

*These notes refer to the Criminal Defence Service (Advice and Assistance) Act 2001 (c.4) which received Royal Assent on 10 April 2001*

# **CRIMINAL DEFENCE SERVICE (ADVICE AND ASSISTANCE) ACT 2001**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Criminal Defence Service (Advice and Assistance) Act 2001, which received Royal Assent on the 10 April 2001. They have been prepared by the Lord Chancellor's Department in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment none is given.

### **SUMMARY**

3. The Act clarifies the extent of the Legal Service Commission's duty to fund advice and assistance as part of the Criminal Defence Service under section 13 of the Access to Justice Act 1999.
4. Under the criminal legal aid system it was possible for advice and assistance to include, in certain circumstances, limited representation at a court or other hearing. (This was known as Advice by way of Representation - ABWOR). It was always the intention that such limited representation would continue to be available in the same circumstances when the Criminal Defence Service sections of the Access to Justice Act 1999 came into force on 2 April 2001, and replaced the legal aid scheme.
5. There was some doubt that the interaction of sections 13 and 14 of the Access to Justice Act 1999 as originally enacted allowed for this limited form of representation. There was also a doubt about whether section 13 allowed the funding of advice and assistance for people who are, may be or have been involved in quasi-criminal proceedings.
6. The Act amends section 13, and has retrospective effect. This was necessary as section 13 of the Access to Justice Act 1999 came into force on 2<sup>nd</sup> April 2001, before the Act could receive Royal Assent. The effect is that from the date of Royal Assent of the Act, the Access to Justice Act 1999 has effect as if enacted as amended by the Act. Secondary legislation made under the powers in s13 (1) may have retrospective effect to 2<sup>nd</sup> April 2001.

### **BACKGROUND**

7. The Legal Services Commission was established by the Access to Justice Act 1999. That Act replaced the legal aid system with two new schemes (the Community Legal Service and the Criminal Defence Service) to secure the provision of publicly funded legal services for people who need them. The Legal Services Commission, (which has replaced the Legal Aid Board), runs the two schemes.

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8. In criminal cases, the Criminal Defence Service has replaced the legal aid scheme. Section 12 of the Access to Justice Act 1999 requires the Commission to establish, maintain and develop the Criminal Defence Service.
9. The purpose of the Criminal Defence Service as set out in section 12(1) is to secure that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require.
10. **Section 12(3)** imposes a duty on the Commission to fund services as part of the Criminal Defence Service in accordance with sections 13 to 15 of the Access to Justice Act 1999.
11. **Section 13** sets out the extent of the duty to fund *advice and assistance*. This is explained in more detail in paragraph 14.
12. **Section 14** requires the Commission to fund *representation* for an individual who has been granted a right to representation.
  - \* *Representation* is defined in section 26 of the Access to Justice Act 1999 as meaning representation for the purposes of proceedings and includes the assistance which is usually given by a representative in the steps preliminary or incidental to any proceedings, and subject to any time limits which may be prescribed, advice and assistance as to any appeal.
13. A right to representation must be granted in accordance with Schedule 3 to the Access to Justice Act 1999, which sets out how and at what stage it may be granted and the criteria (the interests of justice test) for the grant of the right.

#### ***The extent of the duty to fund advice and assistance as originally enacted***

14. **Section 13(1)** as originally enacted provided that the Commission must fund such *advice and assistance* as it considers appropriate for individuals who are arrested and held in custody at a police station or other premises and for individuals involved in criminal investigations in such other circumstances as may be prescribed.
  - *criminal investigations* is defined for the purpose of section 13 as meaning investigations relating to offences or to individuals convicted of an offence.
15. The intention was that this *advice and assistance* would include some limited representation in the form of advocacy. It was intended that advocacy assistance would be available in broadly the same situations as those in which was available under the Legal Aid Act 1988 as part of the ABWOR scheme.

Part III of the Legal Aid Act 1988 and regulations made under it set out the scope of the ABWOR scheme.
16. Advocacy assistance provided under the legal aid ABWOR scheme included-
  - the duty solicitor scheme at magistrates' courts;
  - assistance to a prisoner who has been permitted to be legally represented in disciplinary proceedings;
  - assistance to a detained person whose case is referred to the Parole Board.

#### ***The duty solicitor scheme***

17. A duty solicitor under the old legal aid scheme (under arrangements made by the local duty solicitor committee) would attend a magistrates' court to give advice and assistance to accused individuals, including assistance by way of representation, such as-
  - making a bail application;

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- representing a defendant in court proceedings who entered a guilty plea and wished the case to be concluded on that day;
  - representing an accused person who was at court and at risk of being imprisoned for failure to pay a fine or obey a court order.
18. It was arguable that section 13 as originally enacted did not allow the Commission to fund limited representation in the form of advocacy in the types of situation listed in paragraph 16. The concern was that a person involved in a hearing before a court or other body might not be involved in a criminal investigation while the hearing takes place (even though he has been and may later again become so involved). The fact that “assistance” was not defined in the Access to Justice Act 1999 to include advocacy arguably compounded the uncertainty, particularly as it was so defined in the legal aid provisions.
19. Further, *representation*, granted in accordance with section 14 of and Schedule 3 to the Access to Justice Act 1999, would not have been (without the amendment made by the Act) available to individuals in the types of situations currently covered by the ABWOR scheme. Representation would not have been available where an individual needed it urgently - for example where an individual is charged with an offence, he or she will often appear in court within 48 hours. Such an individual may not have time to apply for (and there may not be time for the court to consider) the grant of representation under section 14. It is also recognised that an individual may not be entitled to representation under section 14 because he fails to satisfy the interests of justice criteria, but that it is still appropriate that he receives some limited assistance in prescribed circumstances.
20. The Act amends section 13 to put beyond doubt that limited advocacy assistance can be funded.

***Widening the classes of individual in respect of whom the Commission may fund advice and assistance***

21. The amendment of section 13(1) by the Act also widens the Commission’s power to fund advice and assistance for other individuals who may otherwise have been outside the scope of section 13(1).
22. As originally enacted, section 13(1) provided the Commission with power to fund individuals who are held in custody, and individuals who are not held in custody but who are currently involved in criminal investigations.
23. The duty to fund advice and assistance as originally enacted appeared narrower than the duty under section 12 to secure that individuals involved in *criminal investigations* or *criminal proceedings* have access to such advice, assistance and representation as the interests of justice require.
24. On a literal reading section 13(1) as originally enacted was more restrictive because it focused only on *criminal investigations* and not on *criminal proceedings* as set out in section 12(2) – including those proceedings which the Lord Chancellor may prescribe by regulations under section 12 (2) (g). The Act allows certain quasi-criminal proceedings (for example, proceedings for anti-social behaviour orders) will be prescribed under section 12(2) (g). It was always intended that *advice and assistance* would be capable of funding individuals who are, may be or have been involved in such proceedings.
25. The second effect of the Act is therefore to amend section 13(1) to widen the power to fund individuals who may not have been within the scope of the section as originally enacted.

## COMMENTARY

### *Section 1: extent of duty to fund advice and assistance*

26. **Subsection (1)** provides that section 13(1) of the Access to Justice Act 1999 has effect as if it had been enacted as amended by the Act. It seeks to remedy the apparent deficiencies in section 13, by amending it -
- to make it clear that the assistance that the Commission may consider it appropriate to fund under section 13 does include advocacy;
  - to add to the classes of individual in respect of whom the Commission may, in prescribed circumstances, fund advice and assistance.
27. *Advocacy* is used in the amendment to section 13(1) to avoid possible confusion with *representation* as defined in section 26 of the Access to Justice Act 1999. It was not considered necessary to define *advocacy*.
28. **Subsection (2)** makes clear that regulations made under the amended section 13(1) may also have retrospective effect.

## COMMENCEMENT

29. The Act came into force on the day it received Royal Assent.

## HANSARD REFERENCES

Stage	Date	Hansard Reference
<b>House of Lords</b>		
Introduction and publication	7 DECEMBER 2000	Col 31
Second Reading	21 DECEMBER 2000	Cols 845 - 850
Committee	22 JANUARY 2001	Cols 12 - 14
Report	5 FEBRUARY 2001	Cols 939 - 941
Third Reading	12 FEBRUARY 2001	Col 11
<b>House of Commons</b>		
Introduction	12 FEBRUARY 2001	
Programme Motion & Second Reading	26 FEBRUARY 2001	Cols 656 - 667
Committee	6 MARCH 2001	STANDING COMMITTEE A
Remaining Stages	2 APRIL 2001	Cols 50 - 62
<b>Royal Assent</b>		
House of Lords	10 APRIL 2001	Col 1057
House of Commons		Col 848