EXPLANATORY MEMORANDUM TO

THE RECOVERY OF COSTS INSURANCE PREMIUMS IN CLINICAL NEGLIGENCE PROCEEDINGS (No.2) REGULATIONS 2013

2013 No. 739

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 instrument

2.1 These Regulations revoke and replace the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (S.I. 2013/92 – "the earlier regulations") and have been made in consequence of defects in them. They make provision to enable successful parties to recover, by way of costs, after the event (ATE) insurance premiums for expert reports in clinical negligence cases from losing parties, and limits recoverability of those premiums to the costs of insuring against the risk of incurring liability to pay for reports which relate to liability or causation in those cases.

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

3.1 The Department regrets that these Regulations breach the rule that statutory instruments subject to the negative procedure should normally be laid, and copies provided to the Committee, 21 days before the instrument comes into force. The reason for this is that this case is one in which the Regulations need to be made as a matter of urgency. As with the earlier regulations which are to be revoked, these Regulations are required to come into force on 1st April this year. If the Department was to observe the 21 day rule, the earlier, defective regulations would come into force (see legislative background below).

4. Legislative Context

4.1 Part 2 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (" the LASPO Act") reforms the funding and costs of civil litigation, which reflect the Government's acceptance of recommendations made by Lord Justice Jackson – see *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, March 2011 (CM8041).

4.2 In his report, Lord Justice Jackson recommended that ATE insurance premiums should not continue to be recoverable under costs orders in all categories of civil litigation. The Government has made an exception in that the ATE insurance premiums will remain recoverable for expert reports in clinical negligence cases only.

4.3 Section 29 of the Access to Justice Act 1999 (c.22) provides for the recovery, by way of costs, of costs insurance premiums from a losing party in civil proceedings. This provision enables the costs of an insurance policy, taken out by a party to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose their case, to be recovered from the losing party should they win their case.

4.4 Section 46 of the LASPO Act repeals section 29 of the Access to Justice Act 1999 and, by inserting new section 58C into the Courts and Legal Services Act 1990 (c.41 – "the 1990 Act"), makes new provision relating to the recoverability of costs insurance premiums from a losing party in civil litigation. (Section 48 of the LASPO Act provides that, for the time being, section 46 - and, so, any regulations made under it – does not apply to personal injury proceedings for diffuse mesothelioma. Similarly, for the time being, section 46 has not been commenced in respect of publication and privacy proceedings and proceedings for and relating to insolvency).

4.5 The effect of new section 58C is to limit the recoverability of insurance premiums to certain clinical negligence proceedings and only allows recovery of any premium to the extent that it relates to the risk of incurring liability to pay for the cost of an expert report or reports in clinical negligence. The new section also enables the Lord Chancellor to make regulations to prescribe the circumstances in which the premium will be recoverable, including limiting recoverability to specified proceedings and to certain descriptions of policy. Regulations may also make provision about the amount of the premium that may be required to be paid under a costs order.

4.6 The earlier regulations were made on 21st January this year and laid on the 24th of that month. They were subsequently reported by the Joint Committee on Statutory Instruments on 27th February for doubtful vires and unexpected use of the enabling power (the report being published on 5th March).

4.7 New section 58C comes into force on 1st April 2013. It will apply to any costs insurance policy taken out on or after that date. If these Regulations do not come into force on the same date, any policy taken out between 1st April and the date on which these Regulations do come into force will be subject to the earlier regulations and, as such, the relevant premium under a costs insurance policy may be unrecoverable, or, at the least, subject to challenge by a losing party, by reason of the defects in the earlier regulations. Moreover, the uncertainty which arises from the defects may, in turn, cause uncertainty in the costs insurance market.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- **What is being done and why**

7.1 ATE insurance protects the claimant from having to pay certain legal costs. It is a type of insurance taken out after an actionable event has occurred. It is often taken out where a conditional fee agreement (CFA) has been entered into. CFAs are a type of 'no win no fee' agreement under which lawyers do not receive a fee from their client if they lose a case, but can charge an uplift (a 'success fee') on top of their base costs if they win. Success fees and ATE insurance add substantially to the costs payable by the losing party. The maximum success fee at present is 100% of the lawyer's fees. Typically, ATE insurers undertake to pay the defendant's costs in the event that the claimant loses the case. They may also cover the claimant's disbursement costs and other expenses. The premium is rarely, if ever, paid by claimants, but is recovered from defendants in cases which defendants lose.

7.2 In his *Review of Civil Litigation Costs*, Lord Justice Jackson argued that the current regime of recoverable CFA success fees and ATE insurance premiums from the losing party had led to excessive costs in civil litigation, with risk free litigation for claimants and additional costs being paid by defendants. As such, Lord Justice Jackson recommended that recoverability of both the CFA success fee and the ATE insurance premium from the losing defendant should be abolished in all categories of civil litigation. The effect of Section 46 of the LASPO Act is that the ATE insurance premiums are no longer recoverable from the losing defendant. As a result of this change, the ATE insurance premium will be payable by the successful claimant out of damages awarded. The Government consulted on the proposal, and the LASPO Act contains provisions which abolish the recoverability of success fees and, with one exception, of ATE insurance premiums (see 7.3, below).

7.3 However, the Government has allowed for a permanent limited exception for clinical negligence cases, where ATE insurance premiums covering the cost of expert reports will still be recoverable. This is because expert reports are often necessary to establish whether there is a case for bringing proceedings, but can be expensive. Currently ATE insurance can insure against the risk of incurring liability to pay the costs of such reports, but with the substantial withdrawal of

legal aid in personal injury (including clinical negligence) cases, a funding mechanism available to claimants to purchase those reports is required. As a result, the practical effect of this exception is that it will allow claimants to purchase expert reports for clinical negligence claims and the premium in respect of incurring the costs of those reports will remain recoverable from defendants.

7.4 In order to control the cost of the ATE insurance premiums, these Regulations restrict the recoverability of the insurance premium to the risk of incurring liability to pay for an expert report or reports determining liability and causation only. The responses to the Government consultation and the department's discussions with stakeholders (see paragraphs 9.1-9.3) suggest that in order to pursue the claim, an expert report or reports establishing liability and causation only is required. By restricting the recoverability of the insurance premium to the cost of these reports (and not, for example, reports concerning quantum), claimants will still be able to progress their claim, whilst ensuring that the costs paid by defendants to cover claimants' ATE insurance premiums are reasonable and proportionate.

7.5 In light of the Joint Committee on Statutory Instruments' report in respect of the earlier regulations, further consideration has been given to the application of these Regulations. Consequently, regulation 3(1)(a) provides that a premium will only be recoverable in those cases where the financial value of the claim for damages in respect of clinical negligence (as opposed to the financial value of any related claim whether separately or in total) is more than £1,000. This addresses the first of the Joint Committees' concerns that new section 58C of the 1990 Act requires regulations to specify particular proceedings to which they should apply, rather than applying them to all clinical negligence proceedings.

7.6 The effect of regulation 3(1)(a) will be that, in those cases where the financial value of the claim in respect of clinical negligence is £1000 or less, a premium will not be recoverable. However, such claims, which would normally be allocated to the small claims track (where, in respect of personal injury cases, the financial limit is £1,000), are unlikely to be as serious or as complex as to require an expert report on causation or liability.

7.7 In addition, regulation 3(1)(b) requires that the insurance policy in question must insure against the risk of incurring a liability to pay for an expert report relating to liability or causation (or that risk and other risks). This addresses the Joint Committee's second concern, namely that the earlier regulations did not prescribe a particular a description of policy to which the regulations should apply as required under new section 58C.

7.8 Finally, regulation 3(2) specifically provides that the amount of the premium that may be required to be paid under a costs order cannot exceed that part of the premium which relates to the risk of incurring liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence in connection with the proceedings.

- **Consolidation**

7.9 This is a stand-alone instrument. There are no plans for consolidation.

8. Consultation outcome

8.1 The Government consulted on Lord Justice Jackson's recommendations in the public consultation paper: *Proposals for reform of civil litigation funding and costs in England and Wales*, (Consultation Paper CP 13/10). The consultation was published on 15 November 2010 and closed on 14 February 2011. The overall consultation received a total of 625 responses and the official response paper was published on 29 March 2011.

8.2 The Government's response, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, may be found at: http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf

8.3 In addition to the Government consultation as set out in paragraph 9.1, the Ministry of Justice has also undertaken extensive stakeholder engagement on the details of how the cost of ATE insurance premiums can be controlled more generally. The Ministry of Justice carried out a further consultation exercise between August and September 2012 which generated 27 responses. Based on these responses and for the reasons addressed at paragraph 7.4 above, the Government is of the view that the approach taken in these Regulations is the appropriate one.

9. Guidance

9.1 The Ministry of Justice will work with representative bodies, such as the Law Society and others, to consider whether any guidance is necessary to support effective implementation of the Regulations.

10. Impact

10.1 There will be some impact on business, but no impact on charities or voluntary bodies. Any sectors that derive an income from civil litigation may be affected. This may include for example, lawyers, ATE insurers, claims management companies and experts. It is unclear whether there will be a knock on effect on ATE insurers as a result of these changes. This will depend very much on how they adapt their business models to counter the effects of non-recovery of ATE insurance premiums from the losing side in all categories of civil litigation. In some instances, ATE insurers may now be unwilling to insure a case because it is no longer profitable.

10.2 The impact on the public sector (such as the National Health Service) will depend on the ATE insurance market and the premiums charged.

10.3 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the LASPO Act receiving Royal Assent in May 2012. 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.

11. Regulating small business

11.1 The Regulations apply to small business. All ATE insurers will be affected by the detail of these Regulations and it will be for them to adapt their business models so that any future insurance policies underwritten by them are done so in accordance with the Regulations.

12. Monitoring & review

12.1 The Ministry of Justice plans to review the policy between three to five years after the implementation date. The review will form part of a wider review of the entire package of reform policies implemented following the passing of the LASPO Act. Further details are attached to Annex A of the Impact Assessment.

13. Contact

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