

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 1: Legal Aid

Supplementary

Section 31 and Schedule 3: Legal aid for legal persons

211. *Section 31* gives effect to Schedule 3.

Schedule 3: Legal aid for legal persons

212. *Schedule 3* provides for the possibility that civil and criminal legal aid may be made available to a legal person, that is a legal entity other than an individual, for example a body corporate. All determinations in relation to legal aid for legal persons will be made by the Director.
213. *Paragraph 2* defines an exceptional case determination for the purposes of this Schedule. This is the same as an exceptional case determination under section 10(3).
214. *Paragraph 3(1)* makes provision about when civil legal services are to be made available to a legal person. First, the Director must have made (and not have withdrawn) an exceptional case determination in relation to the person and the services. Second, the Director must have determined that the person qualifies for the services in accordance with Part 1 of the Act (and not withdrawn that determination). *Paragraph 3(2)* requires the Director to make such a determination in accordance with the means testing provisions (section 21) and the criteria in regulations made under section 11(1)(b). It also requires a determination that a legal person qualifies for civil legal services to specify the type of service and the matters in relation to which the services are to be available. *Paragraph 3(3)* applies the powers in section 12(2) to (6) to make provision about procedures for the making and withdrawal of determinations.
215. *Paragraph 4(1) and (2)* enables the Lord Chancellor to make regulations enabling prescribed advice and assistance for criminal proceedings to be made available to legal persons who are involved in investigations which may lead to criminal proceedings and to legal persons who are before a court, tribunal or other person in criminal proceedings. In order for such prescribed advice and assistance to be made available, prescribed conditions must be met, the Director must have made (and not withdrawn) an exceptional case determination in relation to the legal person and the proceedings, and the Director must have determined that the legal person qualifies for such advice and assistance in accordance with the regulations (and not withdrawn that determination).
216. The effect of *paragraph 4(3)* is that, when making the regulations, the Lord Chancellor must have regard in particular to the interests of justice and the regulations must require the Director to make determinations having regard in particular to the interests of justice

and may require the Director to do so in accordance with the means testing provisions (section 21) and in accordance with criteria set out in the regulations. Paragraph 4(3) also applies provisions in section 15(6) to (9) about procedures for the making and withdrawal of determinations.

217. *Paragraph 5* makes provision about representation for the purposes of criminal proceedings for legal persons. In order for such representation to be made available, the legal person must be a description of legal person specified in relation to those proceedings or the proceedings must involve resisting an appeal to the Crown Court in a private prosecution case. The conditions for representation for criminal proceedings being made available are: *first* (*paragraph 5(2)(a)*), that the Director has made (and not withdrawn) an exceptional case determination, and *second* (*paragraph 5(2)(b)*), that the Director has determined (provisionally or otherwise) that the legal person qualifies for representation in accordance with Part 1 of the Act (and has not withdrawn the determination). *Paragraph 5(5)* requires the Director to make an exceptional case determination in accordance with the interests of justice. *Paragraph 5(6)* requires the Director to make the determination that a legal person qualifies for representation in accordance with the means testing provisions (section 21) and in accordance with the interests of justice. *Paragraph 5(12)* provides that the Lord Chancellor may by regulations prescribe the circumstances in which making representation available to a legal person for the purpose of criminal proceedings is to be taken as being in the interests of justice.
218. *Paragraph 5(3)* provides that where a legal person qualifies for representation, that representation will cover any preliminary or incidental proceedings and the effect of *sub-paragraph (4)* is that regulations made by the Lord Chancellor under section 16(4) and (5) about whether proceedings are or are not to be regarded as preliminary or incidental apply in relation to legal persons unless those regulations provide otherwise.
219. *Paragraph 5(7)* applies the provisions in section 18(2) to (7) about procedures for the making and withdrawal of determinations made by the Direction under paragraph 5(2).
220. *Paragraph 5(8)* provides that the Director may not make a provisional determination under *paragraph 5(2)(b)* that the legal person qualifies for representation in accordance with Part 1 of the Act unless regulations made under *paragraph 5(9)* provide for this.
221. *Paragraph 5(9)* enables the Lord Chancellor to make regulations authorising the Director to make a provisional determination that a legal person qualifies for representation for the purposes of criminal proceedings in the circumstances described in *sub-paragraph (9)(a) to (c)*. *Paragraph 5(10)* applies *subsections (2) and (3)* of section 20 to regulations made under *paragraph 5(9)*.
222. *Paragraphs 6, 7 and 8* ensure that the means testing provisions (section 21) and provisions about contributions and costs (section 23, 24, 25 and 26 and Schedule 2) apply for the purposes of determinations about whether a legal person qualifies for legal aid. *Paragraph 9* ensures that section 27 (choice of provider of services etc), section 28 (position of providers of services), section 29 (code of conduct) and section 30 (position of other parties, courts and tribunals) apply in relation to services that are provided to a legal person under Part 1 of the Act. *Paragraph 10* ensures that sections 34 (restriction on disclosure of other information), section 35 (exceptions from restrictions under section 34) and section 41 (orders, regulations and directions) apply in the context of legal aid for legal persons as if references to an individual included a legal person.

Section 32: Foreign law

223. *Section 32* concerns the availability of legal aid services in relation to foreign law. This section reflects the current provision about legal aid in relation to foreign law at section 19 of the Access to Justice Act 1999.

224. *Subsection (1)* restricts the applicability of the civil legal services made available under the Act to the law of England and Wales only, except where the Act specifies otherwise, where foreign law is relevant to proceedings in England and Wales, or where the Lord Chancellor specifies otherwise by order. *Subsection (2)* makes similar provision in relation to criminal legal aid.
225. *Subsection (3)* limits the Lord Chancellor's ability to make an order under *subsections (1) and (2)*.

Section 33: Restriction on disclosure of information about financial resources

226. *Section 33* provides for the protection of information obtained under the information gateway in section 22. It makes provision similar to the provision in paragraphs 6 to 8 of Schedule 3 to the Access to Justice Act 1999.
227. *Subsections (1) and (2)* provide that a person who receives information under section 22 or under this section may only disclose or use that information if it is necessary or expedient to do so in connection with determining financial eligibility for legal aid.
228. *Subsection (3)* qualifies *subsection (2)* by providing for limited circumstances in which the information may be used for purposes other than assessing financial eligibility. Disclosure is permitted if it would be in accordance with an enactment or in accordance with a court order, if it is for the purposes of the investigation or prosecution of an offence or suspected offence or if it is for the purposes of proceedings before a court, including instituting such proceedings. Disclosure is also permitted if the information has already been lawfully disclosed to the public.
229. *Subsection (4)* provides that disclosure or use of information contrary to this section is a criminal offence and specifies the maximum penalties. The penalty for the offence on conviction on indictment will be imprisonment for a term not exceeding two years or a fine (or both). The penalty for the offence on summary conviction, in England and Wales, will be imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (currently £5,000) (or both) and, in Northern Ireland, will be imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both). *Subsection (7)* provides in relation to the summary penalty in England and Wales that for an offence committed before the commencement of section 154(1) of the 1991 Act the reference in *subsection (4)(b)(i)* to 12 months has effect as if it were a reference to 6 months.
230. *Subsection (5)* provides a statutory defence to the criminal offence detailed in *subsection (4)* where the person charged with the offence reasonably believed that the disclosure or use was lawful.

Section 34: Restriction on disclosure of other information

231. *Section 34* provides for the protection of information other than information to which section 33 applies (see *subsection (7)*) which is given to the Lord Chancellor, the Director, a court, tribunal or any other person or body which has functions under Part 1 of this Act.
232. *Subsection (1)* describes the information to which the provisions apply: information provided to the persons referred to in the paragraph above in connection with an individual applying for or in receipt of legal aid.
233. Subject to the exceptions in section 35, *subsection (2)* prevents such information from being disclosed. *Subsection (3)* makes disclosure contrary to this section a criminal offence and sets out the maximum penalties for that offence. The penalty for the offence will be, on summary conviction, a fine not exceeding level 4 on the standard scale, which is currently £2,500.

- 234. *Subsection (4)* provides a statutory defence for a person charged with the offence where they reasonably believed that the disclosure was lawful.
- 235. *Subsection (5)* requires the consent of the Director of Public Prosecutions before proceedings can be brought in relation to an alleged breach of this section.
- 236. *Subsection (6)* provides that section 34 does not apply to information provided to a provider of services by or on behalf of an individual for whom the services are, or would be, provided under Part 1 of the Act.

Section 35: Exceptions from restriction under section 34

- 237. *Section 35* provides for exceptions to the bar on disclosure in *subsection (2)* of section 34.
- 238. *Subsection (1)* provides for a general exception relating to the disclosure of information for the purpose of enabling or assisting the Lord Chancellor or the Secretary of State for Justice in carrying out their functions. It is not limited to functions created by statute. This subsection also provides for similar exceptions where the Director or a court, tribunal or other person is carrying out functions under Part 1 of the Act, as well as in connection with any proceedings involving services delivered under Part 1.
- 239. *Subsection (2)* provides for an exception relating to disclosure of information where disclosure would be in accordance with the law of England and Wales, as well as when ordered by a court or for the purposes of court proceedings. This subsection also creates an exception relating to disclosure of information for the purposes of proceedings before a court, including instituting such proceedings, for the purpose of a criminal investigation and for the purpose of allowing a tribunal to properly exercise its disciplinary functions. This subsection also provides an exception where information has previously been lawfully disclosed to the public.
- 240. *Subsection (3)* provides two further exceptions to the restriction on disclosure. The first exception is where information is to be released in a form in which information pertaining to the individual cannot be identified. The second exception is where the information requested relates to any grant, loan or other payment made by the Lord Chancellor pursuant to functions under Part 1 of the Act.
- 241. *Subsection (4)* provides an exception where an individual consents to the release of information pertaining to them. *Subsection (4)* also provides that if the information was provided by someone other than the individual to whom it relates the person who provided the information must also consent to its disclosure.
- 242. *Subsections (5) and (6)* ensure that disclosure of information covered by section 33 is not prevented by that section, provided that the restricted period of 100 years has passed, that disclosure is made by a person who is a public authority for the purposes of the Freedom of Information Act 2000, and that the information is not held on behalf of another person.

Section 36: Misrepresentation

- 243. *Section 36* provides criminal penalties for people who intentionally fail to comply with requirements to provide documents or information under Part 1 of the Act, and for people who make a statement or representation which they know or believe to be false when providing documents and information in accordance with Part 1 of the Act. The section largely replicates equivalent provisions in section 21 of the Access to Justice Act 1999. A person found guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale, which is currently £2,500. Unlike the offence under section 21 of the Access to Justice Act 1999, the offence under this section is not punishable by imprisonment.

244. This section also enables the Lord Chancellor to take proceedings in the county courts to recover losses arising as a result of the failure of an individual to provide documents or information or as the result of a false statement or false representation as required under Part 1 of the Act.

Section 37: Status of the Director and Lord Chancellor

245. [Section 37](#) makes provision to provide clarity on the status of both the Director and the Lord Chancellor when exercising specific functions.
246. Section 4(1) of the Act requires the Lord Chancellor to designate a civil servant as the Director.
247. *Subsection (1)* of section 37 ensures that the Director is to carry out the functions of the statutory office on behalf of the Crown and *subsection (2)* ensures that service as the Director is in the civil service of the State.
248. *Subsection (3)* provides that the Lord Chancellor is to be treated as a corporation sole for purposes relating to property (and interests in property) under Part 1 of the Act, and for all other purposes relating to the Lord Chancellor's functions in connection with legal aid and other functions under Part 1. This clarifies the position in relation to the Lord Chancellor's ability to hold an interest in land for these purposes and so applies to those charges (statutory or otherwise) which transfer from the LSC to the Lord Chancellor pursuant to Schedule 4 to the Act and those statutory charges that will arise pursuant to section 25 of the Act.
249. *Subsection (4)* confers on the Lord Chancellor a statutory power to authorise persons to execute instruments conveying property and interests in property held by the Lord Chancellor in connection with legal aid or other functions under Part 1.
250. *Subsection (5)* provides that such an instrument executed by or on behalf of the Lord Chancellor is to be received in evidence and, unless the contrary is proved, to be treated as having been so executed.

Section 38: Abolition of Legal Services Commission

251. [Section 38](#) abolishes the LSC. The LSC was established under section 1(1) of the Access to Justice Act 1999. Following the transfer of legal aid functions to the Lord Chancellor under section 1, it is intended that an Executive Agency will be created within the Ministry of Justice to administer legal aid.
252. *Subsections (3) and (4)* set out provisions for the production of a report and statement of accounts for the final period up to the day before the LSC ceases to exist.

Schedule 4: Transfer of employees and property etc of Legal Services Commission

253. [Schedule 4](#) provides for employees of the LSC to become civil servants and for the transfer of property, assets and liabilities held in the name of the LSC to the Lord Chancellor or to the Secretary of State.
254. LSC employees are currently public sector employees rather than civil servants. [Paragraph 1](#) of Schedule 4 provides that, when the new arrangements for legal aid come into force, LSC employees become civil servants on their existing terms and conditions (save as to pensions and severance). It makes provision to ensure that the transfer does not break the continuity of their employment.
255. [Paragraph 4](#) enables the Lord Chancellor to make a scheme transferring the LSC's rights and liabilities in respect of occupational pension schemes or compensation schemes to the Lord Chancellor or the Secretary of State.

256. *Subparagraph (7)* provides that a transfer scheme may apply legislation relating to compensation schemes and occupational schemes with modifications, so far as is necessary for giving effect to the scheme.
257. *Subparagraph (8)* provides that the transfer scheme may amend or otherwise modify a compensation scheme.
258. When employees of the LSC become civil servants there will be no active members of the (currently two) LSC occupational pension schemes. *Paragraph 5* provides the Lord Chancellor with a power to make a scheme to merge the LSC occupational pension schemes. The power includes provision for the winding up of an LSC occupational pension scheme. A merger must not to any extent deprive members of the LSC occupational pension schemes, or other beneficiaries under those schemes, of rights accrued before the merger takes effect.
259. *Paragraph 6* transfers interests in land held in the name of the LSC to the Secretary of State for Communities and Local Government who holds freeholds and leaseholds on behalf of other government departments. Charges on land are specifically excluded from this paragraph because those charges on property in connection with civil proceedings are to transfer to the Lord Chancellor pursuant to paragraph 7.
260. *Paragraph 7* transfers other property, rights, powers, duties and liabilities of the LSC to the Lord Chancellor. Therefore, for example, by operation of law, contracts (in the name of the LSC) are novated to the Lord Chancellor, including contracts made for the provision of legal aid services.
261. *Paragraph 11* allows the Lord Chancellor to make by statutory instrument, consequential, supplementary, incidental, transitional, transitory or saving provision in connection with the transfers effected by Schedule 4 or schemes made under Schedule 4.

Section 39 and Schedule 5: Consequential amendments

262. *Subsection (1)* provides that Schedule 5 of the Bill has effect. Schedule 5 makes various amendments and repeals which are consequential on the changes to legal aid made by Part 1. There are, for example, a number of amendments to delete references to the LSC in other legislation, such as in Schedule 1 to the Public Records Act 1958 (paragraph 1 of Schedule 5) and in Schedule 2 to the Parliamentary Commissioner Act 1967 (paragraph 2 of Schedule 5). There are also, for example, a number of amendments to replace references to the Community Legal Service and the Criminal Defence Service, such as in the Solicitors Act 1974 (paragraphs 7 to 9 of Schedule 5) and in the Prosecution of Offences Act 1985 (paragraphs 22 to 25 of Schedule 5).
263. *Subsections (2) to (10)* ensure that the Lord Chancellor is able abolish the LSC in advance of some or all of the provisions of Part 1 of the Bill being brought into force.
264. *Subsection (2)* gives the Lord Chancellor the power, where the Lord Chancellor considers it appropriate as part of the arrangements for moving from the legal aid arrangements under the Access to Justice Act 1999 to the operation of the legal aid arrangements under Part 1 of this Act, to make regulations requiring or enabling prescribed services that immediately before the date of such regulations may be funded under the Access to Justice Act, to be made available under Part 1 of this Act for a temporary period specified or described in the regulations.
265. *Subsection (4)* provides the Lord Chancellor with the power, where the Lord Chancellor considers it appropriate for the LSC to cease to exist before Part 1 of this Act is brought into force, to make regulations making provision for the Lord Chancellor and the Director, or persons authorised by them, to carry out functions of the LSC under Part 1 of the Access to Justice Act for a temporary period specified or described in the regulations. *Subsection (6)* provides that regulations under *subsection (4)* may not provide for the Lord Chancellor to take decisions about whether services should be funded in individual cases and regulations may not provide for the Lord Chancellor

to give directions or guidance about the carrying out of functions under Part 1 of the Access to Justice Act 1999 in relation to individual cases.

266. *Subsection (7)* provides that regulations under section 39 may amend, appeal, revoke or otherwise modify Part 1 of the Access to Justice Act, Part 1 of this Act, or any other Act or instrument made under an Act, and that a temporary period described by such regulations may be described, in particular, by reference to the coming into force of a provision of this Act or the repeal of a provision of Part 1 of the Access to Justice Act 1999.
267. Any regulations made under section 39 that amend or repeal a provision of an Act are subject to the affirmative procedure unless they revoke such regulations or insert or repeal provision previously repealed or inserted by such regulations, in which case they would be subject to the negative procedure (see section 41(7)(k)).

Section 40 and Schedule 6: Northern Ireland: information about financial resources

268. *Section 40* and Schedule 6 provide a gateway for the disclosure of information to the chief executive of the Northern Ireland Legal Services Commission (or other prescribed person) by the Secretary of State (in practice, the Secretary of State for Work and Pensions), the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"), the Department for Social Development in Northern Ireland or the Department of Finance and Personnel in Northern Ireland (the "relevant Northern Ireland Departments"). It also provides restrictions on the disclosure of that information. These provisions closely mirror the provisions in sections 22 and 33 that relate to information requests by the Director (or other prescribed persons).
269. *Paragraph 1(1)* of Schedule 6 enables the chief executive (or other prescribed person) to make a request for certain information to the Secretary of State, a relevant Northern Ireland Department or the Commissioners. *Paragraph 1(2)* provides that such a request may only be made for the purpose of facilitating a determination about an individual's financial eligibility for legal aid under the Northern Ireland legislation that governs the provision of legal aid.
270. *Paragraph 1(3)* lists the categories of information which may be requested from the Secretary of State or the relevant Northern Ireland Departments. It includes a power to add further categories of information by secondary legislation.
271. *Paragraph 1(4)* lists the categories of information which may be requested from the Commissioners. It includes a power to add further categories of information by secondary legislation, with the Commissioners' consent (see *paragraph 1(6)*).
272. *Paragraph 1(7)* provides that the Secretary of State, the relevant Northern Ireland Departments and the Commissioners may disclose to the chief executive (or other prescribed person) information specified in an information request made under this Schedule.
273. *Paragraph 2* of Schedule 6 provides for the protection of information obtained under the information gateway in paragraph 1. *Paragraph 2(1) and (2)* provide that a person who receives information under paragraph 1 of this Schedule may only disclose or use that information if it is necessary or expedient to do so in connection with determining financial eligibility for legal aid.
274. *Paragraph 2(3)* qualifies *paragraph 2(2)* by providing for limited circumstances in which the information may be used for purposes other than assessing financial eligibility. Disclosure is permitted if it would be in accordance with an enactment or in accordance with a court order, if it is for the purposes of the investigation or prosecution of an offence or suspected offence or if it for the purposes of proceedings before a court, including instituting such proceedings. Disclosure is also permitted if the information has already been lawfully disclosed to the public.

275. *Paragraph 2(4)* provides that disclosure or use of information contrary to this section is a criminal offence and specifies the maximum penalties. The penalty for the offence will be, on conviction on indictment, imprisonment for a term not exceeding two years or a fine (or both) and, on summary conviction in England and Wales, imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), and in Northern Ireland to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (currently £5,000), or both.
276. *Paragraph 2(5)* provides a statutory defence to the criminal offence detailed in *paragraph 2(4)* where the person charged with the offence reasonably believed that the disclosure or use was lawful.
277. *Paragraph 2(7)* clarifies, in relation to the summary penalty in England and Wales for an offence under this paragraph committed before the commencement of section 154(1) of the 1991 Act, that the reference to 12 months imprisonment has effect as if it were a reference to 6 months.
278. *Paragraph 3* of Schedule 6 enables the Department for Justice in Northern Ireland to make consequential, supplementary, incidental or transitional provision by regulations in relation to the provisions of this Schedule. *Paragraph 4* makes provision about the powers to make regulations under the Schedule. Those powers are conferred on the Department for Justice in Northern Ireland. Under *paragraph 4(4)* the first regulations under paragraph 1 and any regulations under paragraph 3 that amend or repeal Northern Ireland legislation will be subject to the affirmative resolution procedure but otherwise regulations under the Schedule are subject to the negative resolution procedure.

Section 41: Orders, regulations and directions

279. *Subsections (1) to (3)* of section 41 make further provision about the exercise of powers under Part 1 to make orders, regulations and directions. For example, they provide that such instruments may make different provision for different geographic areas and that they may make transitory provision. They may also make different provision for the purpose of proceedings before different courts and tribunals, for particular classes of individual or for individuals selected by reference to particular criteria or on a sampling basis. This provides flexibility and will enable provisions to be piloted. *Subsections (4) to (11)* concern the Parliamentary procedure which applies to secondary legislation under Part 1 of the Bill, including the procedure which applies where the Lord Chancellor makes an urgency statement in respect of regulations made under section 11(1)(b) (criteria for qualifying for civil legal aid).

Section 42: Interpretation

280. *Section 42* provides definitions of terms used in Part 1.