

*These notes refer to the Access to Justice Act 1999
(c.22) which received Royal Assent on 27th July 1999*

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

A.

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

Commentary

Part I: The Legal Services Commission

The Commission

50. **Section 1: The Legal Services Commission.** This section establishes the new Legal Services Commission, and makes provision for appointments to it. The Commission will replace the Legal Aid Board. It is considered necessary to establish a new body to reflect the fundamentally different nature of the Community Legal Service (CLS) compared to civil legal aid. Within the broad framework of priorities set by the Lord Chancellor, the Commission will be responsible for taking detailed decisions about the allocation of resources. It will also be required to liaise with other funders to develop the CLS more widely.
51. The Commission will also have a wider role in respect of the Criminal Defence Service than the Legal Aid Board does in respect of criminal legal aid. The Board has very limited responsibilities for legal aid in the higher criminal courts.
52. **Section 1** is similar to section 3 of the Legal Aid Act 1988 (“the 1988 Act”), which established the Legal Aid Board. However, the membership of the Commission will differ from that of the Board, to reflect a shift in focus from the needs of providers to the needs of users of legal services. Also, the Commission is to be rather smaller than the Board: with between 7 and 12 members rather than 11 to 17. This is intended to facilitate focused decision-making.
53. **Section 1(6)** gives effect to **Schedule 1 (Legal Services Commission)** which makes further provisions about the Commission. Paragraphs 1-10, 12 and 17, concerning the members, staff and proceedings of the Commission, mirror provisions about the Board in Schedule 1 to the 1988 Act, except that Treasury consent to arrangements for the pay, pensions and compensation of members and the staff of the Commission will not be required. Paragraph 11 provides for the Commission’s administrative budget, mirroring section 42(1)(b) & (2) of the 1988 Act. Paragraph 13 requires the Commission to provide any information requested by the Lord Chancellor; this mirrors a provision in section 5 of the 1988 Act. Paragraph 16 requires the Commission to prepare accounts and provides for them to be audited. This mirrors section 7 of the 1988 Act, except that the Comptroller and Auditor General, rather than an appointed auditor, will audit the Commission’s accounts.
54. **Paragraph 14** requires the Commission to prepare an annual report on the discharge of its functions. This will be laid before Parliament. It will include a report on the impact of the Commission’s activities on the supply and development of legal services within

the wider CLS. (Section 5 of the 1988 Act provides for the Legal Aid Board's annual report).

55. **Paragraph 15** requires the Commission to prepare an annual plan, which will be laid before Parliament. This will include the Commission's detailed plans for allocating the resources available to the CLS fund (see paragraph 68 below). This is a new requirement. The Legal Aid Board produces annual corporate and business plans, but these are not statutory documents nor laid before Parliament.
56. **Part II of Schedule 14** makes transitional provisions for the replacement of the Legal Aid Board by the Commission. Briefly, it provides that, on an appointed day, the Commission shall take over all the property, rights and liabilities of the Board. Staff of the Board will automatically become staff of the Commission, and their employment and pension rights are preserved.
57. The intention is that the provisions of the 1988 Act will remain in force for any cases that have already started when the new schemes come into effect. The Commission will be responsible for the continued administration of these cases.
58. **Section 2: Power to replace Commission with two bodies.** This section allows the Lord Chancellor, by order subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)), to split the Legal Services Commission into two separate bodies, one responsible for the Community Legal Service and the other for the Criminal Defence Service.
59. This allows for the possibility that, because of the different nature and objectives of the two schemes, it may prove more effective in the longer term to administer them separately. It would not be practicable to set up two bodies from the outset. This is because of the need to retain, in substance, the existing infrastructure and expertise of the Legal Aid Board to manage the transition from legal aid to the two new schemes. This involves both administering existing cases under the old scheme and developing contracting as the principal means of procuring services under the new schemes.
60. There is no definite intention to split the administration of the two schemes in future. Rather, the intention is to review the situation once the new schemes are firmly established, probably after about 5 years.
61. **Section 3: Powers of Commission.** This section gives the Legal Services Commission similar general powers to those presently enjoyed by the Legal Aid Board (section 4 of the 1988 Act). These powers will allow the Commission to do whatever it believes is necessary in the discharge of its functions. Later sections exemplify the ways in which the powers may be used in the provision of specific services (see sections 6(3), 13(2) and 14(2)).
62. **Section 3(4)** provides that the Commission may delegate its functions to others. For example, it might delegate to contracted providers certain decisions about the funding of particular cases (much as the Legal Aid Board delegates some decisions to franchised firms now). Section 3(5) empowers the Lord Chancellor to make orders about whether and how the Commission should delegate certain functions. For example, he might make an order requiring the Commission to monitor the decisions made by providers under a delegation.

The Community Legal Service

63. **Section 4: The Community Legal Service.** This section requires the Legal Services Commission to establish, maintain and develop the Community Legal Service (CLS). It sets out the purpose of the CLS and defines the services which may be provided under the CLS. These range from the provision of general information about the law and legal services to providing help towards preventing or resolving disputes and enforcing decisions which have been reached (section 4(2)). The scheme will encompass advice, assistance and representation by lawyers (which have long been available under

the legal aid scheme), and also the services of non-lawyers. It will extend to other types of service, including for example mediation in appropriate family or other cases.

64. **Section 4(3)** provides that the CLS does not cover services funded as part of the Criminal Defence Service, in order to avoid any overlap between the two schemes.
65. The purpose of the CLS (section 4(1)) is in two parts, reflecting the Commission's two key roles. First, the Commission will facilitate the development of the wider CLS, by working with other funders of services, such as local authorities, to plan for the most appropriate use of available resources in order to match the provision of services to identified needs and priorities. Section 4(6) describes this function further. The intention is to build on the work already being carried out by the Legal Aid Board's Regional Legal Services Committees in order to establish systems for determining (i) the need for legal services at regional level, and (ii) the ability of providers to supply those services, to the required standard, within the available resources. Secondly, the Commission will itself fund the provision of services through the CLS Fund (which is described further in section 5).
66. The Commission will help to ensure that the services provided are of a high quality by setting and monitoring standards and establishing quality accreditation systems (section 4(7) & (8)). The intention is that only accredited providers will be eligible for funding from the CLS fund and that other funders of legal services will be able to impose a similar requirement. Section 4(9) makes clear that the Commission (and any bodies it authorises) may charge fees to cover the cost of providing accreditation.
67. **Section 4(10)** empowers the Lord Chancellor to give the Commission orders about how it should exercise its functions under subsections (6)-(9). There are similar powers in relation to the Commission's other main functions in sections 6(4), 13(3) and 14(3)(b).
68. **Section 5: Funding of services.** This section establishes the CLS fund and the mechanisms by which the Lord Chancellor will provide resources for the fund. Each year, as part of the general public expenditure planning process, the Lord Chancellor will set an annual budget for the CLS fund. This will take account of the receipts from contributions and other payments expected under the regulations made under sections 10 and 11, with the balance of the budget provided by the Lord Chancellor from money voted by Parliament. The CLS fund will therefore not be open-ended in the way that the legal aid fund is now.
69. **Section 5(2)(a)** provides for the Lord Chancellor to determine how much to pay into the CLS fund. (Section 5(3) requires him to take account of the assessment of need made by the Legal Services Commission under section 4(6).) Section 5(2)(b) provides for the practical arrangements for paying that money into the fund – this will be by regular instalments throughout the year to meet immediate outgoings. Section 5(4) requires the Lord Chancellor to lay a statement of the budget he determines before Parliament. This would also require him to publish any redetermination, should it ever be necessary to change the budget during the course of a financial year.
70. **Section 5(6)** empowers the Lord Chancellor to direct the Commission to use specified amounts within the fund to provide services of particular types. The intention is that the Lord Chancellor will divide the fund into two main budgets, for providing services in (i) family and (ii) other civil cases, while allowing the Commission limited flexibility to switch money between the two areas. The Lord Chancellor may set further requirements within these two budgets, by specifying the amount, or the maximum or minimum amount, that should be spent on, say, services from the voluntary sector, mediation, or cases involving a wider public interest. In this way, it will be possible to ensure that resources are allocated in accordance with the Government's priorities.
71. **Section 5(7)** places a duty on the Commission to aim to obtain the best value for money - a combination of price and quality - when using the resources of the fund to provide services. Section 4 describes how the Commission will seek to ensure that services are

of high quality. Section 5, in providing for a controlled budget, and section 6 in setting out the ways, principally contracting, through which services will be procured, provide the means to control cost.

72. **Section 6: Services which may be funded.** This section builds on the general powers contained in section 3, by setting out the ways in which the Legal Services Commission may use the CLS fund to provide services. These include making contracts with, or grants to, service providers in the private and voluntary sectors; itself providing services directly to the public, whether by employing staff to provide them or by any other means; and making grants or loans to individuals so they can purchase services for themselves.
73. These flexible powers are intended to give effect to one of the principal objectives of the reform of publicly funded legal services: that is the ability to tailor the provision of services, and the means by which services are delivered, to the needs of local populations and particular circumstances. They will also allow the Commission to test new forms of service provision through pilot projects.
74. **Section 6(6)** gives effect to **Schedule 2 (Community Legal Service: excluded services)** which excludes from the scope of the CLS fund specified types of service which would otherwise fall within the broad definition provided by section 4(2). Section 6(7) empowers the Lord Chancellor to make regulations, subject to the affirmative resolution procedure (by virtue of section 25(9)), to amend the Schedule. Section 6(8) empowers the Lord Chancellor to direct or authorise the Commission to fund services within the excluded categories in specified exceptional circumstances; or, following a request by the Commission, to authorise it to fund an individual case. For example, the Lord Chancellor intends to authorise funding for personal injury cases (which are generally excluded by the Schedule because most such cases are suitable for conditional fees) where exceptionally high investigative or overall costs are necessary, or where issues of wider public interest are involved.
75. In effect, Schedule 2 defines the scope of the CLS fund for the time being. People (but not corporate bodies) will be able to obtain general information about any matter of English law, the English legal system or the availability of legal services. Subject to any exceptions authorised by the Lord Chancellor, more substantial services will not be available in the categories listed in paragraph 1. In the categories of case listed in paragraph 2, it will be possible (subject to priorities) to fund any of the services listed in section 4(2). For categories that are not listed in either paragraph, it will be possible to fund any service except advocacy in court or other proceedings.
- Corporate bodies are excluded because section 4(1) defines the overall scope of the Community Legal service in terms of individuals. Section 19 limits the scope of the scheme to English law.
76. Subject to the changes described in paragraphs 77 & 78 below, the scope of the CLS fund will initially mirror the current scope of civil legal aid; but it may be changed over time. In particular:
- as conditional fees, legal expenses insurance and other forms of funding develop more widely, it may be possible to exclude further categories which can generally be funded privately; but on the other hand
 - as resources become available through the greater value for money and control of spending provided by the new scheme and the development of private alternatives, it may be possible to extend the scope of the fund to cover services that are excluded now because, although they would command some priority, they are unaffordable.
77. The following changes to the scope of the current legal aid scheme will take effect immediately. In future, subject to any exceptions that the Lord Chancellor may make, only general information will be available about the following issues.

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- Allegations of damage to property or the person (i.e. personal injury) caused by negligence, apart from those about clinical negligence. These cases are generally considered suitable for conditional fees.
 - Allegations of malicious falsehood. Legal aid is not currently available for representation in defamation cases, but it is sometimes possible to get legal aid by categorising the case as one of malicious falsehood. The Government's view is that these cases do not command sufficient priority to justify public funding; and, in any event, they may often be suitable for a conditional fee.
 - The law about companies and partnerships and other matters arising in the course of business. Legal aid is not available for firms and companies, but a sole trader can currently get legal aid to pursue a business dispute. Businessmen have the option of insuring against the possibility of having to take or defend legal action. The Government does not believe that the taxpayer should meet the legal costs of sole traders who fail to do so.
 - Boundary disputes and the law relating to trusts. The Government does not consider that these command sufficient priority to justify public funding.
78. In addition, funding for advocacy before the Lands Tribunal or Commons Commissioners will no longer be available. Other services, including assistance with preparing a case, will continue to be available.
79. **Section 7: Individuals for whom services may be funded.** This section allows the Lord Chancellor to set financial eligibility limits for people to receive services funded by the CLS fund. It allows him to set different limits, or no limit at all, in different circumstances or for different types of service case.
80. In essence, the section re-enacts provisions in the 1988 Act about financial eligibility: sections 9 (advice and assistance), 13B (family mediation), and 15 (civil legal aid). There are no immediate plans to make any substantive changes to the present financial eligibility limits (apart from any upratings to reflect inflation). In due course, the Government hopes to extend eligibility for advice and assistance to those who can afford to pay contributions (see Annex A to these Notes).
81. **Section 8: Code about provision of funded services.** This section provides for the Legal Services Commission to prepare a code setting out the criteria for determining whether services funded by the CLS fund should be provided in a particular case, and if so what services it is appropriate to provide. The code will also set out the procedures for making applications.
82. The funding assessment under the code will replace the merits test for civil legal aid (set out in sections 15(2) & (3) of the Legal Aid Act 1988, and supplemented by Notes for Guidance published annually by the Legal Aid Board). The new assessment is intended to be more flexible than the existing merits test. It will be possible to apply different criteria in different categories according to their priority. It will also be possible to take account of new factors, such as the wider public interest.
83. **Section 8(2)** lists factors that the Commission must consider when preparing the code. The criteria for funding various types of service in different categories of case will be defined in terms of these factors. The code will set out which factors are relevant in a given category, how they should be taken into account, and what weight should be given to them.
84. **Section 8(3)** requires the code to reflect the principle that in many family disputes mediation is more appropriate than court proceedings. This is intended to reinforce the development, under the Family Law Act 1996, of mediation as a means of resolving private law family disputes in a way that promotes as good a continuing relationship between the parties concerned as is possible in the circumstances. The Government

believes that mediation is more constructive than adversarial court proceedings, and that litigation in these cases usually serves only to reinforce already entrenched positions and further damage the relationship between the parties. In addition, the cost of court proceedings is higher than that of mediation, and additional costs have to borne by the property of the family, reducing the amount available to the parties and their children in future.

85. **Section 8(9)** empowers the Lord Chancellor to give orders to the Commission about the contents and operation of the code. Section 25(9) makes such orders subject to Parliamentary approval under the affirmative resolution procedure.
86. **Section 9: Procedure relating to funding code.** This section provides for the Lord Chancellor and Parliament to approve the funding code before it takes effect. The original code and any revisions to it must be approved by the Lord Chancellor and laid before Parliament. The original code and any revisions which affect the criteria for funding cases (as opposed to those parts of the code dealing with procedures and guidance) must also be approved by an affirmative resolution in both Houses of Parliament.
87. **Section 9(7) & (8)** provides for an exceptional procedure so that urgent changes can take effect without delay. The Lord Chancellor can certify a change as urgent. That change then would take effect immediately, but fall after 120 days if not confirmed by affirmative resolution.
88. **Section 10: Terms of provision of funded services.** This section enables the Lord Chancellor to set financial conditions to apply to people receiving services funded by the CLS fund. Subject to two additions, the effect of section 10 is generally to replicate the provisions of the 1988 Act.
89. As now, it will be possible to make regulations requiring people to contribute towards the cost of the services they receive by way of flat rate fees, contributions related to disposable income and capital, and from any property recovered or preserved as a result of the help given. In general, the intention is to replicate the existing regulations. But the Government also intends to consult about a number of possible changes to the financial conditions. These are described in Annex A to these Notes.
90. **Section 10** extends the potential scope of financial conditions in two ways (although there are no immediate plans to use either of these wider powers).
 - Section 10(2)(b) is the power to set contributions. Unlike the current Act, this power does not preclude contributions from income payable after the end of the case. This would make it possible to provide services in some categories of case in the form of a loan scheme, with contributions continuing until the full cost had been repaid. Section 10(4)(b) would allow for interest to be added to the outstanding cost that the former assisted person remained liable to repay.
 - Under section 10(2)(c), it will be possible to make the provision of services in some types of cases subject to the assisted person agreeing to repay an amount in excess of the cost of the services provided in the event that his or her case is successful. This might make it possible to fund certain types of case on a self-financing basis, with the additional payments from successful litigants applied to meet the cost of unsuccessful cases. It would also be possible to provide public funding to supplement a private conditional fee arrangement. This might be appropriate, for example, where a case could not be taken under a wholly private arrangement, because the solicitors' firm was not large enough to bear the risk of the very high costs likely to be involved.
91. **Section 10(6)(b)** provides for regulations about determining the cost of services for the purpose of applying regulations about contributions and the charge on property recovered or preserved. This is necessary to allow for the possibility of block contracts which do not define the costs of individual cases, or which are based on an average

price for a set number of cases. Some cases require less work, and some more; and such contracts would remunerate the service provider on a ‘swings and roundabouts’ basis. However, it would often be inequitable to make every assisted person liable to contribute or repay the same amount (i.e. the average price under a contract covering many cases).

92. **Section 11: Costs in funded cases.** This section contains provisions about determining the award of legal costs between the parties in cases involving persons supported by the Community Legal Service fund. In effect, it section brings together provisions which are presently contained in sections 12, 13, 17, 18 and 34(2)(b) of the Legal Aid Act 1988. Subject to the changes described in Annex A, it is intended to replicate the position that currently applies under the legal aid scheme.
93. **Section 11** limits the costs that can be awarded against a person receiving funded services to an amount that is reasonable given the financial resources of both parties and their conduct during the case.
94. This protection may be disapplied by regulations subject to the affirmative resolution procedure (by virtue of section 25(9)). This might be appropriate where funding was provided (under section 6(3)(e)) in the form of a grant or loan made directly to the assisted person, in order to allow them to purchase legal services themselves as a private litigant. It would also be necessary to use this power if public funding was used to supplement a conditional fee agreement (see paragraph 90 above). It would not be appropriate to prevent opponents in such cases, who would be liable for a success fee if they lost, from recovering their full costs if they won.
95. **Section 11** also provides that regulations may, among other things, specify the principles that are to be applied in determining the amount of any costs awarded for or against the party receiving funded services; limit the circumstances in which a costs order may be enforced against the person receiving funded services; and provide for circumstances in which the court can require the Commission to meet any costs incurred by the opponent of the party receiving funded services.
96. Regulations which limit the circumstances in which costs may be enforced against a person receiving funded services, or which define the liability of the Commission to meet the costs of the opponent of a person receiving funded services, are made subject to Parliamentary approval under the affirmative resolution procedure by section 25(9). Making these provisions subject to affirmative procedure regulations, rather than in primary legislation as at present, is intended to provide greater flexibility. This is necessary to allow for the greater range of ways in which services may be provided under the Act.

The Criminal Defence Service

97. **Section 12: The Criminal Defence Service.** This section requires the Legal Services Commission to establish, maintain and develop a Criminal Defence Service, for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require. The Criminal Defence Service will consist of the advice, assistance and representation provided under sections 13 and 14.
98. **Section 12(2)** defines “criminal proceedings”. These include criminal trials (subsection (2)(a)), appeals and sentencing hearings ((b)), extradition hearings ((c)), binding over proceedings ((d)), appeals on behalf of a convicted person who has died ((e)), and proceedings for contempt in the face of any court ((f)). Subsection (2)(g) allows the Lord Chancellor to add further categories by regulation. This power will be used, for example, to prescribe Parole Board reviews of discretionary life sentences.

99. **Section 12(3)-(5)** empowers the Commission to accredit providers of criminal defence services, and to charge for that service. This mirrors the provisions of section 4(7)-(9) for the Community Legal Service.
100. **Section 13: Advice and assistance.** This section requires the Legal Services Commission to provide such advice and assistance as it considers appropriate in the interests of justice for individuals who are arrested and held in custody, and in other circumstances to be prescribed by the Lord Chancellor in regulations.
101. Initially, it is intended that regulations will provide for advice and assistance in broadly the categories for which it is currently available to people subject to criminal investigations or proceedings. These categories include advice and assistance provided by duty solicitors at a magistrates' court, at a solicitor's office, to a "volunteer" at a police station or to someone being interviewed in connection with a serious service offence.
- A serious service offence* is an offence under any of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 which cannot be dealt with summarily or which appears to an interviewing service policeman to be serious.
102. **Section 13(2)** enables the Commission to comply with its duty to secure advice and assistance by making contracts with, or payments or grants to, providers (i.e. solicitors' firms, barristers or law centres); by employing people to provide advice and assistance; by establishing and maintaining separate bodies to provide it; and by making grants to individuals to allow them to purchase it directly. Subsection (4) enables the Commission to secure the provision of advice and assistance by different means in different areas in England and Wales and in relation to different descriptions of cases.
103. The aim of section 13 is to provide the Commission with a range of options for securing advice and assistance in criminal matters. Contracting with quality assured suppliers should produce better value for money and give greater control over expenditure and quality of service. The power to provide services through lawyers employed by Commission (or by separate bodies it establishes for the purpose) offers additional flexibility if, for example, there is limited coverage by private lawyers in rural areas. Using employed lawyers should also provide the Commission with better information about the real costs of providing these services.
104. **Section 14: Representation.** This section requires the Legal Services Commission to fund representation for individuals granted a right to representation in accordance with Schedule 3. It enables the Commission to comply with this duty in the same ways as section 13 does for advice and assistance. The power to make direct case-by-case payments to representatives (subsection (2)(b)) will allow the Commission to continue to pay non-contracted lawyers to provide representation during the transitional period while contracting develops; and possibly after that where this proves to be the best means of securing the necessary services.
105. **Section 14(3)(a)** requires the Lord Chancellor to make remuneration orders to set rates for such direct payments. Section 14(5) provides for reviews of, or appeals against, determinations of fees required for the purposes of a remuneration order.
106. **Section 14(1)** gives effect to **Schedule 3 (Criminal Defence Service: right to representation)** which deals with the grant of rights to representation. Paragraph 1 provides that a right may be granted to individuals involved in criminal proceedings as defined in section 12(2) (see paragraph 98 above). Paragraph 1(2) provides that a right may also be granted to private prosecutors to resist appeals to the Crown Court by people they had prosecuted in a magistrates' court. (This mirrors section 21(1) of the Legal Aid Act 1988).
107. **Paragraph 2** provides that a right may be granted by the court hearing the proceedings and by other courts prescribed in regulations. In most cases, a right will be granted by

a magistrates' court and will also cover the case if it goes on to the Crown Court. (This is currently the position under section 20(4) of the 1988 Act.)

108. **Paragraph 2(5)** provides for regulations about when a court must consider withdrawing a right to representation. The prescribed circumstances are likely to include where the charges are reduced so that imprisonment is no longer likely, and where the defendant has refused to co-operate with an inquiry into his or her means (see paragraph 119 below).
109. **Paragraph 5** provides that a right should be granted where the interests of justice require it, and sets out the factors to be considered in assessing the interests of justice. The factors mirror those in section 22(2) of the 1988 Act. Paragraph 5(3) allows the Lord Chancellor to make an order amending the criteria, and paragraph 4 provides for regulations about appeals. Section 25(9) makes both these powers subject to Parliamentary approval under the affirmative resolution procedure; the equivalent powers in the 1988 Act, sections 22(3) & 21(10) respectively, are subject to the negative procedure. Paragraph 5(4) allows for cases in which a right must always be granted. This power will be used to mirror section 21(3) of the current Act.
110. **Section 15: Selection of representative.** This section provides that defendants granted a right of representation can choose their representative, restricted only as provided in regulations under section 15(2). It is intended that regulations (under subsection (2)(d)) will, in due course, provide in particular that a defendant's choice of representatives is limited to those holding contracts with the Legal Services Commission. In time, the Commission will provide all, or nearly all, representation through contracted representatives.
111. It is also expected that contracts with solicitors' firms will cover both initial advice and assistance (at a police station or elsewhere) and any subsequent representation at court. Section 15(2)(b) provides that in prescribed circumstances a defendant may be deemed to have chosen as representative the person who had previously advised him or her. It is important to ensure continuity of representation wherever possible in order to minimise delay and avoid the extra cost of instructing a different representative. This power only applies where a suspect chose the duty solicitor or another firm to advise him or her. Suspects advised by a duty solicitor because their chosen adviser was not available at the time will be allowed to use their original choice as representative in court. Regulations under section 15(4) will provide that suspects who do not express any preference will be deemed to have chosen the duty solicitor. Regulations under subsection (2)(f) will prescribe that defendants may not subsequently change their representative without good reason.
112. In certain types of complex case - such as serious fraud trials - defendants' choice may be limited to representatives from panels of firms and advocates specialising in such cases. Membership of a panel will depend on meeting pre-determined criteria. In this way, the Commission will be able to ensure that defendants in these exceptional cases are represented by those with the necessary expertise, experience and resources to do so effectively.
113. **Section 15(5)** provides for regulations prescribing when the Commission may stop funding a defendant's chosen representative – in effect, requiring that defendant to make a fresh choice. This might be necessary, for example, in cases that turned out to be more complex than originally expected, making it appropriate to require the defendant to change to a panel member.
114. **Section 15(2)(a)** enables the Lord Chancellor to make regulations defining circumstances where a defendant will not have a right to choose a representative, but will instead have a representative assigned to them. This power might be used, for example, to assign an advocate to an otherwise unrepresented defendant charged with a serious sexual offence against a child. (Defendants charged with certain violent or sexual offences may not cross-examine child witnesses directly.)

115. Regulations under subsections (5) and (2)(a) will be subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)).
116. **Section 15(3)** secures that regulations under section 15(2) may not provide for defendants' choice of representative to be restricted to employees of the Commission or any bodies it establishes to employ salaried defenders. The intention is that in most cases there should be a choice between several contracted firms and possibly a salaried defender. In some circumstances, for example when a representative is assigned under subsection (2)(a), it may be that the only person available at the time is an employee of the Commission. Section 15(3) would not prevent that employee providing representation; but it would preclude regulations saying that the representative in such circumstances must always or whenever possible be an employee.
117. **Section 16: Code of conduct.** This section provides that salaried defenders employed by the Legal Services Commission, or by any bodies established by the Commission to provide criminal defence services, should be subject to a code of conduct. The code is to include duties to avoid discrimination; to protect the interests of the individuals for whom services are provided; to the court; to avoid conflicts of interest; of confidentiality; and to act in accordance with professional rules. Before preparing or revising the code, the Commission is required to consult. The code must be approved by a resolution of each House of Parliament, and published.
118. **Section 17: Terms of provision of funded services.** This section provides that suspects and defendants do not have to pay towards the cost of services provided as part of the Criminal Defence Service, except where the court orders them to pay some or all of the cost of their representation. Section 17(2) provides that magistrates' courts do not have the power to make such orders. This means that only defendants in the more expensive cases that go to the higher courts may be ordered to repay their defence costs, but such an order could include the cost of any representation before a magistrates' court.
119. **Section 17(3)** empowers the Lord Chancellor to make regulations about how this new power should be used. It will generally only apply to convicted defendants able to make a substantial repayment. Defendants may be required to provide information about their means to inform a decision, and it will be possible to freeze their assets while their means are being investigated (subsection (3)(d) and (e)).
120. **Section 18: Funding.** This section requires the Lord Chancellor to provide the necessary funding of criminal defence services secured by the Commission in accordance with sections 13 and 14. As a result, like legal aid but unlike the Community Legal Service fund (see paragraph 68 above), the Criminal Defence Service will be a demand-led scheme. The section also enables the Lord Chancellor to determine the timing and way in which this money should be paid to the Commission, and requires the Commission to seek to secure the best possible value for money in funding the Criminal Defence Service.

Supplementary

121. **Section 19: Foreign law.** This section limits the Community Legal Service and Criminal Defence Service to providing information, advice and other services only in relation to the law of England and Wales (except where foreign law is relevant to proceedings in England and Wales). The Lord Chancellor is given a power to order further exceptions where this is necessary to fulfil the United Kingdom's international obligations. This restriction is the same as that currently existing.
122. **Section 20: Restriction of disclosure of information.** This section provides for the protection of information given to the Commission, the court or any other person or body authorised to undertake functions conferred by the Act.
123. **Section 20** largely repeats the provisions presently found in section 38 of the Legal Aid Act 1988. But it allows information to be disclosed, subject to any regulations

to the contrary, for the purposes of the investigation or prosecution of *any* offence or suspected offence. At present, information can only be disclosed for the purpose of prosecuting offences under the 1988 Act itself. This prevents information which indicates that other offences may have been committed from being made available to the appropriate authority for investigation or prosecution. For example, information provided to allow the Commission to assess the means of a claimant might show or suggest that a fraud was being perpetrated in relation to the receipt of social security benefits. This could not be disclosed under the 1988 Act, but it could be disclosed under section 20. Section 20(3)(b) makes clear that information may be disclosed about the value of payments made by the Commission to particular firms or lawyers. This reflects current practice.

124. Disclosure of information in contravention of this section will be an offence punishable by a fine not exceeding level 4 on the scale (currently £2,500). This mirrors the provisions of section 38(4) of the 1988 Act. No prosecution may be brought without the written approval of the Director of Public Prosecutions.
125. **Section 21: Misrepresentation etc.** This section provides criminal penalties for people who give false information about their finances, or otherwise make false statements, in applying for publicly-funded help under the Act. The section largely replicates the equivalent provisions in section 39 of the Legal Aid Act 1988, but extends beyond the person receiving help to anyone who furnishes information. It sets out the proceedings and penalties where those seeking help fail to furnish information required of them under the Act, or make false statements or representations in doing so. It also enables the Legal Services Commission to take proceedings in the county courts for recovering any losses caused by these acts.
126. **Section 22: Position of service providers and other parties etc.** Section 22(1) & (4) provides that, unless regulations say otherwise, the fact that services are funded as part of Community Legal Service or Criminal Defence Service shall not affect lawyer-client privilege or the rights of any third party. This mirrors section 31(1) of the 1988 Act.
127. Section 22(2) makes clear that service providers under either scheme may not seek additional remuneration to that funded by the Legal services Commission from their clients. Section 22(3) makes clear that a person chosen to represent a defendant with a right to representation is entitled to be paid if the right is later withdrawn. These provisions mirror sections 31(3) and 31(4) of the 1988 Act respectively. Section 22(5) provides for regulations about court procedures in cases involving funding under the two schemes. This mirrors section 34(2)(b) of the current Act.
128. **Section 23: Guidance.** This section enables the Lord Chancellor to give guidance to the Commission about the discharge its functions. He is required to publish any guidance. However, the Lord Chancellor may not give guidance about the handling of individual cases. The Commission is required to consider any guidance given by the Lord Chancellor.
129. **Sections 24-26 and Schedule 4** make consequential amendments and provisions about orders, regulations and directions under Part I and its interpretation.
130. Section 25(2)-(4) provides for remuneration orders, under sections 6(4), 13(3) and 14(3), about the payments which the Legal Services Commission may make to providers. Before making a remuneration order affecting payments to lawyers, the Lord Chancellor is required to consult the General Council of the Bar and the Law Society. This mirrors provisions in the 1988 Act about regulations dealing with remuneration. Section 25(3) sets out factors which the Lord Chancellor is required to consider before making a remuneration order. These are the need to secure a sufficient number of competent providers; the costs to public funds; and the need to secure value for money. This differs in several respects from the current list of factors in section 34(9) of the 1988 Act.

131. **Section 25(9)** lists the orders and regulations under Part I of the Act which require Parliamentary approval under the affirmative resolution procedure (see paragraphs 58, 74, 85, 96, 109 & 115 above). All other orders and regulations under this part are subject to the negative resolution procedure – that is they take effect without debate unless there is a successful motion to annul them.

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.