

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

A.

FUNDING OF LEGAL SERVICES (PARTS I & II, SECTIONS 1-34)

Commentary

Part II: Other funding of legal services

Conditional fee and litigation funding agreements

132. **Section 27: Conditional fee agreements.** This section replaces the existing section 58 of the Courts and Legal Services Act 1990 with two new sections: section 58 and 58A. New section 58 takes into statute law the decisions in the *Thai Trading* and *Bevan Ashford* cases described in paragraph 47 above. It does this by making all agreements which provide that legal fees should be payable only in certain circumstances subject to the provisions of the new sections. Section 58(5) excepts from this principle agreements between solicitors and their clients in relation to services (such as conveyancing) that do not relate to litigation or prospective litigation.
133. New section 58 also draws a distinction between agreements which do, and do not, provide for an additional success fee to be paid. It empowers the Lord Chancellor to define the proceedings in which such fees are to be permitted, and to prescribe their maximum size. New section 58A(6) allows for success fees can be recovered in costs from the losing party in the case. Paragraph 32 above sets out the reasons for this change
134. New section 58A replicates the existing bar on conditional fees in family and criminal proceedings, but makes an exception for proceedings under section 82 of the Environmental Protection Act 1990. These cases, which are technically criminal proceedings, concern orders requiring people to put right a statutory nuisance (e.g. the failure of a landlord to maintain rented housing in a habitable condition). The *Thai Trading* case permitted conditional fees without an uplift in these cases, and the exception in section 58A(1)(a) is necessary to preserve that position. Section 58A also clarifies the existing law in several respects. Subsection (3)(a) makes clear that requirements to provide information to a client apply before a conditional fee agreement is actually made. Subsection (4) ensures that the legislation covers tribunal cases, cases that are settled before court proceedings are issued, and cases that go to arbitration.
135. **Section 28: Litigation funding agreements.** This section provides for a new type of agreement called a litigation funding agreement. Like conditional fee agreements, litigation funding agreements would allow litigants to pursue cases on the basis that they would not be liable for their legal costs if the case was unsuccessful. The difference between the two types of agreement is that a litigation funding agreement would be with a third party funder, not the lawyer taking the case. The funder would pay the lawyer in the normal way and, in successful cases, would be able to recover those costs and a success fee from the other side. The success fee would be paid into the fund to help meet the cost of lawyers' fees in unsuccessful cases.

136. **Section 28** provides for the Lord Chancellor to prescribe in regulations who may fund services in this way, and impose similar requirements as apply to conditional fee agreements on the amount of the success fee.

Costs

137. **Section 29: Recovery of insurance premiums by way of costs.** This section makes provision to allow the court to include, in any costs it may award against the losing party, any premium paid for an insurance policy taken out specifically against the need to meet the other side's costs in those proceedings. It is not limited to insurance policies taken out alongside a conditional fee agreement.
138. **Section 30: Recovery where body undertakes to meet costs liabilities.** This section is a parallel provision to section 29. It applies to bodies, such as trade unions, which fund litigation on behalf of their members from the body's own resources; and do not, therefore, take out separate insurance against having to meet the other side's costs. When such a body supports a successful case, section 30 will allow the costs awarded to include an amount equivalent to the insurance premium that would have been recoverable (under section 29) if a policy had been in place.
139. **Section 30** empowers the Lord Chancellor to prescribe which bodies may operate in this way and on precisely what terms. This will enable him to ensure that the amounts recovered fairly reflect the risk that the body had borne.
140. **Section 31: Rules as to costs.** This section allows rules of court about the award of costs to provide that the amount awarded need not be limited to the amount that the litigant would have been liable to pay his or her own lawyers if costs had not been awarded.
141. **Section 31** is a general provision allowing rules of court to limit or abolish the common law principle known as the indemnity principle. This is that the successful party in an action has a right to be indemnified (wholly or partly) against a liability for costs actually incurred in bringing or defending the proceedings, and no more. If no actual costs have been agreed for payment by the client, then no costs should be paid by the losing party. For many years, this was held to prevent recovery from the unsuccessful party of any part of a solicitor's fee which was contingent on the success of the case. More recently, a combination of case law and statutory provisions (most notably the 1990 Act) have greatly reduced the application of the indemnity principle in its pure form. Recent case law has also made its application more cumbersome in practice. The Government believes that the partial survival of the principle is anomalous; section 31 is intended to rationalise the position.

Legal aid in Scotland

142. **Section 32: Regulations about financial limits in certain proceedings.** This section empowers Scottish ministers to make regulations to disapply the financial eligibility and contributions tests for assistance by way of representation in respect of certain proceedings.
143. Assistance by way of representation is a category of advice and assistance under the Legal Aid (Scotland) Act 1986. Advice and assistance, and assistance by way of representation are defined in section 6(1) of the 1986 Act. Advice or assistance is provided by a solicitor or counsel in relation to a matter of Scots law. Assistance by way of representation is provided by a solicitor or counsel in connection with any proceedings before a court, tribunal or statutory inquiry. At present, advice and assistance is available under Part II of the 1986 Act provided financial and contributions criteria are met. Section 8 of the Act sets out the income and capital limits that determine eligibility for advice and assistance. Section 11(2) provides for contributions to be paid by a person in receipt of advice and assistance based on a sliding scale set in regulations.

144. Under section 9 of the 1986 Act, the Scottish ministers may by regulations provide that Part II of the Act as it applies to advice and assistance also applies to assistance by way of representation. Therefore, the financial limits and contributions which apply to advice and assistance are also applicable to assistance by way of representation. Ministers also have the power under section 9 to prescribe different provision for different cases and modify the financial limits which may apply to assistance by way of representation. However, it is not currently possible under section 9 to disapply the financial eligibility and contributions tests completely. Section 32 of this Act amends section 9 of the 1986 Act to permit this. The immediate intention is to use the power to disapply the tests for proceedings before Mental Health Review Tribunals.
145. **Section 33: Recipients of disabled person's tax credits.** This section disapplies the financial eligibility and contributions tests from persons seeking or receiving advice and assistance who are in receipt of disabled person's tax credit.
- The Tax Credits Act 1999 provides disabled person's tax credit to replace disability working allowance (under section 129 of the Social Security Contributions and Benefits Act 1992).
146. At present, sections 8 and 11 of the Legal Aid (Scotland) Act 1986 provide for advice and assistance to be available without a means test or contributions to people in receipt of income support, income-based job seekers' allowance or family credit. Section 33 adds to disabled person's tax credit to that list. Paragraph 12 of **Schedule 14** provides for this change to apply to disability working allowance, should section 33 come into force before section 1 of the Tax Credits Act.
147. **Section 34: References by Scottish Criminal Cases Review Commission.** This section corrects an oversight regarding the availability of legal aid for references from the Scottish Criminal Cases Review Commission to the High Court in Scotland. Under the previous arrangements, the only test that applied to legal aid for references from the Secretary of State for Scotland was that relating to financial eligibility. The Crime and Punishment (Scotland) Act 1997 did not amend the Legal Aid (Scotland) Act 1986 to continue this arrangement for references from the Review Commission. Consequently, when the Commission was set up on 1 April 1999, legal aid was not explicitly made available on the same basis as before. Section 34 restores the previous position.