EXPLANATORY MEMORANDUM TO

THE COMMUNITY LEGAL SERVICE (FINANCIAL) (AMENDMENT NO.2) REGULATIONS 2006

2006 No. 2363

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments and the House of Lords Select Committee on the Merits of Statutory Instruments.

2. Description

2.1 This instrument amends the Community Legal Service (Financial) Regulations 2000 (S.I. 2000/516) which govern the financial aspects of the provision of publicly funded legal services by the Legal Services Commission (LSC).

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

3.1 None.

4. Legislative Background

4.1 These Regulations are made by the Lord Chancellor, in exercise of the powers conferred upon him by sections 7 and 10 of the Access to Justice Act 1999 ('the Act').

4.2 Part I of the Access to Justice Act 1999 established the Legal Services Commission and Community Legal Service as a coherent framework for the provision of legal services. The Community Legal Service (Financial) Regulations 2000, made under sections 7 and 10 of the Act, contain provisions about financial eligibility for funded services.

4.3 The main effects of this instrument are as follows:

4.3.1 It amends the definition of family proceedings to provide for proceedings under the Civil Partnership Act 2004.

4.3.2 It transfers the power to waive contributions from the client from the LSC to the Lord Chancellor for out-of-scope inquests; and transfers the power to waive the financial eligibility limits from the Lord Chancellor to the LSC for in-scope inquests. ['In scope' means within the scope of the legal aid scheme, i.e. matters that are funded by legal aid, and 'out of scope' means matters that are not funded].

4.3.3 It also increases the range of Legal Help available to those in receipt of National Asylum Support Service (NASS) support provided under the immigration and Asylum Act 1999.

5. Extent

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 it does not amend primary legislation, no statement is required.

7. Policy Background

7.1 Last year, proceedings under the Civil Partnership Act 2004 were added to the definition of family proceedings in the CLS Costs Regulations 2000, the CLS Funding Order 2000, and the 2001 Funding Order (Family Graduated Fees). The CLS Financial Regulations 2000 were not amended at this time as it was thought that other planned changes would supersede the change. These other changes did not go ahead and so these Regulations now need to be amended to bring them in line with the other CLS Regulations.

7.2 Legal representation at inquests is excluded from the scope of legal aid funding by Schedule 2 to the Act. This is because an inquest is an inquiry concerned with the facts surrounding a death, rather than issues such as civil or criminal liability. The proceedings are generally less formal than a court hearing, and legal representation is usually considered to be unnecessary. Section 6(8)(b) of the Act gives the Lord Chancellor the power to authorise the LSC to grant funding in individual cases for services normally excluded by Schedule 2 to the Act, if requested by the LSC.

7.3 However, since 1 November 2001, the Lord Chancellor's Direction on Inquest Funding, made under Section 6(8) of the Act, brought into scope funding for advocacy at inquests, for the immediate family of the deceased, for deaths in police or prison custody, or in the course of police arrest, search, pursuit or shooting. These cases were brought into scope due to the strong Article 2 ECHR obligations on the State arising from deaths in custody, and the need for an effective investigation into cases where State agents may be involved in the death. As representation at these inquests is within scope, the LSC can grant funding without requiring the Lord Chancellor to grant 'exceptional funding' under Section 6(8)(b) of the Act. However, in deciding whether or not to grant funding, the LSC must have regard to the guidance, issued by the Lord Chancellor under Section 23 of the Act, on the grant of exceptional funding authorised under section 6(8)(b) of the Act.

7.4 The first change this Instrument makes to the 'exceptional' funding scheme is in relation to 'in-scope' inquests, and it transfers the power to waive the financial eligibility limits, for representation of the immediate family of the deceased at an inquest, from the Lord Chancellor to the LSC..

7.5 It is also proposed to transfer the LSC's current power to waive contributions from the client for out of scope inquests to the Lord Chancellor. These changes will simplify the decision making process for granting funding, and will remove the anomaly of the previous split in decision making in these cases by ensuring all decisions are made in the same place. For out-of-scope inquests, this means that the Lord Chancellor will decide whether exceptional funding should be granted, whether the financial eligibility limits should be waived, and what the correct level of contribution from the client should be (although the LSC will advise on the appropriate contribution). For in-scope inquests, this means that the LSC will decide whether funding should be granted, whether the financial eligibility limits should be waived, and what the appropriate contribution from the client should be.

7.6 The Community Legal Service Financial Regulations 2000 set out the financial eligibility criteria. Those in receipt of certain benefits automatically qualify financially for legal aid. Support from NASS is one of those benefits. The NASS eligibility assessment takes into account all cash and savings that are reasonably available to the applicant and his/her dependants. The amount of support paid is worth approximately 70% of income support levels. Clearly those individuals who are eligible for NASS will always qualify for legal aid, as they will be well within the capital and income eligibility limits. When carrying out an assessment NASS takes into account all the capital that the individual has and the level of support provided is lower than that payable to those receiving passporting benefits such as income support. Individuals on NASS will have less capital and income that those who are currently on passported benefits and therefore the carrying out of means assessments in these cases is clearly unnecessary as they will always qualify for legal aid on the basis of means. Accordingly this amendment will mean that they will qualify financially for these services.

8. Impact

8.1 No RIA has been prepared as these changes have been consulted on and will have no adverse impact on business, charities or voluntary bodies. For example, increasing the scope of NASS support as a passported benefit will have little financial impact as recipients of this financial support will already be eligible as the level of this support is below the current passported benefits. This particular amendment will reduce the administrative burden on suppliers as they will no longer need to undertake means assessments in more instances for NASS support recipients.

9. Contact

9.1 Karen Finlay at the Department for Constitutional Affairs: (Tel - 020 7210 8745 E Mail - Karen.Finlay@dca.gsi.gov.uk) can answer any queries regarding this instrument.

9.2 Helen Johns at the Department for Constitutional Affairs: tel: 0207 210 1490, (e-mail: helen.johns@dca.gsi.gov.uk), can answer any queries regarding the changes in this instrument relating to NASS passporting.