

**EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT NO.2)
ORDER 2008**

2008 No. 2704

**THE COMMUNITY LEGAL SERVICE (FINANCIAL) (AMENDMENT)
(NO.2) REGULATIONS 2008**

2008 No. 2703

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1. The Community Legal Service (Funding) (Amendment No.2) Order 2008 ('the Order') amends the Community Legal Service (Funding) Order 2007 which limits the power of the Legal Services Commission (LSC) to pay remuneration under contract for the provision of funded services, and sets out remuneration rates which are payable for funded services. The Community Legal Service (Financial) (Amendment) (No.2) Regulations 2008 ('the Regulations') amend the Community Legal Service (Financial) Regulations 2000 which govern the financial aspects of the provision of services funded by the Legal Services Commission (LSC) in civil and family matters.

2.2. The main effects of the Order and the Regulations are as follows:

2.2.1 The Order replaces references to the Mental Health Review Tribunal with references to Mental Health Proceedings before the First-tier Tribunal and the Mental Health Review Tribunal for Wales, which is not part of the new Tribunals system. It also includes the new Upper Tribunal within a definition of 'Higher Courts' and provides that a contract may provide a percentage enhancement of up to 200% to the hourly rate for non-family proceedings in the Upper Tribunal.

2.2.2 The Regulations make a consequential amendment arising from the Tribunals, Courts and Enforcement Act 2007 (c. 15), which replaces certain individual Tribunals, including the Mental Health Review Tribunal, with a new First-tier and Upper Tribunal. The 2000 Regulations contain a reference to the Mental Health Review Tribunal, which will cease to exist under the Act. The Regulations replace this reference with a reference to the First-tier Tribunal established under the Tribunals, Courts and Enforcement Act 2007, and the Mental Health Review Tribunal for Wales, which is not part of the new Tribunals system.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These instruments have been laid within 21 days of their commencement date. They are part of a larger package of instruments, including several subject to affirmative resolution, needed to implement the first stage of tribunals reform. The new provisions cannot operate without all the statutory instruments in place. Ministers judged that there was a serious risk of Parliament not approving the affirmative statutory instruments if all of the concerns of some key interest groups had not been met. They also judged that laying the negative instruments before the discussions with stakeholders had reached fruition could jeopardise the parliamentary process and lead to a considerable waste of parliamentary resources if such a large number of instruments had to be withdrawn.
- 3.2 The Minister and Department regret and apologise for the breach of the 21 day rule. However, these instruments have to take effect on 3 November as the draft Transfer of Tribunals Functions Order 2008 (laid in Parliament on 4 June 2008) provides that it is to commence on that date. As the Transfer of Tribunals Order and these instruments are interactive and interdependent it would be necessary to withdraw the Transfer of Tribunals Order and lay a new order in Parliament if the commencement dates on these instruments could not be 3 November. This would create significant confusion for tribunal users and the Tribunal Service and delay implementation of the tribunal reform programme by at least three months.

4. Legislative Background

- 4.1 These are consequential changes to ensure the continuation of legal aid provision in light of the partial implementation of the Tribunals Courts & Enforcement Act 2007, which is available at the following location:
http://www.opsi.gov.uk/ACTS/acts2007/ukpga_20070015_en_1

5. Territorial Extent and Application

- 5.1 The Order and the Regulations apply to England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

- 7.1 The Tribunals Courts and Enforcement Act 2007 makes fundamental changes to the existing Tribunal system. It replaces individual tribunals with a new First-tier Tribunal and Upper Tribunal, grouped into 'chambers'. The overall aim of the Act is to modernise the system and develop collective expertise in each chamber.

- 7.2. The Order makes consequential changes to ensure the continued provision of legal aid under the new system. The Order will allow mental health cases before the new First-tier Tribunal to be paid at the same rates as cases currently before the Mental Health Review Tribunal. It will also allow appeals and judicial reviews that would currently be funded in the High Court to be funded at the same rate in the Upper Tribunal. The Regulations ensure that cases currently before the Mental Health Review Tribunal which are not subject to means assessment, will not be subject to means assessment before the First-tier Tribunal.
- 7.3. These changes were subject to consultation with key stakeholders, namely: The Law Society; Bar Council; Legal Aid Practitioners Group; Department for Children, Schools and Families; Mental Health Lawyers Association; Administrative Justice and Tribunals Council; Advisory Centre for Education; Independent Panel for Special Education Appeals; Victim Support; Education Law Practitioners Group; Criminal Injuries Compensation Authority; General Social Care Council; The Gender Trust; Education Law Association; Child Poverty Action Group; Information Commissioner; Mental Health Review Tribunal; Special Education and Disability Appeals Tribunal; Vat and Duties Tribunal; Care Standards Tribunal and the General and Special Commissioners of Income Tax Tribunal.
- 7.4. This was a joint consultation with the LSC. Of the responses received only those from the Child Poverty Action Group and the Law Society made any substantive comments. These comments were principally concerned with the Funding Code (the code setting out the criteria according to which the LSC decide whether to fund services) and contract changes (i.e. the contract between the LSC and service providers) proposed by the LSC, rather than this Statutory Instrument.

8. Impact

- 8.1. An Impact Assessment has not been prepared for this instrument, as it has no impact on business, charities or voluntary bodies.

9. Contact

- 9.1. Enquiries about the contents of this memorandum should be addressed to:

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