

# LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### Part 1: Legal Aid

##### Provision of legal aid

##### *Section 1: Lord Chancellor's functions*

61. **Section 1** gives the Lord Chancellor overall responsibility for legal aid.
62. *Subsection (1)* provides that the Lord Chancellor must secure that legal aid is made available in accordance with Part 1 of the Act. "Legal aid" is defined in *subsection (2)* as civil legal services and advice, assistance and representation for criminal investigations and proceedings that are required to be made available under sections 9, 10, 13, 15 or 16 or paragraphs 3 to 5 of Schedule 3.
63. *Subsections (3) and (4)* ensure that the Lord Chancellor has the power to arrange for the provision of general information about the law and legal system, including information about where people may obtain advice and assistance about the law and legal system, and to perform functions that support the Lord Chancellor's functions in relation to legal aid. For example, the Lord Chancellor may make arrangements for a legal advice helpline which, as well as assisting people who qualify for legal aid, would also be able to assist callers who do not qualify for legal aid by referring them to providers of appropriate services.

##### *Section 2: Arrangements*

64. **Section 2** makes provision about the arrangements the Lord Chancellor may enter into in order to fulfil the Lord Chancellor's duty in section 1 to secure the availability of legal aid and for the purposes of carrying out the Lord Chancellor's other functions under this Part.
65. As a Minister of the Crown, the Lord Chancellor has power, for example, to enter into contracts relating to the Lord Chancellor's functions. *Subsection (1)* ensures the Lord Chancellor may make any other arrangements appropriate for fulfilling the Lord Chancellor's functions in relation to legal aid and *subsection (2)* ensures that arrangements the Lord Chancellor may enter into include arrangements of the type referred to in *subsection (2)*, such as establishing a body to provide services.
66. *Subsection (3)* allows the Lord Chancellor to make regulations about remuneration for those providing legal aid services. Section 42(1) provides that remuneration includes disbursements. This would include, for example, power to set the level of fees for lawyers and experts who are providing such services. Where such fee levels are set in regulations, or in other arrangements (such as contracts) made by the Lord Chancellor in relation to legal aid, *subsection (4)* provides that if the Lord Chancellor makes

arrangements for a court, tribunal or other person to assess such remuneration, the court, tribunal or other person must apply the remuneration levels set by the Lord Chancellor.

67. *Subsection (5)* allows the Lord Chancellor to make different arrangements for the provision of legal aid in relation to different areas in England and Wales, different types of case and different classes of person. This provides flexibility including, where appropriate, to pilot arrangements.

### ***Section 3: Standards of service***

68. **Section 3** makes provision about setting and monitoring standards of legal aid services.
69. *Subsections (1) and (2)* enable the Lord Chancellor to set quality standards for those providing or wishing to provide legal aid services and to establish a system of accreditation of those providers. Accreditation may be by the Lord Chancellor or by persons authorised by the Lord Chancellor. Any accreditation arrangements must make provision about the monitoring of the services provided by those who are accredited and for the withdrawal of accreditation if the services are unsatisfactory.
70. *Subsections (4) and (5)* allow the Lord Chancellor, and those authorised by the Lord Chancellor, to make charges in connection with accreditation and monitoring.

### ***Section 4: Director of Legal Aid Casework***

71. **Section 4** makes provision about the Director of Legal Aid Casework, a statutory office holder.
72. *Subsection (1)* requires the Lord Chancellor to designate a civil servant as the Director of Legal Aid Casework. The Director's function is to make decisions on legal aid in individual cases.
73. To enable the Director to perform their functions, *subsection (2)* requires the Lord Chancellor to provide civil servants or other persons to give appropriate assistance to the Director.
74. *Subsection (3)* requires the Director to comply with directions given by the Lord Chancellor and to have regard to guidance issued by the Lord Chancellor. *Subsection (5)* requires the Lord Chancellor to publish such guidance and directions. Examples of directions which may be given include directions about the delegation of the Director's functions under section 5 and directions about determinations in respect of exceptional cases under section 10.
75. *Subsection (4)(a)* provides that the Lord Chancellor may not give a direction or guidance under *subsection (3)* in relation to an individual case. *Subsection (4)(b)* places a duty on the Lord Chancellor to ensure that the Director acts independently of the Lord Chancellor when applying directions or guidance under *subsection (3)* in relation to an individual case.
76. *Subsection (5)* provides that the Lord Chancellor must publish any directions and guidance given under this section.

### ***Section 5: Delegation***

77. **Section 5** makes provision about the delegation of the Lord Chancellor's and Director's functions.
78. *Subsection (1)* allows the Lord Chancellor to delegate the functions of the Lord Chancellor under section 1(3), which would include aspects of the civil legal advice telephone helpline, and under section 3, which may include delegating the accreditation and monitoring function to an outside organisation.

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79. *Subsection (2)* allows the Lord Chancellor to make regulations providing for any functions that may be given to the Lord Chancellor under regulations made under Part 1 of the Act to be exercisable by a person authorised by the Lord Chancellor or employees of such a person.
80. *Subsection (3)* allows the Director to delegate the Director's functions. This enables the Director to delegate, for example, decision-making in relation to the merits of a legal aid application, the application of any relevant means test for a particular area of work in relation to a legal aid application and the on-going monitoring of decisions.
81. *Subsection (4)* enables the Lord Chancellor to make regulations providing for functions conferred on the Director under regulations made under Part 1 of the Act to be exercisable by a person authorised by the Director or an employee of such a person.
82. *Subsection (5)* provides that under section 4 the Lord Chancellor may give directions to the Director about the delegation of the Director's functions. The Lord Chancellor will be able to require the Director to delegate, or not to delegate, particular functions and to give directions about the persons to whom the Director may or may not delegate those functions.
83. *Subsections (6) to (8)* ensure that a function of the Lord Chancellor or Director may be delegated entirely or subject to limitations or conditions. For example, decision-making in relation to the merits and financial eligibility might be delegated to providers in relation to particular matters, or subject to particular financial limits as to the amount of work that can be carried out before the case must be referred to the Director for a decision on further legal aid funding.

### **Section 6: Authorisations**

84. **Section 6** makes provision about the effect of the delegation of functions under section 5.
85. *Subsection (1)* gives the Lord Chancellor and the Director the power to limit the duration of a delegation as well as to vary or revoke the delegation at any time. It also reserves the right of the Lord Chancellor and the Director (or another person) to continue to exercise a function that has been delegated.
86. *Subsections (2) and (3)* provide that any act or omission by a person ("authorised person") in exercising a function of the Lord Chancellor or Director delegated to them under section 5 is to be treated as being done or omitted to be done by the Lord Chancellor or the Director.
87. However the liability of the Lord Chancellor or Director for acts or omissions of an authorised person is not absolute. *Subsection (4)* provides that *subsections (2) and (3)* do not affect the rights and liabilities of the Lord Chancellor and the authorised person between themselves (for example, contractual disputes), do not prevent civil proceedings from being brought against the authorised person, do not apply to criminal offences alleged to have been committed by the authorised person and do not make the Lord Chancellor or Director liable under section 6 of the Human Rights Act 1998 for acts of the authorised person which are private in nature.

### **Section 7: Annual report**

88. **Section 7** concerns the production of an annual report by the Director of Legal Aid Casework.
89. *Subsection (1)* requires the Director to produce an annual report for each financial year as soon as practicable following the end of that financial year.
90. *Subsection (2)* requires that the report set out how the Director has carried out the functions of the office in the financial year. *Subsections (3) and (4)* respectively require

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that the Director send a copy of the report to the Lord Chancellor, and that the Lord Chancellor lay the report before Parliament and arrange for its publication.