

*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)

Summary

20. The Act reforms the legal aid system in England and Wales, and amends the law relating to conditional fee agreements between lawyers and their clients, and the award of costs between the parties to litigation. It also makes minor amendments to the legal aid scheme in Scotland.
21. The Government's intention is to increase access to justice, by:
 - reforming the legal aid scheme, which provides public funding for legal services, in order to ensure that resources can be allocated in a way that reflects priorities and to secure better value for money;
 - co-ordinating central Government funding with funding from other sources, in particular local authority grants to advice centres, to ensure that the available resources are used to the best effect overall; and
 - extending the scope and improving the operation of conditional fees, in order to allow more people to fund litigation privately.
22. The Act replaces the existing legal aid system with two separate schemes for funding services in civil and criminal matters. These will be known as the Community Legal Service and the Criminal Defence Service respectively. Both schemes will be run by a new body, the Legal Services Commission, which will replace the Legal Aid Board. Both will secure legal services for people who need them largely through contracts with quality assured providers. But the Commission will also be able to make grants and loans, and employ staff to provide services directly.

Community Legal Service

23. The Legal Services Commission will have two main duties in respect of the Community Legal Service (CLS).
 - It will manage a Community Legal Service fund, which will replace legal aid in civil and family cases. The CLS fund will be used to secure the provision of appropriate legal services, within the resources made available to it and according to priorities. A Funding Code, drawn up by the Commission and approved by the Lord Chancellor, will set out the criteria for deciding whether to fund individual cases.

The Legal Aid Board published a draft Funding Code for consultation in January 1999. The closing date for comments was 30 April 1999. Copies of the draft Code can be obtained from the Legal Aid Board, 85 Gray's Inn Road, London, WC1X 8AA.

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- The Commission will also take the lead in developing the wider Community Legal Service. It will co-operate with local funders and others to develop local, regional and national plans to match the delivery of legal services to identified needs and priorities.

The Lord Chancellor's Department published a consultation paper about the Community Legal Service in May 1999. Copies can be obtained by phoning 0171 210 0733/1325. The closing date for comments is 30 July 1999.

24. The development of the CLS depends on the formation of Community Legal Service Partnerships (CLSPs) in each local authority area. These do not require specific provisions in the Act. Each CLSP will provide a forum for the local authority, the Legal Services Commission, and others, jointly to plan and co-ordinate funding of local advice and other legal services, ensuring that delivery of these services better matches local needs.
25. Overall, the creation of the Community Legal Service is intended to:
 - make best use of all the resources available for funding legal services, by facilitating a co-ordinated approach to planning;
 - improve value for money through contracting and the development of quality assurance systems;
 - establish a flexible system for allocating central Government funding in a transparent way within a controlled budget, so as to provide legal services where they are judged to be most needed; and
 - ensure that the scheme is capable of adapting to meet changing priorities and opportunities.

Criminal Defence Service

26. The purpose of the Criminal Defence Service (CDS) is to secure the provision of advice, assistance and representation, according to the interests of justice, to people suspected of a criminal offence or facing criminal proceedings.
27. The Legal Services Commission will be empowered to secure these services through contracts with lawyers in private practice, or by providing them through salaried defenders (employed directly by the Commission or by non-profit-making organisations established for the purpose). This will necessarily mean that suspects' and defendants' choice of representative is limited to contracted or salaried defenders, although the intention is to offer a choice in all but exceptional cases (see paragraph 114 below). All contractors will be expected to meet quality-assurance standards; and contracts will, wherever possible, cover the full range of services from arrest until the case is completed. (The current arrangements for criminal legal aid are fragmented: a person can receive assistance in respect of the same alleged offence under several separate schemes, each resulting in a separate payment for the lawyers involved.)
28. There will be a transitional period while contracts are developed and extended to cover the full range of services. The Commission will therefore be able to pay lawyers on a case by case basis for representation provided on a non-contractual basis, according to remuneration scales set by order (that is broadly on the same basis as the current criminal legal aid scheme).
29. The Commission will gradually take over the functions currently undertaken by the higher courts in respect of criminal legal aid. At first, Court Service staff will continue to determine costs in most Crown Court cases; but the number of cases dealt with like this will diminish as the Commission increases the proportion of cases covered by contracts. Court staff will also continue to determine costs in cases before the Court of Appeal

(Criminal Division) and the House of Lords; the scope for the Commission to contract for these cases as well will be considered in due course.

30. As now, the courts will grant representation under the scheme to defendants according to the interests of justice. But the courts will no longer have to conduct a means test as well before granting representation. Instead, at the end of a case before any court other than a magistrates' court, the judge will have power to order a defendant to pay some or all of the cost of his or her defence. The Commission may investigate the defendant's means in order to assist the judge. The intention is to abolish the system of means testing every defendant, which the Government considers an ineffective and wasteful aspect of the current scheme, while ensuring that in the more expensive cases defendants continue to pay towards the cost of their defence when they can afford to do so.
31. Under the current criminal legal aid scheme, most defendants (about 95%) are not required to make a contribution to their defence costs. Those who do contribute and are acquitted usually have their contributions returned. The cost of means testing and enforcing contribution orders is high in relation to the contributions recovered. In 1997/98, criminal legal aid contributions totalled £6.2 million, while the direct cost of administering the system was about £5 million. Means testing also leads to delays in cases being brought to court, because cases have to be adjourned when the evidence required to conduct the test is not produced.

Conditional fees etc.

32. The Act reforms the law relating to conditional fees and "after the event" legal expenses insurance (see paragraphs 46 & 48 below). It will enable the court to order a losing party to pay any uplift on the successful party's lawyers' normal fees and any premium paid by the successful party for insurance against being ordered to pay the other side's costs. The intention is to:
 - ensure that the compensation awarded to a successful party is not eroded by any uplift or premium - the party in the wrong will bear the full burden of costs;
 - make conditional fees more attractive, in particular to defendants and to plaintiffs seeking non-monetary redress - these litigants can rarely use conditional fees now, because they cannot rely on the prospect of recovering damages to meet the cost of the uplift and premium;
 - discourage weak cases and encourage settlements; and
 - provide a mechanism for regulating the uplifts that solicitors charge - in future, unsuccessful litigants will be able to challenge unreasonably high uplifts when the court comes to assess costs.