

# ACCESS TO JUSTICE ACT 1999

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## EXPLANATORY NOTES

A.

### FUNDING OF LEGAL SERVICES (PARTS I & II, SECTIONS 1-34)

#### *Commentary*

#### **Part I: The Legal Services Commission**

##### **The Criminal Defence Service**

97. **Section 12: The Criminal Defence Service.** This section requires the Legal Services Commission to establish, maintain and develop a Criminal Defence Service, for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require. The Criminal Defence Service will consist of the advice, assistance and representation provided under sections 13 and 14.
98. **Section 12(2)** defines “criminal proceedings”. These include criminal trials (subsection (2)(a)), appeals and sentencing hearings ((b)), extradition hearings ((c)), binding over proceedings ((d)), appeals on behalf of a convicted person who has died ((e)), and proceedings for contempt in the face of any court ((f)). Subsection (2)(g) allows the Lord Chancellor to add further categories by regulation. This power will be used, for example, to prescribe Parole Board reviews of discretionary life sentences.
99. **Section 12(3)-(5)** empowers the Commission to accredit providers of criminal defence services, and to charge for that service. This mirrors the provisions of section 4(7)-(9) for the Community Legal Service.
100. **Section 13: Advice and assistance.** This section requires the Legal Services Commission to provide such advice and assistance as it considers appropriate in the interests of justice for individuals who are arrested and held in custody, and in other circumstances to be prescribed by the Lord Chancellor in regulations.
101. Initially, it is intended that regulations will provide for advice and assistance in broadly the categories for which it is currently available to people subject to criminal investigations or proceedings. These categories include advice and assistance provided by duty solicitors at a magistrates’ court, at a solicitor’s office, to a “volunteer” at a police station or to someone being interviewed in connection with a serious service offence.
- A serious service offence* is an offence under any of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 which cannot be dealt with summarily or which appears to an interviewing service policeman to be serious.
102. **Section 13(2)** enables the Commission to comply with its duty to secure advice and assistance by making contracts with, or payments or grants to, providers (i.e. solicitors’ firms, barristers or law centres); by employing people to provide advice and assistance;

by establishing and maintaining separate bodies to provide it; and by making grants to individuals to allow them to purchase it directly. Subsection (4) enables the Commission to secure the provision of advice and assistance by different means in different areas in England and Wales and in relation to different descriptions of cases.

103. The aim of section 13 is to provide the Commission with a range of options for securing advice and assistance in criminal matters. Contracting with quality assured suppliers should produce better value for money and give greater control over expenditure and quality of service. The power to provide services through lawyers employed by Commission (or by separate bodies it establishes for the purpose) offers additional flexibility if, for example, there is limited coverage by private lawyers in rural areas. Using employed lawyers should also provide the Commission with better information about the real costs of providing these services.
104. **Section 14: Representation.** This section requires the Legal Services Commission to fund representation for individuals granted a right to representation in accordance with Schedule 3. It enables the Commission to comply with this duty in the same ways as section 13 does for advice and assistance. The power to make direct case-by-case payments to representatives (subsection (2)(b)) will allow the Commission to continue to pay non-contracted lawyers to provide representation during the transitional period while contracting develops; and possibly after that where this proves to be the best means of securing the necessary services.
105. **Section 14(3)(a)** requires the Lord Chancellor to make remuneration orders to set rates for such direct payments. Section 14(5) provides for reviews of, or appeals against, determinations of fees required for the purposes of a remuneration order.
106. **Section 14(1)** gives effect to **Schedule 3 (Criminal Defence Service: right to representation)** which deals with the grant of rights to representation. Paragraph 1 provides that a right may be granted to individuals involved in criminal proceedings as defined in section 12(2) (see paragraph 98 above). Paragraph 1(2) provides that a right may also be granted to private prosecutors to resist appeals to the Crown Court by people they had prosecuted in a magistrates' court. (This mirrors section 21(1) of the Legal Aid Act 1988).
107. **Paragraph 2** provides that a right may be granted by the court hearing the proceedings and by other courts prescribed in regulations. In most cases, a right will be granted by a magistrates' court and will also cover the case if it goes on to the Crown Court. (This is currently the position under section 20(4) of the 1988 Act.)
108. **Paragraph 2(5)** provides for regulations about when a court must consider withdrawing a right to representation. The prescribed circumstances are likely to include where the charges are reduced so that imprisonment is no longer likely, and where the defendant has refused to co-operate with an inquiry into his or her means (see paragraph 119 below).
109. **Paragraph 5** provides that a right should be granted where the interests of justice require it, and sets out the factors to be considered in assessing the interests of justice. The factors mirror those in section 22(2) of the 1988 Act. Paragraph 5(3) allows the Lord Chancellor to make an order amending the criteria, and paragraph 4 provides for regulations about appeals. Section 25(9) makes both these powers subject to Parliamentary approval under the affirmative resolution procedure; the equivalent powers in the 1988 Act, sections 22(3) & 21(10) respectively, are subject to the negative procedure. Paragraph 5(4) allows for cases in which a right must always be granted. This power will be used to mirror section 21(3) of the current Act.
110. **Section 15: Selection of representative.** This section provides that defendants granted a right of representation can choose their representative, restricted only as provided in regulations under section 15(2). It is intended that regulations (under subsection (2)(d)) will, in due course, provide in particular that a defendant's choice of representatives

is limited to those holding contracts with the Legal Services Commission. In time, the Commission will provide all, or nearly all, representation through contracted representatives.

111. It is also expected that contracts with solicitors' firms will cover both initial advice and assistance (at a police station or elsewhere) and any subsequent representation at court. Section 15(2)(b) provides that in prescribed circumstances a defendant may be deemed to have chosen as representative the person who had previously advised him or her. It is important to ensure continuity of representation wherever possible in order to minimise delay and avoid the extra cost of instructing a different representative. This power only applies where a suspect chose the duty solicitor or another firm to advise him or her. Suspects advised by a duty solicitor because their chosen adviser was not available at the time will be allowed to use their original choice as representative in court. Regulations under section 15(4) will provide that suspects who do not express any preference will be deemed to have chosen the duty solicitor. Regulations under subsection (2)(f) will prescribe that defendants may not subsequently change their representative without good reason.
112. In certain types of complex case - such as serious fraud trials - defendants' choice may be limited to representatives from panels of firms and advocates specialising in such cases. Membership of a panel will depend on meeting pre-determined criteria. In this way, the Commission will be able to ensure that defendants in these exceptional cases are represented by those with the necessary expertise, experience and resources to do so effectively.
113. [Section 15\(5\)](#) provides for regulations prescribing when the Commission may stop funding a defendant's chosen representative – in effect, requiring that defendant to make a fresh choice. This might be necessary, for example, in cases that turned out to be more complex than originally expected, making it appropriate to require the defendant to change to a panel member.
114. [Section 15\(2\)\(a\)](#) enables the Lord Chancellor to make regulations defining circumstances where a defendant will not have a right to choose a representative, but will instead have a representative assigned to them. This power might be used, for example, to assign an advocate to an otherwise unrepresented defendant charged with a serious sexual offence against a child. (Defendants charged with certain violent or sexual offences may not cross-examine child witnesses directly.)
115. Regulations under subsections (5) and (2)(a) will be subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)).
116. [Section 15\(3\)](#) secures that regulations under section 15(2) may not provide for defendants' choice of representative to be restricted to employees of the Commission or any bodies it establishes to employ salaried defenders. The intention is that in most cases there should be a choice between several contracted firms and possibly a salaried defender. In some circumstances, for example when a representative is assigned under subsection (2)(a), it may be that the only person available at the time is an employee of the Commission. Section 15(3) would not prevent that employee providing representation; but it would preclude regulations saying that the representative in such circumstances must always or whenever possible be an employee.
117. **Section 16: Code of conduct.** This section provides that salaried defenders employed by the Legal Services Commission, or by any bodies established by the Commission to provide criminal defence services, should be subject to a code of conduct. The code is to include duties to avoid discrimination; to protect the interests of the individuals for whom services are provided; to the court; to avoid conflicts of interest; of confidentiality; and to act in accordance with professional rules. Before preparing or revising the code, the Commission is required to consult. The code must be approved by a resolution of each House of Parliament, and published.

118. **Section 17: Terms of provision of funded services.** This section provides that suspects and defendants do not have to pay towards the cost of services provided as part of the Criminal Defence Service, except where the court orders them to pay some or all of the cost of their representation. Section 17(2) provides that magistrates' courts do not have the power to make such orders. This means that only defendants in the more expensive cases that go to the higher courts may be ordered to repay their defence costs, but such an order could include the cost of any representation before a magistrates' court.
119. **Section 17(3)** empowers the Lord Chancellor to make regulations about how this new power should be used. It will generally only apply to convicted defendants able to make a substantial repayment. Defendants may be required to provide information about their means to inform a decision, and it will be possible to freeze their assets while their means are being investigated (subsection (3)(d) and (e)).
120. **Section 18: Funding.** This section requires the Lord Chancellor to provide the necessary funding of criminal defence services secured by the Commission in accordance with sections 13 and 14. As a result, like legal aid but unlike the Community Legal Service fund (see paragraph 68 above), the Criminal Defence Service will be a demand-led scheme. The section also enables the Lord Chancellor to determine the timing and way in which this money should be paid to the Commission, and requires the Commission to seek to secure the best possible value for money in funding the Criminal Defence Service.