EXPLANATORY MEMORANDUM TO

THE CIVIL LEGAL AID (COSTS) REGULATIONS 2013

2013 No. [DRAFT]

1. 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 Civil Legal Aid (Costs) Regulations 2013 ("the draft Regulations") make provision about costs orders in civil proceedings in favour of or against a legally aided party to those proceedings and, in certain circumstances, against the Lord Chancellor.

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

3.1 None

4. Legislative Context

4.1 This is one of a number of statutory instruments which implement Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act"). These instruments are being laid in time for the Act to come into force on 1 April 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Minister of State for Justice, Lord McNally has made the following statement regarding Human Rights:

In my view the provisions of the Civil Legal Aid (Costs) Regulations 2013 are compatible with the Convention Rights.

7. Policy background

7.1 The Act gives effect to the Government's policy on legal aid. The Government believes that legal aid has expanded far beyond its original remit and

is available for a wide range of issues, many of which need not be resolved through the courts. Irrespective of the current economic situation, a wide ranging programme of reform is required to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice and representation is justified.

7.2 These draft Regulations substantially replicate the effect of the existing regulations made under the Access to Justice Act 1999 in relation to costs. These draft Regulations bring together the rules on costs into a single set of regulations. The existing rules on costs appear in both the Community Legal Service (Cost Protection) Regulations 2000 (SI 2000/824) and the Community Legal Service (Costs) Regulations 2000 (SI 2000/441). Part III of the latter Regulations also makes provision in respect of property and costs recovered in proceedings for a legally aided party. Separate Regulations on those aspects will be laid before Parliament shortly.

7.3 Section 26(1) of the Act sets out the general principle that costs ordered against a legally aided individual in civil proceedings must be reasonable, having regard to all the circumstances, including the financial resources and conduct of the parties to the proceedings (known as "cost protection"). Cost protection is a feature of the existing civil legal aid system. It caps the amount of money a legally aided party may be ordered to pay if they lose their case. The intention of this is to ensure that they are not deterred from resolving their issues through legal action for fear of being personally liable for unaffordably high costs.

7.4 Part 2 of the draft Regulations provides that cost protection does not apply to proceedings funded by way of Help at Court, Legal Help, Help with Family Mediation, Family Help (lower)(except in certain circumstances when combined with other forms of service) and parts of family proceedings provided in the form of Family Help (higher) and Legal Representation. Costs protection applies in relation to forms of service that permit the legally aided party to be represented in court proceedings because such a party will have satisfied a more stringent merits test than for lower forms of assistance, and also because the higher forms of service require the other parties to be notified of the provision of legal aid so they will be aware that they are potentially facing an opponent with cost protection. The rationale for the exclusion of cost protection in certain family proceedings is that the general rule is that there is no order for costs in such proceedings, so that if a costs order is made against the legally aided party it is likely to reflect that party's conduct in those proceedings; it is therefore right that the legally aided party loses the benefit of cost protection.

7.5 Part 3 of the draft Regulations sets out the rules governing costs orders against a legally aided party as well as the grounds on which a costs order might also be made against the Lord Chancellor where he has provided civil legal aid to a party to proceedings. Regulation 10 provides that a court can order the Lord Chancellor to pay to the non-legally aided party the whole or part of the costs

incurred by that party in the proceedings (other than the costs which the legally aided party is required to pay). In first instance cases, this is limited to cases where the non-legally aided party is an individual, since they are more likely to suffer hardship, and only then where the legally aided party commenced the proceedings. As at present, this will apply only in limited circumstances: in first instance proceedings, this is only where the legally aided party has brought proceedings against an individual, as opposed to an organisation, and that individual would otherwise suffer financial hardship and, in all cases, where it is just and equitable that an order should be made out of public funds. The draft Regulations also make provision about the assessment of resources and procedures in relation to costs orders against a legally aided party and the Lord Chancellor.

7.6 Part 4 of the draft Regulations sets out the principles to be applied when a costs order or a costs agreement is made in favour of a legally aided party.

8. Consultation outcome

8.1 The consultation 'Proposals for the reform of legal aid in England and Wales'http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf was published on 15 November 2010 and closed on 14 February 2011. Over 5,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary, members of the House of Commons and Lords, individual solicitors and barristers and members of the public.

8.2 The majority of responses did not support the Government's proposals for reform, although there was some support for particular measures. Some of the original proposals were modified in light of the comments received from consultees. No specific question was asked about costs or cost protection.

8.3 A detailed Government response to the consultation exercise is available on the MoJ Website. http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf

8.4 We have not consulted on the draft Civil Legal Aid (Costs) Regulations 2013.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. A programme of training and guidance is being prepared by the Legal Services Commission to support the transition to the new arrangements. This will be made

available to legal aid providers ahead of the commencement of the Act on 1 April 2013.

10. Impact

10.1 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the Act receiving Royal Assent. This is available at http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information. An Impact Assessment has not been prepared specifically for this instrument.

10.2 There is no impact on business, charities or voluntary bodies.

10.3 There is no impact on the public sector arising from this instrument beyond those accounted for in the Royal Assent Impact Assessment in respect of the Act.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Ministry of Justice will conduct a post-implementation review of the Act between three to five years after implementation. This review will also consider the operation of the secondary legislation.

13. Contact

Michael Tyler at the Ministry of Justice Tel: 020 3334 2443 or email Michael.tyler@justice.gsi.gov.uk who can answer any queries regarding the instrument.