

**JUDICIAL REVIEW AND COURTS BILL**  
**SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

**Prepared by the Ministry of Justice**

The Government has tabled a further amendment to the Judicial Review and Courts Bill for Lords Report Stage which includes three new delegated powers. This supplementary memorandum explains why the powers have been taken and the justification for the procedure selected.

**New clause “Payments in respect of pro bono representation” (48) – new sections 194A, 194B and 194C of the Legal Services Act 2007**

*Power conferred on:*                      *The Lord Chancellor*

*Power exercisable by*                      *The Lord Chancellor*

*Parliamentary procedure*                      *Negative procedure*

*Context and purpose*

1. Existing section 194 of the Legal Services Act 2007 allows pro bono costs orders to be made in civil courts. These orders apply where a party to the proceedings (“P”) is or was represented by a legal representative (“R”) who is acting free of charge in whole or in part. In these circumstances, the court may order any person to make a payment in favour of P in respect of R’s representation of P. Payment is made to the charity that is “prescribed” under section 194(8). The core purpose of a pro bono order is that it can be made even if P did not have any costs liability because R had not charged for representing P. The intention is to prevent costs liability from being avoided where it would in normal circumstances arise, and in so doing to improve the administration of justice generally by supporting high quality pro bono representation.
2. Under section 194 a pro bono costs order may not be made against a person where the person’s representative is acting free of charge or if that person’s representation was provided under legal aid arrangements. “Civil court” in current section 194 means the Supreme Court when dealing with a “relevant civil appeal” (an appeal from the High Court or the Court of Appeal), the civil division of the Court of Appeal, the High Court, the family court or the county court. The “prescribed charity” for the purposes of current section 194(8) is the Access to Justice Foundation. Section 194 currently extends to England and Wales only.

3. New section 194A as inserted by the Bill would allow pro bono costs orders (as described above) to be made in the First-Tier Tribunal, the Upper Tribunal, an employment tribunal, the Employment Appeal Tribunal and the Competition Appeal Tribunal. This list of tribunals is set out in subsection 194A(11). Since these are reserved tribunals that operate across the UK, new section 194A would extend to the whole of the UK. However, in recognition of the fact that there are circumstances where a reserved tribunal could adjudicate on devolved law, and in order to avoid trespassing upon devolved competence, the power will not include proceedings within devolved competence. In recognition of the fact that tribunals do not have the powers to make costs orders in as wide circumstances as the courts do, new section 194A makes it a condition that the tribunal cannot make a pro bono costs order unless the tribunal would have had the power to do so had R's representation of P not been provided free of charge. Under new subsection 194A(10) procedure rules in the relevant tribunals (see subsections 194A(11) for those tribunals and 194A(14) for the resulting meaning of "procedure rules") may make further provision as to the making of pro bono orders.
4. As mentioned above, existing section 194 provides for pro bono costs order in the Supreme Court in "relevant civil appeals". The purpose of new section 194B as would be inserted by the Bill, is to add to the list of "relevant civil appeals" firstly leap-frog appeals directly from the Upper Tribunal to the Supreme Court and secondly appeals to the Supreme Court from appeal courts in Northern Ireland. New section 194B does not add to the list appeals from the Court of Session in Scotland to the Supreme Court because the Scottish Parliament would have competence to do so. In contrast, the Northern Irish Assembly would not have competence to provide so in appeals from the Northern Irish appeal courts. In order to avoid the oddity of a law extending to England and Wales having effect more widely across the UK, new section 194B carves Supreme Court appeals out of section 194 and re-makes the provision (expanded as described in this paragraph) with extent to England and Wales and Northern Ireland.
5. New section 194C concerns the charity prescribed for the purposes of current section 194(8). Since the Access to Justice Foundation is currently authorised to act across the UK, the Ministry of Justice wishes to allow that same charity to continue acting as the "prescribed charity" in relation to current section 194, as well as to be the "prescribed charity" for the purposes of new sections 194A and 194B. However, the Ministry of Justice does not wish to rule out the possibility that in the future a different charity may need to be prescribed. New section 194C achieves this aim by introducing a new UK-wide power to prescribe a new registered charity for the purposes of sections 194 to 194B, whilst also preserving in force the existing order under 194(8) that

prescribes the Access to Justice Foundation. Under that preservation, the current order under section 194(8) has effect as if its prescription were the prescription under new 194C for the purposes of sections 194 to 194B, but may be revoked by order. New section 194C extends to England and Wales, Scotland and Northern Ireland.

6. The new delegated powers taken by this amendment are:
- under new section 194A(13) for the Lord Chancellor by regulations to amend subsection 194A(11) so as to add a tribunal to the list in that subsection; and
  - under new section 194A(13) for the Lord Chancellor by regulations to make consequential amendments of the definition of “procedure rules” in subsection 194A(14);
  - under new section 194C(1) for the Lord Chancellor by order to prescribe a charity or the purposes of sections 194 to 194B.

*Justification for taking the powers*

7. The Ministry of Justice recognises that the list of tribunals in proposed section 194A(11) does not include all tribunals. The tribunals listed are those that are within the responsibility of the Lord Chancellor. There are some tribunals, for example disciplinary tribunals, that are outside this list. The Ministry of Justice recognises that, without consultation with relevant stakeholders, it would not be appropriate at the current time to make pro bono costs provision for tribunals outside the list in proposed section 194A(11), but also recognises that the position (including which tribunals the Lord Chancellor is responsible) could conceivably change in the future. For that reason, the Ministry of Justice does not wish to exclude the possibility of adding to the list in the future. If it were deemed necessary or expedient to add to that list, we think it would be efficient to add further tribunals via secondary, as opposed to primary, legislation. We do not consider that to do so via secondary legislation would amount to insufficient parliamentary scrutiny, given that the current pro bono costs concept, as well as the framework adding tribunals in principle thereto, has already been approved via primary legislation.
8. It is standard in the regulation of courts for primary legislation to provide that procedure rules can govern the finer detail of procedural matters such as costs orders. Indeed, new section 194A(10), which allows procedure rules to make further provision, follows the model already legislated for in current section 194(7). The definition of “procedure rules” in new subsection 194A(14) is dependent on the identity of the tribunals listed

in new subsection 194A(11). The power for the Lord Chancellor by regulations to make consequential amendments of the definition of “procedure rules” in subsection 194A(14) is therefore consequential upon, and corollary to, the power under new section 194A(13) for the Lord Chancellor by regulations to amend subsection 194A(11) so as to add a tribunal to the list in that subsection.

9. As explained in paragraph 5 above, the Ministry of Justice wishes to allow that the Access to Justice Foundation to continue acting as the “prescribed charity” in relation to current section 194, as well as to be the “prescribed charity” for the purposes of new sections 194A and 194B, but does not wish to rule out the possibility that in the future a different charity may need to be prescribed. The current method under existing section 194(8) is for prescription to be by the Lord Chancellor by order. Therefore, the Ministry of Justice believes it is appropriate to retain the same procedure for any new prescription in the future.

*Justification for the procedure:*

5. As explained in paragraph 7 above, we think that to add to the list of tribunals in new subsection 194A(11) via secondary legislation would be efficient and would provide adequate parliamentary scrutiny. Before exercising the power to add tribunals outside the control of the Lord Chancellor, the Ministry of Justice would be likely to consult all relevant stakeholders. If any tribunals were added that had been brought within the control of the Lord Chancellor, the rationale and framework would have already been approved via primary legislation. In that context, we think that an affirmative procedure would be unnecessarily lengthy and complex without adding any value (in terms of scrutiny) over and above the negative procedure. The power in new section 194A(13) for the Lord Chancellor by regulations to make consequential amendments of the definition of “procedure rules” in subsection 194A(14) is consequential upon any addition of further tribunals to subsection 194A(11) and for that reason we think it is appropriate for the same procedure to be used.
6. The current power to prescribe a charity under existing section 194(8) is governed by the negative procedure. For consistency, we think it appropriate for any future prescription to be governed by the same procedure.