EXECUTIVE NOTE

The Legal Aid in Contempt of Court Proceedings (Scotland) Amendment Regulations 2005 SSI/2005/451

The above instruments will be made in exercise of the powers conferred on Scottish Ministers by sections 36(1) and 2(a) and (d) of the Legal Aid (Scotland) Act 1986, with the exception of the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2005, which will be made under sections 33(2)(a) and (3)(f) and 36(1) and (2)(a) of the Legal Aid (Scotland) Act 1986. These instruments are all subject to the negative resolution procedure.

Policy Objectives- Legal Aid

The regulations that are being laid cover a number of policy objectives:-

These ensure that all types of legal aid currently available to persons, including persons defined as suffering from a mental disorder in terms of the Mental Health (Scotland) Act 1984 ("the 1984 Act"), will continue to have legal aid available to them, subject to them satisfying the eligibility tests, after the commencement of the Mental Health (Care and Treatment) (Scotland) Act ("the 2003 Act") in cases where the applicant suffers from a mental disorder as defined by the 2003 Act.

The regulations all make technical changes to the four sets of legal aid regulations, whereby all references to the 1984 Act are substituted with references to the 2003 Act.

The definition of "legal representative" is amended where it appears in each of

- The Criminal Legal Aid (Scotland) Amendment Regulations 2005
- The Legal Aid in Contempt of Court Proceedings (Scotland) Amendment Regulations 2005 and
- The Civil Legal Aid (Scotland) Amendment (No. 2) Regulations 2005.

A reference to the 2003 Act is made to allow persons authorised to act on a person's behalf under that Act to be able to apply for legal aid. Amendments to this definition also incorporate changes flowing from the Adults with Incapacity (Scotland) Act 2000.

A reference to named persons, who may be nominated and appointed in terms of the 2003 Act and who may act on behalf of persons defined as suffering from a mental disorder under that Act, has been added to Regulation 14 of the Civil Legal Aid (Scotland) Regulations 2002. This regulation makes provision for the assessment of resources of persons who apply for civil legal aid in a representative, fiduciary or official capacity.

In the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2005, provision has been made to allow solicitors to continue to be able to claim an additional fee for cases in which the assisted person has suffered, for a significant period of their case, from a mental disorder as defined under the 1984 Act or, as the case may be, as defined under the 2003 Act from 5 October 2005. A savings provision is included which preserves the solicitors' claim for additional payment for work carried out before the commencement of the 2003 Act on 5 October 2005.

Consultation

No formal consultation was undertaken in relation to the legal aid aspects. The policy in relation to the establishment of the new tribunal system was the subject of extensive consultation undertaken by the Health Department. Discussions have taken place with the Health Department in relation to the regulations that are needed to make legal aid available for the new Mental Health Tribunal for Scotland.

Purpose: Legal aid arrangements for the Mental Health (Care and Treatment) (Scotland) Act 2003

The purpose of these regulations is to give effect to the changes that are needed to:-

- The Civil Legal Aid (Scotland)(Fees) Regulations 1989
- The Criminal Legal Aid (Scotland) Regulations 1996
- The Legal Aid in Contempt of Court Proceedings (Scotland) Regulations 1992
- The Civil Legal Aid(Scotland) Regulations 2002

These ensure that the changes come into force at the same time as the Mental Health (Care and Treatment) (Scotland) Act 2003 commences which is on 5 October 2005.

Financial Implications:

As these are technical changes required by the 2003 Act coming into force, it is not anticipated that there will be any change in the costs of the provision of legal aid.

Gillian Mawdsley
Justice Department
Access to Justice 13 September 2005