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Committee Clerk
Devolution (Further Powers) Committee
The Scottish Parliament
Edinburgh
EH99 1SP

Dear Stephen,

Re:Devolution of Reserved Tribunals

I am writing to disclose the text of a draft Order in Council and policy note, which illustrates the proposed approach to be taken in respect of the transfer of legislative competence to the Scottish Parliament, of specified functions of the employment tribunals. The draft Order and policy note have been prepared by the Department for Business, Innovation and Skills, pursuant to wider discussions with officials from the Scottish Government on the provisions that define a Scottish case and set out the scope of concurrent jurisdiction (articles 5 & 7 of the Order, respectively). As committee members will be aware, the Scottish Government is fully supportive of the Smith Commission's recommendations to devolve all powers in relation to the management and operation of reserved tribunals to Scottish Parliament. Accordingly, clause 37 of the Scotland Bill puts in place a legislative framework which envisages tribunal transfers being effected by separate Orders in Council.

Next Steps

We propose to hold a written consultation on the draft Order in January 2016. In addition, the UK government will be holding a series of roundtable discussions both north and south of the border. It is to be noted that as the Scotland Bill is currently at Committee Stage in the House of Lords, there may be further substantive changes to clause 37 and to the Order, before it is formally laid for approval.

Committee members are invited to note the contents of the draft Order and policy note. The Tribunals Devolution Team are happy to provide any further information and assistance that the Committee requires.

Yours Sincerely

Stephen Lea
Tribunals Devolution Team

[This instrument contains a draft outline of proposals for an Order in Council arising out of clause 37 of the Scotland Bill. It is a working draft and has been prepared purely for illustrative purposes and for assisting with discussion during the passage of the Bill. Further work and discussions will be required between the Scottish Government and other Government Departments in Westminster before any Order can be finalised. There will also be engagement with key stakeholders]

Draft Order in Council laid before Parliament and the Scottish Parliament under paragraphs 1 and 2 of Schedule 7 of the Scotland Act 1998, for approval by resolution of each House of Parliament and of the Scottish Parliament.

DRAFT STATUTORY INSTRUMENTS

201X No. X (L. X)

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

The [*Draft*] Scotland Act 1998 (Employment Tribunals) Order
201X

Made - - - - ***

Coming into force - - - - ***

At the Court at Buckingham Palace, the *** day of ***

Present,

The Queen's Most Excellent Majesty in Council

This Order is made by Her Majesty in Council in exercise of the powers conferred by sections 113 and paragraph 2A(2), (4) (6) and (8) of Part 3 of Schedule 5 to the Scotland Act 1998(a).

In accordance with paragraphs 1 and 2 of Schedule 7 to that Act(b) a draft of this Order has been laid before and approved by a resolution of each House of Parliament; and laid before and approved by a resolution of the Scottish Parliament.

Accordingly, Her Majesty, by and with the advice of Her Privy Council makes the following Order:

(a) 1998 c.46. Paragraph 2A of Schedule 5 was inserted by section x of the Scotland Act 201X.

(b) Paragraphs 1 and 2 of Schedule 7 have been modified by paragraph 3(2) of schedule 4 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

Citation, commencement and interpretation

1.—(1) This Order may be cited as the *[Draft]* Scotland Act 1998 (Employment Tribunals and Employment Appeals Tribunal Functions) Order 201[X] and comes into force on *[date]*.

(2) In this Order—

“the 1996 Act” means the Employment Tribunals Act 1996(a),

“the 1998 Act” means the Scotland Act 1998(b),

“the 2014 Act” means the Tribunals (Scotland) Act 2014(c),

“employment claim” means any claim, complaint, reference, application or appeal in respect of which jurisdiction is exercised as mentioned in Article 2(2),

“Scottish case” has the meaning provided for in Article 5,

“employment tribunal” means a tribunal established under section 1(1) of the 1996 Act,

“First-tier Tribunal for Scotland” means the First-tier Tribunal for Scotland established under section 1(1)(a) of the Tribunals (Scotland) Act 2014,

[other definitions].

Specified functions of employment tribunals

2.—(1) The functions mentioned in sub-paragraph (2) are specified for the purposes of paragraph 2A(5) of Part 3 of Schedule 5 to the 1998 Act.

(2) The functions are the functions of exercising the jurisdictions exercised by employment tribunals by virtue of sections 2 and 3 of the 1996 Act.

The specified tribunal

3. The Scottish tribunal specified for the purposes of paragraph 2A(5) of Part 3 of Schedule 5 of the 1998 Act in relation to the functions mentioned in Article 2(2) is the First-tier tribunal for Scotland.

Conditions and restrictions on the transfer of functions

4. The conditions and restrictions in Schedule 1 apply to the transfer of the functions mentioned in Article 2(2) and any exercising of them by the Scottish tribunal.

Scottish Cases

5.—(1) The cases mentioned in sub-paragraph (2) are “Scottish cases” for the purposes of paragraph 2A(2) of Part 3 of Schedule 5 to the 1998 Act.

(2) Those cases are employment claims where the following apply—

(a) the respondent resides or carries on business in Scotland,

(b) the acts or omissions complained of took place in Scotland, and

(c) the claim relates to a contract under which the work is or has been performed wholly or ordinarily in Scotland.

Concurrent jurisdiction

6.—(1) Where there is a transfer of functions in accordance with this Order, the First-tier Tribunal for Scotland may also exercise the functions mentioned in Article 2(2) in relation to concurrent cases.

(a) 1996 c.17

(b) 1998 c.46

(c) 2014 asp 10.

7. A “concurrent case” is an employment claim which is not a Scottish case but in relation to which one or more of the following conditions is met—

- (a) the respondent or one of the respondents, resides or carries on business in Scotland,
- (b) the acts or omissions complained of took place wholly or mainly in Scotland,
- (c) the claim relates to a contract under which the work is or has been performed wholly or mainly in Scotland, or
- (d) the tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is wholly or mainly a connection with Scotland.

[The provisions in relation to Scottish cases and concurrent cases in Articles 5 and 6 above will establish the jurisdiction of the Scottish tribunal once the functions are transferred. Work on finalising the extent of the jurisdiction and any consequential changes to the approach in relation to England and Wales is still ongoing and will be subject to further discussion with stakeholders.]

Transfer of proceedings

8. The President of the relevant Chamber of the First-tier Tribunal for Scotland or the *[an alternative appropriate person]* may at any time, on their own initiative or on the application of a party, with the consent of the President of Employment Tribunals (England and Wales), transfer to an employment tribunal any concurrent cases started in Scotland which could have been presented in England and Wales and in that person’s opinion would more conveniently be determined there.

Powers to regulate practice, procedure and fees

9.—(1) The powers referred to in paragraph (2) may, in relation to the functions mentioned in Article 2(2), be exercised in order to make provision which relates to a reserved matter.

(2) Those powers are the powers of—

- (a) the Court of Session under sections 68 to 70 (tribunal rules)(a) and 71 to 73 (particular matters) of the 2014 Act,
- (b) Scottish Ministers under section 76 of the 2014 Act (tribunal fees).

Amendments to primary and subordinate legislation

10.—(1) Part 1 of Schedule 2, which contains amendments to the 1996 Act, has effect from the coming into force of any transfer, by virtue of this Order, of the functions mentioned in Article 2(2).

(2) Part 2 of Schedule 2, which contains consequential and minor amendments to other primary legislation, has effect from the coming into force of any transfer, by virtue of this Order, of the functions mentioned in Article 2(2).

(3) Part 3 of Schedule 2, which contains consequential and minor amendments to secondary legislation, has effect from the coming into force of any transfer, by virtue of this Order, of the functions mentioned in Article 2(2) .

Transitional provision

11. Transitional provisions relevant to Scottish cases are set out in Schedule 3 to this Order.

(a) To note – these provisions have not yet been commenced. In the meantime, Scottish Ministers have existing rule making powers for the First Tier Tribunal pursuant to paragraph 4 of Schedule 9 of the 2014 Act.

Signatory text

Name
Clerk of the Privy Council

DRAFT

SCHEDULES

SCHEDULE 1

Ref

Conditions and restrictions on the transfer of functions from employment tribunals

1. —(1) Rules of procedure of the First-tier Tribunal must, in relation to that Tribunal's exercising of its functions in Scottish cases and concurrent cases, include provisions—

- (a) to ensure that the Secretary of State shall be entitled to appear and be heard at any hearing in relation to proceedings which may involve a payment out of the National Insurance Fund and shall be treated as a party for the purposes of those proceedings,
- (b) for determining whether a claimant has complied with the early conciliation provisions under section 18A of the 1996 Act (Requirement to contact ACAS before instituting proceedings),
- (c) to ensure that the Tribunal shall send to the Commission for Equality and Human Rights copies of all judgments and written reasons relating to complaints under section 120, 127 or 146 of the Equality Act 2010,
- (d) to govern proceedings in an appeal against an unlawful act notice under section 21 of the Equality Act 2006,
- (e) to govern proceedings in equal value claims,
- (f) to enable the transfer of proceedings in concurrent cases from the First-tier Tribunal for Scotland to employment tribunals, and from employment tribunals to the First-tier Tribunal for Scotland,
- (g) to ensure that where proceedings concern an enactment which provides for conciliation, the Tribunal shall—
 - (i) send a copy of the claim form and the response to an ACAS conciliation officer; and
 - (ii) inform the parties that the services of an ACAS conciliation officer are available to them,
- (h) [*others*]

(2) The requirement in paragraph (1)(c) does not apply to national security proceedings where either the Security Service, the Secret Intelligence Service or the Government Communications Headquarters is a party to the proceedings.

(3) National security proceedings in the First-tier Tribunal are to be subject to tribunal procedure regulations made by the Secretary of State.

(4) In this Schedule—

“equal value claim” means a claim relating to a breach of a sex equality clause or rule within the meaning of the Equality Act 2010 in a case involving work within section 65(1)(c) of that Act,

“national security proceedings” means proceedings in relation to which a direction is given, or order is made, under subsections (3) or (4) of section 10 of the 1996 Act.

“[*others*]”

2. The Lord President of the Court of Session must consult with the Secretary of State before making procedure rules for the First-tier Tribunal in respect of proceedings in Scottish cases and concurrent cases with a view to maintaining and promoting, as far as practicable, consistency in matters of practice and the procedure to be followed in proceedings in the employment tribunal and the First-tier Tribunal in relation to employment claims.

SCHEDULE 2

Ref

[Amendments to primary legislation and secondary legislation]

PART 1

Amendments to the Employment Tribunals Act 1996

1. Part 1 of the 1996 Act (employment tribunals) is amended as follows.
2. In section 1(1), after “tribunals” in the first place it occurs, insert “in England and Wales”,
3. In section 2 (enactments conferring jurisdiction on employment tribunals) and in the heading, for “employment tribunals” substitute “appropriate tribunals”.
4. In section 3 (power to confer further jurisdiction on employment tribunals)—
 - (a) in the heading, for “employment tribunals” substitute “the appropriate tribunal”,
 - (b) in subsections (1) and (4), for “an employment tribunal” substitute “the appropriate tribunal”.
 - (c) In subsection (5), after the definition of “appropriate Minister” (but before the “and” following it) insert—
 - ““appropriate tribunal”—
 - (a) in relation to proceedings in England and Wales, means an employment tribunal,
 - (b) in relation to proceeding in Scotland, means the First-tier Tribunal for Scotland,”
 - (d) After subsection (6) insert—
 - “(7) As to the jurisdiction of the First-tier Tribunal for Scotland in relation to employment claims see the Scotland Act 1998 (Employment Tribunals and Employment Appeals Tribunal Functions Order 201X (S.I. 201X/XXX)).”
5. In section 5 (remuneration, fees and allowances)—
 - (a) omit subsection (1)(b),
 - (b) in subsection 1(c), after “Employment Judge” insert “in England and Wales”.
6. In section 5B (members of employment tribunals: removal from office)—
 - (a) omit subsection (2),
 - (b) omit subsection (3)(a),
 - (c) in subsection (3)(b) omit the words “if paragraph (a) does not apply”,
 - (d) omit subsection (6).
7. In section 5C (Oaths)—
 - (a) omit subsection (1)(a)(ii),
 - (b) omit subsection (4)(c).
8. In section 5D (judicial assistance)—
 - (a) *[any amendments need further policy development in relation to position of Scottish ET judges]*
9. In section 6 (conduct of hearings) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”.
10. In section 7 (employment tribunal procedure regulations)—

- (a) in the heading omit “employment”,
- (b) after subsection (2) insert—
 - “(2A) The Secretary of State must consult with the Lord President of the Court of Session before making employment tribunal procedure rules with a view to maintaining and promoting, as far as practicable, consistency in matters of practice and the procedure to be followed in proceedings in employment tribunals and the First-tier tribunal for Scotland (in relation to the exercising of the First-tier Tribunal for Scotland’s jurisdictions in relation to employment claims).”
- (c) after subsection (3)(a) insert—
 - “(aa) for enabling the transfer of proceedings from employment tribunals to the First-tier Tribunal for Scotland, and from the First-tier Tribunal for Scotland to employment tribunals,”
- (d) in subsection (3)(e)(i)—
 - (i) omit the words “in England and Wales”,
 - (ii) after “proceedings before it” omit the word “or”.
- (e) omit subsection (3)(e)(ii),
- (f) after subsection (6) insert—
 - “(7) In this Act “Scottish procedure regulations” means regulations made by the Secretary of State with respect to proceedings before the First-tier Tribunal for Scotland.”.

11. In section 7A (practice directions)—

- (a) In subsection (1)(a) and subsection (3) omit “territorial”,
- (b) In subsection (3)(a) omit “or”,
- (c) Omit subsection (3)(b).

12. In section 8 (procedure for contract cases) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”.

13. In section 10 (national security)—

- (a) in subsection 1, for “employment tribunal” substitute “appropriate tribunal”,
- (b) After “employment tribunal procedure regulations”, in each place, insert “or Scottish procedure regulations”,
- (c) in subsection (2) for “the tribunal” substitute “the appropriate tribunal”,
- (d) in subsection (9)—
 - (i) omit subsection (9)(c),
 - (ii) *[need further amendment here to assign to appropriate judge in Scotland]*.

14. In section 12A (financial penalties)—

- (a) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”,
- (b) *[may need further drafting here in respect of payment into consolidated fund]*.

15. In section 15 (enforcement) omit subsection (2).

16. In section 16 (power to provide for recoupment of benefits)—

- (a) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”,
- (b) for “employment tribunals”, wherever it appears, substitute “the appropriate tribunals”,

17. In section 18 (conciliation: relevant proceedings etc)—

- (a) for “employment tribunal proceedings”, wherever it appears, substitute “proceedings in the appropriate tribunal”,
- (b) in subsection (7) for “an employment tribunal” substitute “the appropriate tribunal”.

18. In section 18A (requirement to contact ACAS before instituting proceedings) after “employment tribunal procedure regulations”, in each place substitute “or Scottish procedure regulations”.

19. In section 18C (conciliation after institution of proceedings) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”.

20. In section 19(1) (conciliation procedure)—

- (a) after “employment tribunal regulations” insert “and Scottish procedure regulations”,
- (b) for “employment tribunal proceedings” substitute “proceedings in the appropriate tribunal”.

21. In section 19A (conciliation: recovery of sums payable under settlements)—

- (a) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”,
- (b) in subsection (9) after “employment tribunal procedure regulations” insert “or Scottish procedure regulations”.

22. The Employment Tribunals Act 1996 (Part 2) is amended as follows.

23. *[Amendments in relation to the Employment Appeal Tribunal to be inserted here]*

24. Part 2A of the 1996 Act (financial penalties for failure to pay sums ordered to be paid or settlement sums) (as inserted by section 150 of the Small business Enterprise and Employment Act 2015) *[yet to be commenced]* is amended as follows.

25. In section 37A (sums to which financial penalty can relate), in subsection (2)(a), for “an employment tribunal” substitute “the appropriate tribunal”.

26. In section 37G (appeal against penalty notice) for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”.

27. In section 37O (modification in particular cases), in subsection (1)(a), for “an employment tribunal” substitute “the appropriate tribunal”.

28. Part 3 of the 1996 Act (supplementary) is amended as follows.

29. In section 39 (Parliamentary staff), in subsection (2) for “an employment tribunal” substitute “the appropriate tribunal”.

30. In section 42 (interpretation) at the appropriate places insert the following definitions—

““appropriate tribunal” shall be construed in accordance with section 3(5);”;

““employment tribunal” means a tribunal established under regulations made under section 1(1) of this Act;”;

““First-tier Tribunal for Scotland” means the First-tier Tribunal for Scotland established under section 1(1)(a) of Tribunals (Scotland) Act 2014.”.

PART 2

Amendments to other primary legislation

The Employment Rights Act 1996

[The amendments here are to demonstrate how the Employment Rights Act 1996 and other substantive employment law will be amended to reflect that jurisdiction in Scotland will be exercised by the relevant Scottish Tribunal after the functions of the employment tribunal in Scotland are transferred in accordance with this Order.]

31. The Employment Rights Act 1996 is amended as follows—

32. In section 11 (references to employment tribunals)—

- (1) In the heading for “employment tribunals” substitute “appropriate tribunals”,
- (2) For “an employment tribunal” wherever it appears, substitute “the appropriate tribunal”.

33. In section 12 (determination of references), for “an employment tribunal”, wherever it appears, substitute “the appropriate tribunal”.

34. *[amendments to the rest of the rights to bring an employment tribunal claim conferred by the 1996 Act will be inserted here and subsequent paragraphs]*

35. In section 235(1) (other definitions), in the appropriate place, insert—

““appropriate tribunal” has the meaning given by section 3(5) of the Employment Tribunals Act 1996,”

PART 3

Amendments to secondary legislation

[This Part of the Schedule will contain similar amendments to any secondary legislation currently conferring jurisdiction on the employment tribunal, as well as any other consequential amendments.]

SCHEDULE 3

Transitional provisions

[This schedule will contain provisions to deal with the transition required following a transfer of functions between employment tribunal and the First-tier Tribunal for Scotland. Any such provisions will need to be developed between the Scottish and UK Governments.]

Policy and drafting note for draft Employment Tribunals Order in Council (“Order”)

General Introduction

1. Employment Tribunals are managed by Her Majesty’s Court and Tribunals Service, but they sit as a separate pillar of the Unified Tribunals Structure established under the Tribunals, Courts and Enforcement Act 2007. Employment Tribunals deal with a number of different types of dispute arising from the employment relationship. Jurisdiction is conferred by the Employment Tribunals Act 1996 and a range of other pieces of primary and secondary legislation.
2. The draft Order that accompanies this policy note illustrates the proposed approach to be taken in transferring specified functions of the employment tribunal to the Scottish Tribunals. It is important to note however that different requirements may emerge in the context of future tribunal transfers.

Process for drafting the Order

3. The skeleton draft Order is a UK Government document which has been drafted by the Department for Business, Innovation and Skills (“BIS”) in discussions with wider UK Government and the Scottish Government, and sets out the main framework for the legal and policy matters to be captured for the transfer of the employment tribunals to Scotland.
4. It has been produced to illustrate the general approach to transfer and as such is a working draft subject to further discussions between BIS, Scottish Government, key stakeholders, other Whitehall Departments and Parliamentary Counsel. BIS intends to engage in targeted discussions with key organisations which represent the views and needs of the various stakeholder groups in England & Wales and Scotland including the users of the system, and the judiciary.
5. The draft Order will also be subject to further technical legal drafting checks, which have not yet taken place.

Policy aims

6. The fundamental objectives which we are seeking to meet in the drafting of the Order are:
 - a. Meeting the terms **of the Smith Commission Agreement**:
 - i. to transfer the administration of employment tribunals in relation to Scottish cases, including matters such as the appointment of judges, and fee making powers;
 - ii. to preserve the integrity of the underlying reserved substantive rights and duties.
 - b. Maintaining the **integrity of the tribunal system**:
 - i. Ensuring that individuals across GB are able to enforce effectively their employment rights;
 - ii. Ensuring that the tribunal systems in England and Wales and Scotland operate in a way which allows for the effective delivery of reserved policy.

Underlying legal framework / Clause 37 of the Scotland Bill

7. The draft Order is made under clause 37 of the Scotland Bill (as brought from the House of Commons to the House of Lords on 10th November 2015). Clause 37 proposes an amendment to Part 3 of Schedule 5 to the Scotland Act. The provision allows for the *transfer of tribunal functions* which relate to *reserved* matters, and deal with *Scottish cases*, to a Scottish Tribunal. Clause 37 also provides that those functions will be transferred in accordance with the provisions of an Order.

8. The use of an Order should help to ensure that the functions relating to a reserved tribunal are able to be transferred to a Scottish tribunal in a managed and structured way, which reflects that post-transfer, the underlying substantive rights and duties will remain reserved.
9. Clause 37 makes provision for a qualified transfer of specified tribunal functions to a relevant Scottish tribunal. The Order must specify the functions to which the transfer relates and the particular Scottish tribunal to which those functions are being transferred. Specifically, it may make provision for the category of Scottish Cases to which the transfer will apply. Clause 37 also allows the Order to make provision which is necessary or expedient for the purposes of or in consequence of the transfer of the functions. This is being used, for example, to make provision for the exercise of concurrent jurisdiction. Paragraph 2A (5)(2) makes clear that the provisions can include imposing conditions and restrictions relating to rules of procedure, tribunal's staff or accommodation, etc).
10. We will be amending the Employment Tribunals Act 1996 ("the 1996 Act") in order to make it clear that on transfer, the continuing powers of the Secretary of State to make procedural rules etc will only apply to tribunals in England and Wales. We also plan to amend the substantive employment legislation to confer jurisdiction for hearing Scottish cases on the First-tier tribunal for Scotland. A number of amendments to a whole host of primary and secondary legislation will be required to reflect that change.
11. For illustrative purposes we have set out amendments to the most relevant piece of legislation in this area, namely the 1996 Act. In addition, we have set out at Schedule 1 Part 2 of the Order a few of the amendments that we are proposing to make to the 1996 Act, as an example of how it might be achieved. Further amendments to relevant primary and secondary legislation will have to be included as will transitional provisions which will be subject to further discussions with the Scottish Government.
12. Whilst this Order does not deal with the Employment Appeal Tribunal (EAT), it is envisaged that there will be equivalent provisions for the EAT so that the functions of that Tribunal in relation to Scottish employment cases will also transfer to Scotland.

The draft Order – general legal drafting

13. *Recitals* - The Order must be approved by each House of Parliament and by the Scottish Parliament. *Article 1* sets out the relevant definitions to date. Further definitions may need to be added to this section as the draft Order is refined. *Article 2* sets out the relevant functions of employment tribunals by reference to the functions conferred on tribunals under sections 2 and 3 of the 1996 Act. *Article 3* explains that the specified Tribunal to which functions of employment tribunals are to be transferred is the First Tier Tribunal for Scotland.

Conditions and restrictions

14. *Article 4* refers to the conditions or restrictions to which the transfer to the First Tier Tribunal will be subject. These are set out in Schedule 1 to the Order. These are designed to preserve the integrity of the underlying substantive law. Further consideration will be given to the specific conditions and restrictions that may apply to the terms of the transfer prior to enactment of the Order. The conditions listed in Schedule 1 include:
 - a. the requirement to provide that the **Secretary of State should continue to attend hearings which involve the making of payments from the National Insurance Fund on the insolvency of an employer**. This is so that the Secretary of State can still intervene in such cases to protect the fund and therefore the UK Governments financial position (see para 1(a)).

- b. a requirement that ensures that **all employment cases should firstly be subject to the early conciliation procedures conducted by Acas** under section 18A of the 1996 Act. In addition, paragraph (2) of Schedule 1 provides that the rules of the First Tier Tribunal should also make it clear that these provisions should not apply to members of the Security Service, Secret Intelligent Service or the Government Communications Headquarters area party to the proceedings, as is the case now with early conciliation procedures. We consider this relates to underlying rights and duties i.e. access to tribunals.
 - c. a number of provisions require the rules to ensure that all tribunals dealing with employment cases should continue to **send certain documents under the Equality Act 2010 to the Commission for Equality and Human Rights** (paragraph 1 (c) and to govern proceedings under section 21 of the Equality Act 2006.
 - d. **rules will have to be made to govern proceedings which deal with equal pay** (as currently set out in Schedule 3 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”).
 - e. Schedule 1 paragraph (3) makes it clear that **national security proceedings in the First Tier Tribunal in relation to employment cases will continue to be subject to the rules of procedure made by the Secretary of State**. These are at Schedule 2 of the 2013 Regulations.
15. Relevant definitions for the Schedule are set out at paragraph (4) and we can add to these, if necessary, purely for explaining the meaning of the terms within Schedule 1.
16. Paragraph 2 of Schedule 1 provides that the Lord President of the Court of Session should **consult with the Secretary of State on the rules of procedure on Scottish cases and in relation to concurrent cases**. We propose to make similar provision so that the Secretary of State should also consult the Lord President before making rule of procedure on employment cases in England and Wales and in relation to concurrent cases (see paragraph 10 of Schedule 2). We envisage this to be a more informal consultation process (sharing good practice etc). (This is an example of the difference between the ET and other tribunals: it is the Business Secretary who will continue to make the rules in England and Wales, whereas for tribunals in the Unified Tribunals System it is the Tribunal Procedure Committee.)
17. This consultation provision is being proposed to encourage continued dialogue between Scotland, and the UK Governments on the process for hearing employment matters. This does *not* require the rules in Scotland and England and Wales to be the same.

Scottish cases

18. In deciding what cases Scottish tribunals will have exclusive jurisdiction over, we have to develop a suitable definition. We need to identify which cases should **only** be heard by Scottish tribunals.
19. We have drawn on the wording in the current Tribunal rule 8(3) (presenting the claim) and say that “Scottish cases” should be:-
- a. Those that have a respondent residing or carrying on business in Scotland; *and*
 - b. One or more of the acts or omissions complained of was in Scotland; *and*
 - c. The claim relate to a contract under which the work is performed wholly in Scotland.
20. This will mean that those cases which really have no connection with England and Wales can be heard in Scottish tribunals, and only by Scottish tribunals.

Concurrent cases

21. This relates to those which have links with both Scotland and England and Wales. Under the current system, these could potentially be heard in Scotland or in England and Wales.
22. In Article 7 we have provided that a concurrent case is not a Scottish case (see above) but one where the respondent, or one of the respondents, resides in Scotland, or it is a case which has a sufficient link to Scotland. This part of the Order is the subject of ongoing discussions with stakeholders and the Scottish and UK Governments.

Transferring cases

23. We think that there will continue to be a need to allow cases to be transferred between the two countries where there is a strong case to do so.
24. As currently drafted, Article 8 of the Order gives power to the President of the relevant Chamber of the first Tier Tribunal to transfer cases to England and Wales. Once again, equivalent provisions will be made in the rules of procedure for England and Wales to allow for the transfer of concurrent cases to Scotland where appropriate.

Rule making

25. Article 9 aims to make it clear that - subject to any restrictions imposed by Schedule 1 - the powers provided in the T(S)A 2014 apply to any Scottish tribunals accommodating work transferred under cl 37.

Department for Business, Innovation and Skills
Ministry of Justice
January 2016