EXPLANATORY MEMORANDUM TO

THE ROAD USER CHARGING (ENFORCEMENT AND ADJUDICATION) (LONDON) (AMENDMENT) REGULATIONS 2008

2008 No. 1956

THE CHILD SUPPORT COMMISSIONERS (PROCEDURE) (AMENDMENT) REGULATIONS 2008

2008 No. 1955

THE SOCIAL SECURITY AND CHILD SUPPORT (DECISIONS AND APPEALS) (AMENDMENT) REGULATIONS 2008

2008 No. 1957

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 Regulations make changes to the eligibility requirements for appointment to the following judicial offices:

- member of appeal panels for the purposes of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("Social Security Regulations");
- member of appeal panels for the purposes of the Child Support Commissioners (Procedure) Regulations 1999 ("Child Support Regulations"); or
- adjudicator for the purposes of the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001 ("Road User Charging Regulations").

The changes are intended to widen the range of lawyers with relevant skills, expertise and experience eligible to apply for these offices.

2.2 Solicitors and barristers will continue to be eligible for the offices relating to the Social Security Regulations and the Child Support Regulations. Persons with qualifications specified under section 7(6A) of the Social Security Act 1998 will also be eligible although no persons have been specified under section 7(6A) at present.

2.3 The changes to the Road User Charging Regulations provide that a person will be eligible to become an adjudicator for the purposes of those Regulations if that person satisfies the judicial-appointment eligibility condition on a 5-year basis.

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

3.1 The power to make the Social Security Regulations requires the Secretary of State to make regulations with the concurrence of the Lord Chancellor (section 6(3) read in the light of section 79 of the Social Security Act 1998). The policy responsibility for exercising the power has been transferred to the Secretary of State for Justice.

3.2 We are aware that the JCSI reported a statutory instrument for doubtful vires in the Twenty-eighth Report of Session 2006-2007: http://www.publications.parliament.uk/pa/jt200607/jtselect/jtstatin/191/19109.htm

3.3 In brief, the statutory instrument concerned was made by the Criminal Procedure Rule Committee but an essential part of the procedure was that the instrument had to be allowed by the Lord Chancellor with the concurrence of the Secretary of State. Jack Straw MP signed in his capacity as Lord Chancellor and also provided concurrence as Secretary of State. The Committee felt that concurrence required agreement of a separate legal person and reported the instrument on the grounds that there appeared to be a doubt as to whether there was vires to make it.

3.4 4 A significant part of the thinking of the Committee in reaching the decision in the above report appears to have been that the Secretary of State for Justice was not a "corporation sole" and not a separate legal entity. Paragraph 6.5 of the Report states, "If each separate office that person held had been a "corporation sole" (i.e. recognised in law as a separate legal entity), legal separation would have been achieved; but that process had not been completed at the time the Rules were allowed".

3.5 The Ministry of Justice considers that legal separation for the purposes of the present statutory instruments has been achieved regarding the offices of Lord Chancellor and the Secretary of State for Justice.

3.6 The Secretary of State for Justice is now a corporation sole by virtue of the Secretary of State for Justice Order 2007 (S.I. No 2128). That office had not been designated as a corporation sole at the time of making the amendment to the Criminal Procedure Rules reported by the JCSI in the report referred to in the preceding paragraphs.

3.7 The Lord Chancellor is a quasi corporation sole. See Grant, Law of Corporation 661, which is cited with approval in Halsbury's Laws of England, volume 9(2), paragraph 1102.

3.8 The invariable practice of the Ministry of Justice, and the Departments preceding it, has been to treat the Lord Chancellor's office as a separate legal entity with the characteristics of a corporation sole.

3.9 The Lord Chancellor has entered into long-term contracts in his capacity as Lord Chancellor. This is reflected in Her Majesty's Courts Service Estate Management Notice 12/2006 (available on the MoJ website). This records that documents which deal with a legal estate in land will as a general rule be in the name of First Secretary of State(FSS) in accordance with a general rule that the FSS holds land on behalf of Ministers and Departments. The Notice, however, goes on to provide

that "other contracts connected with HMCS Estate will, as a general rule, be in the name of the Lord Chancellor. These documents are to be signed on behalf of the Lord Chancellor in his official capacity. The office of the Lord Chancellor subsists not withstanding the change in the name of the department to the Department for Constitutional Affairs and the creation as a separate legal person of its Secretary of State." (page 3). Examples of contracts signed by the Lord Chancellor under this Notice are occupational licences and public finance initiatives.

3.10 The Notice referred to in the preceding paragraph also notes that in relation to all the documents relating to HMCS estates that "the FSS and Lord Chancellor should be considered as jointly liable on any particular issue". (page 3). (It should be noted that in fact the current practice is for the Secretary of State for Justice to enter into contracts.)

4 Legislative Background

4.1 The Tribunals, Courts and Enforcement Act 2007 (2007 Act) contains 3 sections (50-52) revising the eligibility requirements for judicial appointment. Section 50 introduces the term "judicial-appointment eligibility condition" and provides that where reference is made to the judicial-appointment eligibility condition in relation to eligibility for judicial office in statute candidates for judicial office must hold a relevant qualification and have gained experience in law over a period whilst holding that qualification. Section 50(4) of the 2007 Act provides that a person holds a relevant qualification if the person is a solicitor or barrister or holds a qualification specified in an order made under section 51(1) of that Act in relation to offices identified in the order.

4.2 Section 52 of the 2007 Act defines what is meant by gaining experience in law for these purposes.

4.3 Eligibility for specific judicial offices, for the most part, is set out elsewhere, in both primary legislation and secondary legislation. Schedule 10 to the 2007 Act amends judicial eligibility provisions contained in primary legislation. That Schedule substitutes, where relevant, reference to the judicial-appointment eligibility condition in place of the existing eligibility requirements for specified offices and also lowers the number of years' qualification required from 10 to 7 and from 7 to 5 years in the provisions regarding eligibility for judicial office in statute.

4.4 The purpose of these Regulations is to make corresponding changes judicial eligibility provisions contained in secondary legislation. The changes made by these Regulations correspond to the changes made by Schedule 10 to the 2007 Act for the purposes of the Child Support Regulations, Social Security Regulations, and the Road User Charging Regulations.

5 Territorial Extent and Application

5.1 The Road User Charging Regulations apply to London. The other Regulations apply to England and Wales.

6 European Convention on Human Rights

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

7 Policy Background

7.1 The policy intention is to widen the eligibility criteria for appointment to judicial offices, to ensure that all those with the relevant skills and experience can apply. Widening the pool of those eligible to apply will support the policy aim to encourage diversity in the range of persons available for selection for judicial appointments. Judicial Diversity is a priority for the Ministry of Justice.

7.2 The Trilateral Judicial Diversity Strategy, agreed in 2006 between the Lord Chancellor, Lord Chief Justice and the Chairman of the Judicial Appointments Commission, had four key strands:

- Strand 1 - Promote judicial service and widen the range of people eligible to apply for judicial office
- Strand 2 - To encourage a wider range of applicants, so as to ensure the widest possible choice of candidates for selection
- Strand 3 - Promote diversity through fair and open processes for selection to judicial office solely on merit
- Strand 4 - Ensure that the culture and working environment for judicial office holders encourages and supports a diverse judiciary and increases understanding of the communities served

7.3 The legislative changes set out in this Order will support Strand 1 – widening the range of people eligible to apply.

7.4 The power to make the Child Support Regulations requires the Lord Chancellor to have consulted the Secretary of State. Consultation has been carried out with the Secretary of State for the Department for Work and Pensions and no objections were received. We have been in discussions with DWP officials since March 2008.

8 Impact

8.1 No Regulatory Impact Assessment has been prepared because there is no regulatory impact on any part of the private or voluntary sector.

9 Contact

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