EXPLANATORY MEMORANDUM TO

THE JUSTICES OF THE PEACE AND AUTHORISED COURT AND TRIBUNAL STAFF (COSTS) REGULATIONS 2020

2020 No. 0000

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 This instrument makes provision, mirroring that previously made in relation to justices of the peace and justices' clerks, for circumstances in which a court may order the Lord Chancellor to pay a party's legal costs in respect of proceedings against a justice of the peace or a member of court or tribunal staff authorised to perform relevant judicial functions, and for the way in which costs so ordered are to be assessed. The need for such provision arises because the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (the 2018 Act) abolishes the offices of justices' clerk and assistant to a justices' clerk and replaces them with provision for appropriately qualified court or tribunal staff, to be authorised to perform certain judicial functions ("relevant judicial functions"), and so the existing regulations, which apply to justices' clerks, need to be replaced with regulations covering such authorised staff.

3. Matters of special interest to Parliament

Matters of special interest to the Committees on the UK's exit from the European Union

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument varies between provisions.

3.3 The power under which Part 2 is made extends to England and Wales only (see section 4(6) of the 2018 Act and section 111(1) of the Courts Act 2003). The power under which Part 3 is made covers the whole of the United Kingdom (see section 4(6) of the 2018 Act and section 147(1) of the Tribunals, Courts and Enforcement Act 2007), and the territorial application of Part 3 is not limited either by the Act containing the power or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom for Parts 1 and 2, and England and Wales for Part 2.

4.2 The territorial application of this instrument is the United Kingdom for Parts 1 and 3, and England and Wales for Part 2.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for Justice, Chris Philp MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Justices of the Peace and Authorised Court and Tribunal Staff (Costs) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2018 Act abolishes the offices of justices' clerk and justices' clerk's assistant and replaces them with provision under which court staff who have the necessary legal qualifications (prescribed by the Lord Chancellor with the agreement of the Lord Chief Justice) may be authorised by the Lord Chief Justice to give legal advice to lay justices. Such "authorised court officers" may also be authorised by the Lord Chief Justice to carry out specified judicial functions, and tribunal staff holding the necessary qualifications may similarly be authorised by the Senior President of Tribunals to carry out such functions in tribunals. The 2018 Act provides, in the same way as was previously done for justices' clerks, for these officers to have a degree of judicial independence when performing such functions, and gives them the same protection from legal action and costs orders in respect of their performance of those functions as is accorded to lay justices. This is put into effect by amending section 34 of the Courts Act 2003 (immunity from costs) to remove references to justices' clerks and assistants in relation to costs, and creating a new section 67F providing for the same immunity from costs and for the making of regulations.

6.2 The amendments made by the 2018 Act mean that the regulations previously made under section 34 of the Courts Act will no longer be of effect and these new Regulations are necessary to regulate the power of courts to order costs in these circumstances, and for the manner in which costs so ordered are to be assessed.

6.3 The existing regulations, the Justices and Justices' Clerks (Costs) Regulations 2001 (S.I. 2001/1296), were made under section 53A(4) of the Justices of the Peace Act 1997. When section 53A was replaced by section 34 of the Courts Act 2003, the 2001 Regulations were saved as if made under section 34(4). As a result of the amendments made to section 34, however, the 2001 Regulations are revoked; and so provision is now included in Part 2 of this instrument in relation to justices as well as to the authorised court officers who replace justices' clerks.

6.2 Similar provision to the new 67F of the Courts Act 2003 is made in respect of authorised officers in tribunals by a new section 29D of the Tribunals, Courts and Enforcement Act 2007. Since section 29D extends to the whole of the United Kingdom, and the power to make regulations under section 29D(4) covers the whole of the United Kingdom, the provision in relation to authorised officers in tribunals is contained in a separate Part (Part 3) of this instrument from that relating to justices and authorised court officers in England and Wales, which is contained in Part 2.

7. Policy background

What is being done and why?

7.1 The Regulations replace the former costs regulations made under the former section 34 of the Courts Act with new Regulations, mirroring the replaced regulations but covering the new authorised court and tribunal officers consistently with the 2018

Act. The policy aim of the 2018 Act in this regard, and accordingly of the Regulations, is to protect the independence of justices of the peace and authorised court officers in carrying out judicial functions, by indemnifying them against liability for acts or omissions done in the performance of relevant judicial functions which they are authorised to perform; but also to ensure that a litigant successfully bringing proceedings challenging the decisions of justices of the peace and authorised court officers, may have their costs of bringing the proceedings paid by the Lord Chancellor if the court dealing with those proceedings so orders. This satisfies the policy aim of enabling access to justice. Finally, the regulations allow the Lord Chancellor to specify the way the power to order costs should be exercised and how they should be determined. This ensures that prudent use is made of public funds.

7.2 These Regulations are procedural in nature. They mirror the long-established current provisions in relation to costs in (the very rare) proceedings against justices' clerks and justices of the peace. The only difference is that, because the 2018 Act abolishes the role of justices' clerk and replaces it with the role of a legally qualified officer authorised to perform corresponding functions to those undertaken by justices' clerks, and also makes provision for a similar role in relation to tribunals, these Regulations need to cover the officers performing the new role, and to cover those doing so in tribunals as well. They specify the circumstances in which a court may order the Lord Chancellor to pay a party's legal costs in proceedings when such an order cannot be made and when such an order *is* made, and how the payment ordered by them shall be determined, so that the orders are consistent. The Regulations therefore provide for the *regulation* of the payment of costs by the Lord Chancellor arising from challenges to the decisions of justices of the peace and authorised court officers.

7.3 The mechanism for assessing costs to a party, where a court orders the Lord Chancellor to pay costs similarly mirrors that provided for in the existing regulations, but again the extension to cover authorised tribunal staff necessitates additional provision, because the existing regulations cover only the position in England and Wales (as does Part 2 of the Regulations), but because the provision in relation to tribunals applies in relation to such tribunals as they operate in any part of the United Kingdom, it will be possible for a court in Scotland or Northern Ireland to be dealing proceedings in relation to the performance by tribunal staff of relevant judicial functions in the tribunal in Scotland or Northern Ireland, and so Part 3 of these Regulations makes provision not only for England and Wales but also for Scotland and for Northern Ireland. The difference lies in the way that costs are assessed in Scotland and Northern Ireland compared to England and Wales, with different bodies being responsible for assessing the costs in cases where the court does not do this itself.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 The Ministry of Justice has no plans for consolidation for relevant enactments at present.

10. Consultation outcome

10.1 There has been no formal public consultation on this instrument, as this has been covered by the 2018 Act. There has however been informal technical consultation with stakeholders such as HMCTS and the courts and those who assess costs in Scotland and Northern Ireland, which has in particular informed the drafting of Part 3 of these Regulations, as they concern proceedings in Scotland and Northern Ireland. The Lord Chief Justice and the Senior President of Tribunals were consulted during the drafting of these Regulations and were content with the approach taken by the Regulations.

11. Guidance

11.1 HMCTS will undertake training and provide guidance to reflect the changes before court officers are authorised to carry out judicial functions.

12. Impact

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

12.2 These Regulations have no impact of themselves on the public sector, beyond the changes made by the 2018 Act.

12.3 An Impact Assessment has not been prepared for this instrument. An Impact Assessment was prepared for the 2018 Act covering 'legal advice and judicial functions' and nothing has changed since then to require revisiting that assessment. The Impact Assessment can be viewed at the link below - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767589/catjafs-act-authorised-staff-ia.pdf

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The operation of these regulations will be regularly monitored by the Heads of Legal Operations in HMCTS, as will any impacts of these regulations relating to the protections from costs for such persons and any changes that may be needed will be reviewed.

15. Contact

15.1 Olga Kostiw at the Ministry of Justice, Criminal Courts Policy, Telephone: 07892 724990 or email: olga.kostiw@justice.gov.uk can be contacted with any queries regarding this instrument.

15.2 Matthew Gould, Deputy Director of Criminal Courts and Criminal Law Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP, the Parliamentary Under-Secretary of State for Justice can confirm that this Explanatory Memorandum meets the required standard.