EXPLANATORY MEMORANDUM TO

THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (DISAPPLICATION OF SECTION 85(1) FINES EXPRESSED AS PROPORTIONS AND CONSEQUENTIAL AMENDMENTS) REGULATIONS 2014

2014 No. [DRAFT]

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 and the Select Committee on Statutory Instruments.

2. Purpose of the instrument

2.1. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Disapplication of Section 85(1), Fines Expressed as Proportions and Consequential Amendments) Regulations 2014 ("the Regulations") are intended to come into force at the same time as section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act").

Effect of section 85 of the 2012 Act

2.2. Section 85(1) has the effect of removing any maximum penalty on summary conviction of £5,000 or more, however that penalty is expressed. So references in legislation to maximum penalties expressed as £5,000 (whether by virtue of a numerical amount or any of the phrases "statutory maximum", "prescribed sum" or "level 5 on the standard scale") will cease to mean that amount, and will instead be 'glossed' so that a fine of any amount may be imposed.

2.3. Section 85(2) has a similar effect in relation to powers to create offences – that is, it 'enlarges' any power to create an offence punishable on summary conviction by a fine of £5,000 or more (again, however expressed) so that it becomes a power to create an offence punishable on summary conviction by a fine of any amount.

2.4. In both instances, the effect is limited to offences and powers which are on the statute book at the point of commencement. Section 85 extends to England and Wales only.

2.5. These provisions are, in principle, effective without any consequential etc. amendments. Nonetheless, some amendments to legislation are necessary, and others are desirable.

Summary of effect of Regulations

2.6. The Regulations form part of the first stage of the implementation of sections 85 and 86 of the 2012 Act (see below).

2.7. The Regulations do a number of things:

2.8. Firstly they disapply s. 85(1) in relation to a number of offences (relating to customs issues) and provide that those offences are punishable instead by an amount specified or described (as the case may be) in the Regulations. See regulation 2 and Schedules 1 and 2. The approach taken across Schedule 2 has been to replace the current £5,000 amounts with £20,000. In general terms, this reflects exemplary summary maxima in customs legislation.

2.9. Secondly they deal with penalties which are expressed as proportions of amounts of £5,000 or more (however expressed). See regulation 3 and Schedule 3. The approach has been to substitute a new description for the amount of £5,000 or more currently described. The new amounts equate to 200% of the current amounts.

2.10. Thirdly, they make various consequential amendments on section 85(1) and (2). These amendments include:

- amendments to deal with certain provisions relating to non-criminal sanctions which depend in some way on the existence of a maximum fine of £5,000 or more (however expressed). The amendments are made in order either to provide clarity or to ensure that those provisions continue to 'work';
- amendments to section 32 of the Magistrates' Courts Act 1980 and section 37 of the Criminal Justice Act 1982 to make clear that those provisions (which define "the prescribed sum" and "level 5 on the standard scale" respectively) are affected by section 85 of the 2012 Act.

Note on order amending levels 1 to 4 on standard scale

2.11. It is also proposed to make an order under section 87(1) of the 2012 Act,[1] which will come into force at the same time as the Regulations and the 2012 Act provisions. This Order will amend section 37(2) of the Criminal Justice Act 1982 to increase the amounts of each of levels 1 to 4 on the standard scale by 400%.

2.12. That draft Order is subject to a separate explanatory memorandum.

Further implementation

2.13. It is proposed to make a further set of regulations amending references in legislation to maximum penalties expressed numerically. This Order is to be made

[1] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Standard Scale of Fines for Summary Offences) Order 2014, laid in draft alongside these draft Regulations.

in reliance on the power in s. 86(1) of the 2012 Act where the maximum penalty is less than £5,000, and in reliance on s. 149(5) where the maximum is £5,000 or more. We do not consider that these provisions are necessary in order for section 85(1) and (2) to have effect, but they are plainly desirable.

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

3.1. There are a number of matters of specific interest to the JCSI, which we have set out in this section in some detail for their benefit.

3.2. The draft Regulations have not been submitted for 'pre-clearance'.

Use of footnotes

3.3. We have taken a somewhat 'lighter touch' approach to footnotes than is usual. We have not footnoted chapter numbers of Acts, nor S.I. numbers, where those references are in cross-headings. We have also only included footnotes to set out amendments to provisions where the amendments are directly relevant to the provision being made in the draft Regulations. This is for reasons of space.

'Glosses'

3.4. As noted above, we have inserted provisions into the Magistrates' Courts Act 1980 and the Criminal Justice Act 1982 to alert the reader to the fact that the provisions in issue are affected by section 85 of the 2012 Act. See paragraphs 2 and 3 of Schedule 4.

3.5. We accept that it is generally not desirable to include 'inert material' – that is, legislative provisions which have no legal effect – and we note the JCSI's previous comments on the subject. However, we consider that it is appropriate to make an exception in this case, where the 'gloss' serves the purpose of pointing the reader onwards from a definition which has become potentially misleading.

3.6. (We did, of course, consider simply amending the definitions themselves, but took the view that the limitation of the effect of section 85(1) and (2) to fines on summary conviction meant that we could not regard the definitions as having been altered for all purposes, such as would allow us to amend them.)

3.7. (We have also not 'glossed' the definition of 'the statutory maximum' in the Interpretation Act 1978, since that definition refers the reader to the 'prescribed sum,' which is defined in the Magistrates' Courts Act 1980 (and is glossed by virtue of paragraph 2 of Schedule 4 to these Regulations).)

Amendment of Welsh text of legislation

3.8. We have made two amendments of legislation which appears in both English and Welsh language texts, both of which have equal standing by virtue of section 156(1) of the Government of Wales Act 2006. We have accordingly also amended the Welsh language text of the legislation. The first is paragraph 16 of Schedule 4 (and relates to the Children and Families (Wales) Measure). The second is paragraph 20 of that Schedule (and relates to the Environmental Civil Sanctions (Wales) Order 2010). In both cases we have agreed the amendments with the Office of the Legislative Counsel in Cardiff.

'Geared penalties'

3.9. As noted above, in relation to Schedules 1 and 2, the relevant offences are generally offences which relate to customs legislation. A wide range of customs offences are punishable by the greater (in one case, the lesser[2]) of *n* times the value of specified goods and an amount set out in the legislation. A typical example is section 50(3) and (4) of the Customs and Excise Management Act 1979 (see paragraph 3 of Schedule 1 and paragraph 1(3) of Schedule 2 to the Regulations). We refer to these types of provisions as 'geared penalties'.

3.10. Where the amount set out in legislation is £5,000 or more (however expressed) that amount will, by virtue of section 85(1) of the 2012 Act, be removed. Plainly the effect of this is that the calculation set out above ceases to be effective. It has therefore been necessary, in relation to geared penalties affected by s. 85, to disapply s. 85(1) and substitute new amounts, so that the calculations can continue to 'work'. See, for example, paragraph 1(3) of Schedule 2 mentioned above.

3.11. The Government took the view that it was appropriate and expedient also to disapply the effect of s. 85(1) in relation to penalties which operate simply by way of a maximum amount, but are located in the same legislative scheme as geared penalties, in order that the overall scheme may not be de-stabilised by having different maxima applicable to offences which are currently dealt with in the same or similar ways.

Section 141 of CEMA 1979

3.12. We wanted specifically to note section 141 of CEMA 1979. This is a geared penalty, but the maximum penalty is calculated by determining to the 'lesser' of two sums (rather than the greater). On balance, our view it that this penalty not affected by s. 85(1), since the maximum penalty will not in every case be £5,000 or more. We accept that the scope of s. 85(1) is somewhat imprecise, but we consider that the better view is that it applies to offences where the penalty will in every case be £5,000 or more. (On that basis, we have not, for instance, disapplied s. 85(1) from geared penalties expressed by reference to level 4 on the standard

[2] See discussion below in relation section 141 of the Customs and Excise Management Act 1979.

scale – although depending on the value of the goods, the maximum penalty may *in fact* be £5,000 or more).

3.13. Nonetheless, the geared penalty in section 141 plainly needs to be dealt with insofar as it is relies on an amount of £5,000 or more. We have made the necessary amendment in reliance on the 2012 Act, s. 141, and have included the amendment in Schedule 4 (at paragraph 1).

Use of phrase 'level 4 on the standard scale' in relation to either way offences

3.14. The approach taken in Schedule 3 to the draft Regulations (which deals with penalties expressed as proportions of an amount of £5,000 or more) has involved substituting a new amount in each case. Our intention has been that the new amount should be ambulatory, and therefore we have drafted by reference to a proportion of a level on the standard scale. (In all cases, in fact, the reference is level 4.) This enables the amounts automatically to change should the powers to amend levels 1 to 4 on the standard scale, be re-exercised in the future.

3.15. In some cases we have taken this approach in relation to an either way offence (see e.g. paragraph 3 of Schedule 3, which amends Schedule 11 to the Building Societies Act 1986). We are content that it is lawful to relate an either way offence to a level on the standard scale. But we note that the standard scale is *of itself* used only for summary-only offences. So we have used phrases such as "one-tenth of the amount corresponding to level 4 on the standard scale for summary offences", in order to provide the appropriate distance.

Amendments in relation to non-criminal sanctions generally (Schedule 4)

3.16. In relation to Schedule 4, amendments have been made to various provisions which establish 'non-criminal sanctions' (that is, sanctions which may imposed otherwise than following a criminal conviction) which depend in some way on the existence of a maximum fine on summary conviction of £5,000 or more (however expressed). In some cases (see e.g. section 53 of the Road Traffic Offenders Act 1988, which is amended by virtue of paragraph 5 of Schedule 4) an amendment is necessary in order that the provision may continue to 'work'. In other cases (see e.g. section 50J of the Housing Act 1996, which is amended by virtue of paragraph 6 of Schedule 4), an amendment is made in order to clarify that, in cases where there is no longer a maximum penalty on summary conviction, no maximum non-criminal sanction exists. We were keen to draw the latter amendments to the Committees' attention, given they arguably have no legal effect. We included them because we took the view that it was helpful and appropriate to make express provision for the situation where there is no maximum penalty on summary conviction, rather than rely on judicial interpretation.

Amendment of section 87 of the Health and Social Care Act 2008

3.17. Paragraph 13 of Schedule 4 amends section 87 of the Health and Social Care Act 2008, which contains a power to prescribe fixed monetary penalties. The maximum penalty may not be more than ½ of the maximum penalty on summary conviction for the offence in issue. As with certain other provisions amended by Schedule 4, the knock-on effect of section 85(1) is that, where the offence in issue is punishable by a fine of any amount, it becomes impossible to calculate the maximum prescribable penalty under section 87 of the 2008 Act.

3.18. Our amendment provides that in such a case the maximum amount is £50,000. This particular amount was chosen because certain offences which are within the scope of section 87 are punishable on summary conviction by a maximum fine of £50,000 (and therefore the maximum non-criminal penalty in relation to such an offence is currently £25,000). The effect of the amendment in paragraph 12 of Schedule 4 is to increase the maximum non-criminal penalty in such a case to £50,000.

4. Legislative Context

4.1. The legislative context is hopefully fully enough set out in para. 2 above. Specific points for the JCSI are mentioned in para. 3 above.

5. Territorial Extent and Application

5.1. This instrument extends to England and Wales only.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State in the Ministry of Justice, Jeremy Wright MP has made the following statement regarding Human Rights:

In my view the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Disapplication of Section 85(1), Fines Expressed as Proportions and Consequential Amendments) Regulations 2014 are compatible with the Convention rights.

7. Policy background

7.1. As explained in paragraph 2 above, these draft Regulations make both necessary and desirable amendments to existing legislation to ensure that we will have a sensible and coherent sentencing framework once section 85 of the 2012 Act comes into force.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 fines provisions

7.2. Section 85 is intended to give magistrates greater flexibility to identify the most effective punishment appropriate to the offences and offenders before them.

7.3. The Government believes that financial penalties, as long as they are set at the right level, can be just as effective as community sentences in punishing offenders and deterring them from further offending. Most offenders do not like parting with cash, so fines can be a deterrent to further offending. They also have the advantage of not affecting opportunities for employment and having less of an impact on family responsibilities than some other types of sentence, and hence can prevent further acceleration into a criminal lifestyle. Moreover, they do not impose a further burden on the taxpayer or on society as a whole. Not only are fines punitive; they provide reparation for society, and serve as part of offenders' restoration to the public.

7.4. That is why courts already have flexibility to impose fines in cases that have passed the community sentence threshold. The law specifically provides that even if the courts have the power to impose a community sentence they do not have to do so, meaning that they can impose a fine instead. The courts can consider the circumstances of the offences and of the offenders before them, and, having weighed up the various purposes of sentencing, to decide that a fine will provide an appropriate level of punishment and deterrence without needing to consider a community order. This power was made explicit in the Criminal Justice and Immigration Act 2008 and was intended to increase the number of fines imposed instead of low level community sentences. Courts already have wide discretion to make use of fines in appropriate cases, and section 85 will support and encourage that.

7.5. The aim of the package of provisions in the 2012 Act affecting fines is to ensure that magistrates, who issue the vast majority of fines, have the powers that they need to set them at levels that are proportionate to the most serious offences that come before them for trial. The provisions make two key changes to the way that fines operate in the magistrates' courts.

7.6. The first is to replace all upper limits of £5,000 or more for fines available on summary conviction. At the moment, where an offence is summary only, magistrates do not have the option of committing the case to the Crown Court for sentence and are constrained in their ability to fine by the statutory maximum fines. For the most serious offences tried by magistrates, that maximum is generally £5,000, although for certain offences where the financial gain from offending is substantial—for example, in some environmental offences—the maximum fine can be as high as £50,000.

7.7. Magistrates set the amount of a fine taking into account both the seriousness of the offence and the financial circumstances of the offender. The courts are obliged to

follow any relevant sentencing guidelines, unless this would be contrary to the interests of justice. In the case of the magistrates' courts the sentencing guidelines are the Magistrates Courts Sentencing Guidelines http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_(web)_-_April_2014.pdf. These set out in detail how the courts set the fine in relation to the offender's "relevant weekly income" which is income after tax and national insurance. Under the guidelines, fines are set at between 25% and 175% of the relevant weekly income amount. Where an offender has an unusually high income the guidelines say that the fine should not be more than 75% of the maximum. It is therefore very possible that the current (general) £5,000 limit is restricting the amount of the fine that a court may impose on an offender with a very high income, meaning that the sentence may not be sufficiently punitive.

7.8. The second key change affects the sentencing of less serious offences. Parliament has provided a power to change the amounts of levels 1 to 4 on the standard scale which are currently fine maxima of £200, £500, £1,000 and £2,500 respectively. The Order mentioned at paragraph 2.11 above will propose a fourfold increase in these amounts which will retain the differentials between the punishments (as required by section 87(2)), but also provide the courts with greater sentencing flexibility to deal with this type of less serious offence.

The Regulations

7.9. Paragraphs 2.6 to 2.10 above explain what these regulations achieve. They are designed to ensure that by commencing section 85 we do not create anomalies or inconsistencies in the sentencing framework, or penalties that simply do not work because they would be expressed as, for example, a proportion of an unlimited amount. We believe that, as far as possible and together with section 85 and the order uprating levels 1 to 4, they represent amendments to existing legislation that will lead to a coherent sentencing framework governing the imposition of fines in the magistrates' courts.

Consolidation

7.10. These are the first regulations to be made in relation to section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 so no consolidation issues arise.

8. Consultation outcome

8.1 There was no public consultation on these regulations. They are designed to ensure that the policy approved by Parliament of removing the cap on fines imposed in the magistrates' courts works sensibly in practice. All Ministerial and non-Ministerial Departments considered, on their own behalf and on behalf of their agencies and public bodies, firstly, whether there were any offences or powers to create offences where there was a clear and pressing reason for s.85 to be disapplied and, if so, what the new maximum should be and secondly whether

there were any penalties expressed as a proportion of £5,000 or more. The result of these considerations is reflected in the regulations.

9. Guidance

9.1 Guidance to magistrates about sentencing is achieved via the Sentencing Council and their sentencing guidelines, and by training provided by the Judicial College. The MoJ has made both bodies aware of the impending changes and the likely timetable for them. In addition, we have informed and continue to update all Government Departments about the likely timetable for change and are requesting that they use their own communications channels to contact their agencies, public bodies and other stakeholders who may need to make changes to their publicity and promotional material etc. that will be affected by the changes. For example, the BBC uses the maximum fine for TV licence evasion as an incentive to purchasing a licence.

10. Impact

10.1 The impact of these regulations on business, charities or voluntary bodies is limited. They may find it helpful to be aware of the changes to penalty amounts in the regulations, but the main impact will be from the commencement of section 85 and the order uprating Levels 1 to 4. Individual Government Departments will make stakeholders aware of these changes. The MoJ is also planning its own publicity at the time the regulations are commenced.

10.2 The impact on the public sector is likely to be minimal. These regulations chiefly ensure that the main policy change – commencement of section 85 and the order uprating Levels 1 to 4 – does not give rise to any anomalies in the sentencing framework. As indicated above, the MoJ will publicise the regulations when they come into force.

10.3 An Impact Assessment has not been prepared for this instrument. The Impact Assessment for the LASPOA fines provisions under which these regulations are made said that, based on the evidence available, it was not anticipated that there will be a significant impact of raising the fine limits in the magistrates' courts.

11. Regulating small business

11.1 These regulations do not apply directly to small business as they affect only the sentencing powers of the magistrates' courts. There are many changes to the maximum fines for offences that could be committed by small businesses, such as VAT offences or failing to remove unlawfully deposited waste, but they will apply only if the business fails to comply with the law. Publicity will help to ensure that the public in general are aware of the changes.

12. Monitoring & review

12.1 The MoJ publishes the amounts of fines imposed in the magistrates' courts as averages and in relation to particular offence groups such as theft and drug offences. Any changes in the amounts of fines imposed will be evident from this publication and trends can be monitored taking into account changes in the value of money.

13. Contact

Beverley Moore at the Ministry of Justice (020 3344 5038 and beverley.moore@justice.gsi.gov.uk) can answer any queries regarding the instrument.