EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (AMENDMENT NO. 2) RULES 2017

2017 No. 1168 (L. 19)

1. Introduction

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

2. Purpose of the instrument

2.1 The Tribunal Procedure (Amendment No. 2) Rules 2017 ("Amendment Rules") make amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

3. Matters of special interest to Parliament

Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") created a two-tier tribunal system into which existing tribunals can be transferred, or new appeal rights directed. Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal, which together make up this two-tier system. Both Tribunals are divided into Chambers which deal with different areas of jurisdiction e.g. health, immigration and asylum and education. In addition to statutory appeals, the Upper Tribunal also deals with certain kinds of judicial reviews.

4.2 The 2007 Act provides for Tribunal Procedure Rules to be made by the Tribunal Procedure Committee ("TPC"), and deals with the process of making, and the content of, those rules.

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

Amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

7.1 The Amendment Rules amend the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the HESC Rules") to provide a timeframe for applications under section 127(5) of the Education and Skills Act 2008 ("the 2008 Act").

7.2 Under sections 124, 125 and 126 of the 2008 Act the First-tier Tribunal ("the Tribunal") may in the case of certain appeals by proprietors of registered independent educational institutions make orders imposing "a relevant restriction". Section 117 of the 2008 Act defines "a relevant restriction" as a requirement that the proprietor of such an institution: stops using any part of the institution's premises for all or specified purposes; closes any part of the institution's operation; or ceases to admit any new students or new students of a particular description. Breach of a relevant restriction by a proprietor is a criminal offence.

7.3 Section 127(5) of the 2008 Act provides that, where the Tribunal has imposed a relevant restriction, the proprietor can apply to the Tribunal for the restriction to be varied or revoked. However, the HECS Rules do not currently provide a timeframe for making an application under section 127(5) of the 2008 Act.

7.4 The Amendment Rules rectify this by providing that a section 127(5) application may be made at any time when the relevant restriction has effect. The Amendment Rules also amend the 2008 Rules so that the Secretary of State can act as respondent in a section 127(5) application.

Amendments to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

7.5 The Amendment Rules amend the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2008 ("the Tax Rules") in light of new jurisdiction conferred by Welsh devolved legislation.

7.6 The Tax Collection and Management (Wales) Act 2016 establishes the Welsh Revenue Authority (WRA), which is to be the body responsible for the collection and management of devolved taxes in Wales. It introduces a new right of appeal to the Tribunal against decisions of the WRA and rights to make applications to the Upper Tribunal.

7.7 The Amendment Rules amend the Tax Rules to accommodate the new jurisdiction of the Tribunal by amending the definition of "respondent" in the Tax Rules to ensure that, where a taxpayer makes an appeal to the Tribunal under devolved Welsh legislation, WRA is the respondent. Rule amendments are not considered necessary in respect of the new jurisdiction of the Upper Tribunal.

Amendments to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

7.8 The Amendment Rules amend the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules") to provide a time limit for an appeal against a public authority decision under the Re-use of Public Sector Information Regulations 2015 where a complaint concerns charging above marginal cost.

7.9 Under the Re-use of Public Sector Information Regulations 2015, the Information Commissioner's Office (ICO) deals with a complaint by a re-user of public sector information, the complaint having first been considered by the public-sector body itself. The ICO takes the role of impartial review body with the ability to make binding decisions, but these decisions are appealable to the Tribunal.

7.10 There is one exception to the above process: where a complaint concerns charging above marginal cost, the ICO only makes a recommendation, which is referred to the public sector body for a final decision, appealable to the First-tier Tribunal. The public sector body can also appeal against the ICO's recommendation.

7.11 The reason for the above exception is to ensure that, as agreed with the Treasury Officer of Accounts, binding decisions relating to charging above marginal cost are only made by a judicial body in the form of the First-tier Tribunal. This also affords the Accounting Officer of the public sector body concerned the opportunity to fully consider and respond to any recommendations that are made in relation to charging above marginal cost.

7.12 The Amendment Rules amend the GRC Rules to provide for a time limit for the appeal of 28 days from the twentieth working day of receipt by the public sector body of the recommendation notice.

Amendments to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

7.13 The Amendment Rules amend Part 5 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the IAC Rules), which deals with bail, in light of Schedule 10 to the Immigration Act 2016.

7.14 The 2016 Act replaces the existing system of bail recognizances and, in Scotland, bail bonds with a UK wide system of financial conditions. The Amendment Rules update the terminology in the IAC Rules to be consistent with this.

7.15 The 2016 Act introduces a new power for the Tribunal to direct that Secretary of State may vary bail conditions where bail has been granted by the Tribunal. The Amendment Rules introduce a procedure for this in the IAC Rules which ensures that parties and third parties have the opportunity to make representations before the power is exercised.

7.16 The 2016 Act makes provision for the Secretary of State to make a reference to the Tribunal where a person has been subject to immigration detention for more than four months (and periodically re-referred thereafter). The Amendment Rules introduce a procedure for this in the IAC Rules.

Amendments to the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

7.17 The Amendment Rules amend the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 in light of the new Upper Tribunal jurisdiction under the Electronic Communications Code (the code) and the Riot Compensation Act 2016.

7.18 The code in Schedule 3A to the Communications Act 2003 (inserted by section 4 of, and Schedule 1 to, the Digital Economy Act 2017) sets out the basis on which electronic communications operators, authorised by Ofcom under section 106 of the Communications Act 2003, may exercise rights to deploy and maintain their apparatus on, over and under land. In England and Wales, the county court has jurisdiction for most disputes under the code. However, paragraph 94 of the code enables the Secretary of State to make regulations to confer jurisdiction for such disputes on the Upper Tribunal. The Secretary of State has exercised this power and laid the Electronic Communications Code (Jurisdiction) Regulations 2017 before Parliament on 19 November 2017, and will come into force when the code commences.

7.19 The Riot Compensation Act 2016 provides that individuals or businesses who experience loss as a result of a riot may claim compensation from their local Police and Crime Commissioner or Mayor (in the case of London and Manchester). The Riot Compensation Regulations 2017, made under the Riot Compensation Act 2016, set out the procedures for the review of a decision on a claim and introduce a right of appeal to the Upper Tribunal against any review decision.

7.20 The Amendment Rules amend the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, including the provisions dealing with references and costs, in light of the new Upper Tribunal jurisdiction under the code and the Riot Compensation Act 2016.

Consolidation

7.21 Informally consolidated versions of these rules will be updated onto the Justice website when the instruments come into force. They will be found at: https://www.gov.uk/government/publications?departments[]=tribunal-procedure-committee

8. Consultation outcome

8.1 No public consultation was undertaken on these Rules. However, in accordance with paragraph 28(1)(a) of Schedule 5 to the 2007 Act, the TPC has consulted such persons as it considers appropriate which includes individually with all relevant government departments and stakeholders. This includes the Tribunal Chamber Presidents, legal and policy colleagues in the Welsh Government, Home Office, Department for Culture, Media and Sport, the National Archives, Department for Education and Her Majesty's Courts and Tribunals Service.

8.2 The TPC conducted a pubic consultation for proposals on changes to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 arising from the Immigration Act 2016 that ran from 09 February 2017 to the 23 March 2017. Please see link: https://www.gov.uk/government/consultations/changes-to-the-tribunal-procedure-first-tier-tribunal-immigration-and-asylum-chamber-rules-2014

8.3 The Home Office consulted on a proposal in 2014 to introduce a right of appeal rather than continue to offer the ability to take individual claims before the court. The

proposal to introduce an appeal to the Tribunal was supported by most respondents to the consultation. The Home Office published a response to the consultation. Please see link:

https://www.gov.uk/government/consultations/reform-of-the-riot-damages-act--2

8.4 In relation to the Electronic Communication Code, in Chapter 9 of their report, the Law Commission recommended that the forum for almost all code disputes should, in England and Wales, be the Lands Chamber of the Upper Tribunal, stating that "this will be one of the most important changes brought in by the revised Code; [as] many consultees regarded it as crucial for the revised Code to be backed by an adjudication system with more specialist expertise than the County Court can offer". DCMS agreed with that recommendation. In subsequent discussions with the Scottish Government consensus was reached that the specialist lands tribunals in that jurisdiction was the appropriate forum to hear disputes under the code. This change has broad support from stakeholders and Government believes that changing the forum for code disputes is an essential change which will see disputes handled faster and more effectively by drawing upon the specialist expertise of the relevant Lands Tribunals. Please see link:

https://www.gov.uk/government/consultations/consultation-on-reforming-the-electronic-communications-code

9. Guidance

9.1 Her Majesty's Courts and Tribunals Service produces guidance for all tribunal jurisdictions which is issued to parties at key stages of the appeals process and is available on the website at: http://www.justice.gov.uk/tribunals.

10. Impact

10.1 The instrument does not propose to put regulatory burdens on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument as its impact is expected to be minimal and well below the threshold of £5 million per annum at which an assessment must be prepared.

11. Regulating small business

11.1 The legislation does not apply to activities undertaken by small businesses.

12. Monitoring & review

12.1 The impact of any changes to the Tribunal Procedure Rules is constantly monitored by the TPC by way of feedback from tribunal and users.

13. Contact

13.1 Vijay Parkash at the Ministry of Justice Telephone: 0203 334 4471 or email: Vijay.Parkash@justice.gov.uk can answer any queries regarding the instrument.