income or "windfall", creditors would be able to secure payments.

B. Subsequent developments

When the Draft Bill was published in July 2006, "Debt Relief Orders" were amongst the proposals contained in Part 5. The DCA indicated in the Draft Bill that to maintain a low level of administrative costs (and therefore entry fee) the facility to apply for a Debt Relief Order (DRO) would only be available online. This condition was repeated in the Bill as introduced in November 2006.

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[99] *ibid*, pg 2
[100] *ibid*, pg 18
[101] *ibid*, pg 31

The effect of an order would be to prevent creditors from enforcing their debts and the debtor would be discharged from the debts after a period of one year. Creditors would be notified of the making of an order and would have a right to make objections on certain grounds if they believed the order should not have been made (see above).

Citizens Advice made some comments on the debt relief provisions of the Bill in time for Second Reading in the Lords. It indicated that:

> For many CAB clients with substantial debts and no available income to pay their creditors or those whose debts will take a lifetime to repay (our 2006 report, *Deeper in debt*, found that CAB clients who could make offers to their creditors would take an average of 77 years to repay their debts), insolvency remedies, such as bankruptcy and administration orders, which provide for full or partial debt write off, can be a suitable way forward. In our 2003 evidence report, *In too deep*, we highlighted the problems our clients faced in accessing these remedies and argued for the need for a joined up approach to all insolvency remedies to create a system of effective and sustainable debt settlement, as happens in other European states.
>
> Citizens Advice believes that, in particular, the Debt Relief Order proposals have the potential to help a substantial proportion of CAB clients, many of whom are vulnerable and on low incomes. Long-term repayment schemes are often inappropriate for people with multiple debts and low disposable incomes. CABx often report the hardship that debt clients experience when attempting to maintain small token repayments, often to a large number of creditors, for a protracted period.[102]

The *Detailed Policy Statement on Delegated Powers*, published in December 2006 makes plain that the limits consulted on (namely a limit on indebtedness of £15,000, a limit on the debtor's surplus monthly income of £50 and the limit of the debtor's property of £500) will be retained, although with the proviso that these are "initial" figures. None of these amounts has been included in the primary legislation and the Department has acknowledged that the figures will be "kept under review".[103]

VII Protection of Cultural Items

A. Background

Part 6 of the Bill, as introduced into the House of Lords on 16 November 2006, provides immunity from seizure to objects which have been lent to the UK 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 owned by a person who is not resident in this country (or an institution located outside this country) which are lent for temporary exhibitions to the public at any museum or gallery within the UK. These provisions were not contained in the draft Bill which was put out to public

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[102] http://www.citizensadvice.org.uk/tce_bill_2nd_reading_lords_nov_06.doc

[103] Department for Constitutional Affairs, *Tribunals, Courts and Enforcement Bill: Detailed Policy Statement on Delegated Powers*, December 2006, pp52-53

consultation earlier in 2006. Although the original intention was to introduce such measures in the UK via clauses in a Bill implementing the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, they have now been incorporated instead into the *Tribunals, Courts and Enforcement Bill [HL]*.

Clause 129 of the present Bill as brought to the Commons defines the conditions that need to be met for an object to be protected from seizure and specifies where and for how long the protection will be given. **Clause 130** specifies the effect of the protection and sets out the limited circumstances under which it will not be given. Importantly, 130(1) provides 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. The example given in the Explanatory Notes is where a 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.[104] **Clause 131** defines "museum or gallery" for the purposes of the Act and stipulates that only objects which are loaned to those institutions that have been approved by the relevant authority will qualify for immunity under the Act. Further interpretation provisions are contained in **clause 132**. Finally, **clause 133** 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.

A Partial Regulatory Impact Assessment on these measures provides background:

> This issue first arose in November 2005 when works of art from the Pushkin Museum in Moscow were seized at the Swiss border at the request of the trading company Noga on the grounds of a claimed Russian government debt. The items were later released, following the intervention of the Swiss national government but the Russians have become increasingly nervous about lending to the UK and other countries without protection from seizure legislation. Other countries are also insisting on such safeguards.
>
> In the absence of legislation guaranteeing immunity from seizure the UK is unable to satisfy such requests. The *State Immunity Act 1978* provides some protection for works of art lent to exhibitions in this country where such works are state owned. However, this protection does not apply to property which is in use, or intended for use, for commercial purposes. The application of the Act to works of art which are lent to this country for exhibitions is not entirely clear. In addition, the protection given by the 1978 Act does not extend to works borrowed from private collections.[105]

At the centre of discussions about the international movement of art objects is the concept that museums should be diligent in ensuring that they acquire or borrow only ethically acceptable items and reject items that might have been looted or illegally exported. In this spirit, the Department for Culture, Media and Sport (DCMS) published

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104 http://www.publications.parliament.uk/pa/ld200607/ldbills/005/en/index_005.htm

105 DCMS, *Partial regulatory assessment*, March 2006, http://www.culture.gov.uk/NR/rdonlyres/8B7E39CB-8CD8-4060-ADEF-0EB24E53320A/0/Partial_Regulatory_Impact_Assessment.pdf

"due diligence" guidelines in 2005.[106] The guidelines build on standards already disseminated such as the Museums Association's Ethical Guidelines on Acquisition[107] and the Spoliation Guidelines of the National Museum Directors' Conference.[108] Endorsed by the professional bodies representing museums, libraries and archives, the DCMS guidelines advise that:

> Museums should acquire and borrow items only if they are legally and ethically sound. They should reject an item if there is any suspicion about it, or about the circumstances surrounding it, after undertaking due diligence. Documentary evidence, or if that is unavailable an affidavit, is necessary to prove the ethical status of a major item. Museums should acquire or borrow items only if they are certain they have not been illegally excavated or illegally exported since 1970 (p4).

The 1970 threshold is adopted as a "practicable watershed", not least because that year marked UNESCO's adoption of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property* (p4).

"Due diligence" is deemed to involve five components:

- initial examination of item
- consider the type of item and likely place of origin
- take expert advice
- determine whether the item was lawfully exported to the United Kingdom
- evaluate the account given by the donor (pp8-9)

(Note that this advice is framed in terms of acquisitions rather than loans.)

Subsequently, from March to May 2006, DCMS ran a consultation on proposals for possible anti-seizure legislation.[109] The document contains numerous examples of objects in foreign ownership which have been withheld from exhibitions in the UK because the host institution was unable to give a guarantee that the work would not be liable to seizure. Consultation questions covered such matters as whether immunity should be automatic or depend on an advance application providing detailed information on the objects for which immunity is required, and whether immunity should extend to all institutions or be restricted to defined categories. Only 23 responses were received, mostly from museums and galleries, the majority supportive of introducing legislation in this area. According to a Departmental summary of responses, most respondents felt that the granting of immunity should be automatic, rather than relying on an advance

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106 DCMS, *Combating illicit trade: due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material*, October 2005, http://www.culture.gov.uk/NR/rdonlyres/721E9365-38BE-4AF8-BF8D-BE5B4BF8B21C/0/CombatingIllicitTrade_v5.pdf (subsequently referred to by page number)

107 Museums Association, *Acquisition: guidelines on the ethics and practicalities of acquisition*, 2004, http://www.museumsassociation.org/asset_arena/text/ns/ethicalguidelines_acquisitions.pdf

108 http://www.nationalmuseums.org.uk/spoliation.html. "Spoliation" is the term conventionally used to refer to the misappropriation of works of art and other cultural objects during the Holocaust and World War II.

109 DCMS, *Consultation paper on anti-seizure legislation*, April 2006, http://www.culture.gov.uk/NR/rdonlyres/1E4A4FF8-C515-4F95-9B75-D0090579266B/0/Consultation_paper_on_antiseizure_legislation.pdf

application. Consultees, in the main, also took the view that potential claimants should not be given an opportunity to object to the grant of immunity in relation to a particular object, on the grounds that an application system would be administratively complex and could threaten delays to major exhibitions.[110] The most obvious dissenting voice in the consultation was that of the Commission for Looted Art in Europe, which argued that, if implemented, the proposals in the paper "would make the United Kingdom a safe haven for stolen, illicitly traded, criminally acquired and looted works of art well as for those who have assets but unpaid debts".[111]

The consultation paper includes a useful annex summarising protection measures currently in place in other countries.

B. Lords proceedings

At Lords second reading, Lord Falconer described the Part 6 provisions as follows:

> Part 6 covers an entirely separate category to the rest of the Bill. It will provide immunity from seizure for cultural objects that are lent to the United Kingdom for temporary exhibitions to the public at any museum or gallery that is approved by the Secretary of State. We currently have no such anti-seizure legislation, and foreign lenders are becoming increasingly reluctant to lend works of art to the United Kingdom. The problems that that may cause were illustrated by the seizure, in 2005, of 55 Russian impressionist paintings on loan to an exhibition in Switzerland, under a court order obtained by one of Russia's creditors. That places us at a serious disadvantage compared with other countries, which will ultimately limit our museums' ability to stage major exhibitions.
>
> Our museums are already having problems in arranging exhibitions. An important Chinese exhibition planned by the British Museum for 2004 was cancelled after a major loan from Taiwan could not be secured because the lender could not be assured that the material would be protected from seizure while it was in the United Kingdom. The immunity that we propose will be for only a temporary period and will apply only to works of art that are to be put on public display. It will not apply to objects that are coming here for sale, or objects on long-term loan to museums. Works of art that are usually kept in the United Kingdom, or are owned by a UK resident, will not qualify for protection. The immunity will only provide protection from seizure. It will not protect museums in the UK or lenders from being subject to a claim in conversion.[112] Specific restitution of a work of art being claimed is only one of the remedies that the court can award; it can also award damages.
>
> The immunity will only be given to museums and galleries approved by the Secretary of State for Culture, Media and Sport. We will be looking very carefully

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110 DCMS, *Consultation on anti-seizure legislation: summary of responses*, http://www.culture.gov.uk/NR/rdonlyres/D702DCD5-5FB1-4FD4-BFD3-DC1188AC215D/0/cons_responsessummary_asl.pdf

111 http://www.culture.gov.uk/NR/rdonlyres/F60E7306-46A2-466F-A2EB-0FCFA078C97B/0/Commission_for_LAEU.pdf

112 In law, wrongfully taking possession of goods, disposing of them, destroying them, or refusing to give them back are acts of "conversion".

> at the procedures for due diligence followed by each museum wanting immunity before approval is given. We have published a code of practice setting out guidelines on the due diligence that should be undertaken by a museum that is considering the acquisition or loan of cultural material. If museums do not maintain high standards of due diligence, and in particular if they do not follow these guidelines, they risk that approval—and the protection given by these provisions—being withdrawn.[113]

Lord Thomas of Gresford was puzzled by the presence of these clauses in this Bill:

> Part 6 is on the protection of cultural objects on loan. What on earth that is doing in the Bill I cannot imagine. It has nothing to do with anything else that the Bill deals with. I understand the Government to be giving an assurance to those who would seek to loan items temporarily to selected museums in this country that the items loaned will not be seized in pursuance of a judgment debt by a creditor in this country. That is a good aim, but we must have regard to looted objects that find their way to this country. Is it enough to have a code of due diligence imposed on museums, as is currently the case, or do we need to strengthen that code significantly? Part 6 cannot go unchallenged. We will need to ensure that proper safeguards are in place.[114]

Lord Howarth of Newport conceded that there was a strong cultural, economic and political case for anti-seizure legislation. He saw a strong public interest in the continuation of art exhibitions as a means to promote better international understanding and preserve London's place as a cultural capital. However, he warned:

> […] we must also consider whether there is an important case, on the other hand, in terms of justice under the law. Situations in which works of art might be seized are when a claimant to title of a particular work is enabled to seize it, when a work of art is seized in settlement of a debt or when the police are pursuing investigations and assembling evidence. These are very serious concerns. We should in particular be very heedful of the anguish of a survivor of a Nazi concentration camp or the descendant of someone who was killed in the Holocaust era for no other reason than that he was Jewish. They may seek restitution of a work of art which they claim belongs to their family, not only because that is an act of justice but because, in a much broader sense, it is a way to bring settlement or put wrong to right.[115]

He also questioned whether anti-seizure legislation would contravene Article 6 of the European Convention on Human Rights, which guarantees a right to a fair and public hearing in court in a reasonable time. The Government appeared satisfied that preventing a potential claimant from seeking a particular form of relief in one jurisdiction for a limited period of time struck a far balance between the rights of the claimant and the public interest, but, in Lord Howarth's view, "it is a key question for Parliament whether that fair balance has been struck in the Government's proposals".[116]

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[113] HL Deb 29 November 2006 cc766-7
[114] HL Deb 29 November 2006 c772
[115] HL Deb 29 November 2006 cc782-3
[116] HL Deb 29 November 2006 c783

Lord Janner argued that these clauses were incompatible with the principles laid down in the 1998 Washington Conference on Holocaust-Era Assets:

> At present, if a Holocaust survivor sees a painting or object that belonged to his or her family, they can go and claim. If the Bill becomes law in its present form, if they see such property, they will be unable to prevent the people who have brought that property and exhibited it in this country at least keeping it, hiding it or taking it home. That is totally wrong and immoral and is not a fair balance.[117]

Lord Maclennan was also unhappy that a potentially contentious measure had been included in a Bill on unrelated matters. He suggested that an issue of such importance should be resolved by international agreement – at UNESCO or European Union level – rather than by national legislation. He was also concerned that the UK was being "dictated to" by Russia, which has indicated that it would be unwilling to lend objects to countries which do not have legislation of this kind.[118]

Winding up for the Opposition, Lord Kingsland said that, while his "heart" was with Lord Janner, his "head" was with the Government. He hoped that there would be a thorough debate in Committee on these clauses.[119] For the Government, Baroness Ashton assured peers that the responsible minister, David Lammy, "is listening to proposals for safeguards and wants to work with interest groups to ensure that an appropriate balance is achieved between potential claimants and the interests of the museum".[120]

On the eve of the Lords second reading debate, a letter to the *Times* from Lord Janner and ten other peers set out the case for opposing these clauses outright:

> Sir, We are deeply concerned at the Government's proposal to give complete immunity to those who wish to display stolen and looted art works by making them available for exhibition in this country. The proposed legislation, buried in the Tribunals, Courts and Enforcement Bill, would provide automatic protection from seizure to lenders outside Britain, making them safe from the legitimate claims of the rightful owners.
>
> The justification is that the UK's position as a leading centre for world class exhibitions will be jeopardised unless all loans are protected from seizure. This reasoning results from pressure exerted by museums and those overseas whose concern for the provenance of art works owned by them is at best cavalier. In fact, the result will be that Britain will become one of the few countries in the West where such ill-gotten gains can be displayed with impunity and where the rights of the true owners will be so easily frustrated.
>
> The public interest must surely be in upholding the rule of law, rather than promoting an international free-for-all through the unrestricted circulation of tainted works of art. Do we really wish to educate our children to have no respect for history, legality and ethical values by providing museums with the opportunity freely to exhibit stolen property?

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117 HL Deb 29 November 2006 c787
118 HL Deb 29 November 2006 c789
119 HL Deb 29 November 2006 cc798-9
120 HL Deb 29 November 2006 c804

> The morally correct and legally responsible approach, adopted by many countries, is for objects proposed for loan to galleries and museums to be subject to rigorous inquiries to determine their provenance and that rightful owners have the opportunity to recover works surfacing in this way. The current proposals, giving automatic and indiscriminate protection against seizure mean that otherwise respectable institutions in this country will have no reason to make such inquiries. This legislation shames us and should be opposed rigorously.[121]

The following day, in the same newspaper, Lord Howarth responded that safeguards already exist, in the form of "due diligence" exercised by art institutions and existing obligations on the UK under European and international law:

> Sir, The Government's proposals would not promote an "international free-for all" or give "complete immunity" to those who wish to display what may be stolen and looted art in public exhibitions (letter, Nov 28). Immunity from seizure will not mean immunity from suit.
>
> Department for Culture, Media and Sport guidance on due diligence, together with the code of practice of the Museums Association and the principles promulgated by the National Museum Directors Conference, makes it clear that museums and galleries should borrow items only if they are "legally and ethically sound". The Tribunals, Courts and Enforcement Bill allows the Secretary of State to withdraw approval, and therefore immunity from seizure, from an institution that she considers not to be performing due diligence adequately.
>
> The Government has also made it clear that the immunity will not apply where a UK court is required to make an order for the seizure or confiscation of property under European or international law. The Return of Cultural Objects Regulations 1994 provide for a procedure whereby an object that was removed unlawfully from a member state and is found in the territory of another member state can be returned to the state from which it was removed. The Unesco convention, to which the Government subscribed recently, provides for the recovery and return of stolen cultural property.
>
> The Government issued a consultation paper containing a full discussion of the issues and the approach it was minded to take. The measure is plain to see, forming a discrete part of a main government Bill.
>
> Happily, all your correspondents are legislators, privileged to take part in the debates on the Bill in Parliament. Beyond condemning the policy in a letter, they may care to participate in the second reading debate today and thereafter in the painstaking scrutiny and amendment in committee, at report stage and at third reading which is key to the reputation of the Second Chamber.
>
> The issue to examine is whether the Government has or has not succeeded in its declared aim of striking "a fair balance" between the rights of the claimant and the public interest. The Government has sought strenuously to resolve the tension between two public goods: the continuation of great art exhibitions (such as those

[121] "Stolen art works", *Times*, 28 November 2006, p18 (letters)

> currently in London of Holbein, Velasquez, Elsheimer and Hockney) and access to legal remedy in our jurisdiction for aggrieved claimants of works of art.[122]

At Committee stage in the Lords, attention focused on a single aspect of part 6 – whether the requirement of due diligence was satisfactorily built into the Bill as originally drafted and how the Government anticipated that it would work in practice. Lords Thomas of Gresford and Renfrew of Kaimsthorn tabled similar amendments. Lord Thomas proposed to insert a new clause in the Bill as follows:

> The Secretary of State shall not approve a museum or gallery for the purposes of this part, unless he is satisfied that the museum or gallery in question has suitable procedures in place to investigate with due diligence the provenance and ownership of any object brought to the United Kingdom for the purposes of display.[123]

Lord Renfrew drew attention to Lord Falconer's assurance at second reading (quoted earlier) that the Government would scrutinise each museum's procedures for due diligence before granting immunity, commenting: "I am sure that is fine as far as it goes, but that assurance is not given in the Bill".[124] Lord Thomas remarked pointedly that "the exercise of due diligence seems to be a trade-off for immunity, however that is expressed".[125] Both peers withdrew their amendments in the face of assurances from the Government that they would look again at the "sensible" principle underlying the amendments.

When the Bill returned to the Lords on Report in late January, it was evident that much negotiation with the Bill's critics had taken place behind the scenes. Not only had the Government moved on the due diligence issue but there were new Government amendments in response to other matters raised at earlier stages. On due diligence, the new clause (now **clause 131**) requires museums and galleries to satisfy the Secretary of State or appropriate ministers in Scotland, Wales and Northern Ireland that their procedures for checking provenance and ownership are satisfactory and comply with the DCMS guidelines. Museums and galleries will be invited to apply for approval and demonstrate through the submission of their due diligence procedures that they carry out very thorough checks of items they intend to borrow.[126]

An amendment, creating what is now **clause 129(2)(c)**, ensures that protection will not be given to a work of art that is used to conceal contraband items so that they can be smuggled into the UK. An amendment, creating what is now **clause 129(2)(e)**, makes it a condition of the museum's approval for protection, that it publishes specified information about the objects it intends to borrow in advance of the objects entering the country. There will be regulations specifying what information must be published, by what means, and how far in advance of the exhibition. For the Government, Baroness Ashton promised to consult "widely" before laying these regulations, and reported that

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122 "Law on displays of looted art", *Times*, 29 November 2006, p18 (letters)
123 Amendment 132
124 HL Deb 14 December 2006 c128GC
125 HL Deb 14 December 2006 c135GC
126 HL Deb 31 January 2007 cc293-4

"we are currently considering requiring publication of information two months before the start of the exhibition".[127] An amendment, creating what is now **clause 129(9**), gives the Secretary of State powers to make regulations requiring museums to provide additional information to an enquirer about an object in an exhibition.

There was cross-party support in the Lords for these changes to the Bill at Report stage. Lord Howarth of Newport suggested that they mollified the Bill's original impact by creating a system of "discretionary immunity from seizure, as opposed to the system of automatic immunity that the museums and galleries originally asked for".[128] Significantly, Lord Janner, who had led opposition to this part of the Bill at earlier stages, now appeared satisfied that his concerns had been listened to:

> I thank my noble friend for her assurance that proper standards for provenance research and due diligence will be introduced and enforced. I am delighted that the Secretary of State will grant immunity only to institutions adhering to appropriate standards and that there will be government oversight to ensure that these standards are continued. I have been assured that the standards and methods for this research will be clarified in future regulations; I hope that the Minister will confirm that. I look forward to consultations with my noble friend and other colleagues whenever they may be useful. I am also pleased that methods of presenting the research will be created. I hope that we can agree not only on such methods but on how they should best be publicised. Once claimants visit the register and recognise artwork that they know or believe to be theirs, they will now have what they have not had before—the opportunity to pursue their claims in the countries of origin. I call on the Government to give people the opportunity to pursue their claims in the countries of origin and to establish procedures that will enable claimants to obtain advice on how best to approach such legal proceedings in foreign jurisdictions. I trust that they will create and maintain a library of helpful information on those processes and provide the necessary support for claimants' campaigns for justice.[129]

There was no further debate on part 6 at Lords third reading stage.

VIII Miscellaneous Provisions

A. Judicial Review (Power to Substitute Decisions)

Clause 136[130] of the Bill proposes to amend s 31 of the *Supreme Court Act 1981* so as to provide for an alternative power where the High Court quashes a decision on an application for judicial review.[131] The power would allow the court (in specific

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[127] HL Deb 31 January 2007 cc293, 300. In his speech Lord Howarth commented: "it is generally agreed that the provision in Switzerland that 30 days' notice should be given is, in practice, too short" (c297). Two months' notice is required in France.

[128] HL Deb 31 January 2007 c296

[129] HL Deb 31 January 2007 cc295-6

[130] The clause is frequently referred to as clause 132 below, since this was the number attributed when the Bill was introduced in the Lords

[131] For information about judicial review generally, see the Library Research Paper *Judicial Review: A short guide to claims in the Administrative Court*, which is available at::
http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf

circumstances) to be able to substitute its own decision, rather than to remit a matter back to the original decision maker.

Certain limitations would be placed upon this power – in particular, it would only be exercisable where:

> (a) the decision in question was made by a court or tribunal;
> (b) the decision is quashed on the ground that there has been an error of law; and
> (c) without the error, there would have been only one decision which the court or tribunal could have reached.

Currently, where a claimant is successful in a judicial review application, this will typically result in a remittal. Section 31(5) of the 1981 Act provides that:

> (5) If, on an application for judicial review seeking [a quashing order], the High Court quashes the decision to which the application relates, the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court.

This means that the matter is sent back to the decision maker for reconsideration afresh. Sometimes the court may determine that the reconsideration should be made by different personnel.[132] While the court is permitted to provide some guidance to a decision maker[133] case law suggests that the Administrative Court should not seek to completely pre-empt the jurisdiction of the decision maker.[134]

When the Bill was introduced, the explanatory note indicated that:

> 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*[135] the

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[132] For further information, see for example, *Fordham's Judicial Review Handbook*, Hart Publishing, 2004, paras 3.1-3.19

[133] *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309

[134] See *Chief Constable of North Wales v Evans* [1982] 3 All ER,141, where Lord Hailsham observed judicial review was "not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the court as the bodies making the decision", and also *R v Dairy Produce Quota Tribunal, ex p PA Cooper & Sons* (1994) 6 Admin LR 540, at which the court indicated that "it is not for this court to pre-empt the jurisdiction of the Tribunal by making the declaration sought". The courts have acknowledged, however, that in some circumstances while the court previously had no power to substitute its own decision for that of an authority "no doubt in practice there will be cases where the court's decision will effectively determine the issue, as for instance where on undisputed primary facts the court holds that no reasonable housing authority, correctly directing itself in law, could be satisfied that the [claimant] became homeless intentionally" (Cocks v Thanet District Council [1983] 2 AC 286). Moreover, the court already has the power to quash a decision and not remit to the relevant authority, where that is an appropriate remedy (R *v Nottingham Crown Court, ex p Toms* [1995] COD 389, in which a driving disqualification and fine were quashed by the court, with no remittal)

[135] Report No.226 *Administrative Law: Judicial Review and Statutory Appeals,* October 1994. [The report is not available electronically, however the relevant sections at paras 8.15- 8.16 provide: "Where the High Court considers that there are grounds for quashing the decision of an inferior court, tribunal or authority, the High Court may, in addition to quashing the order, remit the matter to the inferior court, tribunal or

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.

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. [Emphasis Added]**

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.

[…]

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

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authority with a direction to reconsider it and reach a decision in accordance with the findings of the Court. Our consultation paper raised the question whether in certain circumstances the High Court should also have the power to substitute its own order for that of an inferior body. There was significant support for this proposal (Approximately 80% of those who responded supported this proposal) provided that it was restricted to exceptional cases i.e. where it could be said that to remit the decision was a mere formality. It would not be appropriate to exercise a power of substitution where a decision is judicially reviewed on the ground of breach of natural justice or abuse of discretion. In such cases there will often be more than one permissible answer open to the lower court or administrative body and a power of substitution would be incompatible with the court's reviewing function. However, where the ground of review is error of law and the error of law is one which, once corrected, necessarily leads to an obvious outcome, an order remitting the case to the court may now appear to be a remnant of an outmoded and unjustified insistence on procedural propriety. (Although in theory situations in which there is only one possible inference from the primary facts are susceptible to the same arguments (see the facts in *R v Rowe, ex p Mainwaring* [1992] 1 WLR 1059 (CA), a power of substitution could risk the court going beyond its reviewing function)). In the case of decisions by administrative authorities such as ministers and regulatory bodies the need to make it clear that the exercise of the judicial review jurisdiction is a supervisory one means that we do not recommend in those cases a power of substitution. We do, however, consider that different considerations apply to courts and tribunals.
We recommend that in the case of decisions by an inferior court or tribunal the reviewing court should be empowered to substitute its own decision for the decision to which the application relates provided that: (i) there was only one lawful decision that could be arrived at; and (ii) the grounds for review arose out of an error of law]

> 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.

The assertion (highlighted in the quoted paragraph 553 above), that the power under CPR 54.19(3) had not been used, was in fact incorrect. since the power has been exercised in a number of cases.[136]

CPR 54.19 provides:

> 54.19 Court's powers in respect of quashing orders
>
> (1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.
> (2) The court may –
> (a) remit the matter to the decision-maker; and
> (b) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court.
> (3) Where the court considers that there is no purpose to be served in remitting the matter to the decision-maker it may, subject to any statutory provision, take the decision itself.
>
> (Where a statutory power is given to a tribunal, person or other body it may be the case that the court cannot take the decision itself)

The issue was considered by the House of Lords at the second reading debate, where Lord Kingsland observed that:

> A number of noble Lords have expressed astonishment at the appearance of provisions on works of art, so the noble Lord, Lord Thomas of Gresford, and I are probably entitled some astonishment at this clause because it is a constitutionally revolutionary clause. It will allow the administrative court, having quashed a

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[136] See for example *R (on the application of Haracoglou) v Department for Education and Skills* [2001] EWHC Admin 678; and examples in *Fordham's Judicial Review Handbook*, Hart Publishing, 2004, para 24.4.2. It is true to say, however, that the remedy has not been frequently used. Supperstone and Knapman, *Administrative Court Practice (Judicial Review)*, Butterworths, 2002, para 8.2, specifically makes reference to the powers the court already has under CPR 59.19(3) and observes […] it is not clear to what extent a court will use this power in effect to substitute its own view for that of the primary decision maker, beyond cases where it is clear from the court's ruling that a particular result is inevitable. The White Book Service (Civil Procedure Volume 1), Sweet and Maxwell, 2006 also provides background information on CPR 54.19, indicating that: "The scope of this power is unclear. Judicial review is primarily concerned with controlling the exercise by public bodies of statutory or other public law powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully; it is not the role of the court to determine how those powers should be exercised. Normally, therefore, the courts will not be in a position to determine that there is no purpose to be served in remitting the matter to the decision maker and taking the decision itself. It may be that there will be occasions when it is clear that a public body must take a particular decision and any refusal to do so would be Wednesbury unreasonable. It is theoretically possible that, in those cases the power conferred by CPR r 54.19(3) can be exercised. In general, however, there would seem to be little scope for this power to be exercised" (pg 1654). For more comment on the potential use of CPR 54.19(3) see: *The Substitutionary Remedy Under CPR 54.19(3)*, Anya Proops, [2001] JR 216 and *The Substitutionary Remedy Under CPR 54.19(3) - A response* , John Campbell, [2002] JR 72

> decision, to substitute its own decision for the substantive decision in issue made by the forum which decides the merits of the matter.
>
> Throughout the jurisprudence of the administrative court, even in the world of human rights law and proportionality that we now inhabit, judges, particularly in the higher reaches of the judicial echelons, are at pains to emphasise that judicial review, while of course it is based on fairness, is in the end about the mechanics of the decision making process; it is not about the merits of the decision made by the lower tribunal or court. Judges in the administrative court cannot place weight on the various relevant considerations that those who are responsible for deciding the merits of a case have to consider.[137]

In particular, Lord Kingsland criticised the third limb of the test, whereby the court had to determine that "without the error, there would have been only one decision which the court or tribunal could have reached." He said:

> How could the administrative court possibly know that? For example, a decision in a case could be quashed because the administrative court decides that two matters which the lower court in question dealt with and thought were relevant were not relevant at all; and, therefore, the whole basis upon which the lower court performed its balancing act—relevance and weight—has been changed completely. The administrative court is in no position to reconsider the matter unless it rehears the whole case ab initio. If it does that, it must hear evidence from all the people who made submissions to the lower court. In my view, in the context of our jurisprudence and the development of the whole law of judicial review, this marks the most extraordinary reversal. I really do hope that the Government will think very hard about Clause 132 [now **clause 136**] before they take it any further.
>
> Quite apart from anything else, it often takes many months for the administrative court to hear a matter like this. By the time it has made its decision, the situation on the ground might have moved on. In planning law, for example, it is up to the local authority to take into account when making its decision any changes in planning law that may have taken place between the time it made its original decision and the time when something is quashed and it has to go back and consider the issue again. How on earth is the administrative court to know about all these things without engaging in an extremely time-consuming exercise? With the greatest possible respect, I think that the Government have a great deal of explaining to do about this.[138]

In response, Baroness Ashton of Upholland, the Parliamentary Under Secretary for Constitutional Affairs, indicated that:

> As for Clause 132 going under the carpet, every clause in the Bill is precious to me. The fact that a provision comes under Clause 132 as opposed to Clause 1 is just an accident of design by those eminent parliamentary counsel who do such fantastic work for us all the time. I do not quite see it in the strong terms that the noble Lord, Lord Kingsland, does. What we are trying to do is clear. The noble Lord spoke about planning. We are trying to streamline the procedure. Instead of

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[137] HL Deb, 29 November 2006, c797-798
[138] *ibid*

> sending the case back so that the one decision that could have been arrived at is made, the court makes it instead. That is what the provision is designed to do. The noble Lord shakes his head—I have clearly not convinced him that this will be exciting.[139]

The point about CPR 54.19(3) was subsequently also raised by Lord Kingsland at Grand Committee. He stated that:

> I have one further matter to draw to the Minister's attention: the amendment to the civil rules of procedure in Rule 54.19. […] What puzzles me is that the words used in this rule are quite different from the words that the Government are seeking to employ in the Bill, which states simply that where the court considers that there is no purpose to be served in remitting the matter to the decision-maker, it may, subject to any statutory provision, take the decision itself. If the Bill becomes law, the rule will then be subject to that statutory provision. At the moment, however, it appears that the civil procedure rules now contain a provision that goes rather wider than Clause 132. I should be most grateful if the Minister could say something about that as well.[140]

The Minister replied that:

> […] The noble Lord rightly says that the difficulty with the civil procedure rules is that they are unclear and ambiguous. That is why we wanted to make sure that we clarified the position. The evidence suggests that the courts are not using the provision because they consider that it is ambiguous. I am being corrected.
>
> The amendment to the CPR was in 2000. I think that that was what I was asked about. We hope that putting the measure in statute will make it clear and give it statutory force rather than making it purely procedural. The measure is deliberately intended to remove the ambiguity. But it is absolutely essential that we understand that it is about the cases where only one decision could properly have been made. I give an example from a tribunal to illustrate the point. A tribunal might decide that a child should not be admitted to a particular class in a school because of a cap on numbers. For whatever reason that decision is overturned and the child is admitted to that class. Rather than incurring the cost—which is sometimes borne by the individual who is trying to get the decision made—of the measure being reviewed with consequent delay taking place, it would be much easier if the relevant decision could simply be substituted.
>
> We want to apply the measure in a very limited set of circumstances to clear up the ambiguity in the civil procedure rules. We also want to pick up the Law Commission's recommendations and ensure that we define the measure as appropriate within the legislation. The noble Baroness, Lady Butler-Sloss, who has had to leave, asked me to say how much she supports what the Government are doing in this regard. I hope that the noble Lord does not mind my doing that. We believe that we have the balance right here. I hope that the noble Lord will reflect on it. If I can give him any further information, I shall do so.[141]

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139 HL Deb, 29 November 2006, c804
140 HL Deb, 14 December 2006, cGC136
141 HL Deb, 14 December 2006, cc137-138

This issue was again revisited at report stage by Lord Kingsland, where Baroness Ashton provided further information about the proposed inter-relationship between CPR 54.19(3) and clause 136. In particular, she indicated that while CPR 54.19(3) covered similar ground to clause 136, it was "rather ambiguous" and not considered "satisfactory". She therefore indicated that she would ask the Civil Procedure Rule Committee to amend the CPR to ensure consistency with cl 136.[142]

[142] HL Deb, 31 January 2007, c303

IX Annex 1 – Statistics on Judicial Appointments between 1998-2007

[Gavin Berman, Social and General Statistics Section]

Annual Diversity Statistics - as at 1st April 1998

		Females		Ethnic Minority	
	Total	Number	% of total	Number	% of total
Lords of Appeal in Ordinary	12	0	0%	0	0%
Heads of Division (excl LC)	4	0	0%	0	0%
Lord Justices of Appeal	35	1	2.9%	0	0%
High Court Judges	97	7	7.2%	0	0%
Circuit Judges (inc TCC)	551	31	5.6%	5	0.9%
Recorders	1,223	134	11.0%	24	2.0%
District Judges (inc Family Division)	355	42	11.8%	4	1.1%
Deputy District Judges (inc Family Division)	725	81	11.2%	12	1.7%
District Judges (MC)	90	14	15.6%	2	2.2%
Deputy District Judges (MC)	82	18	22.0%	3	3.7%
Total	**3,174**	**328**	**10.3%**	**50**	**1.6%**

Note: As at 31/8/2000 all Stipendary Magistrates became District Judges (Magistrates' Courts)

Source: Annex E, Judicial Appointments Annual Report 1998-1999, Cm 4449

Annual Diversity Statistics - as at 1st April 2001

		Females		Ethnic Minority	
	Total	Number	% of total	Number	% of total
Lords of Appeal in Ordinary	12	0	0%	0	0.0%
Heads of Division (excl LC)	4	1	25.0%	0	0.0%
Lord Justices of Appeal	33	2	6.1%	0	0.0%
High Court Judges	99	8	8.1%	0	0.0%
Circuit Judges (inc TCC)	570	45	7.9%	4	0.7%
Recorders	1,370	168	12.3%	35	2.6%
District Judges (inc Family Division)	427	70	16.4%	7	1.6%
Deputy District Judges (inc Family Division)	760	151	19.9%	9	1.2%
District Judges (MC)	98	17	17.3%	2	2.0%
Deputy District Judges (MC)	162	35	21.6%	9	5.6%
Total	**3,535**	**497**	**14.1%**	**66**	**1.9%**

Note: As at 31/8/2000 all Stipendary Magistrates became District Judges (Magistrates' Courts)

Source: Annual Diversity Statistics, Judiciary of England and Wales
http://www.judiciary.gov.uk/keyfacts/statistics/index.htm

Annual Diversity Statistics - as at 1st January 2007

		Females		Ethnic Minority	
	Total	Number	% of total	Number	% of total
Lords of Appeal in Ordinary	12	1	8.3%	0	0%
Heads of Division (excl LC)	5	0	0%	0	0%
Lord Justices of Appeal	37	3	8.1%	0	0%
High Court Judges	106	11	10.4%	1	0.9%
Circuit Judges (inc TCC)	637	73	11.5%	9	1.4%
Recorders	1,398	211	15.1%	60	4.3%
District Judges (inc Family Division)	442	97	21.9%	14	3.2%
Deputy District Judges (inc Family Division)	804	225	28.0%	30	3.7%
District Judges (MC)	139	33	23.7%	7	5.0%
Deputy District Judges (MC)	168	41	24.4%	9	5.4%
Total	**3,748**	**695**	**18.5%**	**130**	**3.5%**

Note: As at 31/8/2000 all Stipendary Magistrates became District Judges (Magistrates' Courts)

Source: Annual Diversity Statistics, Judiciary of England and Wales
http://www.judiciary.gov.uk/keyfacts/statistics/index.htm

X Annex 2 – Tribunals

The Tribunals Service website gives details of the various tribunals currently operating as part of the unified administration set up in April 2006.[143] Some, but not all, of these will have their judicial functions transferred by Bill into the new unified system. A following annex gives a list of all the tribunals that will transfer.

Adjudicator to HM Land Registry
Independent office created by the *Land Registration Act 2002* to resolve disputes about registered land in England and Wales.

Adjudicator to HM Land Registry
http://www.ahmlr.gov.uk

Tribunal Manager
The Adjudicator to HM Land Registry
Procession House
55 Ludgate Hill
London EC4M 7JW
Phone: 020 7029 9860
Fax: 020 7029 9801
Email: alr@tribunals.gsi.gov.uk

The Asylum & Immigration Tribunal

The purpose of the Asylum & Immigration Tribunal is to hear and decide appeals against decisions made by the Home Office in matters of asylum, immigration and nationality. Appeals are heard in a number of hearing centres across the United Kingdom.

http://www.ait.gov.uk/
http://www.ait.gov.uk/general/contact_us.htm#1
Contact details for the Hearing centre addresses are available via this page.

Criminal Injuries Compensation Appeals Panel

The Panel's role is to determine appeals against decisions made by the Criminal Injuries Compensation Authority (www.cica.gov.uk) solely arising from claims for compensation for criminal injuries made on and after 1 April 1996 under the Criminal Injuries Compensation Scheme. The Criminal Injuries Compensation Appeals Panel (CICAP) is a tribunal with around 75 part time panel members at any one time, including the chairman, together with a secretariat (with generally around 75 staff) with offices in London and Glasgow, comprised of Department for Constitutional Affairs staff.

http://www.cicap.gov.uk/

[143] http://www.tribunals.gov.uk/

Criminal Injuries Compensation Appeals Panel
11th Floor
Cardinal Tower
Farringdon Road
LONDON EC1M 3HS

Phone: +44 (0)20 7549 4600
Fax: +44 (0)20 7549 4643
Email: enquiries-cicap@tribunals.gsi.gov.uk

Employment Appeal Tribunal

The Employment Appeal Tribunal (EAT) was created by the E*mployment Protection Act 1975*. It is a Superior Court of Record dealing with appeals from the decisions of the Employment Tribunals and Certification Officer or by the Central Arbitration Committee.

http://www.employmentappeals.gov.uk/index.htm

Contact details are given below:

London
Audit House
58 Victoria Embankment
London
EC4Y 0DS
Phone: 020 7273 1041
Phone: 0131 225 3963 (from Scotland only)
Fax: 020 7273 1045
Fax: 0131 220 6694 (from Scotland only)
Email: londoneat@tribunals.gsi.gov.uk

Edinburgh
52 Melville Street
Edinburgh
EH3 7HS
Phone: 0131 225 3963 (calls answered in London)
Fax: 0131 220 6694 (faxes received in London)

Employment Tribunals

Employment Tribunals resolve disputes between employers and employees over employment rights.

http://www.employmenttribunals.gov.uk/
http://www.employmenttribunals.gov.uk/general/contact_us.htm
Contact details for the tribunal areas are given on this page.

Customer Services team
Employment Tribunals Service
3rd Floor
Alexandra House
14-22 The Parsonage
Manchester M3 2JA

Phone: 0161 833 6314
Fax: 0161 833 6310
Email: customer.services@ets.gsi.gov.uk

Finance and Tax Tribunals

This Tribunal is designed for people wishing to appeal against decisions of HM Revenue & Customs or the Claims Management Services Regulator or to refer matters relating to certain decisions of the Financial Services Authority and the Pensions Regulator. For administrative purposes, the five tribunals are known collectively as the Finance and Tax Tribunals, although each retains its own separate jurisdiction.

http://www.financeandtaxtribunals.gov.uk/

Contact details are given below:

15/19 Bedford Avenue
London
WC1B 3AS

Phone: + 44 (0)207 612 9700
Fax: + 44 (0)207 436 4150
Email: vatlon@tribunals.gsi.gov.uk (VAT & Duties, London)
sc@tribunals.gsi.gov.uk (Special Commissioners)
fs&mt@dca.gsi.gov.uk (Financial Services & Markets)
PRT@tribunals.gsi.gov.uk (Pensions Regulator Tribunal)
cmst@tribunals.gsi.gov.uk (Claims Management Services Tribunal)

Gambling Appeals Tribunal

The Gambling Appeals Tribunal deals with appeals categories as referred to in Sections 80, 127 and 336 of the *Gambling Act 2005*.

http://www.gamblingappealstribunal.gov.uk/index.htm

Contact details

Elaine Farrin
Tribunal Manager
Gambling Appeals Tribunal
Tribunals Operational Support Centre
PO Box 6987
Leicester
LE1 6ZX

Telephone: 0845 6000 877 – This is a customer service switchboard that answers calls for more than one Tribunal. Please ask to speak to an operator on the Gambling Appeals Tribunal.
Fax: 0116 249 4253
Email: gat@tribunals.gsi.gov.uk

Gender Recognition Panel

The Gender Recognition Panel assesses applications from transsexual people for legal recognition of the gender in which they now live. The Panel was set up under the *Gender Recognition Act 2004* and ensures that transsexual people can enjoy the rights and responsibilities appropriate to their acquired gender.

http://www.grp.gov.uk/

Contact details are given below:

Gender Recognition Panel
PO Box 6987
Leicester
LE1 6ZX
Phone: +44 (0)845 355 5155

Email: grpenquiries@tribunals.gsi.gov.uk

General Commissioners of Income Tax

The General Commissioners of Income Tax is a tribunal which hears appeals against decisions made by Her Majesty's Revenue and Customs (HMRC) on a variety of different tax related matters.

http://www.generalcommissioners.gov.uk/

Tax Tribunals Branch
1st Floor, 4 Abbey Orchard Street
London
SW1P 2BS
Phone: +44 (0)20 7340 6559

Immigration Services Tribunal

The Immigration Services Tribunal was created in October 2000 to hear appeals against decisions made by the Office of the Immigration Services Commissioner and to consider disciplinary charges brought against immigration advisors by the Commissioner.

http://www.immigrationservicestribunal.gov.uk/index.htm

Procession House
55 Ludgate Hill
London

EC4M 7JW
Phone: +44 (0)20 7029 9790
Fax: +44 (0)20 7029 9782
Email: imset@tribunals.gsi.gov.uk

Information Tribunal

The Information Tribunal (previously called Data Protection Tribunal) was originally set up to hear appeals under the Data *Protection Act 1984*. It continued to hear appeals after the *Data Protection Act 1998* (DPA) came into effect, but was renamed the Information Tribunal when it also became responsible for hearing other information appeals under the *Freedom of Information Act 2000* (FOIA), the *Privacy and Electronic Communications Regulations 2003* (PECR) and the *Environmental Information Regulations 2004* (EIR). The remit of the Tribunal is to hear appeals from notices issued by the Information Commissioner

http://www.informationtribunal.gov.uk/

Information Tribunal
Arnhem House Support Centre
PO BOX 6987
Leicester
Leicestershire
LE1 6ZX

Phone: +44 (0)845 600 0877 – This is a customer service switchboard that answers calls for more than one Tribunal. Please ask to speak to an operator on the Information Tribunal.
Fax: +44 (0)116 249 4253

Lands Tribunal

The Tribunal was established by the *Lands Tribunal Act 1949* to determine questions of disputed compensation arising out of the compulsory acquisition of land; to decide rating appeals; to exercise jurisdiction under section 84 of the *Law of Property Act 1925 (discharge and modification of restrictive covenants)*; and to act as arbitrator on references by consent. Under the 1949 Act, other jurisdictions may be added and a number have been since the Tribunal came into existence on 1 January 1950. The Tribunal's jurisdiction is exercised in England and Wales.

http://www.landstribunal.gov.uk/index.htm

Contact details
In person
The Lands Tribunal
Procession House
110 New Bridge Street
London
EC4V 6JL

By post
The Lands Tribunal
Procession House
55 Ludgate Hill
London
EC4M 7JW

Phone: Switchboard: +44 (0) 20 7029 9780
Fax: +44 (0)207 029 9781
Email: Lands@dca.gsi.gov.uk

Mental Health Review Tribunal

Independent judicial bodies that operate under the provisions of the *Mental Health Act 1983* and the *Mental Health Review Tribunal Rules 1983*. The Tribunal's main purpose is to review the cases of patients detained under the Mental Health Act and to direct the discharge of any patients where the statutory criteria for discharge have been satisfied. In some cases, the Tribunal also has the discretion to discharge patients who do not meet the statutory criteria. These cases usually involve making a balanced judgement on a number of serious issues such as the freedom of the individual, the protection of the public and the best interests of the patient. The Tribunal has no discretion to discharge 'restricted patients'. Tribunals normally sit in private and take place in the hospital or community unit where the patient is detained.

http://www.mhrt.org.uk/index.htm
http://www.mhrt.org.uk/general/contact_us.htm
Contact details for the tribunal areas are given on this page.

Pensions Appeal Tribunals

The Tribunal hears appeals from ex-servicemen or women who have had their claims for a War Pension rejected by the Secretary of State for Defence. The Tribunals' jurisdiction covers England & Wales (Scotland and Northern Ireland have their own Tribunals), and they are independent from the Veterans Agency.

http://www.pensionsappealtribunals.gov.uk/

Tribunal Manager
Pensions Appeal Tribunals
Procession House
55 Ludgate Hill
London
EC4M 7JW
Phone: +44 (0)20 7029 9800
Fax: +44 (0)20 7029 9819
Email: pensions.appeal@tribunals.gsi.gov.uk

Social Security and Child Support Appeals

The purpose of the Social Security and Child Support Appeals (SSCSA) Tribunal is to deal with disputes about; Income Support; Jobseeker's Allowance; Incapacity Benefit; Disability Living Allowance; Attendance Allowance; and Retirement Pension. It also deals with disputes about Child Support Maintenance; Tax Credits; Statutory Sick Pay (SSP)/ Statutory Maternity Pay (SMP); Compensation Recovery Scheme/ Road Traffic (NHS) charges; Vaccine Damage and decisions on Housing Benefit and Council Tax Benefit.

http://www.appeals-service.gov.uk/index.htm
http://www.appeals-service.gov.uk/general/contact_us.htm
Contact details for the tribunal areas are given on this page.

Social Security and Child Support Commissioners

The Social Security and Child Support Commissioners are special judges appointed by the Queen. They are independent of, and in no way connected to, the Department for Work and Pensions, HM Revenue and Customs, the Child Support Agency or Local Authorities. Commissioners decide appeals on point of law from Appeals Service tribunals in social security, tax credit, child support, housing benefit, council tax benefit and compensation recovery cases. They also decide appeals from Pensions Appeal Tribunals relating to war pensions and cases which have been referred to them under the Forfeiture Act.

http://www.osscsc.gov.uk/index.htm

Social Security and Child Support Commissioners
3rd Floor
Procession House
55 Ludgate Hill
London
EC4M 7JW

Phone: Switchboard +44 (0)20 7029 9850
Minicom: +44 (0)20 7029 9820
Fax: +44 (0)20 7029 9819
Email: osscsc@tribunals.gsi.gov.uk

Special Educational Needs & Disability Tribunal

The Special Educational Needs Tribunal was set up by the *Education Act 1993*. It considers parents' appeals against the decisions of Local Education Authorities (LEAs) about children's special educational needs if parents cannot reach agreement with the LEA.

http://www.sendist.gov.uk/index.cfm
http://www.sendist.gov.uk/general/contact_us.htm
Contact details for the SENDIST offices are given on this page

Transport Tribunal

The Transport Tribunal has three jurisdictions. It was originally set up to hear appeals against decisions of Traffic Commissioners in connection with the Heavy Goods Vehicles & Public Service Vehicles Operators Licensing Systems. It also hears appeals against decisions of The Registrar of Approved Driving Instructors. In addition, it is able to resolve disputes under the *Postal Services Act 2000*.

http://www.transporttribunal.gov.uk/

By post
Transport Tribunal
Procession House
55 Ludgate Hill
London
EC4M 7JW
Phone:+44 (0)20 7029 9790
Fax:+44 (0)20 7029 9782
Email: transport@tribunals.gsi.gov.uk

In person
Transport Tribunal
Procession House
110 New Bridge Street
London
EC4V 6JL

XI Annex 3 – List of tribunals transferred

Existing tribunal jurisdictions that will be transferred are contained in parts 1-4 of Schedule 6 of the Bill. The following tribunals will be affected by clauses **30, 35 and 36**. These clauses relate to:

30 Transfer of functions of certain tribunals
35 Transfer of Ministerial responsibilities for certain tribunals
36 Transfer of powers to make procedural rules for certain tribunals

Appeal tribunal
Chapter 1 of Part 1 of the *Social Security Act 1998* (c. 14)

Child Support Commissioner
Section 22 of the *Child Support Act 1991* (c. 48)

Consumer Credit
The Secretary of State as respects his function of deciding appeals under: Section 41 of the *Consumer Credit Act 1974* (c. 39)

Estate Agents
The Secretary of State as respects his function of deciding appeals under: Section (1) of the *Estate Agents Act 1979* (c. 38)

Foreign Compensation Commission
Section 1 of the *Foreign Compensation Act 1950* (c. 12)

Commissioner for the general purposes of the income tax
Section 2 of the *Taxes Management Act 1970* (c. 9)

Information Tribunal
Section 6 of the *Data Protection Act 1998* (c. 29)

Meat Hygiene Appeals Tribunal
Regulation 6 of the *Fresh Meat (Hygiene and Inspection) Regulations 1995* (S.I. 1995/539)
Regulation 6 of the *Poultry Meat, Farmed Game Bird Meat and Rabbit Meat (Hygiene and Inspection) Regulations 1995* (S.I. 1995/540)
Regulation 5 of the *Wild Game Meat (Hygiene and Inspection) Regulations 1995* (S.I. 1995/2148)

Mental Health Review Tribunal for a region of England
Section 65(1) and (1A)(a) of the *Mental Health Act 1983* (c. 20)

Reinstatement Committee
Paragraph 1 of Schedule 2 to the *Reserve Forces (Safeguard of Employment) Act 1985* (c. 17)

Reserve forces appeal tribunal
Section 88 of the *Reserve Forces Act 1996* (c. 14)

Sea Fish Licence Tribunal
Section 4AA of the *Sea Fish (Conservation) Act 1967* (c. 84)

Social Security Commissioner
Schedule 4 to the *Social Security Act 1998* (c. 14)

Special Educational Needs and Disability Tribunal
Section 333 of the *Education Act 1996* (c. 56)

Transport Tribunal
Schedule 4 to the *Transport Act 1985* (c. 67)

Umpire or deputy umpire
Paragraph 5 of Schedule 2 to the *Reserve Forces (Safeguard of Employment) Act 1985*

VAT and duties tribunal
Schedule 12 to the *Value Added Tax Act 1994* (c. 23)

The following tribunal will be affected by clauses **30 and 35**. This clause relates to:

30 Transfer of functions of certain tribunals
35 Transfer of Ministerial responsibilities for certain tribunals

Adjudicator
Section 5 of the *Criminal Injuries Compensation Act 1995* (c. 53)

The following tribunals will be affected by clauses **30 and 36**. These clauses relate to:

30 Transfer of functions of certain tribunals
36 Transfer of powers to make procedural rules for certain tribunals

Adjudicator to Her Majesty's Land Registry
Section 107 of the *Land Registration Act 2002* (c. 9)

Charity Tribunal
Section 2A of the *Charities Act 1993* (c. 10)

Consumer Credit Appeals Tribunal
Section 40A of the *Consumer Credit Act 1974* (c. 39)

Financial Services and Markets Tribunal
Section 132 of the *Financial Services and Markets Act 2000* (c. 8)

Gambling Appeals Tribunal
Section 140 of the *Gambling Act 2005* (c. 19)

Immigration Services Tribunal
Section 87 of the *Immigration and Asylum Act 1999* (c. 33)

Lands Tribunal
Section 1(1)(b) of the *Lands Tribunal Act 1949* (c. 42)

Pensions Appeal Tribunal in England and Wales
Paragraph 1(1) of the Schedule to the *Pensions Appeal Tribunals Act 1943* (c. 39)

Pensions Regulator Tribunal
Section 102 of the *Pensions Act 2004* (c. 35)

Commissioner for the special purposes of the Income Tax Acts
Section 4 of the *Taxes Management Act 1970* (c. 9)

The following tribunals will be affected by clause **30**. This clause relates to:

30 Transfer of functions of certain tribunals

Agricultural Land Tribunal
Section 73 of the *Agriculture Act 1947* (c. 48)

Aircraft and Shipbuilding Industries Arbitration Tribunal
Section 42 of the *Aircraft and Shipbuilding Industries Act 1977* (c. 3)

Antarctic Act Tribunal
Regulation 11 of the *Antarctic Regulations 1995* (S.I. 1995/490)

Appeal tribunal
Part 2 of Schedule 9 to the Scheme set out in Schedule 2 to the *Firefighters' Pension Scheme Order 1992* (S.I. 1992/129)

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

Case tribunal, or interim case tribunal, drawn from the Adjudication Panel for England
Section 76 of the *Local Government Act 2000* (c. 22)

Family Health Services Appeal Authority
Section 49S of the *National Health Service Act 1977* (c. 49)

Insolvency Practitioners Tribunal
Section 396(1) of the *Insolvency Act 1986* (c. 45)

Appeals Tribunal
Part 3 of the *Local Authorities (Code of Conduct) (Local Determination) Regulations 2003* (S.I. 2003/1483)

Plant Varieties and Seeds Tribunal
Section 42 of the *Plant Varieties Act 1997* (c. 66)

Tribunal
Rule 6 of the model provisions with respect to appeals as applied with modifications by the *Chemical Weapons (Licence Appeal Provisions) Order 1996* (S.I. 1996/3030)

Tribunal
Health Service Medicines (Price Control Appeals) Regulations 2000 (S.I. 2000/124)

Tribunal
Section 706 of the *Income and Corporation Taxes Act 1988* (c. 1)

Tribunal
Section 150 of the *Mines and Quarries Act 1954* (c. 70)

Tribunal
Part 1 of Schedule 3 to the *Misuse of Drugs Act 1971* (c. 38)

Tribunal
Regulation H6(3) of the *Police Pensions Regulations 1987* (S.I. 1987/257)

Tribunal
Section 9 of the *Protection of Children Act 1999* (c. 14)

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