

LEGAL AID (NORTHERN IRELAND) ORDER 2005

S.I. 2005 No. 3423 (N.I. 19)

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Legal Aid (Northern Ireland) Order 2005 (“the Order”) was made on 14 December 2005.
2. This Explanatory Memorandum has been prepared by the Northern Ireland Court Service (“the Department”) in order to assist the reader in understanding the Order. It does not form part of the Order.

BACKGROUND AND POLICY OBJECTIVES

3. The existing statutory basis for the provision of legal aid in Northern Ireland is the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 [SI 1981/228 (NI 8)] (“the 1981 Order”). The 1981 Order remains the primary authority for legal aid funding in Northern Ireland pending the full implementation of the Access to Justice (Northern Ireland) Order 2003 [SI 2003/435 (NI 10)] (“the 2003 Order”) which provides a modern basis for the provision and administration of publicly funded legal services. The 1981 Order broadly reflects the position in respect of legal aid in England and Wales under the former Legal Aid Act 1974, while the 2003 Order reflects the current position in England and Wales under the Access to Justice Act 1999.
4. The Lord Chancellor, as the Minister responsible for legal aid in Northern Ireland, requires a power to enable him to provide funding for exceptional cases which could not otherwise receive funding under the legal aid scheme. Such a power, comparable to the power currently available in England and Wales, is required to ensure that the State can comply with its obligations under Articles 2 and 6 of the European Convention on Human Rights.
5. There is no power in the 1981 Order to enable the Lord Chancellor to grant legal aid in exceptional cases.
6. The introduction of an exceptional grant power in Northern Ireland was raised in June 1999 in the Department’s Consultation Paper *‘Public Benefit and the Public Purse’*. The proposal proved to be uncontroversial, and the Department’s Decisions Paper *‘The Way Ahead’* published in September 2000 indicated that the Government would take a statutory exceptional grant power in Northern Ireland.
7. To address this lacuna, a power to grant exceptional legal aid was included in the 2003 Order. Pending the full implementation of that Order, the Lord Chancellor commenced, in transitional form, the exceptional grant power in the 2003 Order to ensure that he could respond appropriately to requests for funding.
8. The Order is intended to provide a new statutory mechanism for the granting of exceptional legal aid in specified categories of cases. This mechanism is required following a recent High Court ruling regarding the transitional mechanism used for the

*This Explanatory Memorandum refers to the Legal
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current exceptional grant scheme. The new mechanism will replace the current scheme. It will be a temporary measure, pending the full commencement of the 2003 Order, when the 1981 Order will be repealed. The Order will enable the Lord Chancellor to grant legal aid in exceptional cases in Northern Ireland which in normal circumstances would not attract funding by virtue of:

- (a) the statutory scope of legal aid, and/or
- (b) the inflexible powers available to grant legal aid, under the 1981 Order.

CONSULTATION

- 9. No specific consultation has taken place regarding the new statutory mechanism as it replaces a statutory provision already in existence.

COMMENTARY ON ARTICLES

- 10. Comments are not given where the wording is self-explanatory.

Article 2 – Exceptional Legal Aid

- 11. The Lord Chancellor will be empowered to direct that legal aid shall be provided by the Northern Ireland Legal Services Commission in specified general categories of case which fall outside the scope of ordinary legal aid.
- 12. The Lord Chancellor will also be empowered to authorise funding generically or in respect of individual cases, whether the cases fall within or outside the scope of ordinary legal aid, if the Commission requests him to do so.

Schedule 1, paragraph 1 – Minor and Consequential Amendments

- 13. The scheme for providing exceptional grant funding will operate alongside the statutory scheme for providing advice and assistance in respect of preparation work carried out in connection with relevant proceedings. However, funding will not be available simultaneously under the two schemes in connection with any individual case.

Schedule 1, paragraph 5– Minor and Consequential Amendments

- 14. This amendment is required as a consequence of the establishment of new Northern Ireland departments and the transfer of functions between departments which was given effect under the Departments (Northern Ireland) Order 1999 [SI 1999/283 (NI 1)].

COMMENCEMENT

- 15. The majority of the provisions in the Order came into operation on 15 December 2005.