

EXPLANATORY MEMORANDUM TO
THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (WAR PENSIONS AND ARMED FORCES COMPENSATION CHAMBER) RULES

2008 No. 2686 (L. 14)

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

2008 No. 2698 (L. 15)

THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (HEALTH, EDUCATION AND SOCIAL CARE CHAMBER) RULES 2008

2008 No. 2699 (L. 16)

THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (SOCIAL ENTITLEMENT CHAMBER) RULES 2008

2008 No. 2685 (L. 13)

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 These instruments govern the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal in proceedings which have been allocated to the War Pensions and Armed Forces Compensation Chamber, the Social Entitlement Chamber, and the Health, Education and Social Care Chamber of the First-tier Tribunal by the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008. These Rules come into force on 3 November 2008 and are subject to negative resolution.
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 the all 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process and lead to a considerable waste of parliamentary resources if such a large number of instruments had to be withdrawn.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 Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal. Section 30 of the Act allows for the Lord Chancellor to transfer functions of tribunals listed in Schedule 6 of the Act to either or both of these two Tribunals.
- 4.2 Section 7 of the Act provides that the Lord Chancellor may, with the concurrence of the Senior President of Tribunals organise the two Tribunals into Chambers and specify the allocation of functions within each Chamber.
- 4.3 Section 22(1) of the Act provides for Tribunal Procedure Rules to govern the practice and procedure to be followed by the First-tier Tribunal and the Upper Tribunal.
- 4.4 Section 22 (2) provides that those rules are made by the Tribunal Procedure Committee. Section 22(4) provides that the power to make rules must be exercised with a view to securing, among other requirements, that rules are simple and simply expressed.
- 4.5 So far as practicable, the rules for the different chambers of the First-tier Tribunal are in the same terms, especially as regards the general procedural powers of the tribunal to manage cases.
- 4.6 Schedule 5 to the Act makes provision for the Committee's membership. The Lord Chancellor, the Lord Chief Justice, the Senior President of Tribunals and the Lord President are given roles in relation to the appointment of members. The Committee has 11 members representing a range of judicial, legal and tribunal interests.
- 4.7 Paragraph 28 of Schedule 5 to the Act requires the Committee to consult before it makes rules and for rules made by the committee to be signed by a majority of its members. They are then submitted to the Lord Chancellor for him to allow them. Rules made and allowed are required to be contained in a statutory instrument to which the Statutory Instruments Act 1946 (c.36) applies as if the instrument contained rules made by a Minister of the Crown.
- 4.8 Paragraph 24(2) of Schedule 7 to the Act disapplies the requirement to consult with The Administrative Justice and Tribunals Council prior to making or approving rules where the rules were made by the Tribunal Procedure

Committee. The Administrative Justice and Tribunals Council has a place on the Tribunal Procedure Committee.

5. Extent

- 5.1 The Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules apply to England and Wales. The Tribunal Procedure (Upper Tribunal) Rules 2008 apply to the United Kingdom. The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 apply to England, Wales and Scotland. The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 apply to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

- 7.1 The Tribunals, Courts and Enforcement Act 2007 creates two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, into which existing tribunal jurisdictions can be transferred. The establishment of the Tribunals follows the Government's acceptance of the recommendations in Sir Andrew Leggatt's Review of Tribunals, *Tribunals for Users – One System, One Service*, published in August 2001. He recommended that tribunals should be brought together in a single system and that they should become separate from their current sponsoring departments.
- 7.2 The Government's response to Sir Andrew Leggatt's recommended single tribunal system was to enact the Tribunals, Courts and Enforcement Act 2007 which creates two new, generic tribunals, the First-tier Tribunal and the Upper Tribunal, into which existing tribunal jurisdictions can be transferred.
- 7.3 The First-tier Tribunal and Upper Tribunal (Chambers) Order establishes three chambers in the First-tier Tribunal, the Social Entitlement Chamber, the War Pensions and Armed Forces Compensation Chamber and the Health, Education and Social Care Chamber, and the Administrative Appeals Chamber in the Upper Tribunal.
- 7.4 From 3 November 2008 the Administrative Appeals Chamber of the Upper Tribunal will hear appeals from the First-tier Tribunal, appeals under section of the Safeguarding Vulnerable Groups Act 2006, appeals from the Pensions Appeal Tribunal (Scotland), appeals under section 5 of the Pensions Appeal Tribunals Act 1943 from the Pensions Appeal Tribunal (Northern Ireland), appeals from the Mental Health Review Tribunal, Wales, appeals from the Special Educational Needs Tribunal Wales and judicial review matters. The

rules reflect the jurisdictions that will be transferring into each of the Chambers.

Consultation

- 7.5 The Tribunal Procedure Committee carried out a six week consultation exercise on the proposed rules. The consultations commenced on 28 May 2008 for Social Entitlement Chamber, 30 May 2008 for Health, Education and Social Care, and 2 June 2008 for the Upper Tribunal. The consultations ran till 11 July. 145 responses were received to the three sets of rules. 54 of these covered Social Entitlement, 79 were in relation to Health, Education and Social Care and 12 were in respect of the Upper Tribunal.
- 7.6 In covering notes to accompany the consultation the Committee noted that the intention behind each set of the chamber rules was to create a single set of rules that can apply to all jurisdictions within a chamber. It was intended that the rules should be simple, flexible and easy to understand. The purpose of the rules was not to radically overhaul the existing processes, but to allow best current practices to be maintained.
- 7.7 Following consultation a further draft of the three sets of rules was placed on the Tribunals Service website and sent to all respondents to the consultation. Whilst there was not a formal consultation on this draft, 19 responses were received in respect of the revised rules.
- 7.8 The consultation invited views on the rules as a whole and did not have any specific questions. The main changes made as a result of the consultation were to remove anomalies within the rules.
- 7.9 Powers to award expenses were amended to reflect the practice and legislation in jurisdictions prior to their transfer into the new Tribunals. This change was made in response to concerns that the rules provided insufficient guidance on the circumstances where expenses would be payable.
- 7.10 Concern was also raised that the draft rule in the consultation creating a 'combined application for appeal or review' may be confusing to users, and that in practice the Tribunal could use its powers under Sections 9 and 10 of the Act, and review decisions where appropriate, when an appellant sought permission to appeal. The rule was amended accordingly to provide expressly only for an application for permission to appeal (which, however, also triggers a requirement for the tribunal to consider first whether it should review its own decision) .
- 7.11 Following further consultation on the chambers structure and in recognition of concerns expressed by members of the Armed Forces community and the special relationship between service personnel and the Government as characterised by Command Paper [CM 7424 -*The Nation's Commitment: Cross Government Support to our Armed Forces, their Families and Veterans*], the decision was made to create a separate War Pensions and Armed Forces Compensation Chamber, and to remove the Pensions Appeal Tribunal ("PAT") from the Social Entitlement Chamber.

- 7.12 Upon notification of the intention to create the additional chamber, draft rules were prepared for it, drawing on the rules that would have applied to the PAT jurisdiction within the Social Entitlement Chamber. These rules were then sent to representatives of ex-service organisations for a further short consultation, and the rules were approved by them.
- 7.13 The need to ensure that changes to Rules relating to War Pensions and Armed Forces Compensation appeals in England and Wales were shared and discussed with the jurisdictions of the PATs Scotland and Northern Ireland, was raised in earlier responses to the Government's consultation Transforming Tribunals – Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007 (CP30/07).
- 7.14 Acknowledging these concerns the Tribunals Service intends to establish an Advisory Steering Group within 3 months of commencement, with an independent chair that will draw together stakeholders from across the three jurisdictions including representatives of the WP&AFC Chamber, representatives from ex-Service organisations who represent appellants at appeal hearings and proposed by COBSEO, representatives of the judiciary and administration for the PATs in Scotland and NI and the Ministry of Defence.
- 7.15 The remit of the group will include consideration of the implementation of existing procedures, changes the Government or Tribunal proposes to make to the procedures, and the applicability of any such changes across the jurisdictions.

8. Impact

- 8.1 A Regulatory Impact Assessment (RIA) was prepared for the Tribunals, Courts and Enforcement Act. This can be found at: <http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm> In terms of this order, the RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals bringing tribunals together in one organisation. This will consist of a First-tier Tribunal and Upper Tribunal, with the First-tier Tribunal hearing appeals from the decision making body and the Upper Tribunal being the appellate level for decisions of the First-tier.
- 8.2 The RIA further stated the legislation would create a coherent system of appeals with appropriate oversight from the courts, ensuring that only those cases that should be dealt with in a court are and reducing the need for judicial review.
- 8.3 In assessing the costs and benefits of the legislation which is the subject of this SI, the RIA stated that the new system will have greater flexibility in adsorbing new work or responding to fluctuations, and would allow the introduction of a more coherent appellate system from tribunals
- 8.4 A further RIA for the Tribunal Procedure Rules has not been produced.

9. Contact

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