

*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)

Background

Legal Aid

33. The present scheme is contained in the Legal Aid Act 1988.
34. A common feature of existing civil and criminal legal aid schemes is that expenditure on them is demand-led. Any lawyer can do legal aid work for a client who passes the relevant means test (if any), and whose case passes the statutory merits test (in the case of civil legal aid), or the interests of justice test (in the case of criminal legal aid). Lawyers are paid on a case-by-case basis, usually at rates or fees set in regulations, but in some cases on the same basis as a privately-funded lawyer.
35. This means that there are few mechanisms or incentives for promoting value for money or assuring the quality of the services provided; and that neither the Government nor the Legal Aid Board is able to exert adequate control over expenditure or determine the priorities for that expenditure.
36. Over the last 6 years, total *net* expenditure on legal aid has increased by £529 million, from £1,093 million in 1992/93 to £1,622 million in 1998/99, a rise of 48%. This compares with general inflation of 16% over the same 6 years. Meanwhile, the total number of people helped by legal aid increased by 7% to 3.5 million. Over the same period, spending on civil and family legal aid rose from £463 million to £659 million, an increase of 42%, while the number of people helped fell by almost 30%. The average *gross* cost of civil or family cases rose by 86%, from £1,739 in 1992/93 to £3,239 in 1998/99. Spending on criminal legal aid rose by 50% from £418 million to £625 million, while the numbers helped increased by 11%. The average cost of a criminal case went up by 8% in the magistrates' courts and 53% in the Crown Court.

Quality assurance and contract pilots

37. Since August 1994, the Legal Aid Board has operated a voluntary quality assurance scheme, known as franchising. Currently, some 2,900 solicitors' firms have franchises in one or more of the 10 subject categories in which they are awarded (criminal, family, personal injury, housing etc.) Over 3,100 further applications for franchises are pending. The Board is continuing to develop the franchising scheme, and introduce new categories, in order to underpin the move to a generally contracted scheme under the reforms in this Act.
38. In 1994, the Board set up a pilot scheme that showed that non-profit-making advice agencies could provide legally-aided advice and assistance to the same standard as solicitors' firms. In October 1996, a second stage of the pilot was established,

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involving a larger number of agencies, to develop systems for contracting for advice and assistance work.

39. In November 1996, the Board began to pilot contracts with solicitors' firms to provide advice and assistance in civil matters. A pilot of contracts to provide mediation in family cases under the legal aid scheme commenced in May 1997. A pilot covering advice and assistance in criminal cases began in June 1998, and was extended in February 1999 to cover representation in youth courts.
40. Since October 1997, the Board has set up a Regional Legal Services Committee in each of its 13 Areas to advise it about priorities for contracting.
41. The Government has announced that all civil advice and assistance, and all family work, will be provided exclusively under contract from January 2000. Only organisations with a relevant franchise will be eligible to bid for these contracts. Also, a new clinical negligence franchise came into effect in February 1999; and from July 1999 only firms with that franchise will be able to take these cases under the legal aid scheme.
42. Four documents published by the Legal Aid Board explain aspects of the approach to contracting:
 - *Legal Aid Quality Assurance Franchise Standard. Third Edition. Draft for Consultation*, Legal Aid Board, September 1998.
 - *Reforming the Civil Advice and Assistance Scheme. Exclusive Contracting - The Way Forward. Report Following Consultation*, Legal Aid Board, October 1998.
 - *Exclusive Contracting of legal advice and assistance for civil matters and certificated legal aid for family/matrimonial matters. Contract documentation*, Legal Aid Board, April 1999.
 - *Access to Quality Services in the Immigration category. Exclusive contracting. Recommendations to the Lord Chancellor*, Legal Aid Board, May 1999.

Advice sector

43. There are over 1,500 non-profit-making advice agencies in England and Wales. They receive their funding from many different sources, mainly local authorities, but also the National Lottery Charities Board, central Government, the Legal Aid Board, charities and business.
44. The provision of advice services is not spread consistently across the country. Some areas appear to have relatively high levels of both legal practitioners and voluntary outlets, while others have little or none. For example, the Legal Aid Board's South East Area has one Citizens Advice Bureau per 46,000 people, but in the East Midlands 138,000 people share a Citizens Advice Bureau. The Government believes that the fragmented nature of the advice sector obstructs effective planning, and prevents local needs for legal advice and help from being met as rationally and fully as possible.

Conditional fees

45. Section 58 of the Courts and Legal Services Act 1990 allowed the use of conditional fee agreements in such types of case as the Lord Chancellor specified by order (and subject to any requirements made by him in regulations). Section 58(10) excludes from the potential scope of conditional fees all criminal and family proceedings.
46. Conditional fee agreements allow clients to agree with their lawyers that the lawyer will not receive all or part of his or her usual fees or expenses if the case is lost; but that, if it is won, the client will pay an uplift to the solicitor in addition to the usual fee. In July 1995, conditional fee agreements were allowed for a limited range of cases (personal injury, insolvency and cases before the European Commission of Human Rights). The maximum uplift that could be charged if the lawyer was successful was

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set at 100% of the normal fee. In addition the Law Society recommended that lawyers should voluntarily limit the uplift to a maximum of 25% of the damages if that was lower than the 100% uplift of the fee. At the same time, insurance policies were developed which allowed the client to take out insurance to cover the costs of the other party, and the client's own costs other than the solicitor's fees, if the case should be lost. Generally the uplift and the premium are taken from any damages recovered by the client. In July 1998, the Government extended the availability of conditional fees to all civil cases (excluding family cases).

47. Since the introduction of conditional fees, the common law has been developed by two recent decisions of the courts (*Thai Trading Co. (A Firm) v Taylor*, [1998] 3 All ER 65 CA; and *Bevan Ashford v Geoff Yeandle (Contractors) Ltd*, [1998] 3 All ER 238 ChD). In the first of these cases the Court of Appeal held that there were no longer public policy grounds to prevent lawyers agreeing to work for less than their normal fees in the event that they were unsuccessful, provided they did not seek to recover more than their normal fees if they were successful. (The latter was only permissible in those proceedings in which conditional fee agreements were allowed). In *Bevan Ashford*, the Vice Chancellor held that it was also lawful for a conditional fee agreement to apply in a case which was to be resolved by arbitration (under the Arbitration Act 1950), even though these were not court proceedings, provided all the requirements specified by regulations as to the form and content of conditional fee agreements were complied with.
48. In addition, it is now possible for someone contemplating litigation to take out an insurance policy to cover, in the event that the case is lost, both the costs of the other party and his or her own legal costs (including the solicitor's fees if these are not subject to a conditional fee agreement). Some of these policies were developed to support the use of conditional fee agreements but others are used to meet lawyers' fees charged in the traditional way. The Act makes premiums paid for protective insurance recoverable in costs.
49. The principles behind the Government's desire to see an expansion in the use of conditional fee arrangements were set out in a consultation paper, *Access to Justice with Conditional Fees*, Lord Chancellor's Department, March 1998.