These notes refer to the Tribunals, Courts and Enforcement Act 2007 (c.15) which received Royal Assent on 19th July 2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

EXPLANATORY NOTES

PART 2: JUDICIAL APPOINTMENTS

Summary

283. Part 2 of the Act amends the minimum eligibility requirements for judicial appointments in England and Wales (and for some posts where the office-holders may sit in Scotland or Northern Ireland) with the aim of increasing the diversity of the judiciary. The existing eligibility requirements for judicial office are replaced with the requirement that a person must satisfy the "judicial-appointment eligibility condition". The sections 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 Act will have to show that he has possessed a relevant legal qualification for the requisite period and that while holding that qualification he has been gaining legal experience. In respect of many of the offices, the number of years for which a person must have held his qualification before he becomes eligible for judicial office is also reduced.

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

285. Part 2 of the Act also makes provision for the appointment to fee-paid judicial office of those who have previously held corresponding salaried appointments (section 53) and makes provision (sections 56 and 57) about appointments (in the civil courts in England and Wales) of district judges, deputy district judges and deputy, and temporary, masters and registrars. Section 58 makes provision about appointments of temporary assistants to the Judge Advocate General, section 59 makes provision about appointments to certain Appeals Commissions, section 60 makes provision about appointment as chairman of the Law Commission and section 61 relates to the Northern Ireland Judicial Appointments Commission.

Background

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

qualified in Scotland or Northern Ireland for the required number of years are also eligible for some posts, notably in those tribunals which exercise UK-wide jurisdiction).

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

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

Commentary on Sections: Part 2

Section 50: Judicial appointments: "judicial-appointment eligibility condition"

289. This section sets out the new basis of eligibility for judicial appointment. In order to satisfy the "judicial-appointment eligibility condition", an individual has to hold a "relevant qualification" (i.e. as a barrister, a solicitor or a holder of another specified legal qualification) for a specified minimum number of years (generally five or seven, in place of the seven or ten specified in existing legislation), and has to have gained experience in law for the specified minimum number of years, while holding a relevant qualification. Activities which count as gaining experience in law are set out in section 52.

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

Schedule 10: Amendments relating to judicial appointments

291. The minimum eligibility requirements for judicial offices are contained in a large number of statutory provisions. This Schedule amends those provisions in two main respects. First, the existing requirement of a qualification within the meaning of section 71 of the Courts and Legal Services Act 1990 is replaced by a requirement to

satisfy the judicial-appointment eligibility condition on an N-year basis. Second, the period of time for which a qualification should have been held, and experience in law acquired (N years), is reduced. For those judicial appointments which currently require possession of a ten-year qualification under the 1990 Act, the period is reduced to seven years and for those appointments which currently require a seven-year qualification, the period is reduced to five years. Where those with Scottish or Northern Irish qualifications are eligible for appointment, corresponding reductions are made.

Section 51: "Relevant qualification" in section 50: further provision

292. This section empowers the Lord Chancellor (after consultation with the Lord Chief Justice and the JAC) to extend the list of relevant qualifications for the purpose of the judicial-appointment eligibility condition in section 50. The power is exercisable by order made under the affirmative resolution procedure.

293. Orders made under this section would say which qualifications – other than being a barrister or a solicitor – would be "relevant qualifications" for the purpose of eligibility for particular judicial offices. The only qualifications which it would be permitted to specify in this way would be those awarded by the Institute of Legal Executives or by other bodies authorised to confer rights of audience or rights to conduct litigation under sections 27 and 28 of the Courts and Legal Services Act 1990. This would provide assurance that the bodies concerned had in place approved training and qualification arrangements for their members. The section also provides for a qualification to cease to be relevant if the body which awarded it ceases to be an authorised body under the procedure set down in the 1990 Act. The Legal Services Bill currently (i.e. Summer 2007) before Parliament would, if enacted in its current form, amend the references to the 1990 Act that are contained in this section.

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

Section 52: Meaning of "gain experience in law" in Section 50

295. This section defines various ways in which an individual may gain post- qualification experience in law so as to satisfy the "qualifying period" element of the judicial-appointment eligibility condition in section 50. Consistent with the aim of encouraging applications from a wide range of suitably qualified people, these include not only those activities traditionally regarded as part of a lawyer's practice (e.g. legal advice and assistance) but also exercising judicial functions in a court or tribunal, arbitration and teaching or researching law. Broadly similar activities are also included. Such work need not be performed full-time or for remuneration.

296. It should be noted that at the same time as gaining experience by undertaking these activities, an individual must also possess a "relevant qualification" – i.e. as a barrister, a solicitor or as a holder of a qualification awarded by one of the bodies to be specified by order under section 51.

Section 53: Transfer from salaried to fee-paid judicial office

297. This section makes provision for the appointment to fee-paid judicial offices of those who have previously held corresponding salaried appointments. It adds two new sections, 94A and 94B, to the Constitutional Reform Act 2005. Subsections (1) and (2) of the new section 94A enable the Lord Chancellor to make appointments to fee-paid offices in the ordinary courts below the rank of circuit judge (and to fee-paid offices in courts established under armed forces legislation), without the JAC selection process applying. Such appointments may be made only with the concurrence of the

Lord Chief Justice and provided the person holds a corresponding qualifying salaried office or has ceased to hold such an office within the two years immediately preceding the proposed appointment. Subsection (3) enables the Lord Chief Justice to delegate his power of concurrence. Section 94B makes corresponding provision to enable the Lord Chancellor to make such appointments in tribunals, covering the existing tribunals listed in Part 3 of Schedule 14 to the Constitutional Reform Act 2005 and the new tribunals created by Part 1 of this Act. These appointments require the concurrence of the Senior President of Tribunals. Where it is proposed to appoint a person as a deputy judge of the Upper Tribunal, and that person holds or held an office listed in section 6(1), the Lord Chancellor must also consult the Lord Chief Justice. The general 2-year limit is disapplied in relation to former judges of the High Court and above (and equivalents in Scotland and Northern Ireland) being appointed as deputy judges of the Upper Tribunal.

Section 54: Continuation of judicial office after normal retirement date

298. Section 54 amends section 26 of the Judicial Pensions and Retirement Act 1993 to rectify a lacuna resulting from its modification by the Constitutional Reform Act 2005. Section 26 makes provision for the extension of service of judicial office holders beyond the retirement age otherwise prescribed by that Act. The modification made by the 2005 Act catered for the extension of service of judicial office holders exercising jurisdiction exclusively in one of the three legal jurisdictions of the United Kingdom but inadvertently omitted to cater for those exercising jurisdiction in two or all three of those legal jurisdictions. The new sub-sections of section 26 of the 1993 Act added by this section rectify the problem by conferring the power to extend service in such circumstances on the Senior President of Tribunals in respect of Tribunal offices listed in the new section 26 (12A) of the 1993 Act or otherwise by the Lord Chief Justice, in both cases subject to the concurrence of the Lord Chancellor.

Section 55: Appointment of deputy Circuit Judge

299. Section 55 modifies section 24 of the Courts Act 1971 (as previously modified by the Constitutional Reform Act 2005) so that the responsibility for appointing as a deputy circuit judge someone who has previously held office as a judge of the Court of Appeal or of the High Court, or as a circuit judge, is vested in the Lord Chancellor, with the concurrence of the Lord Chief Justice, rather than the other way round.

Section 56: Appointment of deputy district judges, etc

300. Section 56 gives effect to Schedule 11.

Schedule 11: District judges and deputy district judges

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

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

303. Paragraph 3 amends the provisions in section 102 of the Supreme Court Act 1981 about the appointment of deputy district judges.

304. Provision is made for appointments to be made by the Lord Chancellor, normally subject to the Judicial Appointments Commission (JAC) selection process as prescribed under the Constitutional Reform Act 2005. A retirement age of 70 will apply to these post-holders (with the possibility of extension up to age 75).

305. Further provision is made however that where a person holds or has previously within the last two years held the office of district judge, the Lord Chancellor may appoint that person as a deputy district judge, with the concurrence of the Lord Chief Justice, without that appointment being subject to selection by the JAC. Such persons may be appointed up to (but will have to retire by) the age of 75.

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

307. Paragraph 4 makes transitional provision about existing deputy district judges: they continue to be deputy district judges, and are treated as having been assigned to the district registries for which they were appointed. In paragraph 4, the label "the commencement date" is given to the point in time at which paragraph 3 comes into force, not to the entire day at the beginning of which paragraph 3 comes into force.

308. Paragraphs 7 and 10 make, for deputy district judges appointed under section 8 of the County Courts Act 1984, provision similar to that made by paragraphs 3 and 4. The paragraphs respectively modify the provisions in section 8 of the 1984 Act and make transitional provision.

309. Paragraphs 8 and 9 make consequential amendments to the County Courts Act 1984. Paragraphs 11 to 13 make consequential amendments to the judicial-retirement provisions of the Judicial Pensions and Retirement Act 1993. Paragraphs 14 and 15 consequentially amend references to these appointments in other legislation.

Section 57: Deputy, and temporary additional, Masters etc.

310. Section 57 amends the provisions in section 91 of the Supreme Court Act 1981 for appointing deputies and temporary officers to certain posts, including masters and registrars of the Supreme Court. Section 91 of the Supreme Court Act 1981 was amended by paragraph 139 of Schedule 4 to the Constitutional Reform Act 2005 to enable the Lord Chief Justice, after consulting the Lord Chancellor, to make appointments to these posts. Section 57 further amends the Supreme Court Act 1981, and the Constitutional Reform Act 2005, to provide that these appointments are now to be made by the Lord Chancellor, and will normally be subject to the JAC selection process under the 2005 Act. These appointments are added to Schedule 14 to the 2005 Act. However, provision is also made that where a person holds or has within the last two years held equivalent office on a salaried basis, the Lord Chancellor may with the concurrence of the Lord Chief Justice appoint him to a deputy or additional temporary office under section 91 of the Supreme Court Act 1981 without a JAC selection process. The section makes consequential amendments to the Supreme Court Act 1981, so that a retirement age of 75 will apply to those who have previously held salaried office. (The usual retirement age for appointments under section 91 is 70, with the possibility of annual extensions up to the age of 75.)

Section 58: Appointment of temporary assistant to Judge Advocate General

311. The purpose of section 58 is to enable certain judicial office-holders and lawyers, who already have considerable experience of sitting as judge advocates in courts-martial, to continue to be eligible to sit as judge advocates once the Armed Forces Act 2006 is in force, without the need for selection by the Judicial Appointments Commission (JAC).

312. A judge advocate is appointed by the Judge Advocate General to an individual court-martial. Under the current law, judge advocates must have a 5-year legal qualification, and the JAC is not involved in their selection.

313. That position will change once section 362 of the Armed Forces Act 2006 (AFA) comes into force, which is expected to be in January 2009. The AFA defines Judges Advocates as (a) the Judge Advocate General (JAG); (b) a person appointed under section 30(1)(a) or (b) or (2) of the Court-Martial (Appeals) Act 1951 ("the 1951 Act") (Vice JAG, Assistant JAG, and temporary assistants to JAG); or (c) a puisne judge of the High Court of England and Wales who, following advice from the Judge Advocate General, is nominated by or on behalf of the Lord Chief Justice of England and Wales to sit as a Judge Advocate.

314. Once implemented this provision will mean that, apart from High Court judges and the Judge Advocate General himself, only persons appointed under s. 30 of the 1951 Act may be appointed as judge advocates. However, appointments under s. 30 of the 1951 Act require a selection by the JAC.

315. Over the past few years, the Judge Advocate General has adopted the practice of appointing judge advocates both from persons holding salaried office under s. 30 of the 1951 Act (ie Vice JAG and Assistant JAG), and also from a pool of qualified lawyers and judicial office holders, which currently numbers 12 individuals. The purpose of these amendments is to enable this pool to carry on sitting as judge advocates once the AFA is in force, without the need for a JAC competition. This section will amend the 1951 Act so that no JAC selection will be required for appointments to the position of temporary assistant to the Judge Advocate General under s.30(2) of the 1951 Act where the appointee has, within the last two years, been appointed as a judge advocate to a court-martial by the Judge Advocate General. However, the concurrence of the Lord Chief Justice is required for such appointments. Once a person has been appointed to the position of temporary assistant to the Judge Advocate General, he will be eligible to sit as judge advocate in a Court Martial when the Armed Forces Act 2006 is in force. This section will enable the pool of 12 judicial office-holders or lawyers, from which appointments as judge advocates are currently made, to continue sitting as judge advocates.

Section 59: Members and chairmen of certain Appeals Commissions

316. Section 59 amends Part 3 of Schedule 14 to the Constitutional Reform Act 2005 to remove references to the offices of member, and Chairman, of: the Special Immigration Appeals Commission; the Proscribed Organisations Appeal Commission; and the Pathogens Access Appeal Commission. Candidates for these appointments will no longer be required to go through the Judicial Appointments Commission selection process. In practice, the legally qualified members and the Chairmen of these Commissions are appointed only from among serving senior judges. Once section 59 is in force, appointments will continue to be made by the Lord Chancellor, but it is intended that he will seek nominations for these posts from the Lord Chief Justice. If the Lord Chancellor wishes to be given assistance in making appointments to these Commissions, it will be possible for him to ask for assistance from the Judicial Appointments Commission under section 98 of the Constitutional Reform Act 2005.

Section 60: Appointment as Chairman of Law Commission

317. This section makes provision for the Lord Chancellor to select the Chairman of the Law Commission from serving members of the senior judiciary only, by making changes to section 1 of the Law Commissions Act 1965 (c.22). The 'senior judiciary' for these purposes are the judges of the High Court and the judges of the Court of Appeal in England and Wales. This change reflects what has happened in practice since the establishment of the Law Commission.

Section 61: Orders permitting disclosures to Judicial Appointments Commission

318. Section 5A of the Justice (Northern Ireland) Act 2002 ('the 2002 Act') confers power to disclose information to the Northern Ireland Judicial Appointments Commission

for the purposes of selection for appointment to judicial office in Northern Ireland. Section 5A(1) of the 2002 Act provides that information held by 'permitted persons' may be disclosed to the Commission for the purposes of making any such selection. Section 5A(5) of that Act specifies a number of 'permitted persons' for the purpose of section 5A. Section 5A(6), which has yet to be commenced, provides that the Lord Chancellor may by order designate other persons, who exercise functions which he considers are of a public nature, as 'permitted persons'. The order-making power contained in section 5A(6) is not, however, currently subject to any Parliamentary control. Section 61 remedies this anomaly by subjecting the order-making power contained in section 5A(6) to the negative resolution procedure.