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SENIOR PRESIDENT
OF TRIBUNALS

Costs in Tribunals

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Report by the Costs Review
Group to the Senior President of
Tribunals

December 2011

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CONTENTS

	<i>Para</i>
A Introduction	1
B Background	9
C Costs regimes in the First-tier Tribunal	32
D Costs regimes in first instance jurisdictions of the Upper Tribunal	78
E Costs regimes in other first-instance tribunals	92
F Costs regimes in appellate jurisdictions of the Upper Tribunal	113
G Costs regime in the Employment Appeal Tribunal	136
H Costs regime in the judicial review jurisdiction of the Upper Tribunal	137
I General issues relating to costs regimes	145
J Particular types of costs orders	153
K Whose costs may be recovered ?	165
L Procedure and assessment	176
M Conclusions and summary of recommendations for change	188

APPENDIX 1: Members of the Costs Review Group

APPENDIX 2: Table of current costs regimes

A. Introduction

1. At the request of the Senior President of Tribunals (“**the SPT**”), a group (“**the Costs Review Group**”) has been established to carry out a review of the costs regimes applicable in tribunals operating in England and Wales. Our terms of reference are as follows:
 - a. to consider and review the provisions of Tribunal Rules relating to costs, particularly in the light of Lord Justice Jackson’s Review of Civil Litigation Costs; and
 - b. to produce a report for the SPT, making recommendations for any changes to the Tribunals costs regime in order to promote access to justice in Tribunals.
2. Although concerned primarily with those tribunals within the structure created by the Tribunals, Courts and Enforcement Act 2007 (“**the TCEA**”), our remit covers other tribunals operating in England and in Wales. Some of the tribunals with which we are concerned have, at the present time, jurisdiction in Scotland and some also in Northern Ireland. So long as cross-border jurisdictions remain, it is not suggested that different costs regimes should apply in different parts of the United Kingdom so that what we have to say about tribunals with cross-border jurisdiction applies as much to Scotland and Northern Ireland as to England and Wales.
3. A list of the members of the Costs Review Group is set out in Appendix 1.
4. The review is not an attempt to replicate for the Tribunals the work carried out by Lord Justice Jackson in his mammoth report on costs in the Courts produced in December 2009: Review of Civil Litigation Costs: Final Report (“**the Jackson Report**”). We do not have the resources in terms of either judicial time or money to do so even if this were a desirable objective. Rather, our purpose is to carry out a more general review of the costs regimes in the Tribunals bearing in mind the contents of the Jackson Report and its recommendations. Further, although Lord

Justice Jackson stated repeatedly that his recommendations were to be taken as a package representing, as they do, his assessment of the proper balance between conflicting views and interests, we would favour an approach under which any changes to the details of the costs rules in the Tribunals are effected step-by-step to produce gradual improvements rather than the formulation of a wide-ranging set of interlinking proposals the balance of which may be distorted by the rejection of a particular recommendation.

5. We have not carried out any public consultation or any consultation with Government departments. We have not thought it necessary or even helpful to do so at this stage. The SPT, in taking matters forward, may wish to discuss a public consultation with the Ministry of Justice. The Tribunal Procedure Committee (“**the TPC**”) would be bound to consult in any case before implementing any change to the Rules. We have, however, sought the views of judges in the various tribunals. The consequence of this approach, given also that only one of us is not a judge, is that this Report represents almost wholly a judicial view. However, we have also received some other representations in relation to the costs of tax appeals before the First-tier Tribunal Tax Chamber and the Upper Tribunal Tax and Chancery Chamber. These came about as a result of statements made by the Chairman of the Costs Review Group at various tribunal user group meetings and other gatherings that he would welcome views which anyone wished to express, particularly from HMRC and from groups who regularly represent taxpayers. These do no more than express again the various views previously expressed in the context of the Tax Appeals Modernisation Programme where radically different, and irreconcilable, views had been expressed.
6. We see the question of costs falling under two broad headings for the purposes of our considerations:
 - a. The first is whether there should be any sort of costs-shifting regime (i.e., a power to order one party to pay another party’s costs of preparing a case and presenting it) in the tribunals with which we are concerned.

- b. The second is whether there are changes to the practices and procedures within whatever is the appropriate costs-shifting regime which could be adopted to reduce the costs and expenses incurred by the parties whoever ultimately pays.
7. It is true that these two headings are not wholly independent. The behaviour of lawyers and other advisers and how they use the procedures laid down by the rules can often be influenced by who is likely, at the end of a case, to have to pick up the bill.
8. However, we decided at an early stage that we should prepare a Report dealing principally with the first heading, leaving the detailed consideration of the second heading to a later stage when the appropriate costs-shifting regime has been decided on. There are, nonetheless, some specific areas on which we consider it useful to comment in this Report.

B. Background

9. As a general rule, tribunals are intended to provide citizens with speedy and inexpensive access to justice. Tribunals are meant to be more user-friendly and less legalistic than the Courts. Tribunals, comprising as they often do not only judges but also lay members with relevant qualifications or experience, have a specialist expertise which is often absent in the case of court judges whose jurisdictions are very wide. It cannot be expected that court judges can have a technical expertise across all the types of case which they hear.
10. The different costs regimes in the Courts (generally there is costs-shifting with the winner obtaining costs from the loser) and the Tribunals (generally there is no costs-shifting absent unreasonable conduct) reflect a number of factors, both historical and practical. For present purposes, it can be said that the difference in approach reflects different views about what is most effective to achieve access to justice and different perceptions of fairness. In the vast majority of cases with which the Tribunals deal, the views of judiciary and users' representatives is that access to justice is promoted by the general absence of costs-shifting (although there is a significant body of

contrary opinion in relation to some tax cases, to which we will come later). Certainly, where the appellant or applicant is acting in person, it is easy to see that he or she will be deterred from approaching the tribunal if there is a risk of an adverse costs order.

11. The expert nature of the tribunal and its inquisitorial approach also reduce the need for representation (legal or otherwise). Thus, while Lord Justice Jackson was able to say that a costs-shifting regime in the Courts was generally needed to encourage lawyers to appear for litigants and to encourage litigants to instruct lawyers, that is not to nearly the same extent a consideration in tribunals. Procedural simplicity, such as a power to determine appropriate cases without a hearing, further reduces the need for expert representation. Moreover, in many tribunals (and, we might remark even in some court cases) the cost of lawyers or other professional or paid representatives would be, or is, simply disproportionate to the amount in issue and the value they add. Thus, in the majority of cases before tribunals, even Government departments are not represented by lawyers. If representation by a lawyer is not necessary, it may generally be considered unreasonable to expect the losing party to pay for the winner's legal representation.

12. In contrast, in the Courts, the perception is that access to justice is promoted by the presence of a costs-shifting power. It is said that it is only fair that a successful litigant should recover the costs which he has incurred in vindicating his rights in the face of opposition. And what is fair must surely promote access to justice since, if fairness is absent, justice cannot be achieved. That approach has merit where the parties are on an equal footing and can afford representation. It is not so obviously fair when one side only is represented (and thus incurring substantially more costs than the other) or where the costs of losing litigation could bring financial ruin to the paying party. Indeed, a major inroad into this principle is the way in which legal aid operates. A claimant with the benefit of public funding is not, of course, personally exposed to costs even if he loses: but nor, in most cases, is the Legal Services Commission. In contrast, the defendant without funding is exposed to an adverse costs order. The result is one-way costs-shifting which, where there are individual litigants on both sides, is not one which can be said to be obviously fair.

13. We need to make a brief mention of legal aid. The Government has recently conducted a comprehensive review of civil legal aid in the Courts and the Tribunals. There has been a public consultation to which the former Tribunals Service and the tribunal judiciary have made representations. The Government has published its response.¹ In those circumstances, we see no point in saying anything in this review about the desirability of legal aid, save for making the obvious point that the existence of “exceptional funding” under section 6(8)(b) of the Access to Justice Act 1999 does enable legal representation to be obtained by a person of limited means in the occasional case where legal representation is really necessary in the interests of justice in a tribunal where the participation of lawyers is not generally encouraged.
14. We also observe that there is no need to consider a costs-shifting regime in mental health cases where non-means-tested legal aid is available and we suggest below (paras 119 and 149) that, in other areas where means-tested legal aid has been available and has provided one-way costs-shifting the TPC might wish to consider whether two-way or one-way costs-shifting should be made available for all citizens, particularly in any areas that might be removed from the scope of legal aid. The availability of otherwise of legal aid in the Tribunals does not, we think, have any other significance in the context of addressing what is the appropriate costs regime within the various tribunals with which we are concerned.
15. Legal aid is a thing of the past in relation to much civil litigation following successive restrictions on its availability imposed in the past by the previous Government. Reflecting the impact which these restrictions would have on access to justice, provisions were made allowing conditional fee agreements (“**CFAs**”) to be entered into between a litigant and his lawyers, with a successful litigant being able to recover the success fee payable to his lawyers together with any “after-the-event” (“**ATE**”) insurance premium.
16. The point has been made that in some regulatory fields it is not unreasonable to expect that litigants should have before-the-event insurance which would cover the legal costs of a regulatory challenge, often through membership of a trade or professional organisation. This is certainly a way of ensuring that legal representation

¹ CM 8072

is available but it does not point to an obvious answer to the question whether there should be a cost-shifting regime. On the one hand, it could be seen as a factor in favour of a costs-shifting regime; if successful, the claimant will receive his costs from the regulatory authority and if unsuccessful will have his own costs, and any adverse costs, met by the insurance. On the other hand, it could be seen as a factor in favour of a no costs-shifting regime: the claimant would, whether successful or unsuccessful, recover his own costs from his insurance and would not be exposed to the risk of an adverse order. We do not, in any case, know the extent to which it is safe to proceed on the footing that litigants should have before-the-event insurance. We do not, accordingly, think that we can properly rely on this point to assist in reaching any conclusions on the appropriate costs regime to apply in regulatory cases. However, we observe that, even in the Courts, it is accepted that, where regulatory proceedings are concerned, a simple application of the principle that costs should follow the event is not necessarily appropriate.²

17. Indeed, it can generally be said that there is not the stark divide between the costs regimes of the Courts and the Tribunals which there once was. Costs-shifting already exists in some tribunals. Not only is that the case, but also there are categories of court cases which have no costs-shifting, such as those dealt with in the small claims jurisdiction of the county courts.

18. This reflects the fact that the Tribunals and the Courts are moving closer together. Different practices and procedures will not be allowed to continue unless they are justified. In that context, the different philosophies of the Courts and the Tribunals will need to be clearly articulated and the unique features of tribunal jurisprudence identified if the best of them are to be preserved. The overriding objective in both courts and tribunals is to achieve fair and proportionate justice. On the one hand, within the Courts, there is less formalism than a generation ago. There are many more litigants in person than in the past, particularly following the reduction in availability of legal aid. On the other hand, within the Tribunals, there are some signs of more formalism. Procedural rules are more detailed. Legal representation is more common than it was. There are fewer lay members of tribunals and the legally-

² *Baxendale-Walker v Law Society* [2007] EWCA Civ 233; [2008] 1 W.L.R 426

qualified members are now called “Judges”. The judges of the Courts and the Tribunals are described as members of the same judicial family.

19. The persons appearing in the Courts and the Tribunals are coming closer too. On the one hand, there is increasing legal representation in the Tribunals because many jurisdictions have been transferred out of the court system, where lawyers often, if not usually, appeared. On the other hand, the costs of litigation have risen to such an extent that, coupled with the effective abolition of legal aid, litigants in person are now far more common in the Courts, including the High Court and the Court of Appeal, than they were even in recent years.
20. In addition, structural changes are already happening. The merger of the Courts Service and the Tribunals Service into the new HM Courts and Tribunals Service took place in April 2011. And the Government, in an announcement by the Lord Chancellor in September 2010, has outlined plans to create a unified judiciary in England and Wales under the overall leadership of the Lord Chief Justice.
21. This Report is not the place to debate the merits or otherwise of the increasing proximity of the Courts and the Tribunals or how the distinctive characteristics of each are to be preserved (if such differences are to be preserved at all) and we say nothing more about it. What we do need to say, however, is that the closer the Courts and the Tribunals become, the less easy it is to maintain a different approach to costs. At some stage, policy-makers will have to address which competing costs philosophy is to prevail where material differences do not exist. The answer may be that one regime is appropriate for parts of each of the Courts and the Tribunals, and another regime is appropriate for different parts: the division may not in the end be between courts and tribunals at all. Alternatively, perhaps some work now dealt with in the Tribunals will be transferred to the Courts and *vice versa*.
22. For the purposes of this Report however, we must take Tribunals as they are. There has already been much rationalisation and a number of jurisdictions have been transferred from the Courts to the Tribunals with the coming into force of TCEA. This followed Sir Andrew Leggatt’s 2001 report *‘Tribunals for Users, One System, One Service’* and the July 2004 White Paper following the publishing of that report,

Transforming Public Services: Complaints, Redress and Tribunals. TCEA created two new tribunals, the First-tier Tribunal (“**the F-tT**”) and the Upper Tribunal (“**the UT**”), to which the functions of a number of now-abolished tribunals have been transferred. The UT exercises an appellate jurisdiction, notably hearing appeals from the F-tT, but it also has first-instance jurisdictions, largely in sensitive or complex areas, and it has a judicial review jurisdiction. Both the F-tT and the UT are divided into a number of chambers, dealing with different types of work. There still remain a number of other tribunals outside the TCEA structure, of which the largest are the employment tribunals (“**ETs**”) from which an appeal lies to the Employment Appeal Tribunal (“**the EAT**”).

23. For the F-tT and the UT, the position as regards costs is governed by section 29 of the TCEA and the relevant Tribunal Procedure Rules. Section 29 gives the Tribunals the widest of powers. Section 29(1) provides that the costs of and incidental to all proceedings in the F-tT and the UT are at the discretion of the tribunal in which the proceedings take place. And section 29(2) provides that the relevant tribunal has full power to determine by whom and to what extent the costs are to be paid. An express power is conferred by section 29(4) to make wasted costs orders. We say more about the interrelation between section 29(1) and section 29(4), in particular whether the power under section 29(4) can be qualified by the Rules, later in this Report.
24. The general provisions of sections 29(1) and (2) have effect, according to section 29(3), subject to Tribunal Procedure Rules. Although the TPC has adopted a general approach designed to achieve as much commonality as possible across the tribunals within the TCEA structure, there are differences between different chambers. Some of these differences reflect the different nature of the jurisdictions but some are the result of adopting the approach of a former tribunal, where there has not been sufficient time to consult on a change.
25. Tribunals outside the TCEA structure – most notably ETs, the EAT and various tribunals dealing with matters relating to land and land valuation – have a variety of rules made under a variety of enabling provisions. There is sometimes a lack of

consistency between different tribunals where a difference in approach is not required.

26. Despite those differences, if one ignores matters of detail, one can see that there are broadly three different costs regimes operated in tribunals with first-instance jurisdictions and, although they may have grown up partly by accident and the reasons for having one regime rather than another in any particular jurisdiction have not always been clearly articulated, it is possible to provide rationales for each of them.
27. The first regime is one where there is no costs-shifting at all. This tends to be used in tribunals exercising a jurisdiction between citizens and the State where legal representation on both sides is rare, where a substantial proportion of litigants have modest means, where any financial sums in dispute are also likely to be modest and where hearings are generally very short – often only an hour or so. In these circumstances, arguments about costs would be likely to add a disproportionate cost to the proceedings and would very seldom serve any practical purpose.
28. The second regime is a variation on the first; an award of costs may be made only where costs have been incurred as a result of a party's, or representative's, unreasonable conduct. This tends to be used in tribunals exercising jurisdiction between citizens and the State where the nature of the proceedings is such that legal representation, although not necessarily expected, is more common and where the proceedings may be lengthy so that substantial costs can be incurred. Even where legal representation is common on both sides, it tends to be used in the regulatory field where even in the Courts costs do not necessarily follow the event. It is also used in citizen v citizen jurisdictions where representation, although not necessarily expected, is fairly common but where it is considered that the parties are likely not to have equal means.
29. The third regime is full costs-shifting. This tends to be used in citizen v State tribunals only where the case is one in which it is to be expected that both parties will have legal representation or in citizen v citizen disputes where legal representation is not actively discouraged and there is no reason to presume an inequality of arms.

30. It is also conventional to have costs-shifting to enable a successful party to recover any fee that has been paid to a tribunal, if there is no other provision for repayment. However, fees are relatively rare in tribunals. Proposals to introduce fees for employment cases are currently under consideration and we hope that, if they are adopted, provision will be made to enable successful applicants generally to recover any fees they have paid.
31. In the next six sections we will consider the costs regimes in each tribunal in detail. We set out in Appendix 2 a table showing the provisions which currently apply to the principal tribunals with which we are concerned. In the case of the F-tT and the UT, the table indicates the way in which Tribunal Procedure Rules have constrained the wide powers under section 29. We proceed on the basis that the underlying principle of the Tribunals – at least where the issue in question relates to relations between the citizen and the State – is that there should be no costs-shifting absent unreasonable conduct and that departure from that principle should occur only if a clear case for it is made out.

C. Costs regimes in the First-tier Tribunal

General Regulatory Chamber

32. As its name suggests, the General Regulatory Chamber (“GRC”) contains a number of disparate jurisdictions concerned with the regulation of activities ranging from running casinos to driving instruction. It has not been suggested that the general rule (no costs orders save where there has been unreasonable conduct) is other than appropriate. The additional power to make the Charity Commission, the Gambling Commission or the Information Commissioner (as regulators) liable for costs where the decision which it made and which is the subject matter of the proceedings was unreasonable is clearly a salutary power. We consider below (see para 150) whether it should be extended to other jurisdictions. A similar power is to be found in relation to the decisions of regulators and others in financial services cases in the UT. It is to be noted that fees are payable under the First-tier Tribunal (Gambling) Fees Order 2010 in relation to appeals from the Gambling Commission. The GRC can, and usually must, make an order for costs equal to the fee paid by a successful appellant (unless it has already been included in a costs order made because the Commission’s original decision, direction or order was unreasonable). We do not recommend any change in respect of this Chamber but we do raise below (see para 148) the question whether the F-tT should have a power to direct that there be a costs-shifting regime in individual cases.

Health, Education and Social Care Chamber

33. There are two different costs regimes within the Health, Education and Social Care Chamber (“HESC”). (It should be noted that, in addition to these regimes, the Secretary of State may pay allowances in respect of travel, subsistence and loss of earnings to those attending hearings in this chamber.)

34. In respect of the Primary Health List, care standards and special educational needs and disability in schools jurisdictions, the costs regime is no costs-shifting absent unreasonable conduct. The judges consider this to be generally desirable. The Primary Health List and care standards jurisdictions are regulatory and the cases can

be lengthy. Legal representation is also common in special educational needs and disability in schools cases, where legal advice is within the scope of the legal aid scheme. Subject to the point considered at para 148 below, we do not recommend any change in respect of these cases.

35. In mental health cases, the F-tT has no power to award costs save to make a wasted costs order. The judiciary are again content with this position, considering that it is inappropriate that there should be a power to make an order in respect of unreasonable conduct when unreasonable conduct on the part of a patient may be a manifestation of the mental health issue, making it inappropriate to make an order for costs. In any event, patients often have limited means and other parties seldom have legal representatives. Patients, though, are frequently represented because there is non-means-tested legal aid which is why the power to make a wasted costs order is thought desirable. We do not recommend any change.

Immigration and Asylum Chamber

36. The Rules currently preclude the making of any costs order in the Immigration and Asylum Chamber (“**F-tT(IAC)**”), even in respect of unreasonable conduct, although, with the proposed introduction of fees, it has been proposed that the Rules be amended so as to allow orders to be made requiring UKBA in effect to reimburse to a successful appellant the amount of any fee that has been paid. The judiciary do not consider that it would be appropriate to have power to make any other costs orders. We suppose this to be because UKBA seldom has legal representation, hearings are generally short and appellants, who may be eligible for legal aid (although the Government plans to reduce the scope of the scheme in immigration cases), are often poor or at least have no assets in the UK. We do not recommend any further change (but see para 156 et seq below in respect of wasted costs orders).

Social Entitlement Chamber

37. Here, again, the Rules preclude the making of any costs order. However, there is a power to pay allowances in respect of travel, subsistence and loss of earnings to those attending hearings in most, but not all, cases.
38. There is a wide range of work within the Social Entitlement Chamber (“SEC”). The view expressed by the Chamber President is that no change is needed; and he considers that the no costs-shifting regime in respect of all the different jurisdictions within the SEC is appropriate.
39. In relation to social security and child support cases, the judicial view is that, while the prospect of being able to award costs may be tempting as a sanction against a party who is acting in a wholly unreasonable manner, there are two major drawbacks.
40. Firstly, it is generally recognised that for many claimants with winnable cases the prospect of appealing to a tribunal can be quite daunting. In its public information, the SEC is currently able to give the assurance that appealing will not carry any risk of liability for fees or costs. If the tribunal had to qualify that assurance by mentioning the possibility of a costs order, there is a real risk of creating a deterrent to pursuing justice.
41. The sums in issue in the proceedings are generally modest, mainly in the form of awards of periodical payments of social security benefits. The means of appellants are, by and large, similarly modest.
42. It is true that there are cases where more money is involved or where the appellant is of more than modest means. In Vaccine Damage appeals, the claim can be for as much £140,000. In the Compensation Recovery jurisdiction, the appellants tend to be large insurance companies seeking to recover from the DWP sums that are often in the range £20,000 - £40,000. In Child Support cases, the paying parent may be very well-off and that may be so even in some social security cases. But these cases probably together account for less than 1% of the social security and child support workload.

43. The judicial view is that the risk of deterring an appellant who falls within the general category militates against attempting to introduce a selective power to award costs in the categories mentioned in the preceding paragraph.
44. The second drawback is the practical difficulty in enforcing any costs order. The tribunal itself has no enforcement powers. There is a statutory limitation on imposing a charge on benefits. And in the nature of the case, appellants will often have no or minimal assets against which to enforce an order.
45. In asylum support appeals, the same arguments apply with even more force. The sums with which an appeal is concerned are even more modest and the means of the appellants constrained, the basis of the entitlement being destitution. Legal representation is rare and where it is present is usually *pro bono*.
46. In Criminal Injury Compensation cases, awards can be substantial. They can exceed £1m in some old, “pre-tariff scheme” cases and can still exceed £100,000. However, most awards are relatively modest, with about half of tariff awards being £2,000 or less and there being no compensation for loss of earnings and other expenses where incapacity lasts for less than 28 weeks. Many victims of crime are of modest means. Although there is no power to award costs, in an appeal against a decision to withhold an award, to make an award or to require repayment of an award, the tribunal has the power to reduce the amount of any award if it considers the appeal to have been frivolous or vexatious (see paragraph 65 of the Criminal Injuries Compensation Scheme 2008). There is no similar power to penalise the Criminal Injuries Compensation Authority for unreasonable behaviour in opposing an appeal that has caused the appellant to incur additional costs but the power is consistent with other powers to reduce an award for misconduct or a failure to co-operate and it does not impose a sanction on a person to whom no award would otherwise be made.
47. No change is sought in relation to the “no costs” regime in these cases, even to introduce a power to make wasted costs orders or as a sanction in relation to unreasonable conduct. The lack of perceived need for a power to award costs may

be because the power to reduce awards is thought adequate, because there is anyway seldom legal representation on either side before the tribunal and because the tribunal does not wish to be troubled with arguments about costs when the other work – the vast majority – of the SEC is, appropriately, outside any costs regime. Moreover, the tribunal attempts to control, through the use of practice statements, the costs which an appellant might incur through, for instance, the obtaining of medical reports.

48. We accept that no change in the present costs regime in the SEC can be justified in the great majority of cases and that setting up the machinery for dealing with a few exceptional cases might give rise to expense and other difficulties out of all proportion to the possible benefits. Accordingly, we recommend no change (but see para 156 et seq in respect of wasted costs orders).

Tax Chamber

49. The present rules are the result of considerable debate between stakeholders within the context of the Tax Appeals Modernisation Project and within the TPC when the Tax Chamber was created. We should say a little about the pre-existing regimes.
50. The General Commissioners of Income Tax had no power to award costs. In contrast, the Special Commissioners had power to make costs awards in cases of wholly unreasonable conduct. The VAT Tribunal had a general power to make costs orders, but HMRC did not normally seek costs against an unsuccessful appellant and normally paid the costs of a successful appellant. This was known as the Sheldon practice³. HMRC refused to extend this practice into the Tax Chamber. They are not prepared to re-introduce it and quote the then Government's position on the approach to the costs regime as set out in "Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007—The Government's Response", published on 19 May 2008 by the Ministry of Justice.

³ set out by the Right Hon. Robert Sheldon, now Lord Sheldon of Ashton-under-Lyne, on 13 November 1978-and restated on 24 July 1986 by the right hon. Peter Brooke, now Lord Brooke of Sutton Mandeville.

“The Government considers that the basic principle should be that any power of the tribunal to award costs should apply equally to both parties, and intends not to operate the Sheldon practice in the new Tax Chamber (under this practice HMRC did not normally seek costs when they won in the VAT Tribunal). On this basis, where costs follow the event, each party will bear the other party’s costs if they lose.”

51. Even amongst stakeholders other than HMRC, there was no unanimity of view about the most suitable costs regime (or indeed regimes) for costs in the Tax Chamber. The various professional representatives among the stakeholders were no doubt articulating perceptions of the interests of taxpayers generally which, to some extent at least, reflected their own self-interest. The different views on the appropriate regime stemmed largely, if not entirely, from different views about how taxpayers would react. Everyone professed support for as great an access to justice as possible. Some maintained it to be obvious that the risk of an adverse costs order would deter taxpayers from appealing winnable cases; others maintained it to be equally obvious that the absence of an ability to recover costs if successful would deter taxpayers. Others took less extreme views, recognising that different taxpayers would have different approaches to risk and reward so that what would deter one might encourage another. We do not think that any amount of research or consultation can take that particular debate any further. There is simply no “correct” answer.

52. The compromise reached is reflected in the current Tax Chamber rules. These provide for a case to be allocated to one of four categories: Default Paper, Basic, Standard or Complex. Aside from wasted costs orders and unreasonable conduct orders, there is no power to award costs other than in a case which has been allocated to the Complex category. A Complex case is one which (a) will require lengthy or complex evidence or a lengthy hearing, (b) involves a complex or important issue or principle or (c) involves a large financial sum. Where a case has been allocated as Complex, the default position is that the general power under section 29 TCEA applies. However, a taxpayer, but not HMRC, may opt out of that regime with the result that only a wasted costs order or an order where there has been unreasonable conduct may be made.

53. An appeal to the F-tT from a decision of HMRC can be transferred to the UT but only if (a) it is allocated as Complex and (b) the parties consent. In Complex cases in the Tax Chamber, the default position is that adverse costs orders can be made against either side. A taxpayer can, in the F-tT, opt out of the costs regime ordinarily applicable to Complex cases (and thus eliminate his exposure to an adverse costs award save for wasted costs or in respect of unreasonable conduct). But this is not possible in the UT with the consequence that a taxpayer is exposed to an adverse costs order. If he wishes to remain in a costs free environment, he will have to refuse his consent to a transfer to the UT.
54. The Tax Chamber has power to re-allocate a case between categories under rule 23(3) of the F-tT Rules. This power can be exercised at any stage. Thus a Standard case may be re-allocated as Complex or a Complex case as Standard. The question then arises about what power there is to make an order in respect of costs incurred prior to the re-allocation. In *Capital Air Services Ltd v HMRC* [2010] UKUT 373 it was decided that an order can be made, and can only be made, if the case is categorised as Complex when the order is made; and, if made, it may relate to the entirety of the costs, even those incurred when the case was categorised as Standard. We do not consider that any change to this result needs to be introduced.
55. HMRC do not wish to see any changes to the current costs rules in the Tax Chamber. They consider that the Tax Chamber should continue to be available to appellants on a no costs basis with an appropriate sanction for unreasonable behaviour. This means that every taxpayer (rich or poor) who appeals a decision has the option of a low-cost independent decision at first instance. The opt-out, coupled with the right to refuse to agree to the transfer of a Complex case to the UT, ensures that right of every taxpayer who behaves reasonably to an environment where no adverse costs order can be made is preserved.
56. In their response to the TPC's consultation on the Rules, HMRC said "We are content that the substantive rules about costs for the First-tier Tribunal reflect extensive MoJ Stakeholder Group discussion, and agreement, to which HMRC was party." and went on to say "It is, accordingly, strongly to be desired that these [rules] remain as they are." This is still their position.

57. HMRC observe that, in practice, the rules appear to have gained wide acceptance and the system is working well. The new tribunals have been in operation for only a short time and fewer cases have gone to appeal in that time than expected. In the circumstances, their strong view is that the rules should remain as they are for the time being, unless there is substantial evidence of real problems. They are not aware of any such problems. Their figures suggest that around 60% of appellants are unrepresented so the majority have no costs except their own time.
58. It is clear, we think, that the current rules are appropriate for Default Paper and Basic cases. No-one has suggested otherwise.
59. Nor has anyone argued for a different regime in respect of Complex cases. So far as Standard cases are concerned, the question is where the line should be drawn between cases where there is no costs-shifting absent unreasonable conduct and cases where there is costs-shifting but with an opt-out.
60. The view has been expressed by some that, in indirect tax cases, the rules should be amended to reinstate the system as it existed in the VAT Tribunal. Those who propound that view do not really envisage a complete replication. Instead, they envisage the Tax Chamber having a power to award costs but with the Sheldon practice enshrined in the rules rather than by a new Parliamentary Statement and with the opt-out under the present rules being retained.
61. The reasons given in support of this change are in effect these:
- a. The old system worked well.
 - b. The new system discourages appeals in cases where professional advice and assistance are appropriate because the costs involved may exceed the amount of tax at stake.
62. It is said that HMRC often take cases to litigation on the basis that the law needs to be clarified and that, across the body of taxpayers, a great deal of money may be at

stake. In contrast, a taxpayer, taking a commercial view, may decide it is not worth the candle to pay professional fees where, for that taxpayer, not much is at stake. If the case is not allocated as Complex, the taxpayer will have to pay his own costs with no scope for recovery. It is said that the inability to recover costs will have a deterrent effect where the costs of the appeal would exceed the tax in dispute. If a case is allocated as Complex, there will either be an opt-out (with the same result) or there is the risk of an adverse costs order. It is said that under the old system that risk, qualified by the Sheldon practice, was one which taxpayers were often prepared to take.

63. We make two observations at this point. First, we can see no reason for making a distinction between direct and indirect tax cases so far as costs are concerned. If it right to revert to the old regime (or something like it) for indirect tax, there is no reason not to adopt the same approach for direct tax. To draw a distinction would simply create an anomaly. Secondly, it is suggested that cases where the law needs to be clarified may not be complex so that the costs rules for Complex cases will not apply. But that is not right: a Complex case includes one which “involves a complex or important principle or issue” so that a case which raises a general point which needs clarification ought to fall into the Complex category.

64. In any case, HMRC continue generally to apply what is known as “the Rees practice”⁴ and they have made it explicit that the practice will apply whenever costs are available in the tribunal system. Accordingly, the Rees practice should apply to Complex cases in the Tax Chamber which have not been the subject to the taxpayer opt-out. Subject to what we say below, this, it seems to us, provides precisely the protection which those advocating a return to the old system seek in relation to what might be seen as test cases.

⁴ The Rees practice was set out by Mr Peter Rees on 12 March 1980: “The general rule in the appeal courts is that losing party risk having to pay the other side’s costs, and I do not think it would be right to treat tax cases differently as a matter of course. However, both revenue departments exercise their discretion on matters of costs and are willing in appropriate circumstances, and in particular where it is they who are appealing against an adverse decision, to consider waiving their claims to costs or making other arrangements. Influential factors include the risk of financial hardship to the other party and whether the case is one of significant interest to taxpayers as a whole, turning on a point of law in need of clarification. If the revenue authorities are to come to an arrangement of this nature, they would expect to do so in advance of the hearing and following an approach by the taxpayer involved.”

65. A different approach would involve abolishing the distinction between standard and Complex cases. The view of at least some of the judiciary can be summarised in five points:

- a. A uniform approach to costs in tax appeals is not appropriate, given the enormous variations in size and complexity and the amount of new legislation.
- b. The costs regime for Complex cases with the right of an appellant to opt out was a sensible and pragmatic solution. There is not, however, any obvious logic in not extending this to standard cases.
- c. An appellant has a legitimate grievance if forced to bear his own costs of establishing that HMRC misapplied the law or that the UK legislation is incompatible with EC law.
- d. The availability of a costs sanction for unreasonable conduct is a necessary tool particularly for interlocutory matters.
- e. The absence of a general costs regime in Standard cases can have an inhibiting effect on efficient case management.

66. The second and third points really go together. We say a little more about them. The grievance referred to will not arise in a Complex case (unless the taxpayer has exercised the opt-out, in which case he must bear the consequences). In most cases where the appellant's resources are limited, costs are a material factor and can result in inadequate representation either because a representatives' fee does not enable adequate preparatory work or the fee which an appellant is willing to pay only obtains an advocate of limited experience or competence. This inequality of arms in appeals, which are meritorious but do not qualify as Complex, would, it is said, be largely redressed if the regime in Complex cases with the right to opt out of costs was extended to Standard cases (although not to Default Paper and Basic appeals). It is suggested that there is not any logical rationale for restricting the costs regime subject to an appellant's right to opt out to Complex cases.

67. It is to be noted that the distinction between Complex and Standard allocations has already given rise to its own satellite litigation⁵ where taxpayers who want to be able to obtain an adverse costs order against HMRC are challenging allocations. It is unlikely that there would ever, save in the rarest of cases, be a similar scope for dispute about allocating a case as Basic or Standard.
68. This is an aspect on which the TPC might wish to carry out a consultation. Our view, however, is that matters should be left as they are although (as revealed by the satellite legislation mentioned in the last paragraph) the criteria for allocation as Complex may need some revision. The default position in any tribunal case is that there should be a no costs-shifting regime. That starting point is appropriate to a Standard tax case. Neither side should be exposed to the risk of the other side running up significant costs which it might have to pay when the case is relatively straight-forward and not a great deal of money is at stake. Where the case is Complex, the taxpayer can elect for whichever costs regime suits his own approach to risk and reward. This regime strikes an appropriate balance.
69. As to the fourth point, there is already a power to award costs in the case of unreasonable conduct. There might be some argument about whether a failure to comply with directions is necessarily, of itself, unreasonable conduct. We suggest that the Rules should provide expressly that failure to comply with a direction of the tribunal will be treated as unreasonable behaviour, so that if the other party is put to expense in obtaining compliance with a direction, he will be able to recover that expense. We add that this point applies in any chamber which has a power to make an order for costs in the case of unreasonable conduct.
70. As to the fifth point, effective case management often involves directions which give rise to additional work and expense before the hearing, including disclosure, witness statements, identification of issues and skeleton arguments. The experience of the judiciary is that there is sometimes a reluctance to incur costs which cannot be recovered if successful. It is even said that this in turn can cause the tribunal to be reluctant to give directions which would otherwise be appropriate. We do not

⁵ See for example *Capital Air Service Ltd v HMRC* [2010] UKUT 373 (TCC)

consider that account should be taken of that flawed approach. If the costs regime is considered to be unfair or inappropriate, it must be changed but, so long as it exists in its present form, case management decisions should be made on their merits regardless of the orders which can or cannot be made in respect of the costs of compliance. It is proper to have regard to the expense of complying with a case management direction in deciding whether to make it, because parties should not be required to incur unreasonable costs, but if it is unreasonable to require a successful party to bear the expense in the absence of costs-shifting, it is likely to be equally unreasonable to require the unsuccessful party to pay bear it if there is costs-shifting.

71. Two other concerns have been expressed. First, that the tax at stake may be exceeded by the cost to the taxpayer of vindicating his position. Secondly, that HMRC may have an interest in the point at issue going beyond the particular case and thus not be willing to reach a compromise.

72. As to the first of those, we do not consider that, by itself, it dictates the solution which has been suggested (*i.e.* costs-shifting with an opt-out for Standard cases). In cases of this sort, we consider that it is more appropriate to see the costs before the Tax Chamber in the same light as compliance costs. If HMRC has acted reasonably in disputing the taxpayer's case, they should not be exposed, in a Standard case, to an adverse costs award when they have simply been carrying out their statutory duty to collect tax even if, in the event, it is shown that they were wrong on the facts or their interpretation of the law.

73. As to the second concern, we make two observations. If the case is indeed one which HRMC are insistent on taking forward because of its implications for other cases, then it may be appropriate to allocate it as a Complex case as one which "involves [an] important principle or issue" within Rule 23(4)(b) thus bringing the case within the costs-shifting regime. If the case is truly in the nature of a test case, the Rees practice can then, as we have already noted, be invoked.

74. In any event, as to unwillingness on the part of HMRC to settle because of the implications of the point, it is not at all obvious that HMRC would be willing to

compromise simply because the outcome may be doubtful even in a case involving a small amount having no implications of significance for other cases.

75. However, unfortunately, there are cases where HMRC have declined to invoke the Rees practice where an impartial observer might think that it should have been. In one case which has been brought to our attention, HMRC declined to invoke the practice and, having lost in the Court of Appeal, sought (and obtained) leave to appeal to the House of Lords on the basis that a point of law of general public importance was involved⁶. The taxpayers were ultimately successful. But they had to fund their litigation by making an appeal (through tax professionals) for support in meeting their costs. The need for the Rees practice is, by its very existence, recognised by HMRC. A case such as the one we have just mentioned indicates that in practice a deserving case can fail to attract an application of the practice. We accordingly recommend that the practice be formalised within the Rules by making provision for a taxpayer to apply for an appropriate order in defined circumstances where HMRC declines to apply the practice.

76. In summary, our view, accordingly, is that the current costs rules in the Tax Chamber are appropriate and not in need of change, save to formalise the Rees practice.

⁶ See *Jones v Garrett* [2007] HL 78 TC 597.

War Pensions and Armed Forces Compensation Chamber

77. There is no power to award costs in the War Pensions and Armed Forces Compensation Chamber (“**WP&AFCC**”) but there is a power to pay allowances in respect of travel, subsistence and loss of earnings to those attending hearings. The Chamber President sees no need for any change to the no-costs regime. The relevant considerations seem to us to be the same as those in the SEC. We do not recommend any change (but see para 156 et seq for wasted costs orders).

D Costs regimes in first instance jurisdictions of the Upper Tribunal

78. Three of the four chambers of the UT possess some first-instance jurisdiction (other than Judicial Review, which we consider separately below).

Administrative Appeals Chamber

79. Appeals to the GRC concerning national security certificates under section 28 of the Data Protection Act 1998 or section 60 of the Freedom of Information Act 2000 must be transferred to the UT and are heard in the Administrative Appeals Chamber (“**AAC**”). Other information rights cases *may* be transferred from the GRC to the AAC if both Chamber Presidents agree. Where cases have been transferred on a discretionary basis, the AAC has the same powers to award costs as the GRC would have had, which is to award costs only where there has been unreasonable conduct. In national security certificate cases, there is a broad two-way costs-shifting regime if the appeal is against the application of a certificate but one-way costs-shifting if the appeal is against a certificate, although costs may also be awarded against the appellant if he has acted unreasonably. It has not been suggested that any change is needed and we do not recommend any change.

80. First instance appeals against a decision of the Traffic Commissioners and against the Independent Safeguarding Authority are also heard in the AAC. Again, there is no general costs-shifting power absent unreasonable conduct. There is a power to pay allowances in respect of travel, subsistence and loss of earnings to those attending

hearings in appeals from the Independent Safeguarding Authority. This is consistent with the regimes in regulatory cases in the GRC and HESC. It has not been suggested that any change is needed and we do not recommend any change (but see para 148 below).

81. The AAC also hears references under section 4 of the Forfeiture Act 1982. These references arise in connection with claims for social security benefits and war pensions or the Armed Forces Compensation Scheme and are required whenever the decision-making authority considers that the Forfeiture Rule applies, irrespective of whether or not the claimant disputes the point. The AAC has no power to award costs. This is consistent with the position in the SEC and WP&AFCC. It has not been suggested that any change is needed and we do not recommend any change (but see para 156 et seq in relation to wasted costs orders).

Tax and Chancery Chamber

82. Tax appeals in the Tax Chamber allocated as Complex may, with the consent of the parties and the Presidents of the Tax Chamber and the Tax and Chancery Chamber (“**T&CC**”), be transferred to the T&CC. The latter has a general power to award costs. Unlike in the Tax Chamber, a taxpayer has no opt-out from costs-shifting. We consider that this is anomalous. A taxpayer in a Complex case who wishes to opt-out of costs-shifting can achieve that objective by refusing to consent to the transfer of the case to the UT and by exercising his right to opt out. The result of that may be that a case which is appropriate to the UT, and which the parties and the Presidents consider would best be heard in the UT, will remain with the F-tT in order to preserve the taxpayer’s right to opt out. We can see no reason why the taxpayer should not be given the same right to opt out in the UT when it is exercising a first-instance jurisdiction and recommend that the TPC considers an appropriate rule change.
83. Appeals, references and applications to the charity jurisdiction of the GRC can be transferred to the T&CC with the consent of the Presidents of each chamber but without the consent of the parties (in contrast with the position in relation to tax appeals). The powers of the UT in relation to costs are the same as those which the

GRC would have had if the case had proceeded before it. It has not been suggested that any change is needed and we do not recommend any change.

84. Financial services cases (relating principally to decisions of the Financial Service Authority, the Bank of England, and the Pensions Regulator) are commenced in the T&CC. There is no general power to make a costs order, but the UT can make an order in the case of unreasonable conduct with the additional power to make an order against the decision-maker if the decision was, in the view of the UT, unreasonable. This is consistent with the position in other regulatory jurisdictions. We note that in market abuse cases there is a scheme of legal assistance available to the applicant funded by the industry through the FSA. We are not aware of any pressure for change from any quarter, including the FSA itself. In saying that, we should not be taken as accepting that the scope of the legal assistance scheme is not unduly restricted; we express no view one way or the other. However, we do not recommend any change to the costs regime.

Lands Chamber

85. The Lands Chamber has a large number of first instance jurisdictions arising under a variety of statutes. For present purposes the jurisdictions can be categorised as follows:
- a. Compensation for the compulsory purchase of land.
 - b. Compensation where land is adversely affected by the exercise of statutory powers (e.g. through noise arising from a new road or a new runway at an airport, mining subsidence, the laying of pipelines, the revocation of planning permission).
 - c. Blight notice and purchase notice cases where the issue is whether the planning authority is required to purchase the claimant's interest in land.
 - d. Land valuation issues in tax appeals.
 - e. The discharge or modification of restrictive covenants.
 - f. References by consent in which the tribunal acts as arbitrator
86. In compulsory purchase compensation cases (category a), section 4 of the Land Compensation Act 1961 makes provision in relation to costs and the same principles

are applied in those references by consent where the tribunal acts as arbitrator in assessing compensation following an agreement to transfer of land to an authority (most of category f). Where the acquiring authority has made an unconditional offer which is not exceeded by the tribunal's award or where the claimant has failed to deliver a claim on the basis of which they could have made an offer, the tribunal must, in the absence of special reasons, award the authority their costs. Where the claimant has made an unconditional offer and the award exceeds the amount offered, the tribunal must, in the absence of special reasons, order the authority to pay the claimant's costs.

87. Where there has been no offer, so that the statutory provisions do not apply, the basic rule, endorsed by the Court of Appeal, has been that the claimant should receive his costs unless he has behaved unreasonably. The justification for the basic, non-statutory, rule that has been established is that the claimant has had his land taken from him compulsorily and he should therefore be compensated fully for his losses, including the cost of establishing his claim. Given this rule, the second part of the statutory provision serves no practical purpose since there is no incentive on a claimant to make an offer.
88. It is for consideration whether the mere failure to beat the acquiring authority's offer should result in an award of costs against a claimant who has behaved in all respects reasonably, and the failure to deliver a claim might similarly more appropriately be addressed on the basis of unreasonable conduct. We recommend that there should be standard two-way costs-shifting regime in compulsory purchase compensation cases (both category a and most of category f), with a claimant's opt-out right in small cases but with power for the tribunal to order one-way costs-shifting or no costs in appropriate cases.
89. In all other cases (categories b, c, d, e and the rest of f), there is currently a general costs-shifting power. However, the usual rule that costs follow the event is often modified in practice.
90. In particular, applications for the discharge or modification of restrictive covenants (category e) are in the nature of the compulsory purchase of private rights. In view

of this, a successful objector will normally get his costs but an unsuccessful objector will not normally have to pay the applicant's costs unless he has behaved unreasonably. Where, at a preliminary stage, the applicant opposes the admission of an objector on the basis that he does not have the benefit of the covenant and this issue is decided as a preliminary issue, costs will normally follow the event. We do not recommend any change in either the legislation or the practice for this category of cases.

91. In other cases where there is a general costs-shifting power, no costs are in practice awarded where the parties have used the non-statutory fast-track procedure operated by the chamber and have thereby agreed to a no-costs regime. Nearly all category d cases are dealt with under the fast-track procedure. We recommend a standard no-costs regime in all jurisdictions other than categories a and e, qualified by provisions allowing for an award of costs in the case of unreasonable conduct and subject to a power for the tribunal to order that costs-shifting should apply in an individual case – either two-way (*e.g.* because of complexity or the amount in issue) or one-way (*e.g.*, because of imbalance between the parties in terms of resources or the significance of the outcome, for instance where there are many claims for compensation in respect of noise from a new road scheme and the claim is essentially a test case).

E Costs regimes in other first-instance tribunals

Employment tribunals

92. The jurisdictions which we have so far considered deal with issues between the citizen and the State albeit that some jurisdictions – in particular high-value tax appeals – have something of the flavour of conventional court litigation. The jurisdiction of the ETs is not concerned with issues between the citizen and the State but concerns private law disputes between employer and employee. And, as with tax, large sums can be involved; there is, for instance, no cap on the amounts which may be awarded in discrimination cases. Significant costs can be involved, particularly if some point of European Union law is referred to the Court of Justice.

93. There has, however, always been a large political element in the formulation of substantive employment law and in its practice, including costs, with powerful interest groups – employers’ organisations and trades unions – exerting their influences. The costs regime in the ETs has been reviewed on a number of occasions in recent years. As with many statutory tribunals, ETs (formerly industrial tribunals) were set up with a view to excluding needless formality and expense. The concept was that parties at odds with each other over employment matters could appear before a tribunal with appropriate experience, without representation or help and secure speedy and inexpensive justice. That resulted in a very limited power to award costs but the payment by the Secretary of State of allowances in respect of travel, subsistence and loss of earnings to those attending hearings. This reflected the idea that individuals should not be deterred from bringing claims in the ETs by a fear of a potentially ruinous costs award being made against them.
94. Over time, matters have moved to the current position where there is power to make a wasted costs order and an order if, in bringing or conducting the proceedings, the party or representative has acted vexatiously, abusively, disruptively, unreasonably or the bringing or conducting of the proceedings was misconceived. This is similar to the unreasonable conduct orders which can be made in some of the F-tT and UT jurisdictions which we have addressed above. The position today, therefore, is that the power to make an adverse costs award is very much based on the conduct of the party rather than on whether the party has been successful in bringing or defending the claim. Consistently with that approach, a costs order can be made in unfair dismissal cases where an adjournment has been caused by a failure by the respondent to produce evidence about reinstatement for which the claimant had given notice. There is also power to make, in favour of an unrepresented claimant, a Preparation Time Order. Such an order can (or must) be made in the same situations as a costs order can (or must) be made.
95. Since the issue of costs in the ETs is seen by its judiciary as a political and policy matter over which the judiciary has little influence, there has been reluctance on the part of the judiciary of England and Wales to express a view. We would observe, however, that the general approach to costs in the ETs is consistent with the general approach in the F-tT although its details differ and in particular where circumstances

unique to the ETs make it appropriate that costs orders should be made. Any change in policy which produced a divergence from the general rule and treated the ETs is a way fundamentally different from that accorded to jurisdictions within the F-tT would, we suggest, require the clearest justification. The judiciary in Scotland consider that the costs rules are fit for purpose and there is no desire for any change.

96. We note that concern has been expressed on behalf of the ETs judiciary in England and Wales that there is no power to order the costs and expenses of the tribunal itself to be reimbursed where a party has acted vexatiously *etc.* However, that is a question beyond our terms of reference.

Competition Appeals Tribunal

97. The Competition Appeals Tribunal (“**CAT**”) has wide powers to award costs. It has developed its own jurisprudence resulting in the different sort of order which it conventionally makes in respect of the different types of case which come before it. The President does not want the wide powers conferred on the CAT to be circumscribed but wishes to see it continue to develop its practices. We see no reason to differ from that view. The nature of its work justifies a costs-shifting power. Most of the CAT’s work involves high-value disputes between large corporations or involves regulatory matters concerning large corporations. It is difficult to imagine a jurisdiction which could be further removed from that of, for instance, the SEC in terms of the appropriate principles to apply in respect of costs. We know of no dissatisfaction with the current regime. In any event, in this specialist field, we consider that the appropriate costs regimes are very much a matter to be determined through discussion between the CAT itself and user groups.

Adjudicator to Her Majesty’s Land Registry

98. This is one of a number of tribunals the powers of which – at least as regards England rather than Wales – would be transferred to a new chamber of the F-tT under plans currently being worked on by the Ministry of Justice.

99. The judiciary of this tribunal are very strongly of the view that their costs jurisdiction, a broad costs-shifting power applied in practice in the same way as cost powers in the Courts) should be maintained. It is pointed out that the vast majority of the disputes involved are no different from many actions in the Courts. Indeed, many disputes concerning registered land that are dealt with by the adjudicators are no different from disputes which, in the case of unregistered land, would necessarily be resolved in a court. The current costs jurisdiction of the Adjudicator works well in practice and in the experience of the judiciary is widely understood by the parties. The Adjudicator considers that his power are appropriate to his jurisdiction because

- a. it substantially reflects the regime in the High Court and county courts where similar issues are litigated;
- b. where people have to take part in proceedings to protect their property rights, and are successful, they should in general be able to recover the reasonable costs of doing so; and
- c. it enables the Adjudicator to take into account the importance and complexity of the matter.

100. The Adjudicator does not favour a move to a more restrictive fixed costs or no costs regime.

101. The Adjudicator would favour changes to his costs jurisdiction and powers to add additional flexibility. These could include giving the Adjudicator power –

- a. to take into account conduct of the parties before the reference is made by HMLR;
- b. powers similar to those given to the Courts by the Litigants in Person (Costs and Expenses) Act (it is anomalous that a litigant in person should be able to recover an hourly rate for his time before the Courts but not before the Adjudicator);
- c. power to make *pro bono* costs awards;
- d. express power to make interim costs orders.

102. All of those strike us as sensible proposals. We consider items b., c. and d. later since they are relevant to tribunals generally and not just to the Adjudicator. Item a. is unique to the Adjudicator since rule 42 of the relevant Practice and Procedure Rules expressly does not allow conduct prior to the proceedings being taken into account. In contrast, the F-tT and UT Rules are not restricted in this way. We see no reason why the Adjudicator should not be entitled to take into account conduct prior to the issue of proceedings in exercising his costs jurisdiction although the weight to be given to that conduct will, of course, be a matter for him and the amendment would not permit an order in respect of costs other than those of and incidental to the proceedings. We recommend that this change be made.

Leasehold Valuation Tribunal and Residential Property Tribunal

103. The power to award costs in these tribunals is limited to £500 and in Mobile Homes Act cases it is limited to £5,000 and costs may in most cases be awarded only in limited circumstances (broadly speaking where there is frivolous or vexatious conduct or where there is otherwise an abuse of process). The tribunals' separate powers to order the reimbursement of fees can also be used in much the same way as a costs order. The judicial view is that costs orders tend to go against the principles behind the setting-up of tribunals and that the present regime strikes the right balance. However, we do not consider that this costs power should be subject to a financial limit, although it is open to consideration whether the means of the parties should be taken into consideration (see below at para 185) or whether the assessment of costs should be limited to summary assessment. We recommend that, if and when the English components of these tribunals are brought within the TCEA structure, the financial limit should be removed.

104. We note that these tribunals have jurisdiction in what are effectively party and party disputes such as the price to be paid on enfranchisement by a leaseholder or the amount of a service charge. If and when these jurisdictions are brought into the F-tT, the TPC might wish to consult as to whether the introduction of wider costs-shifting powers than those which are currently available would be appropriate, at least in high-value leasehold enfranchisement cases, but we make no positive recommendation on this point.

Agricultural Land Tribunals

105. Although these tribunals deal essentially with party and party disputes, they have only a limited power to award costs. Apart from “unreasonable behaviour” cases, this power is essentially limited to certain cases concerning the operation of certain notices to quit and where there is thus in essence a property dispute. The costs provisions are consistent with the Tribunal philosophy with no costs-shifting save for vexatious *etc* conduct. We have not carried out any consultation, but we know of no dissatisfaction with this regime which has operated successfully for many years. We do not recommend any substantial change but, if and when the English tribunals are brought within the TCEA structure, the powers should be harmonised with those of the rest of the new chamber.

Valuation Tribunal for England

106. This has a no costs regime. The President would like to see the introduction of a limited power to award costs where one party has improperly put the other to some expense, say, £250. He considers that a limited costs regime of this sort would be useful in enforcing discipline in relation to the powers that the tribunal has been given, for instance the power to make directions and so on. This reflects a view expressed on behalf of the Tax Chamber. The introduction of a power to award costs where there has been unreasonable conduct (and indeed the power to make a wasted costs order) would bring consistency with many jurisdictions in the F-tT and appears to us to be right in principle. As in relation to the Leasehold Valuation Tribunal and the Residential Property Tribunal, we can see no reason for imposing a limit at all. We recommend the inclusion of an “unreasonable conduct” power in the same terms as is found in some chambers of the F-tT and UT. We do not consider that the power should be made subject to a financial limit, but in exercising the power, the tribunal could be directed to have regard to the means of the paying party (see para 185 below) and the assessment of costs could be limited to summary assessment.

Valuation Tribunal for Wales

107. Like its English counterpart, this has no costs regime. The Governing Council of the tribunal does not wish there to be any change, considering that the additional administrative burden of having a power to award costs where there has been unreasonable conduct would outweigh the potential benefit of the power. We see the force in this point and make no recommendation for change.

Mental Health Review Tribunal for Wales

108. The jurisdiction of this tribunal is equivalent to that of the F-tT(HESC) in Mental Health cases. It has no power to award costs, whereas the F-tT(HESC) has a power to make wasted costs orders. The President does not see the need for such a power in such a small tribunal where unreasonable conduct by a representative is very rare. This is the same point that we make in respect of those chambers of the F-tT where there is no other power to award costs (see para 158). We make no recommendation for change.

Special Educational Needs Tribunal for Wales

109. This tribunal also exercises a similar jurisdiction to part of the F-tT(HESC) but its costs regime is different in that, although it basically has costs-shifting only in cases of unreasonable conduct, it extends to cases where the decision being challenged was unreasonable. However, costs orders are very rare, only three having been made since 2003. It is currently operating under the same procedural regulations as applied in England before the TCEA came into force but new regulations are being drafted. As now, the power to award costs under the new regulations would extend not just to unreasonable behaviour but also to cases where the decision being challenged was unreasonable. The power to make an order would extend not just to an order in respect of costs incurred by the other party but also to an order in respect of allowances paid to those (other than tribunal members) attending a hearing.

110. There seems no reason why the costs powers of this tribunal should be very different from those of the F-tT(HESC) but we see no reason to recommend any

change in respect of this tribunal. We suggest at para 152 below that TPC might wish to consult on an extension of the F-tT's power to award costs to cases where the decision being challenged was unreasonable. The question whether the F-tT should be able to make an order in respect of allowances paid to those attending a hearing is not within our terms of reference.

Parking and Traffic Adjudicators and Road User Charging Adjudicator Tribunal

111. The response from the Chief Parking Adjudicator is that the current position, under which there is no power to award costs absent unreasonable conduct, is appropriate for this tribunal, dealing as it does with minor traffic contraventions attracting relatively modest civil penalties. The costs position has to be seen in the context of the governing primary legislation, the Traffic Management Act 2004, under which the enforcement authorities are liable to defray all the expenses of the adjudication process. Thus, an appellant pays no fee for making an appeal. Any change that weakened the limitations on the award of costs against an appellant would undermine the principle that in general the appeal process should be free for the appellant. We have received no separate response from the Road User Charging Adjudicators; we can discern no distinction between the two tribunals which would warrant a different approach between them. We do not recommend any change, although the wording of the powers could be brought into line with the wording in the rules made by the TPC when an opportunity presents itself.

Other tribunals

112. There are a number of other tribunals with jurisdiction in England and Wales but most sit only extremely rarely and some are altogether moribund. We make no specific recommendations in respect of these tribunals. Where it is thought desirable to rationalise them, no doubt consideration will be given to transferring their functions to the F-tT or UT. Otherwise, the general approach we have suggested is likely to be applicable to the costs regimes of those tribunals, unless their specialist nature requires a different approach.

F Costs regimes in appellate jurisdictions of the Upper Tribunal

Administrative Appeals Chamber and Immigration and Asylum Chamber

113. In the AAC and the Immigration and Asylum Chamber of the UT (“**UT(IAC)**”), the UT has the same costs regime as the tribunal from which the appeal is brought. In most, but not all, instances, there is the same power to pay allowances in respect of travel, subsistence and loss of earnings to those attending hearings as there is in the lower tribunal.

114. The argument in favour of having the same costs regime as the lower tribunal is that the considerations that shape the costs regime in the lower tribunal apply equally in the UT. Moreover, there are no special features of appeals suggesting that there should be a general costs-shifting power in appellate tribunals. Since there is, in nearly all cases, a requirement for permission to appeal (either from the lower tribunal or from the UT itself) wholly unmeritorious appeals will be sifted out. There is no need, therefore, for a costs power to be available as a sanction against such appeals. It is also not inherently fair to require a respondent to a successful appeal to pay the appellant’s costs when the respondent may well not have contributed to the error made by the lower tribunal.

115. However, it is arguable that the UT should have a power to award costs in respect of unreasonable behaviour even where the tribunal below does not, just as an

appellate court would. The judiciary in the AAC do not seek such a power. Notwithstanding that the UT is a superior court of record, it is still a tribunal and it is considered that the arguments that require no costs at all in the lower tribunals also apply in the AAC. In those areas where there is no costs power in the F-tT, legal representation is not much more common in the AAC than it is the F-tT and the litigants are just as impecunious. Moreover, in the AAC, the vast majority of cases in those areas are decided on the papers and arguments about costs dealt with on paper are disproportionately time-consuming. On the other hand, the Chamber President of the UT(IAC) considers that there should be a power to award costs where there has been unreasonable behaviour, including a power to make a wasted costs order. In that chamber, representation and oral hearings are far more common than in the AAC. The TPC may wish to consult on this issue. The rule need not necessarily be the same in both chambers.

116. A more complicated issue is whether, at least in some jurisdictions, a citizen respondent should be entitled to his costs where a public body appeals to the UT.

117. If permission to appeal is given to the public body which was the respondent below, there are good arguments for protecting the individual citizen from any liability to pay the appellant's costs, absent unreasonable conduct. In particular, if the individual, having succeeded at first-instance, were to be faced with an appeal in respect of which he would be at risk as to costs, he might well be deterred from appearing on the appeal and seeking to uphold the decision appealed against. That is the same, or a very similar, denial of access to justice as would be a costs-shifting regime at first instance. There is therefore a powerful argument for saying that the individual should not be exposed to the risk as the costs of the appellant body on appeal even if the appeal is successful, particularly where the public body's reason for appealing is to establish a wider point that goes beyond the case in hand. This points in favour of retaining the no-costs-shifting regime on appeals where the public body succeeds on the appeal.

118. However, there is also an argument for saying that, if the public body's appeal is unsuccessful, the individual should be entitled to apply for his costs of the appeal: it would be wrong to make an individual bear his own costs incurred in vindicating the

decision of the first instance tribunal when he did not choose to bring the proceedings in the UT. This points in favour of displacing the no-costs-shifting regime in the UT.

119. We do not consider that having a costs-shifting regime would be appropriate in appeals from the SEC or WP&AFCC, where no substantial costs will have been incurred in the F-tT and where litigants seldom have the means to instruct lawyers. Nor is it necessary in mental health cases where there is non-means-tested legal aid for proceedings in the UT. However, in appeals from the GRC, HESC (other than mental health cases) and the Special Educational Needs Tribunal for Wales, the approach has more merit and the argument will become more powerful in relation to appeals from the GRC if, as is currently proposed, these cases cease to be within the scope of legal aid. One of the reasons that these cases are currently within the scope of legal aid is that these jurisdictions have recently been transferred to the UT from the High Court. However, a more relevant factor in the costs argument is that they are the type of case in which lawyers often appear on both sides in the F-tT, notwithstanding the lack of a costs-shifting regime, and continued representation in the UT is to be expected and may be reasonable.

120. Where the individual citizen was unsuccessful at first instance, matters may appear rather differently. Thus it can be argued that the individual has been provided with a forum for redress. He has had his “day in court” (or, rather, in the tribunal) and should accept the decision. Cases of obvious error can be dealt with pursuant to a review without the need for an appeal at all. Subject to that, it can be argued, the individual has the right to appeal, if he can obtain permission, but he should do so at risk of being liable for the costs of the appeal: there is no reason why he should put the respondent to expense which is irrecoverable if the original decision is upheld. Further, if the appellant individual succeeds in his appeal, he ought to have the opportunity of receiving his costs of the appeal. These factors point to introducing a costs-shifting regime where it is the individual who appeals. On the other hand, it can be argued that a citizen is entitled to a decision that is not wrong in law and, if he gets permission to appeal on the basis that he has a reasonable argument, he should not be at risk of having to pay the other party’s lawyers, particularly if he is acting in person.

121. It is important to avoid undue complexity and a multiplicity of different costs provisions on appeals. Accordingly, we consider that in appeals from a jurisdiction in the F-tT where there is no general costs-shifting rule, the same costs regime should apply on appeal as applied at first instance; and this is so whichever party is the appellant. However, we are also of the view that in a citizen v State appeal, the citizen should be able to opt into a general costs shifting regime when he has been the successful party at first instance.

Tax and Chancery Chamber

122. The position in relation to appeals from the Tax Chamber is more complex. The UT can make an adverse costs order in all appeals, whether or not there was power to make a costs order in the Tax Chamber. But if it is right that the costs regime in the F-tT should continue to apply on appeal in the manner which we have just suggested in appeals from other chambers, the logic of the argument leads to the same conclusions in cases in the Tax Chamber allocated as anything other than Complex. We do not at present understand why a tax appeal should be treated differently although HMRC's position needs to be noted (see para 128 et seq below).

123. Accordingly, where a case which has been allocated as other than Complex and the taxpayer has succeeded in the Tax Chamber, he should, in our view, be able to proceed on the basis that he will not be liable for HMRC's costs of their appeal even if they are successful. He should have a choice whether to be inside or outside a costs-shifting regime. In Complex cases in the Tax Chamber the default position is that there is a costs-shifting regime with an opt-out available to the taxpayer. It makes no substantial difference on an appeal to the UT in a non-Complex case whether there is an opt-out or an opt-in. Consistency within the Tax Chamber suggests an opt-out rather than an opt-in; and that is the course we recommend.

124. Complex cases require further consideration. In a Complex case where the taxpayer has not opted out of costs-shifting, we can see no reason why the UT should not also have a general power to make a costs order, and that is the current position which we do not suggest should be changed. It is only if the taxpayer opts

out of the costs shifting regime at the beginning of his challenge to HMRC's decision that there should be any question of the opt-out continuing to apply through the appeal to the UT.

125. However, even where the taxpayer has opted out of the default costs-shifting regime in the Tax Chamber, the case remains a Complex case. It does not necessarily follow that an opt-out from the costs-shifting regime in the Tax Chamber should automatically follow through to an appeal to the UT. Again, there are two situations to consider: first where HMRC are successful in the Tax Chamber; secondly, where the taxpayer is successful.

126. In the first situation, there is little to be said for maintaining the costs free regime which applied in the Tax Chamber as the result of the opt-out. If the taxpayer wishes to challenge the decision of the Tax Chamber in a Complex case, we consider that it is right that he should be at risk of an adverse costs order (subject always to the Rees practice in appropriate cases).

127. The position is more difficult to resolve in the second situation where the taxpayer succeeds in the Tax Chamber. The taxpayer who has opted out of the costs-shifting regime in the Tax Chamber has taken a view reflecting his own approach to risk and reward; he has effectively decided that access to justice for him is achieved only by opting out of the costs-shifting regime. One view is that it is only right that the taxpayer should be able to appear before the UT to defend the decision of the Tax Chamber without thereby exposing himself to the risk of paying HMRC's costs.

128. That does not appear to be HMRC's view. When the UT rules were being considered it was suggested in some quarters that there might be cases in the UT where costs would not be appropriate and that a universal costs regime risked deterring appellants from bringing their case forward. Solutions proposed were to follow the costs scheme of the F-tT or allow an opt-out at the point of appeal. HMRC did not support either proposal and do not do so now. Their stance is that although called a "tribunal" the UT is a superior court of record and it is difficult to see why the costs rules should be different from the High Court, the business of

which it has taken on. Tax cases before the UT are generally very complex and involve challenging points of law.

129. The point is made that the expectation that costs will be paid by the losing party in the UT helps to avoid vexatious or speculative appeals that would consume valuable resources. We do not consider that there is anything in that particular point given, as we have explained, the filter represented by the need for permission to appeal.

130. Another point is made that a costs-shifting regime affords the opportunity for those who are pursuing reasonable cases to get costs if they win. Removing the option for costs might be considered a disincentive for many taxpayers pursuing what they consider to be strong arguments, who would otherwise have to fund a case themselves, even if they win.

131. The current regime therefore seems to HMRC to afford the correct balance between the rights of the individual taxpayer and the public purse. If a single regime is to apply to all cases, the approach of HMRC may be the fairest overall. But as we see it, there is no need to have the same approach in all cases; and our view is that there need to be different approaches.

132. Our conclusions are these:

- a. Where a case is allocated as other than Complex, the default position should be a costs-shifting regime with a right for the taxpayer to opt out of that regime.
- b. Where a case is allocated as Complex and the taxpayer has not opted out of the costs-shifting regime in the Tax Chamber, there should continue to be costs-shifting in the UT.
- c. Where a case is allocated as Complex and the taxpayer has opted out of the costs-shifting regime, and where the taxpayer is successful in the Tax Chamber, there should be a costs-shifting regime in the T&CC but with the taxpayer again having the right to opt out of it.

- d. Where a case is allocated as Complex and the taxpayer has opted out of the costs-shifting regime, and where the HMRC are successful in the Tax Chamber, there should be a costs-shifting regime in the T&CC with no right for the taxpayer to opt-out of that regime.
133. In relation to appeals from the GRC in charity cases, the T&CC has the same powers to award costs as the GRC. Subject to paras 148 and 164, we do not recommend any change.

Lands Chamber

134. Appeals lie to the Lands Chamber from leasehold valuation tribunals, residential property tribunals, the Valuation Tribunal for England and the Valuation Tribunal for Wales. In the case of appeals from leasehold valuation tribunals, the Rules have the effect that the costs regime is similar to that in the lower tribunal. In the case of appeals from the other tribunals, the Rules provide for full costs-shifting. The President seeks a general rule that there be no costs-shifting except for unreasonable conduct, which, if our recommendations above are accepted, would be the same as the rules in the lower tribunals. However, he also suggests that the tribunal should be able to order that costs-shifting should apply in a particular case: either one-way, where the outcome is of wider significance to one of the parties or the relative means of the parties makes this appropriate; or two-way, where both parties consent. We agree with this.
135. The position would be different in relation to appeals where a general costs-shifting regime existed in the first instance tribunal, as would be the case if, for instance, the Adjudicator to HM Land Registry is brought within the TCEA in the F-tT. We can see no reason why the general costs-shifting regime in such cases should not continue in the UT in accordance with the general principle that the costs-regime on appeals should be the same as in the lower tribunal.

G Costs regime in the Employment Appeal Tribunal

136. The costs regime here is much the same as that in the ETs from which appeals lie to the EAT. It has not been suggested that any change is needed and we do not recommend any change.

H Costs regime in the judicial review jurisdiction of the Upper Tribunal

137. The costs of judicial review in the UT call for separate consideration. There are two aspects. The first is whether the costs regimes for cases transferred in from the Administrative Court on a discretionary basis and for cases commenced in the UT should be the same. The second is the appropriate regime (or regimes, depending on the answer to the first point).

138. As to the first point, we can see no justification at all for different costs regimes depending on where judicial reviews are commenced. It is true that there is bound to be one difference in terms of expense in that the Administrative Court charges fees, whereas the UT generally, at present, does not. But issue fees in the Administrative Court are modest and if a case is to be transferred at all, it is likely to be at a fairly early stage. Parties in the Administrative Court in a case where there is the possibility of transfer will need to be aware of the consequent costs regime (if they are different: that depends on the answer to the second point). Having said that, we consider that it is only right that costs incurred before transfer to the UT should remain subject to the costs regime of the Administrative Court and that the UT itself should be given power to deal with those costs on that basis. And similarly where a case is transferred from the UT to the Administrative Court. We recommend that the necessary powers be given to the UT and the Administrative Court.

139. The second point is more difficult. The rules currently allow the UT to exercise its general powers under section 29 TCEA and thus to effect costs-shifting in the same way as the Administrative Court itself. This is, in effect, to carry across to the UT the approach of the Administrative Court to costs: costs are governed by the nature of the case and the treatment afforded hitherto in the Courts. A different approach is to view the judicial review as a tribunal proceeding and to apply an appropriate tribunal-oriented approach to costs. This would reflect the reality that

the judicial review is in fact a proceeding in the UT and, in cases commenced in the UT, has nothing to do with the Administrative Court at all.

140. We have little doubt that the latter approach is appropriate and in accordance with principle. What then follows depends on the nature of the review. There are essentially two distinct types of case. The first is where it is sought to review the F-tT or any other lower tribunal; the second is where it is sought to review the decision maker, for instance HMRC in a tax case. In the second type of case, the decision which it is sought to review is often closely connected with a statutory appeal but this need not necessarily be the case. This happens, for instance, in tax appeals where a taxpayer contends that as a matter of tax law he is not liable for the tax claimed and wishes to assert, in the alternative, that a practice or extra-statutory concession applies which HMRC are improperly refusing to implement.

141. In the first type of case, there is something to be said for the view that the costs regime should match that of the regime for appeals from the F-tT chamber or other tribunal concerned. The judicial review has this in common with appeals namely that both are concerned with overturning the decision of the lower tribunal. But this approach is not entirely easy to apply in tax cases where the costs regime applying to the underlying tax appeal depends on the allocation of the appeal as Complex or not and on the taxpayer's decision whether, in a Complex case, to opt out of the costs-shifting regime.

142. In the second type of case, there is less of an analogy with an appeal although the judicial review can sometimes be seen as closely related to and as raising the same or almost the same factual issues as existing proceedings in the F-tT (as happens on occasions where there is a tax appeal and a judicial review against HMRC).

143. As in the case of appeals, it is important to avoid undue complexity and a multiplicity of costs regimes applicable to judicial reviews. We consider that a single approach should be adopted across all chambers of the UT for the second type of judicial review. Our present tentative view is that there should be a costs-shifting regime for all judicial reviews of the second type but with the option (as in appeals in Complex tax cases) for the applicant to elect for a no costs-shifting regime.

144. Judicial reviews of the first type (that is to say of the F-tT and other lower tribunals) may involve more than the applicant, the decision-maker and the tribunal itself because there may be more than two parties to the proceedings before the lower tribunal; for instance, all child support cases are tri-partite. The simplest regime, and the one which is in our, again tentative, view the one to adopt (other than in judicial review of the Tax Chamber in tax appeals) is to have the same costs regime as is applicable in the F-tT chamber or other tribunal concerned. In cases of judicial review of the Tax Chamber in tax appeals, our present view is that there should be a costs-shifting regime but with the taxpayer having a right to opt out (except perhaps where the case has been allocated as Complex in the F-tT and the taxpayer has not opted out of the costs-shifting regime). This should be so whether it is the taxpayer or HMRC which brings the application for judicial review.

I General issues relating to costs regimes

One-way costs-shifting

145. It does not follow from the proposition that a citizen appellant should not be at risk of an adverse costs order where there has been no unreasonable conduct that the respondent should not be exposed to an adverse costs order if the appellant succeeds. It can sensibly be argued that a citizen who has incurred (reasonable) costs in establishing his rights against the State should be entitled to recover those reasonable costs of vindicating those rights. Against that, it can be argued that where the relevant public body has acted reasonably (i) in making its decision and (ii) in conducting the litigation, that it should not be exposed to a risk of an adverse costs award in carrying out its statutory duty.

146. We consider that the correct balance is achieved by a general rule (subject to the exceptions we mention in a moment) which precludes the making of an adverse costs award against the public body in the absence of unreasonable conduct. In chambers where there is no power to make an award of costs even where there is unreasonable conduct, that is the position both in relation to the appellant and the public authority. The majority of us do not consider that a power to award costs only against the

public authority if it has behaved unreasonably should be introduced in those chambers. It would involve the chambers setting up a judicial and administrative process for dealing with costs, thereby diverting resources (already under pressure) from the main business of the chambers. It does not, in the view of the majority, represent a proportionate response to a problem the scale of which has not been identified, even if it exists at all. This is, nonetheless, a matter on which the TPC may wish to consult.

147. The exceptions just mentioned are these.

- a. There are already powers to make adverse costs awards against HMRC in Complex cases in the Tax Chamber where the taxpayer has not exercised his right to opt out and against the relevant Minister in appeals against national security certificates in the AAC.
- b. In addition, we have already suggested formalising the “Rees principle” in the Tax Chamber.
- c. We have also suggested that the Lands Chamber of the UT should have a power to order one-way costs-shifting both in its first-instance and appellate jurisdictions.
- d. More generally, we consider that the Rules should provide for the possibility of one-way costs shifting in all chambers where the case is in the nature of a test case.

148. TPC may therefore wish to consult on whether a power to order one-way costs-shifting in test cases should be conferred on HESC, in relation to non-mental health cases, and the GRC in the F-tT and on the Lands Chamber, the AAC and the UT(IAC) in the UT. Again, we are not unanimous as to whether a power to order one-way costs-shifting in test-cases would be appropriate in those chambers where there is currently no power to award costs at all.

149. One-way costs-shifting in test cases might not be as revolutionary an idea as it first seems. In those areas where means-tested legal aid has been available, it has in practice provided one-way costs-shifting for impecunious citizens in citizen v State jurisdictions. TPC may particularly wish to consider whether one-way costs-shifting should be made available in appropriate cases in any areas that might be removed

from the scope of legal aid. One-way costs-shifting in test cases would go some way to replace the planned removal of “exceptional funding” under section 6(8)(b) of the Access to Justice Act 1999.

Costs where the decision challenged was unreasonable

150. We have also considered whether, in a jurisdiction where costs may be awarded only if there is unreasonable behaviour, there should be a power to make an award of costs against a public body where the decision leading to the appeal was itself unreasonable. The rules already allow an adverse costs award to be made against a regulator (the Financial Services Authority, the Charity Commission, the Gambling Commission and the Information Commissioner) and others performing a statutory duty (*e.g.* a person relating to the assessment of any compensation or consideration under the Banking (Special Provisions) Act 2008 or the Banking Act 2009). This is recognition that those charged with statutory duties can not only get things wrong but can get things seriously or unreasonably wrong. It is not easy to see a justification for the different treatment of different regulators and TPC may wish to consult on this issue in relation to appeals against regulators in both the GRC and HESC.

151. If it is right that these regulators can be visited with an adverse costs order, then it might be suggested that the same should apply to other respondents in cases involving a dispute between the citizen and the State. In chambers, or tribunals outside the TCEA structure, where there is currently no power at all to make a costs order, we do not consider that it would be a proportionate response to the possibility of an unreasonable decision by a decision-maker to introduce this costs sanction. The SEC and other jurisdictions where there is currently no power even to make an “unreasonable conduct” order power or a wasted costs order do not wish to see such a power introduced. They prefer to have no costs powers at all and thus to avoid the need to have judicial and administrative structures to deal with applications. If it is not to have even the power to make an “unreasonable conduct” order, it would be disproportionate to set up such structures to deal with a possible difficulty (an unreasonable decision by a decision-maker requiring an appeal in which significant

costs are incurred) which has not yet been encountered in practice – at least, we have not been informed of any such difficulty.

152. The position is different where the chamber or tribunal already has power to make an order in respect of unreasonable conduct or to make a wasted costs order (or some other limited jurisdiction such as the slightly different regimes in the LVT and the RPT). The relevant judicial and administrative structures exist (or should exist) and to add another instance in which a costs order can be made should not be to introduce a significant burden. Accordingly, TPC may wish to consult on the question whether, where there is already a power to make a costs award, there should be introduced an additional power to do so where the decision giving rise to the appeal was, in the view of the tribunal, unreasonable. We draw particular attention to the current difference between the position in England and the position in Wales in special educational needs cases.

J Particular types of costs orders

Costs in another chamber

153. Except in the case of a successful appeal (when the UT can, under section 12 of TCEA, make any order which the F-tT could have made), section 29 of TCEA has the effect that it is not generally possible for one chamber to make a costs order in respect of proceedings in another chamber when there has been a transfer or appeal or remitter between chambers. This can sometimes be inconvenient in the case of a transfer or remitter. For instance, where a Complex case in the Tax Chamber is transferred to the T&CC, the latter has no power to award costs in relation to the proceedings before they were transferred. It needs to be considered whether section 29 should be amended to allow a chamber to which a case, or part of a case, is transferred or remitted should have power to deal with the costs incurred in the chamber from which it has been sent.
154. On a related point, where there is a transfer or remitter of a case from one chamber where there is no costs-shifting, to a chamber where there is costs-shifting, or *vice versa*, the case will be subject to different costs regimes before and after transfer. If section 29 is to be amended to allow the transferee Chamber to deal with the totality of the costs, it needs to be decided what costs regime is to apply for the different periods.
155. Our recommendation is that section 29 should be amended to allow a chamber to which a case, or part of a case, is transferred or remitted, to deal with the totality of the costs both before and after transfer. The Rules should provide that such a power can be exercised only in a way which reflects the power to award costs in each chamber so that a receiving chamber cannot make an award of costs in respect of costs incurred in the transferring/remitting chamber where there was not power to award costs in that latter chamber.

Wasted costs

156. There is another difficulty in relation to section 29 which we wish to identify and to express the hope that, when a legislative opportunity arises, the difficulty can be eliminated. This is concerned with the power to order a representative to pay “wasted costs”.
157. Section 29(1) provides that the costs of and incidental to proceedings shall be in the discretion of the tribunal in which the proceedings take place. This, however, is made subject to Tribunal Procedure Rules by section 29(3). Section 29(4) provides that in any such proceedings, the relevant tribunal may disallow costs or make a wasted costs order against a “legal or other representative”. Section 29(3) according to its terms affects only sections 29(1) and (2): it is not stated to apply to section 29(4). Accordingly, it would appear that Tribunal Procedure Rules are not capable of cutting down the powers conferred by section 29(4) unless that subsection is to be read as simply an example of the powers contained in section 29(1). It may, therefore, be that those chambers of the F-tT and the UT which according to their rules have no power to make a costs order in fact do have power to make a wasted costs order.
158. Moreover, because a “legal or other representative” is identified by section 29(6) in relation to a party to the proceedings as “any person exercising a right of audience or right to conduct the proceedings on his behalf”, the power to make a wasted costs order is very wide. We consider that it would be appropriate to restrict the power to cases where the representative is a legal representative (not acting *pro bono*) or is any other person who receives payment for his services. In those chambers where there is no other power to award costs and where legal representation is rare, it is debatable whether the expense (including the training of judges) of making provision for the making of a very occasional wasted costs order is really justifiable, although it may be that a distinction can be drawn between the SEC and WP&AFCC where representation for payment is rare and F-t(IAC) and mental health cases in HESC, where it is not so rare. We therefore recommend that both subsections (4) and (6) of section 29 should be made subject to Tribunal Procedure Rules.

159. ETs and the EAT also have powers to make wasted costs orders. There, the definition of representative covers “a party’s legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to those proceedings” and “a person is considered to be acting in pursuit of profit if he is acting on a conditional fee arrangement”. This is similar to what we have recommended for the F-tT and the UT. The power to make a wasted costs order in ETs and the EAT also extends to making an order that the representative should reimburse the Secretary of State for allowances paid to persons in respect of their attendance at a hearing. It would be consistent for section 29 of TCEA to be amended to allow wasted costs orders in the F-tT and UT also to extend to such allowances. Indeed, it might be appropriate to allow costs orders based on unreasonable conduct to extend to such allowances, as in the Special Educational Needs Tribunal for Wales and as suggested by the ETs judiciary. However, these are strictly points beyond our terms of reference.

160. In other tribunals, provision for wasted costs orders is patchy. Thus the Adjudicator to HM Land Registry has a power to order a legally-qualified representative to pay costs but not any other paid representative. It may not be a priority to have consistent rules but we suggest that consideration to making them more consistent should be given as and when opportunities arrive.

161. Applications for wasted costs orders are capable of generating significant costs of their own. It does not appear that there is any power to make an order in respect of the costs of such an application where the general power is not available. We recommend that, where necessary, an express power be introduced to allow any tribunal which has power to make a wasted costs order to be able to make an order in respect of the costs of the application.

Beddoe orders and prospective costs orders in charity cases

162. In the context of trust litigation, there are some well-established principles relating to costs. First, there is what is known as a *Beddoe* order (after *Re Beddoe* [1893] 1 Ch 547). A trustee wishing to bring or defend proceedings is able to apply to the court for an order which (a) allows him to take his own past and future costs from

the fund of which he is trustee and (b) entitles him to an indemnity from that fund of any costs which he is ordered to pay to the other party. The circumstances in which such an order could properly be made were considered in some detail in *Re Buckton* [1907] 2 Ch. 406. This jurisdiction extends to charitable trusts but not to charitable companies.

163. The juridical basis of such orders appeared, until comparatively recently, to be the court's general supervisory powers of trustees. If a trustee acts pursuant to a direction of, or with the consent of the court, a beneficiary could not be heard to say that the trustee was acting improperly; the trustee would therefore be entitled to his ordinary indemnity in respect of expenses properly incurred in the administration of the trust, including as part of those expense costs properly incurred in litigation or ordered to be paid to a third party. However, the jurisdiction has developed to allow beneficiaries of pension trusts to obtain similar costs indemnities in the case of pension trusts: see the leading case of *Macdonald v Horn* [1995] 1 All E.R. 961 and the review of the authorities by Arnold J in *HR Trustees Ltd v German* [2010] EWHC 321 (Ch).

164. It has been suggested that the GRC and the T&CC should have power to make a prospective costs order which would authorise trustees of a charity to bring or defend proceedings and to recover costs out of the fund whether the trustees are successful or not. If orders of this sort are properly to be seen not as the exercise of a costs jurisdiction but only as an exercise of a jurisdiction over the conduct of trustees in the management of their trust, *Beddoe* orders could not be made by the Tribunals in the exercise of their costs powers. But if orders of this sort can be seen, in the alternative, as an exercise of the powers conferred by section 29 TCEA, then the Tribunals can make such orders in case involving charitable trusts. We are of the view that such orders can be viewed as an exercise of the costs jurisdiction. We consider that it would be useful for the GRC and the T&CC to have power to make such orders in charity cases which are before them or which are yet to be commenced. The Rules do not currently allow this to be done. We recommend that they be amended to allow it.

K Whose costs may be recovered ?

Litigants in Person

165. We recommend that the F-tT and the UT should be given the same powers as those given to the Courts by the Litigants in Person (Costs and Expenses) Act 1975: it is, as the Adjudicator to HM Land Registry says, anomalous that a litigant in person should be able to recover an hourly rate for his time before the Courts but not before the Adjudicator and the same can be said for the F-tT and the UT in cases where there is costs-shifting. The 1975 Act has been amended⁷ so that both the F-tT and the UT are now included in the list of courts and tribunals in which costs of a litigant in person may, subject to procedural rules, be allowed. We recommend that the F-tT Rules and the UT Rules be amended to make similar provision to that made in the Civil Procedure Rules 1998 (“**the CPR**”) (CPR 48.6).

166. There has been no similar amendment to the 1975 Act in respect of other tribunals. In principle, we would recommend that this is done perhaps by allowing the Secretary of State for Justice to add any tribunal to the list of tribunals within the Act. In practice, this point is only of significance in relation to tribunals where there is a costs-shifting regime but many litigants represent themselves. We think it likely that this is only of real significance to the Adjudicator to HM Land Registry. He is likely to be brought within the TCEA structure in the not too distant future at which stage special provision for him will no longer be needed. Provision is already made in the procedural rules for ETs and the EAT for orders in favour of litigants in person.

Costs of non-legally qualified representatives

167. The Jackson Report made recommendations about the recoverability of the costs of representatives other than lawyers in tax cases. This was in response to the

⁷ see paragraph 6, Schedule 8 TCEA, inserting a new paragraph (ba) into section 1(1) of the 1975 Act. The amendment was made with effect from 3 November 2008 by paragraph 5(c)(i) of the Tribunal, Courts and Enforcement Act 2007 (Commencement No 6 and Transitional Provisions) Order 2008 (SI 2008 No 2696).

decision in *Agassi v Robinson (HMIC)* [2005] EWCA Civ 1507, [2006] 1 WLR 2126. Mr Agassi had been advised on his tax appeal by Chartered Tax Advisers who were not solicitors. They instructed, as they were entitled to do, counsel directly. They were not, however, authorised litigators. It was held that Mr Agassi could not recover the costs of the advisers in the same way as the costs of lawyers. Instead, he could recover only their disbursements (such as counsel's fees) and fees in respect of their expertise as tax advisers. And this was so even though their fees for conducting the litigation might have been less than those of a solicitor employed to do the same work. The same may be the case in the Tribunals since the assessment which is to be carried out under Rule 10 of the UT Rules and the F-tT Rules is the same as in High Court litigation.

168. However, HMRC take the view that *Agassi* does not apply in the Tribunals. Accordingly, a taxpayer who obtains a costs order against HMRC will in practice obtain full recovery. The CPR apply in the F-tT and UT only with "necessary modifications" and HMRC see this as a necessary modification in the light of the right of litigants in tribunals to appoint non-lawyer representatives.

169. Although *Agassi* concerned tax, and although the Jackson Report only addressed the point in relation to tax, the same issue arises whenever a suitably qualified professional carries out work which could, and might normally be expected to be, carried out by a lawyer. This is a matter of concern in any tribunal jurisdiction where a costs-shifting order can be made, whether a general order, or an unreasonable conduct order or a wasted costs order.

170. Consideration was given in the Jackson Report to reversing *Agassi* altogether. This was rejected in the final report (see Chapter 33 paragraph 4.13) Instead, Recommendation 54 was as follows:

"A suitable body of tax experts should become an 'approved regulator' within section 20 of the Legal Services Act 2007."

171. The recommendation is now being taken forward in the tax context. If it is eventually implemented, the very least that we would wish to see in the Tribunals is for the recommendation to be followed through in tax cases in the Tax Chamber and the T&CC in case HMRC's approach is incorrect. If that approach is incorrect, a change in the CPR will, as matters stand, probably be carried through automatically

to the Tribunal Procedure Rules (because detailed assessment of tribunal costs is carried out on the same basis as a court assessment). However, if as we recommend, assessment of tribunal costs is to be dealt with in more detail in Tribunal Procedure Rules, Recommendation 54 will need to be followed through expressly.

172. In tax cases, representation in the Tax Chamber by professionals other than lawyers is common. We are of the view that the fees charged for such representation by appropriately qualified tax professionals should be recoverable in the same way and in the same circumstances as lawyers' fees. However, we are not persuaded that the rejection in the Jackson Report of the reversal of *Agassi* in the Courts is the right solution in the Tribunals. We do not consider that an additional layer of regulation of such professionals in the Tribunals is a proportionate response. We therefore take a different approach from the Jackson Report and recommend reversal of *Agassi* in tax cases.

173. We also consider that there is much to be said for adopting the same approach in relation to representation by appropriately qualified persons in matters other than tax where a costs-shifting regime is applicable. But we have not canvassed views from anyone on this aspect and make no recommendation.

174. These are matters on which the TPC may wish to consult.

Pro Bono costs awards

175. The Courts have power to make *pro bono* costs awards under section 194 Legal Services Act 2007. This applies where a party to proceedings ("P") has a representative ("R") who acts free of charge in whole or in part. The court has power to order any person to make a payment to the "prescribed charity" in respect of R's representation of P. The power is circumscribed by the provisions of section 194 and is subject to Rules of Court. We recommend that the provisions of section 194 be extended to tribunals and that the power thereby conferred be subject to Tribunal Procedure Rules and other procedural rules for tribunals.

L Procedure and assessment

176. Where the F-tT or the UT makes a costs order, the amount of costs may be ascertained by
- a. summary assessment by the UT;
 - b. agreement between the parties; or
 - c. assessment of the whole or a specified part of the costs or expenses incurred by the receiving person, if not agreed.
177. Following an order for assessment, either of the parties may apply for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the CPR then apply, with necessary modifications, as if the proceedings in the tribunal had been proceedings in a court to which the CPR apply.

Payment on account

178. Both the UT and the F-tT have power to make an award of costs at any stage of the proceedings: see Rule 10(6) of the UT Rules and Rule 10(4) of the F-tT Rules (in tax cases). The tribunal is therefore able to make a costs order in respect of a distinct part of the proceedings. However, the Rules do not expressly provide for the making of a payment on account of costs (sometimes referred to as an interim award)
179. Where the F-tT Rules or the UT Rules allow an order for costs to be made and an order is in fact made, it is envisaged that the amount of costs will be agreed or the tribunal will assess the costs summarily or the matter will go to a detailed assessment in the High Court. In the former case, the tribunal will, *ex hypothesi*, have determined the amount of costs due and will be able to direct the appropriate time for payment. No question of payment on account really arises. Where the matter goes to a detailed assessment, the costs judge can grant an interim costs certificate under CPR 47.15, but to get to that stage will take time and the incurring of expense.

180. Under CPR 44.3(8), the court is able to order a payment on account where an order for costs has been made but assessment has not taken place. This is a power which is frequently exercised by a trial judge. There is no similar express power in the Tribunals and we consider it doubtful that the Tribunals in fact have such a power. We recommend that the UT and the F-tT be given a power by the Rules to order payment on account of costs which they have ordered to be paid.

Interest

181. There is no power to make rules enabling the UT or the F-tT to award interest on costs. This seems to us to be anomalous. We recommend that the same power be conferred on the Tribunals to award interest on costs as subsists in the Courts, that is to say a power to award simple interest over such periods as the tribunal determines. This will require primary legislation.

Assessment

182. Unlike CPR 44.3(6), the UT Rules and the F-tT Rules make no express provision about the sort of orders which can be made (such as an order for one party to pay a proportion of another party's costs or costs limited by reference to the time when they were incurred). Nor does it make express provision about the factors which are to be taken into account when making an order (such as those found in CPR 44.3(3)) although it is inherent in the Rules that conduct can be taken into account, otherwise one would not expect to find a power to make an adverse costs order based on unreasonable behaviour. We consider that section 29 gives the tribunal power to make orders such as those listed in CPR 44.3(6). But section 29 is subject to the Rules. Rule 10(8) of the UT Rules (and there are similar provisions in the F-tT Rules) provides that the amount of costs to be paid under an order under the rule "may be ascertained by" summary assessment, agreement, or assessment. In the last case, a party may apply to the relevant court or office to conduct an assessment. In England and Wales, the application is made, depending on the chamber concerned, to the county court, the High Court or the Costs Office of the Supreme Court.

183. We comment below (see para 186) about the impact of this provision in relation to the recovery of success fees and ATE insurance premiums. There is a more general point to be made, however, about the suitability of these provisions for the assessment of costs in the Tribunals. In each case, costs are to be assessed as if they had been incurred in the relevant court. We consider that this is wrong in principle and that the proportionality and reasonableness of costs should be judged bearing in mind the nature of the case and in particular that it is a case in a tribunal. We consider that the relevant costs judges or assessing officers should be able, and required, to apply criteria appropriate to tribunals in assessing the proportionality and reasonableness of costs, and should not be obliged to treat the case as though it were a court case. We so recommend. This topic will require further detailed consideration if our proposal is taken forward. In particular, it will be necessary to provide costs judges and taxing officers with appropriate powers.

184. It is convenient to consider costs capping at this point. The CPR make provision for cost capping: see CPR 44.18-20 and the Costs Practice Direction paragraph 23A. Prior to the introduction of those provisions, there was no judicial consensus about whether the Courts had a power, in exercising their statutory powers to award costs, to make a costs capping order in advance of the incurring of costs. The same doubt must exist in the Tribunals. We consider that the Tribunals should be given equivalent powers. Accordingly, we recommend that in cases where there is a general costs-shifting power in accordance with Tribunal Rules, a similar cost-capping power should be introduced.

185. A particular aspect of the approach to assessment is how the means of a paying party are to be taken into account. In ETs, it is expressly provided that the paying party's ability to pay may be taken into account by the tribunal or judge (but not a costs officer) when it is being decided whether to make a costs order or how much it should be. Financial means are also expressly to be taken into account in all F-tT chambers which have power to make costs orders. They are also expressly taken into account in the UT when making an "unreasonable conduct" order against an individual and in judicial review cases. Curiously, they are not taken into in the UT when it comes to wasted costs orders; this contrasts with the position in F-tT chambers in which wasted costs orders can be made. This may simply be a drafting

error. We recommend that the UT should be obliged to take means into account in making wasted costs orders just as it must do in making “unreasonable conduct” orders. The present position in the UT in relation to the ordinary costs of an appeal is that there is no express provision that any account should be taken of means. The position is thus the same as in court proceedings. We do not recommend any change to this position although it is a matter which should be reviewed if and when further detailed consideration is given to the criteria to be applied when assessing costs in the Tribunals.

CFAs and ATE insurance

186. Our very strong view is that in cases where an adverse costs order can be made it should not have the consequence that the receiving party is enabled to recover any success fee or any ATE premium. The issue of CFAs and ATE insurance was considered at some length in the Jackson Report. Lord Justice Jackson came out strongly against them. We agree with his recommendation⁸ and his reasons. The Government appears to accept, in its consultation paper⁹ and in clauses 41 and 43 of the Legal Aid, Sentencing and Punishment of Offenders Bill, that his recommendation should be adopted.

187. Our own view is that success fees under CFAs and premiums in respect of ATE insurance have no place in the tribunal system whatever may be appropriate in the Courts. They can be instruments of injustice. This is a matter which requires to be addressed by the TPC. At present, where costs fall to be assessed, they will either be assessed summarily or be referred to a court taxing judge to assess; in so doing, he is to apply the CPR. Unless and until clauses 41 and 43 of the Bill are passed and brought into force, this would appear to mean that he must apply the rules applicable to CFAs and ATE premiums as they apply in the Courts. If that is correct, it would follow that a receiving party would be able, even in the case of summary assessment, to recover a success fee and ATE premiums on top of the base costs.

⁸ “I recommend that [CFA] success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented, it will lead to significant costs savings, whilst still enabling those who need access to justice to obtain it.”: Final Report para xvi, para 2.2

⁹ Proposals for Reform of Civil Litigation Funding and Costs in England and Wales, Implementation of Lord Justice Jackson’s Recommendations, Consultation Paper CP 13/10, November 2010

M Conclusions and summary of recommendations for change

188. Tribunals are diverse. No single costs regime would be appropriate for all of them. We have started from the proposition that there should usually be a power to order costs to be paid where they have been incurred through unreasonable conduct but no other power to award costs. However, there are some areas where it is inappropriate to have any power to award costs at all and others where full costs-shifting can be justified.
189. The costs regimes within the F-tT and the UT were largely rationalised when those tribunals were created and need few changes. Exceptions are mostly in the UT, where regimes from tribunals and courts replaced by the UT were brought into the UT for the Lands Chamber, for the T&CC and for judicial review cases in all chambers, in respect of which we recommend substantial changes. In some citizen v State proceedings in the UT where there are arguments both for and against costs-shifting, we suggest allowing the citizen to opt in or out of a costs-shifting regime, as is already possible in Complex tax cases in the F-tT.
190. There is more variety in the costs regimes in other tribunals but the differences are often more of language than of substance and harmonisation of the language may not be a priority. Moreover, there are a number of relatively small tribunals where full costs-shifting would not be appropriate due to the nature of the cases and where the disadvantages of creating a power to award costs in a very few cases where there has been unreasonable conduct would probably outweigh the advantages. Consequently, we have not recommended many changes in respect of these tribunals.
191. While we have not made a large number of recommendations as regards costs regimes, we have made more recommendations in relation to the types of order that may be made and the assessment of costs. Here, the procedural rules in the Tribunals, and often the primary legislation under which the rules are made, have lagged behind developments in the Courts. Although a desire for simplicity is an argument for not having costs-shifting, where there is costs-shifting there seems no

reason why a tribunal should not have the same powers as a court. On the other hand, we recommend that the costs of tribunal proceedings should not be assessed as though they were court proceedings.

192. We list in the following paragraphs our proposals, drawing a distinction between positive recommendations and mere suggestions and setting out first those relating to the F-tT and the UT and then those relating to other tribunals.

193. Some of our recommendations in respect of the F-tT and UT would require primary legislation and often amendments to the Tribunal Procedure Rules as well. In this category, we recommend that –

- a conventional two-way costs-shifting power should be introduced for compulsory purchase cases in the Lands Chamber of the UT and in references by consent where acquisition has been agreed (para 88)
- section 29 of the TCEA should be amended to enable the UT to award costs in respect of proceedings in the F-tT before a case is transferred to the UT and to enable the F-tT to award costs in respect of proceedings in the UT where the UT has remitted the case to the F-tT (para 155)
- section 29 of the TCEA should be amended to make the power to make wasted costs orders and the definition of “representative” subject to Tribunal Procedure Rules (para 158)
- the fees of non-lawyer tax professionals should be recoverable as costs (para 172)
- the power to make pro bono costs awards should be extended to tribunals (para 175)
- the F-tT and UT should be given the power to award interest on costs (para 181).

194. However, most of our recommendations would require amendments only to Tribunal Procedure Rules. In this category, we recommend that –

- “the Rees practice” in the Tax Chamber should be formalised in the Rules (para 75)

- a taxpayer should be enabled to opt out of a costs-shifting regime in a Complex case that has been transferred from the Tax Chamber of the F-tT to the UT (para 82)
- a standard no-costs regime should be introduced for all first-instance jurisdictions in the Lands Chamber other than in compulsory purchase cases (including references where acquisition has been agreed) and cases concerned with the discharge or modification of restrictive covenants, but it should be qualified by provisions allowing for an award of costs in the case of unreasonable conduct and subject to a power for the tribunal to order that costs-shifting should apply in an individual case – either two-way or one-way, as appropriate (para 91)
- in a citizen v State appeal to the AAC or IAC, the citizen should be able to opt into a general costs shifting regime when he has been the successful party at first instance (para 121)
- in an appeal from the Tax Chamber to the UT, the taxpayer should have the right to opt out of costs-shifting except in those Complex cases where either the taxpayer did not opt out in the F-tT or he opted out and HMRC was successful in the F-tT (para (132)
- in an appeal to the Lands Chamber from another tribunal, the costs regime should be the same as that we have suggested for the lower tribunal, save that there should always be a power to make an order for costs in respect of unreasonable conduct (paras 134 and 135)
- in judicial review of the decision of a regulator or decision maker, the applicant should have the right to opt-out of the costs-shifting regime into a no costs-shifting environment (para 143)
- in judicial review proceedings against the F-tT or other lower tribunal, the costs regime in the UT should be the same as in the relevant chamber or tribunal, save in tax cases where there should generally be a costs-shifting regime but the taxpayer should have the right to opt out (except perhaps in a Complex case where the taxpayer has not opted-out of the costs-shifting regime in the F-tT) (para (144)
- there should be a power to award costs in respect of the costs of applying for a wasted costs order (para 161)

- the GRC and the T&CC should have the power to make prospective costs orders in charity cases (para 164)
- litigants in person should be able to recover their costs where there is costs-shifting in the F-tT and the UT (para 165)
- there should be an express power to order interim payments on account of costs (para 180)
- costs should not be assessed as though the case were a court case (para 183)
- there should be a power to make a costs-capping order where there is a general power to award costs (para 184)
- the UT should be under a duty to have regard to the means of the paying party when making a wasted costs order (para 185)
- success fees under CFAs and premiums in respect of ATE insurance should not be recoverable as costs (para 187).

195. Our other suggestions in relation to the F-tT and the UT merely recommend that consideration should be given to consulting users on issues on which we do not make positive recommendations but where there is an argument for change. These are –

- giving the AAC and UT(IAC) a power to award costs where there has been unreasonable conduct in an appeal from a lower tribunal, notwithstanding that the lower tribunal had no power to award costs (para 115)
- giving at least those chambers with a power to award costs a power to order one-way costs-shifting in appropriate cases (paras 146 and 148)
- giving at least those chambers with a power to award costs in first-instance citizen v State jurisdictions a power to order costs to be paid where the decision under appeal was unreasonable (para 152)
- making the fees of all non-lawyer representatives acting for payment recoverable as costs (para 173).

196. Our recommendations in respect of other tribunals are that –

- the Adjudicator to HM Land Registry should be able to take account of conduct before proceedings were started (para 102)

- the financial restriction on awards of costs in the LVT and RPT should be removed (para 103)
- the VTE should have the same costs regime as there would be for the LVT and RPT (para 106)
- litigants in person should be able to recover their costs where there is costs-shifting (para 166)
- tribunals should be given the power to award interest on costs (para 181)
- costs should not be assessed as though the case were a court case (para 183)
- there should be a power to make a costs-capping order where there is a general power to award costs (para 184)
- success fees under CFAs and premiums in respect of ATE insurance should not be recoverable as costs. (para 187).

APPENDIX 1

Members of the Costs Review Group

Sir Nicholas Warren	Chamber President, Tax and Chancery Chamber of the Upper Tribunal
George Bartlett QC	Chamber President, Lands Chamber of the Upper Tribunal
David Latham	President, Employment Tribunals (England and Wales)
Alison McKenna	Principal Judge (Charities), General Regulatory Chamber of the First-tier Tribunal Deputy Judge, Administrative Appeals Chamber and Tax and Chancery Chamber of the Upper Tribunal
Bronwyn McKenna	Member, Administrative Justice and Tribunals Council Member, Tribunal Procedure Committee
Mark Rowland	Judge, Administrative Appeals Chamber of the Upper Tribunal Member, Tribunal Procedure Committee

APPENDIX 2

Table of costs regimes

In this Appendix there are set out only the provisions governing the circumstances in which costs orders may be made. Provisions relating to procedure and assessment are not included.

FIRST-TIER TRIBUNAL

Section 29(1) of the TCEA provides –

The costs of and incidental to –

- (a) all proceedings in the First-tier Tribunal, and
- (b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

However, subsection (3) makes subsection (1) subject to Tribunal Procedure Rules, which limit the power to award costs as follows –

<p>GENERAL REGULATORY CHAMBER</p> <p>Rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009</p>	<p>10.—(1) [Subject to paragraph (1A), the Tribunal may make an order in respect of costs (or, in Scotland, expenses) only—</p> <ul style="list-style-type: none"> (a) under section 29(4) of the 2007 Act (wasted costs); (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; or (c) where the Charity Commission, the Gambling Commission or the Information Commissioner is the respondent and a decision, direction or order of the Commission or the Commissioner is the subject of the proceedings, if the Tribunal considers that the decision,
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	<p>direction or order was unreasonable.</p> <p>(1A) If the Tribunal allows an appeal against a decision of the Gambling Commission, the Tribunal must, unless it considers that there is a good reason not to do so, order the Commission to pay to the appellant an amount equal to any fee paid by the appellant under the First-tier Tribunal (Gambling) Fees Order 2010 that has neither been included in an order made under paragraph (1) nor refunded.</p>
<p>HEALTH, EDUCATION AND SOCIAL CARE CHAMBER</p> <p>Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008</p>	<p>10.—(1) Subject to paragraph (2), the Tribunal may make an order in respect of costs only—</p> <p>(a) under section 29(4) of the 2007 Act (wasted costs); or</p> <p>(b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.</p> <p>(2) The Tribunal may not make an order under paragraph (1)(b) in mental health cases.</p>
<p>IMMIGRATION AND ASYLUM CHAMBER</p> <p>Rule 23A of the Asylum and Immigration Tribunal (Procedure) Rules 2005</p>	<p>23A. The Tribunal may not make any order in respect of costs (or, in Scotland, expenses) pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 (power to award costs).</p>
<p>SOCIAL ENTITLEMENT CHAMBER</p> <p>Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008</p>	<p>10. The Tribunal may not make any order in respect of costs (or, in Scotland, expenses).</p>
<p>TAX CHAMBER</p> <p>Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009</p>	<p>10.—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—</p> <p>(a) under section 29(4) of the 2007 Act (wasted costs);</p> <p>(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;</p> <p>(c) if—</p> <p>(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and</p> <p>(ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this subparagraph; or</p> <p>(d) in a MP expenses case, if—</p> <p>(i) the case has been allocated as a Complex case under rule 23 (allocation of cases to categories); and</p> <p>(ii) the appellant has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this subparagraph.</p>
<p>WAR PENSIONS AND ARMED FORCES COMPENSATION CHAMBER</p> <p>Rule 10 of the Tribunal Procedure</p>	<p>10. The Tribunal may not make any order in respect of costs.</p>

(First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008	
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UPPER TRIBUNAL

As in the First-tier Tribunal, the general power to award costs conferred by section 29(1) of the TCEA is made subject to Tribunal Procedure Rules, which limit the power to award costs as follows –

<p>ADMINISTRATIVE APPEALS CHAMBER</p> <p>IMMIGRATION AND ASYLUM CHAMBER</p> <p>TAX AND CHANCERY CHAMBER</p> <p>Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008</p>	<p>10.—(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except—</p> <p>(aa) in a national security certificate appeal, to the extent permitted by paragraph (1A);</p> <p>(a) in proceedings transferred by, or on appeal from, the Tax Chamber of the First-tier Tribunal; or</p> <p>(b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).</p> <p>(1A) In a national security certificate appeal—</p> <p>(a) the Upper Tribunal may make an order in respect of costs or expenses in the circumstances described at paragraph (3)(c) and (d);</p> <p>(b) if the appeal is against a certificate, the Upper Tribunal may make an order in respect of costs or expenses against the relevant Minister and in favour of the appellant if the Upper Tribunal allows the appeal and quashes the certificate to any extent or the Minister withdraws the certificate;</p> <p>(c) if the appeal is against the application of a certificate, the Upper Tribunal may make an order in respect of costs or expenses—</p> <p>(i) against the appellant and in favour of any other party if the Upper Tribunal dismisses the appeal to any extent; or</p> <p>(ii) in favour of the appellant and against any other party if the Upper Tribunal allows the appeal to any extent.</p> <p>(2) The Upper Tribunal may not make an order in respect of costs or expenses under section 4 of the Forfeiture Act 1982.</p> <p>(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—</p> <p>(a) in judicial review proceedings;</p> <p>(b) ...</p> <p>(c) under section 29(4) of the 2007 Act (wasted costs);</p> <p>(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;</p> <p>(e) if, in a financial services case, the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable.</p>
<p>LANDS CHAMBER</p> <p>Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010</p>	<p><i>The general power to awards costs that is conferred by s.29 of the TCEA is not limited except by r.10(7) and (8)</i></p> <p>(7) In an appeal against the decision of a leasehold valuation tribunal, the Tribunal may not make an order for costs except—</p>

	<p>(a) under section 29(4) of the 2007 Act (wasted costs);</p> <p>(b) under paragraph (6); or</p> <p>(c) if the Tribunal considers that the party ordered to pay costs has acted unreasonably in bringing, defending or conducting the proceedings.</p> <p>(8) The amount that may be awarded under paragraph (7)(c), disregarding any amount that may be awarded under paragraph (6), must not exceed £500.</p>
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OTHER FIRST-INSTANCE TRIBUNALS

Tribunal	Costs Rule
<p><u>Employment Tribunal</u></p> <p>Paras. 38 to 47 of Sch.1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004</p>	<p>38.—(1) Subject to paragraph (2) and in the circumstances listed in rules 39, 40 and 47 a tribunal or chairman may make an order (“a costs order”) that —</p> <p>(a) a party (“the paying party”) make a payment in respect of the costs incurred by another party (“the receiving party”);</p> <p>(b) the paying party pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of tribunals) paid by the Secretary of State under section 5(2) or (3) of the Employment Tribunals Act to any person for the purposes of, or in connection with, that person’s attendance at the tribunal.</p> <p>39.—(1) Subject to rule 38(2), a tribunal must make a costs order against a respondent where in proceedings for unfair dismissal a Hearing has been postponed or adjourned and —</p> <p>(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the Hearing; and</p> <p>(b) the postponement or adjournment of that Hearing has been caused by the respondent’s failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed, or of comparable or suitable employment.</p> <p>40.—(1) A tribunal or chairman may make a costs order when on the application of a party it has postponed the day or time fixed for or adjourned a Hearing or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.</p> <p>(2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.</p> <p>(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings,</p>

	<p>or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.</p> <p>(4) A tribunal or chairman may make a costs order against a party who has not complied with an order or practice direction.</p> <p><i>Rules 42 to 44 make provision for preparation time orders to be made in favour of a party who is not legally represented in terms that are broadly equivalent to rules 38 to 40, which apply only where a party is legally represented.</i></p> <p>47.—(1) When: —</p> <p>(a) a party has been ordered under rule 20 to pay a deposit as a condition of being permitted to continue to participate in proceedings relating to a matter;</p> <p>(b) in respect of that matter, the tribunal or chairman has found against that party in its or his judgment; and</p> <p>(c) no award of costs or preparation time has been made against that party arising out of the proceedings on the matter;</p> <p>the tribunal or chairman shall consider whether to make a costs or preparation time order against that party on the ground that he conducted the proceedings relating to the matter unreasonably in persisting in having the matter determined; but the tribunal or chairman shall not make a costs or preparation time order on that ground unless it has considered the document recording the order under rule 20 and is of the opinion that the grounds which caused the tribunal or chairman to find against the party in its judgment were substantially the same as the grounds recorded in that document for considering that the contentions of the party had little reasonable prospect of success.</p> <p>48.—(1) A tribunal or chairman may make a wasted costs order against a party’s representative.</p>
<p><u>Competition Appeals Tribunal</u></p> <p>Rule 55(2) of the Competition Appeal Tribunal Rules 2003</p>	<p>(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.</p>
<p><u>Adjudicator to Her Majesty’s Land Registry</u></p> <p>Rules 42 and 43 of the Adjudicator to Her Majesty’s Land Registry (Practice and Procedure) Rules 2003</p>	<p>42.—(1) In this rule—</p> <p>(a) “all the circumstances” are all the circumstances of the proceedings and include—</p> <p>(i) the conduct of the parties—</p> <p>(aa) in respect of proceedings commenced by a reference, during (but not prior to) the proceedings; or</p> <p>(bb) in respect of proceedings commenced by a rectification application, before and during the proceedings;</p> <p>(ii) whether a party has succeeded on part of his case,</p>

	<p>even if he has not been wholly successful; and</p> <p>(iii) any representations made to the adjudicator by the parties; and</p> <p>(b) the conduct of the parties includes—</p> <p>(i) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;</p> <p>(ii) the manner in which a party has pursued or defended his case or a particular allegation or issue; and</p> <p>(iii) whether a party who has succeeded in his case in whole or in part exaggerated his case.</p> <p>(2) The adjudicator may, on the application of a party or of his own motion, make an order as to costs.</p> <p>(3) In deciding what order as to costs (if any) to make, the adjudicator must have regard to all the circumstances.</p> <p>43.—(1) In this rule—</p> <p>“costs thrown away” means costs of the proceedings resulting from any neglect or delay of the legal representative during (but not prior to) the proceedings and which—</p> <p>(a) have been incurred by a party; or</p> <p>(b) have been—</p> <p>(i) paid by a party to another party; or</p> <p>(ii) awarded to a party,</p> <p>under an order made under rule 42;</p> <p>“an order as to costs thrown away” means an order requiring the legal representative concerned to meet the whole or part of the costs thrown away; and</p> <p>“the legal representative” means the legally qualified representative of a party.</p> <p>(2) The adjudicator may, on the application of a party or otherwise, make an order as to costs thrown away provided the adjudicator is satisfied that—</p> <p>(a) a party has incurred costs of the proceedings unnecessarily as a result of the neglect or delay of the legal representative; and</p> <p>(b) it is just in all the circumstances for the legal representative to compensate the party who has incurred or paid the costs thrown away, for the whole or part of those costs.</p>
<p><u>Leasehold Valuation Tribunal</u></p> <p>Para.10 of Sch.12 to the Commonhold and Leasehold Reform Act 2002</p>	<p>10. (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).</p> <p>(2) The circumstances are where—</p> <p>(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7; or</p> <p>(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.</p> <p>(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph must not exceed—</p> <p>(a) £500, or</p>

	(b) such other amount as may be specified in procedure regulations.
<u>Residential Property Tribunal</u> Para.12 of Sch.13 to the Housing Act 2004	12. (1) A tribunal may determine that a party to proceedings before it is to pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2). (2) The circumstances are where— (a) he has failed to comply with an order made by the tribunal; (b) in accordance with regulations made by virtue of paragraph 5(4), the tribunal dismisses, or allows, the whole or part of an application or appeal by reason of his failure to comply with a requirement imposed by regulations made by virtue of paragraph 5; (c) in accordance with regulations made by virtue of paragraph 9, the tribunal dismisses the whole or part of an application or appeal made by him to the tribunal; or (d) he has, in the opinion of the tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph must not exceed— (a) £500, or (b) such other amount as may be specified in procedure regulations.
<u>Agricultural Land Tribunal</u> s.5 of the Agriculture (Miscellaneous Provisions) Act 1954 s.27(7) of the Agricultural Holdings Act 1986	5.— (1) An Agricultural Land Tribunal, where it appears to them that any person concerned in a reference or application to them (including any Minister of the Crown or Government department so concerned) has acted frivolously, vexatiously or oppressively in applying for or in connection with the reference or application, may order that person to pay to any other person either a specified sum in respect of the costs incurred by him at or with a view to the hearing or the taxed amount of those costs; and an order may be made under this subsection whether or not the reference or application proceeds to a hearing. (7) The Tribunal may, in proceedings under this section, by order provide for the payment by any party of such sum as the Tribunal consider a reasonable contribution towards costs.
<u>Valuation Tribunal for England</u>	<i>This tribunal has no power to award costs</i>
<u>Valuation Tribunal for Wales</u>	<i>This tribunal has no power to award costs</i>
<u>Mental Health Review Tribunal for Wales</u>	<i>This tribunal has no power to award costs</i>
<u>Special Educational Needs Tribunal for Wales</u> Reg.40 of the Special Educational Needs Tribunal Regulations 2001	40.— (1) The tribunal shall not normally make an order in respect of costs and expenses, but may, subject to paragraph (3), make such an order— (a) against a party (including a parent who has withdrawn his appeal or an authority which has withdrawn its opposition to the appeal) if it is of the opinion that

	<p>that party has acted frivolously or vexatiously or that his conduct in making, pursuing or resisting an appeal was wholly unreasonable;</p> <p>(b) against a party who has failed to attend or be represented at a hearing of which he has been duly notified;</p> <p>(c) against the authority where it has not delivered a statement of its case under regulation 13; or</p> <p>(d) against the authority where it considers that the disputed decision was wholly unreasonable.</p>
<p><u>Parking and Traffic Adjudicators and Road User Charging Adjudicators</u></p> <p>Reg. 12 of the Road Traffic (Parking Adjudicators) (London) Regulations 1993</p> <p><i>Para.13 of the Schedule to the Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007 and para.13 of the Schedule to the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001 are in almost identical terms.</i></p>	<p>12. (1) The adjudicator shall not normally make an order awarding costs and expenses, but may, subject to paragraph (2) make such an order –</p> <p>(a) against a party (including an appellant who has withdrawn his appeal or a local authority that has consented to an appeal being allowed) if he is of the opinion that that party has acted frivolously or vexatiously or that his conduct in making, pursuing or resisting an appeal was wholly unreasonable; or</p> <p>(b) against the local authority, where it considers that the disputed decision was wholly unreasonable.</p>

OTHER APPELLATE TRIBUNALS

Tribunal	Costs Rule
<p><u>Employment Appeal Tribunal</u></p> <p>Rules 34A and 34C of the Employment Appeal Tribunal Rules 1993</p>	<p>34A.—(1) Where it appears to the Appeal Tribunal that any proceedings brought by the paying party were unnecessary, improper, vexatious or misconceived or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party, the Appeal Tribunal may make a costs order against the paying party.</p> <p>(2) The Appeal Tribunal may in particular make a costs order against the paying party when—</p> <p>(a) he has not complied with a direction of the Appeal Tribunal;</p> <p>(b) he has amended its notice of appeal, document provided under rule 3 sub-paragraphs (5) or (6), Respondent’s answer or statement of grounds of cross-appeal, or document provided under rule 6 sub-paragraphs (7) or (8); or</p> <p>(c) he has caused an adjournment of proceedings.</p> <p>(3) Nothing in paragraph (2) shall restrict the Appeal Tribunal’s discretion to award costs under paragraph (1).</p>

	34C. —(1) The Appeal Tribunal may make a wasted costs order against a party’s representative.
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