

# LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 2: Litigation funding and costs**

##### **Payments for legal services in civil cases**

##### ***Section 49: Divorce etc proceedings: orders for payment in respect of legal services***

303. Part II of the Matrimonial Causes Act 1973 (“the the 1973 Act”) makes provision (mirrored for civil partnerships by Schedule 5 to the Civil Partnership Act 2004 (“the 2004 Act”)) for the court’s powers to make orders “for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation”. The orders include orders that one party to the marriage makes periodical payments to the other or for a child of the family; or that one party pays a lump sum to the other or for a child of the family. It is not possible to make an *interim* order for a lump sum, or periodical payments, by one party to the marriage to the other. Section 22, however, makes provision for *maintenance pending suit*, where the court may at any time in the proceedings make an order for one party to make to the other “such periodical payments for his or her maintenance ... as the court thinks reasonable”, and case law has developed in which the court has included an element to enable that other party to fund that party’s costs of pursuing the proceedings where he or she has insufficient immediately available resources to do so.<sup>1</sup>
304. **Section 49** amends the the 1973 Act to confer a more general power, not limited to maintenance pending suit, for a court in divorce, nullity of marriage or judicial separation proceedings to order payment by one party to the other for the purpose of securing legal services.
305. **Subsection (1)** amends section 22 of the the 1973 Act to provide that the court cannot use its existing powers to use maintenance pending suit to cover payment for legal services, so that such payment will be covered by the new power alone.
306. **Subsection (2)** inserts into the the 1973 Act a new section 22ZA, which sets out the court’s power and the conditions for its exercise as well as the terms on which any order may be made. Subsections (1) and (2) of the new section make provision about the scope of the power and its purpose: the power may be exercised in proceedings for divorce, nullity of marriage or judicial separation (including ancillary relief proceedings), and is a power to make an order requiring one party to pay to the other (referred to as the applicant) an amount to enable the other to obtain legal services for the purposes of the proceedings.

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<sup>1</sup> The leading case, which gives the history of the development of the case law in this respect and restates the principles governing the making of such orders, is the Court of Appeal case of *Currey v Currey* [2006] EWCA Civ 1338

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) which received Royal Assent on 1 May 2012*

307. Subsection (3) of the new section contains the test for making an order, which requires the court to be satisfied that without this money the applicant would not otherwise reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of them. This, by virtue of subsection (4) of the new section, includes being satisfied that the applicant could not obtain a loan or secure legal services with the promise of payment on conclusion of the proceedings and division of the assets.
308. Subsection (5) of the new section provides for flexibility in making an order. The court does not have to assess the likely need for legal services for the entire proceedings and make an order for a payment to cover that (although that is possible), but may order payment to cover specified services, services in a specified period or for a specified part of the proceedings, or a combination (“specified” being explained in subsection (11) of the new section as meaning specified by the court). Coupled with the ability to make more than one order, this enables the court, for example, to make an order for payment for services limited to addressing a specific issue or issues in the proceedings at an initial stage and to review the position at the conclusion of that stage.
309. Subsections (6) to (8) of the new section provide for additional flexibility, enabling the court to order payment to be made in instalments or for it (or any part of it) to be deferred, and to vary an order if there has been a material change of circumstances. Subsection (9) of the new section provides for the paying party to have credit for a payment made pursuant to an order under the section in that the amount paid will be set off, in the event of an order for costs as between the parties, against any costs which the applicant might be able to recover.
310. Subsection (10) of the new section defines “legal services” in a broad and flexible way which will cover disbursements as well as pure legal advice, so that, for example, if the court were satisfied that an initial report was necessary, it could order payment of an appropriate amount to cover the cost of that report as part of the legal services.