

EXPLANATORY MEMORANDUM TO
THE CASE TRIBUNALS (ENGLAND) REGULATIONS 2008

2008 No. 2938

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government (“the Department”) and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The Case Tribunals (England) Regulations 2008 (“the Regulations”) make provision regarding the sanctions available to a case tribunal of the Adjudication Panel for England (“the Adjudication Panel”) where it has decided that a member (or former member), or a co-opted member (or former co-opted member) of a local authority has failed to comply with an authority’s code of conduct and that a sanction should be imposed. The Regulations also make provision as to the content and effect of notices served on local authority standards committees by a case tribunal of the Adjudication Panel and the circumstances in which a reference of a matter by an ethical standards officer of the Standards Board for England to the president of the Adjudication Panel may be withdrawn, and the procedure for doing so.

2.2 The Regulations come into force on 12th December 2008.

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

3.1 The Local Government and Public Involvement in Health Act 2007 (Commencement No. 2 and Savings) Order 2008 (SI 2008/172) brought into force on 31 January 2008 the provisions in the Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”) necessary to make the Regulations. Those provisions amend the Local Government Act 2000 (“the 2000 Act”), in which section 79 currently makes provision as to the sanctions available to case tribunals in England and Wales.

3.2 A further commencement order will bring into force sections 197 and 199 of the 2007 Act and the remaining subsections of sections 192 and 198 of that Act simultaneously with the Regulations. Consequently, section 79 of the 2000 Act, will cease to have effect in England.

3.3 There is no express enabling power for the provision in regulation 4(1) whereby case tribunals are authorised to give a copy of the notice referred to in section 78A(7) of the 2000 Act to the standards committee of any other relevant authority of which the respondent has been a member. The enabling provision relied on in this instance is section 77(2) of the 2000 Act, or, alternatively, section 105(2)(a). It is considered expedient that the standards committees of other authorities with which a member has

connections should be informed as quickly as possible of the outcome of disciplinary proceedings affecting that member.

4. Legislative Context

4.1 Part 3 of the 2000 Act established the regime governing the conduct of members and co-opted members of relevant authorities in England and Wales. Section 49 of the 2000 Act defines “relevant authority” for this purpose, and enables the Secretary of State in relation to relevant authorities in England and police authorities in Wales, and Welsh Ministers in relation to relevant authorities in Wales (other than police authorities) to specify by Order the principles which are to govern the conduct of members and co-opted members. Section 50 of the 2000 Act provides for the making by Order of a model code of conduct as regards the conduct which is expected of those members and co-opted members, the mandatory provisions of which must be adopted by relevant authorities.

4.2 Section 57A of the 2000 Act provides that written allegations that a member or co-opted member of a relevant authority in England has failed to comply with the code of conduct are made to the standards committee of the relevant authority concerned. On receipt of an allegation, the standards committee may decide to take no action in relation to the allegation, refer an allegation to the monitoring officer of the authority concerned for investigation or action other than investigation or refer the allegation to the Standards Board for England.

4.3 Where a matter is referred to the Standards Board, the Board must decide whether to refer the matter to one of its ethical standards officers for investigation under section 59 of the 2000 Act; decide to take no action or refer the matter back to the standards committee of the relevant authority concerned.

4.4 Section 75(1) of the 2000 Act provides for the establishment of the Adjudication Panel to consider and determine allegations of misconduct referred to it by an ethical standards officer of the Standards Board under section 64(3) or 65(4) of the 2000 Act. Regulation 17 of the Standards Committee (England) Regulations 2008 (SI 2008/1085) (“the Standards Committee Regulations”) provides that on receipt of a monitoring officer’s report, in relation to an allegation of misconduct, a local authority standards committee may decide that the matter which is the subject of the report should be referred to the Adjudication Panel for determination. The Standards Committee Regulations prescribe that on receipt of such a matter the Adjudication Panel should appoint a tribunal to deal with it as if the matter had been received under section 64(3) of the 2000 Act.

4.5 Sections 64(7) and 65(4A) of the 2000 Act provide that the Secretary of State may by regulations make provision for the withdrawal of an ethical standards officer’s report under section 64(3) or interim report under section 65(4) from the president of the Adjudication Panel.

4.6 Section 78A(4) of the 2000 Act permits the Secretary of State to make regulations prescribing the actions available to case tribunals of the Adjudication Panel where it has received a matter from an ethical standards officer or a local authority standards committee, and determined that a person has failed to comply with the code of conduct of the relevant authority concerned. Section 78A(5) sets out the actions which may, in particular, be included in the such regulations, including censure, suspension, or partial

suspension, of a person for a limited period and disqualification of a person, for a period not exceeding five years, for being or becoming a member of that or any other relevant authority.

4.7 Section 78A(7) and (8) of the 2000 Act provides that the Secretary of State may make regulations to require a case tribunal to give notice to the standards committee of the relevant authority concerned where it has decided that a person has failed to comply with the code of conduct of that authority and make provision regarding the content and effect of such a notice.

4.8 The power of the Secretary of State to make procedural rules for case tribunals of the Adjudication Panel appointed under section 76 of the 2000 Act is exercisable only after consultation with the Administrative Justice and Tribunals Council (“AJTC”) (see section 44 of, and paragraph 24(1) of Schedule 7 to, the Tribunals Courts and Enforcement Act 2007). Further details about the consultation undertaken in connection with the Regulations are set out in paragraphs 8.1 to 8.8.

5. Territorial Extent and Application

5.1 The Regulations apply in relation to England only.

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

What is being done and why

7.1 Part 10 of the 2007 Act, which received Royal Assent on 30 October 2007, and the associated Standards Committee Regulations, which came into force on 8 May 2008, implemented the Government’s policy of introducing a more locally-based conduct regime for local authority members in England. Under the new devolved regime, local standards committees will undertake the initial assessment of misconduct allegations and, in all but the most serious cases, the investigation and determination of such allegations will be undertaken locally, instead of by the Standards Board for England.

7.2 In the new devolved regime, the Government considers that case tribunals, which determine allegations that a member has failed to comply with the code referred to them by local standards committees or ethical standards officers, should have a full range of sanctions available to them. This will allow a case tribunal, for example, to impose a proportionate sanction in a case referred to it on the grounds that the referring standards committee or ethical standards officer considered it to be very serious, but the case tribunal concluded it was less serious. The Government has therefore decided that the wider range of less onerous sanctions, which are currently available to local authority standards committees, as set out in regulation 19 of the Standards Committee Regulations, should be made available to case tribunals. The Government considers that making available to case tribunals sanctions such as censuring a member, requiring a member to apologise, attend training or enter into a process of conciliation, or restricting a member’s use of his or her authority’s resources, will ensure that the extent of the

failure of a member to comply with an authority's code of conduct is proportionate to the sanction imposed on them.

7.3 The Regulations also make provision to secure efficient administration of the conduct regime. The Regulations enable an ethical standards officer to apply to the president of the Adjudication Panel in certain circumstances to withdraw a reference he or she has made to the president, for instance, where the ethical standards officer is satisfied that the matter is less serious than appeared to be the case when it was initially referred and as a consequence is not sufficiently serious to be determined by a case tribunal or a local authority standards committee, or that the pursuit of the matter would not be in the public interest. Previously, where the ethical standards officer referred a matter to the Adjudication Panel for determination, a case tribunal was required to hold a hearing to determine the matter regardless of any evidence or circumstances which came to light in the interim.

7.4 Where a case tribunal decides that a member has failed to comply with an authority's code of conduct and that the failure warrants the member's suspension, there is currently a requirement for the tribunal to issue a notice to the authority concerned. Currently, the effect of the suspension notice, unlike a tribunal's notice to disqualify a member, is not to suspend the member, but merely to give notice to the standards committee that the person has failed to comply with the authority's code of conduct. Accordingly, the authority must then take action to suspend the member. The Government considers that this process is unnecessarily bureaucratic. The Regulations therefore prescribe that a tribunal's notice will have the effect set out in the notice, for instance to suspend a member, so that no further action is needed by the relevant authority before the sanction takes effect.

Consolidation

7.5 This is the first exercise of the enabling power so not applicable.

8. Consultation outcome

Public consultation

8.1 The Department published on 3 January 2008, its '*Orders and Regulations Relating to the Conduct of Local Authority Members in England*' consultation paper¹. The consultation paper was sent to all local authorities in England, local government representative bodies, including the Local Government Association ("LGA"), and other key partners and stakeholders identified as having an interest in the conduct regime for local authority members. A list of those consulted is provided at Annex A to this memorandum. Consultees were asked to comment on the Department's proposals:

- that the sanctions available to a case tribunal of the Adjudication Panel where it has determined that a person has failed to comply with the code of conduct should include those less onerous sanctions available to local authority standards committees;

¹ This document is available on the Department's website at <http://www.communities.gov.uk/publications/localgovernment/laconduct>.

- regarding the circumstances where a reference to the president of the Adjudication Panel following an investigation or an interim report by an ethical standards officer may be withdrawn; and
- that a case tribunal's notice of its decision that a member has failed to comply with the code of conduct should have the effect specified in the notice.

8.2 The consultation ran for six weeks until 15 February 2008. This reflects the period normally allowed for consultation with local government in the 'Framework for Partnership' between the Government and LGA, and the previous extensive consultation undertaken by the Department, including in the Local Government White Paper, '*Strong and Prosperous Communities*', published on 26 October 2006, on the policy principles underpinning the establishment of a new devolved conduct regime for members of relevant authorities in England.

8.3 The Department received 571 responses to its consultation paper. The Department has published a summary of the consultation responses it received and its responses to them². The majority of respondents were supportive of the Department's proposals that the sanctions available to case tribunals of the Adjudication Panel should include those less onerous sanctions available to standards committees. Most respondents also agreed with the proposal to allow ethical standards officers to withdraw references to the president of the Adjudication Panel in the circumstances set out in the consultation paper. However, it was suggested that such a withdrawal should be subject to the consent of the president of the Adjudication Panel. Respondents were also supportive of the proposal to provide for decision notices by tribunals to have the effect of imposing the sanction decided by the tribunal, rather than, as now, imposing a requirement on authorities to take action to impose the sanction.

Consultation with panel of experts

8.4 Following the Department's consultation, the LGA convened an informal panel of experts to consider the Department's proposals. The panel consisted of officials from the Department, the Standards Board, the Adjudication Panel and local government representative bodies. In the drafting of the Regulations the Department has also received assistance from the Adjudication Panel and the Standards Board.

8.5 The informal panel questioned whether a case tribunal's decision notices should, as proposed, have immediate effect. The informal panel considered that the Regulations needed to address the fact that where a case tribunal determines that an individual has failed to comply with the code and imposed a sanction, that individual should have 21 days to appeal against the decision to the High Court. It was therefore suggested that the Regulations should include provision to suspend the effect of the decision notice until the time within which the subject of an allegation may lodge an appeal had expired. The informal panel also supported the view that an ethical standards officer should only be permitted to withdraw a reference made to the president of the Adjudication Panel after receiving the president's consent.

² Also available on the Department's website at <http://www.communities.gov.uk/publications/localgovernment/lamembersconduct>

Consultation with the Administrative Justice and Tribunals Council

8.6 The power of the Secretary of State to make procedural rules for case tribunals of the Adjudication Panel appointed under section 76 of the 2000 Act is exercisable only after consultation with the AJTC (see section 44 of, and paragraph 24(1) of Schedule 7 to, the Tribunals Courts and Enforcement Act 2007).

8.7 The Department sent a draft of the Regulations to the AJTC on 26 August 2008 and received comments from them on 30 September 2008. In response to the draft of the Regulations, the AJTC suggested certain drafting amendments to regulation 5 of the Regulations, regarding the circumstance where an ethical standards officer may apply to the president of the Adjudication Panel to withdraw a reference, and the procedure for doing so. In particular, the AJTC suggested that the Regulations should include provisions which:

- indicate what happens after the president of the Adjudication Panel has agreed to a request to withdraw a matter;
- require an ethical standards officer, before applying to the president of the Adjudication Panel to withdraw a matter, to give notice of his or her intention to apply for a withdrawal to the interested parties (the complainant, the subject of the allegation, the standards committee of any relevant authority concerned and the monitoring officer of any relevant authority concerned). AJTC also suggested that the interested parties should be given a specified period of time to make representations to the ethical standards officer and that the ethical standards officer should be required to take any representations received into account before applying to the president of the Adjudication Panel to withdraw a matter; and
- require the president of the Adjudication Panel to give his or her reasoning for inviting an ethical standards officer to withdraw a matter or for accepting an application to withdraw a matter from an ethical standards officer.

Outcome of consultation

8.8 The Secretary of State considered the responses received to the consultation paper, the comments of the informal panel of experts and the AJTC's suggested drafting amendments. In response to the key concerns and views raised, the Regulations include provisions:

- to enable the president of the Adjudication Panel to suspend the effect of a case tribunal's decision notice, if requested to do so by a person who intends to appeal to the High Court against the tribunal's decision;
- to provide that an ethical standards officer may only withdraw a reference made to the president of the Adjudication Panel after informing the interested parties of his or her intention to withdraw a matter, giving such persons 28 days to respond, taking in to account any representations received from such persons in that regard and with the permission of the president of the Adjudication Panel;
- to require that the president of the Adjudication Panel must give his or her reasoning for inviting an ethical standards officer to withdraw a matter or accepting an application from an ethical standards officer to withdraw a matter; and
- to require a notice to be sent to people concerned once an application has been withdrawn from the Adjudication Panel. This meets the suggestion that there

should be some indication of what happens after the president of the Adjudication Panel has agreed to the withdrawal of a reference. The AJCT has indicated that it is content with this provision.

9. Guidance

9.1 After the commencement of the Regulations, the Standards Board will publish guidance on the circumstances where an ethical standards officer may withdraw a reference made to the president of the Adjudication Panel, and the procedure for doing so. The Adjudication Panel will also issue guidance to local authorities, under sections 75(10) and 77(3) of the 2000 Act, on the sanctions available to a case tribunals where it has determined that an individual has failed to comply with an authority's code of conduct and the content and effect of decision notices of case tribunals.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. The Regulations will have no significant impact on the public sector – there may be some administrative savings for local authorities by virtue of the fact that case tribunals' decision notices will have direct effect rather than requiring standards committees to be convened to give effect to decisions of case tribunals.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 The Department maintains close dialogue and liaison with the Standards Board for England and the Adjudication Panel for England. This includes monthly meetings with officials at the Standards Board which provide an opportunity for the Department to keep abreast of issues relating to the conduct regime for local authority members. Any issues relating to these Regulations will be identified through these channels.

13 Contact

Karl Holden at the Department for Communities and Local Government Tel: 020 7944 5962 or e-mail: karl.holden@communities.gsi.gov.uk can answer any queries regarding the instrument.

ANNEX A

List of consultees

Adjudication Panel for England
Association of Council Secretaries and Solicitors
Association of Larger Local Councils
Association of Police Authorities
Audit Commission
Broads Authority
City of London
Combined Fire and Rescue Authorities
Commission for Local Administration in England
Commission for Local Administration in Wales
Committee for Standards in Public Life
Communities and Local Government Committee
Council of the Isle of Scilly
County and District Councils in England
Electoral Commission
The Greater London Authority
INLOGOV
Joint Waste Disposal Authorities in England
London Borough Councils
Local Government Association
Local Government Employers
Local Government Independent Adjudicator
National Assembly for Wales
National Association of Local Councils
National Park Authorities
Parish and Town Councils in England
Police Authorities in England and Wales
Political parties
Society of Local Authority Chief Executives
Society of Local Council Clerks
Standards Board for England
Trades Union Congress
UNISON