EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (TRANSITORY PROVISION) ORDER 2008

2008 No. 1799

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.This instrument, enables, until section 3A of the Charities Act 1993 comes into force, the reference to section 3A of the Charities Act 1993 in section 194(9)(a) of the Legal Services Act 2007 ('the 2007 Act') to have effect as if it were a reference to section 3 of the Charities Act 1993.

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

3.1 Section 194(8) of the 2007 Act confers the power on the Lord Chancellor to prescribe by order a charity for the purposes of section 194. Section 194(9) provides that an order under subsection (8) may only prescribe a charity which (a) is registered in accordance with section 3A of the Charities Act 1993 and (b) provides financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance (by way of presentation or otherwise) which is free of charge.

3.2 Section 9 of the Charities Act 2006 substitutes for section 3 of the Charities Act 1993 new sections 3, 3A and 3B. However, section 9 of the Charities Act 2006 has yet to be fully commenced.

3.3 The possibility that section 3A of the Charities Act 1993 might not be commenced by the time section 194 of the 2007 Act was commenced was considered at the time of the passage of the Legal Services Bill and the view was taken that the Department would have the power to commence section 194 and make a transitory provision pending the commencement of section 3A of the Charities Act 1993.

3.4 The transitory provision made by this instrument will not alter the effect of section 194(9) of the 2007 Act as the intention is to prescribe the charity that (a) was anticipated at the time the clause (now section 194) was debated in Parliament and (b) described in the consultation process detailed in paragraph 7.6 below.

4. Legislative Background

4.1.The Legal Services Act 2007 received Royal Assent on 30 October 2007. It introduces a new regime for the regulation of legal services and makes a large number of amendments to the legislation which governs legal services regulators. This

includes amendments to the Solicitors Act 1974, the Administration of Justice Act 1985, the Courts and Legal Services Act 1990 and the Compensation Act 2006.

4.2 Section 194 of the 2007 Act applies to proceedings in a civil court in which a party to those proceedings is or was represented by a legal representative and that legal representation is or was provided free of charge. Under section 194(3) of the Act, the court may order any person to make a payment to the prescribed charity in respect of that legal representation.

4.3 The Legal Services Act 2007 (Commencement No 2 and Transitory Provisions) Order
2008 (S.I. 2008/1436) commences (in stages) section 194 of the 2007 Act.

5. Territorial Extent and Application

5.1 This instrument contains provisions which 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 2007 Act reforms the way in which legal services are regulated in England & Wales. The 2007 Act establishes an oversight regulator; the Legal Services Board, and an independent complaints handling body; the Office for Legal Complaints. It also provides for alternative business structures which will enable legal firms to explore new ways of organising their business.

7.2.Section 194 of the 2007 Act, enables the court to make, in civil proceedings where a party has received pro-bono (or free of charge) representation, an order against another party to make a payment to the prescribed charity in respect of the pro bono representation. This provision prevents a losing party escaping orders to pay a sum, in effect equivalent to costs, solely on the basis that their successful opponent received representation free of charge. This section provides for the ordered payment to be made to a charity prescribed by Order made by the Lord Chancellor. The charitable funds will be employed to fund further pro bono help and advice. To accommodate this provision, amendments will be made to the Civil Procedure Rules 1988 (S.I. 1998/3132) and an order made to prescribe the charity in accordance with section 194(8) of the 2007 Act.

Consultation and Guidance

7.3 The 2007 Act is the result of extensive consultation both before and during the Parliamentary passage of the Legal Services Bill.

7.4 The draft Legal Services Bill was published in May 2006 and was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Joint Committee reported in July 2006, and the Government published its response to this in September of the same year.

7.5 A consultation on the proposals for the implementation of section 194 and the prescribed charitable body - '*Cost Recovery in Pro Bono Assisted Cases*' – including a partial impact assessment was published on 16 April 2007. The Ministry of Justice published its response with a full impact assessment on 30 November 2007. These documents are attached and can be found at
http://www.justice.gov.uk/publications/cp0707.htm

8. Impact

8.1 An impact assessment has not been prepared for this Order as no impact on the private or
voluntary sectors is foreseen.

9. Contact

9.1.Any enquiries about the contents of this Memorandum should be addressed to:

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