EXPLANATORY MEMORANDUM TO

THE COSTS IN CRIMINAL CASES (GENERAL) (AMENDMENT) REGULATIONS 2012

2012 No. 1804

AND

THE COSTS IN THE COURT MARTIAL APPEAL COURT REGULATIONS 2012

2012 No. 1805

1. This explanatory memorandum has been prepared by the Ministry of Justice 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 instruments**

2.1 Successful defendants and appellants in criminal proceedings may, pursuant to section 16 of the Prosecution of Offences Act 1985 ("the POA 1985"), be awarded by the court payments out of central funds in respect of costs incurred by them in the proceedings. The Costs in Criminal Cases (General) (Amendment) Regulations 2012 (the "Amendment Regulations") correct an error in regulation 20 of the Costs in Criminal Cases (General) Regulations 1986 (the "1986 Regulations") and amend Part III of the 1986 Regulations, which sets out procedures for making such payments, so as to require the court, in most cases where it is still permitted to make an award in respect of legal costs, to either assess the amount to be paid in respect of such costs at rates set by the Lord Chancellor, or to fix the amount having regard to such rates.

2.2 The Costs in the Court Martial Appeal Court Regulations 2012 (the "Court Martial Appeals Regulations") set out for the first time procedures relating to the award of costs in the Court Martial Appeal Court, largely reflecting provisions found in Part III of the 1986 Regulations.

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

3.1 The Amendment Regulations are made under new powers that have been inserted into the POA 1985 as a consequence of the quashing by the High Court of regulations that similarly attempted to cap the amount a court could award a successful defendant or appellant in respect of legal costs. This is discussed in more detail at 7.4-7.6 below.

3.2 Schedules 7 and 8 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act") are to be commenced on 1 October 2012. To give effect to the policy underlying Schedules 7 and 8, it is necessary for the Amendment Regulations and the Court Martial Appeals Regulations to come into force on 1 October 2012 as well, so we are relying on section 13 of the Interpretation Act 1978 to make the regulations before the commencement of the enabling powers.

3.3 Schedule 7 to the 2012 Act amends the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003 to make payments by the court under those Acts subject to regulations made under section 20(1A) to (1C) POA 1985, which largely remake the parts of section 20(1) POA 1985 that have been repealed by paragraph 6(2) of Schedule 7 to the 2012 Act. We consider that the operation of section 17(2)(b) of the Interpretation Act 1978 will mean that regulations made under section 20(1) POA 1985, such as Parts III and V of the 1986 Regulations will, on commencement of Schedule 7 to the 2012 Act, apply to the three Acts mentioned above. This is because Parts III and V of the 1986 Regulations could be made under section 20(1A) to (1C) POA 1985.

4. **Legislative Context**

4.1 The court has statutory powers to award persons who incur costs in criminal proceedings a payment out of public funds in respect of those costs. Payments arising out of most criminal proceedings are made in accordance with the POA 1985 and governed by procedures set out in the 1986 Regulations.

4.2 Schedules 7 and 8 to the 2012 Act make a number of amendments to the legislation governing payments out of public funds in respect of costs incurred in criminal proceedings. The most significant changes are:

- in cases, other than those in the Supreme Court, where legal aid is available to all individuals (such as most Crown Court cases), the court no longer has the power to award successful defendants and appellants an amount in respect of any legal costs[1] incurred;
- in cases, other than those in the Supreme Court, where legal aid may not be available to all individuals (such as cases in the magistrates' court), the court may still award successful defendants and appellants an amount in respect of any legal costs incurred, but the Lord Chancellor now has the power to set the rates at which any such award must be calculated;
- the court will no longer be able to make an award in respect of legal costs to legal persons such as companies, except in relation to proceedings before the Supreme Court;
- regulations made under section 20(1A) to (1C) POA 1985 will apply to payments made in relation to proceedings under the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003; and
- there is now a power to set out in regulations procedures governing payments out of public funds in respect of costs incurred in the Court Martial Appeal Court.

4.3 The Amendment Regulations are the first exercise of the regulation making powers in new section 20(1A) and (3). They relate to the second bullet at 4.2 above. They provide that the Lord Chancellor, with the consent of the Treasury, must set rates and scales or other provision for the calculation of legal costs. These rates and scales or other provision are not set out in the Amendment Regulations – in reliance on the power in new section 20(3) of the POA 1985, they will be set out in a separate document to be published shortly, and will be available on the Ministry of Justice website. The court, when calculating the amount of an award in respect of legal costs

[1] 'Legal costs' are defined in section 16A(10) of the Prosecution of Offences Act 1985, which was inserted by paragraph 3 of Schedule 7 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. They include fees, charges disbursements and other amounts payable in respect of advocacy services or litigation services including, in particular, expert witness costs.

to an individual, will be required by new regulation 7(6) to do so in accordance with the rates and scales or other provision set by the Lord Chancellor, whether or not that results in an amount the court considers reasonably sufficient to compensate the individual.

4.4 The Amendment Regulations also provide that where a court fixes (rather than sending for detailed assessment by a determining officer) an amount in respect of legal costs, it must calculate such an amount in accordance with the rates and scales or other provision set by the Lord Chancellor under the new regulation 7(7), whether or not that results in the fixing of an amount that the court considers reasonably sufficient or necessary to compensate the person who incurred the costs.

4.5 In an unrelated minor amendment, regulation 20(2)(b) of the 1986 Regulations has been amended by the Amendment Regulations to update a reference to section 30 of the Magistrates' Court Act 1980, which was repealed by paragraph 1 of Schedule 12 to the Powers of Criminal Courts (Sentencing) Act 2000, to the correct legislative reference, section 11 of the Powers of Criminal Courts (Sentencing) Act 2000.

4.6 The Court Martial Appeals Regulations are the first exercise of the regulation making powers in new section 33B(1) and (2) of the Court Martial Appeals Act 1968. The Court Martial Appeals Regulations relate to the final bullet at 4.2 above. They set out in regulations procedures governing payments out of public funds in respect of costs incurred in the Court Martial Appeal Court, largely based on Part III of the 1986 Regulations.

5. Territorial Extent and Application

5.1 These instruments 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 Currently, where the court exercises its statutory powers to award persons who incur costs in criminal proceedings a payment out of public funds in respect of those costs, it may award such amount as it considers reasonably sufficient to compensate that person for any costs properly incurred. In the case of a defendant or appellant who pays privately for legal representation and is subsequently acquitted, the court would normally award, from the public purse, an amount sufficient to compensate him or her for all of their legal costs. This amount is often several times greater than the amount that the public purse would have paid had the person received legal aid instead of paying privately.

7.2 The amount paid out of public funds in respect of defendants' costs has increased significantly in recent years. In 2007/08, defendants' costs orders accounted for £41 million of the central funds budget. By 2009/10 however, defendants' costs orders accounted for £66 million of the central funds budget – an increase of £25 million.

7.3 In light of the rapidly escalating amounts being paid out of public funds in respect of defendants' costs, the previous Government ran a full public consultation on potential reforms to the system. A total of 93 responses to the consultation paper were received. Of these, 46 were from individual solicitors, 18 were from professional bodies, 12 were from members of the public, five were from barristers, four were from members of the judiciary, the magistracy and associated bodies, three were from companies and one each were received from a law costs draftsman, a human rights and law reform organisation, a self-help group and a trade association. A combined response was provided by the prosecuting authorities (Crown Prosecution Service (CPS), Attorney General's Office (AGO), Serious Fraud Office (SFO) and Revenue and Customs Prosecutions Office (RCPO)). Overall, respondents to the proposals were in favour of maintaining the current system whereby defendants are entitled to claim their legal costs if they are acquitted. Respondents considered that the existing approach for awarding the costs of privately paying clients, determined on a case by case basis, is both fair and transparent.

7.4 The previous Government decided to proceed with reforms that would cap payments for all defendants, including companies, to the equivalent of legal aid rates. The Costs in Criminal Cases (General) (Amendment) Regulations 2009 (S.I. 2009/2720 – the "2009 Regulations") were introduced to implement this policy by amending Regulation 7 of the 1986 Regulations.

7.5 The Law Society brought a judicial review challenge of the 2009 Regulations shortly after their coming into force. The Court held (see *R (Law Society of England & Wales) v the Lord Chancellor* [2010] EWHC 1406 (Admin)) that the Lord Chancellor did not have the power under the POA 1985 to cap payments made by the court at an amount less than the court considers reasonably sufficient to compensate a person for any costs properly incurred. The court therefore ordered the amendments to Regulation 7 of the 1986 Regulations to be quashed.

7.6 The present Government decided to amend the POA 1985 to give the Lord Chancellor the power to set the rates at which an award of legal costs must be calculated by the court, and additionally to restrict the availability of legal costs to certain types of proceedings and to individuals. The Government's intention is to save between £40 million and £50 million annually by restricting the reimbursement of legal costs, and, where such costs are allowed, by limiting the amount of costs that can be awarded by the court to the equivalent of legal aid rates.

7.7 The Government also decided to make all awards by the court in respect of costs incurred in criminal proceedings subject to the same procedures. Amendments to the Criminal Justice Act 1972, the Criminal Justice Act 1988 and the Extradition Act 2003 ensure that payments by the court under those Acts subject to regulations made under section 20(1A) to (1C) POA 1985.

7.8 The Court Martial Appeal Court is the military equivalent of the Court of Appeal, and therefore the policy intention of Schedule 8 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was to reflect provisions (as amended by Schedule 7 to the 2012 Act) and procedures governing the award of costs in the civilian Court of Appeal. Previously, there were no regulations governing awards of costs by the Court Martial Appeal Court.

7.9 The Court Martial Appeals Regulations set out procedures relating to the award of costs in the Court Martial Appeal Court, largely reflecting similar provisions found in Part III of the 1986 Regulations. Previously, there were no regulations covering procedures in the Court Martial Appeal Court. Differences between the two reflect the fact that an amount in respect of legal costs can still be awarded in some of the civilian courts to which the 1986 Regulations apply (such as the magistrates' court), whereas the Court Martial Appeal Court, as a consequence of the amendments to the Court Martial Appeals Act 1968, can no longer award legal costs.

8. Consultation outcome

8.1 No consultation was undertaken on these regulations as they implement aspects of a policy debated and approved by Parliament during the passage of the 2012 Act. As noted at 7.3 above however, a full public consultation was undertaken by the previous Government on the policy underlying the Amendment Regulations.

9. Guidance

9.1 The document setting out rates and scales will contain guidance for practitioners.

10. Impact

10.1 The impact on business, charities or voluntary bodies was set out in the final Impact Assessment that was published with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which can be found at www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/ia-central-funds.pdf

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for these instruments. The Impact Assessment for the 2012 Act did however include consideration of the effect

of these reforms to the court's statutory powers to make payments in respect of costs incurred in criminal proceedings.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 We will review the effect of these regulations in three to five years.

13. Contact

In relation to the Amendment Regulations contact David Carter at the Ministry of Justice, 4th Floor (4.42) 102 Petty France, London SW1H 4AJ, telephone 020 3334 4211, or email David.Carter@justice.gsi.gov.uk .

In relation to the Court Martial Appeals Regulations contact Group Captain Philip Spinney at the Ministry of Defence, 6-F-41 MOD Main Building, Whitehall, SW1A 2HB, telephone 020 7218 8339, or email CLS-CDC6@defence.gsi.gov.uk.