EXPLANATORY MEMORANDUM TO THE

COMMUNITY LEGAL SERVICE (SCOPE) REGULATIONS 2005

2005 No. 2008

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 House of Lords Select Committee on the Merits of Statutory Instruments and the Joint Committee on Statutory Instruments.

2. Description

2.1 This instrument amends Schedule 2 to the Access to Justice Act 1999 which lists, with exceptions, and subject to any directions made under section 6(8) of that Act, services which are excluded from Community Legal Service (CLS) funding. It excludes from scope services consisting of the provision of help in relation to any allegations of personal injury or death other than allegations of clinical negligence. It also includes within the exceptions and therefore brings within scope advocacy in the Crown Court in relation to applications for restraint orders under Part 2 of the Proceeds of Crime Act 2002.

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 Secretary of State for Constitutional Affairs, in exercise of the powers conferred upon the Lord Chancellor by section 6(7) of the Access to Justice Act 1999 and now vested in him.

4.2 Part I of the Access to Justice Act 1999 establishes the Legal Services Commission (LSC) and the CLS as a coherent framework for the provision of legal services. In particular, section 6 provides that certain services (those set out in Schedule 2) shall not be funded as part of the CLS. Schedule 2 is also subject to exceptions and any directions made by the Lord Chancellor under section 6(8) of that Act.

5. Extent

5.1 This instrument extends to England and Wales.

6. European Convention on Human Rights

6.1 The Minister Bridget Prentice has made the following statement regarding human rights:

In my view the provisions of The Community Legal Service (Scope) Regulations 2005 are compatible with the Convention rights.

7. Policy background

7.1 In July 2004, a joint consultation paper 'A new focus for civil legal aid' was published jointly by the LSC and the Department for Constitutional Affairs (DCA). This proposed a number of changes aimed at targeting legal aid in a better way, through reform of the merits test and scope of the civil legal aid scheme, in order to encourage early resolution of disputes and discourage unnecessary litigation. The legal aid budget is seriously under pressure and the proposals, while aimed at tightening up the existing funding arrangements, and considering whether any case types should be removed from scope, were carefully designed not to reduce access to funding for deserving cases in priority areas of law.

7.2 The consultation closed in October 2004. As part of the consultation, officials from the LSC and DCA held discussions with key stakeholders including the Legal Aid Practitioners Group ; Solicitors Family Law Association (now Resolution); The Law Society; The Official Solicitor. In addition, Ministers held meetings with the Child Poverty Action Group ; Public Law Project , Legal Aid Practitioners Group; Advice Services Alliance; the Bar and Law Society as part of this consultation process. Following careful consideration of the 136 written responses and issues raised during meetings, a number of proposals were not taken forward, and the final package represents a balanced set of measures.

7.3 These regulation changes will ensure that services in relation to certain personal injury claims remain in scope, such as Legal Help and Legal Representation in claims relating to the abuse of children and vulnerable adults. But the wording of the exclusion will be drawn more widely, so that subject to the Lord Chancellor's Directions, the exclusion will apply generally to personal injury claims other than resulting from clinical negligence. Additionally, Legal Help in relation to applications to the Criminal Injuries Compensation Authority will be a new provision to be included in the new Direction.

7.4 Currently the exclusion applies only to negligence cases, not to allegations of deliberate harm. The exclusion was originally framed in this way in part to make clear that high priority cases such as allegations of assault by the police and child abuse claims should remain in scope. This is no longer necessary as existing directions by the Lord Chancellor under section 6(8) of the 1999 Act bring back into scope claims against public authorities alleging serious wrongdoing. There are other reasons for amending the wording which are set out in detail in the Consultation Paper but the main ones are summarised as follows:

(i) the existing formulation allows certain cases to remain in scope which cannot be considered a high priority for CLS funding, eg, the claim brought by the burglar Brendon Fearon against Tony Martin. Although Brendon Fearon was funded under the Legal Aid Act 1988 his claim would have been within scope under Schedule 2 to the Act because his injuries were deliberately not negligently caused.

(ii) the distinction between whether or not a Personal Injury claim concerns "negligently caused injury" is usually academic. If a Personal Injury claim is within scope and is not in a priority area under the Funding Code it will be considered under the General Funding Code which allows an individual case to

be refused if it appears suitable for a conditional fee agreement. Almost all Personal Injury claims within the General Funding Code are refused under these criteria.

7.5 Whilst making the changes resulting from the new focus consultation the opportunity has been taken to make a necessary amendment to paragraph 3 of Schedule 2 to the Access to Justice Act 1999. Paragraph 3 of Schedule 2 lists the proceedings for which funding is available under the Proceeds of Crime Act 2002 and the amendment brings applications under section 42 for a restraint order within funding.

8. Impact

8.1 The Final Combined Regulatory and Race Impact Assessment was signed by Ministers on 20 March 2005 and published shortly thereafter. The Small Business Service did not anticipate that these proposals would have a significant impact on business. A copy is attached for information.

9. Contact

9.1 Yasmin Tengnah at the Department for Constitutional Affairs: tel: 0207 210 0601, (e-mail: yasmin.tengnah@dca.gsi.gov.uk), can answer any queries regarding this instrument.