

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 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.

- 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.

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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 be 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

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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.