
STATUTORY INSTRUMENTS

2003 No. 435

Access to Justice (Northern Ireland) Order 2003

PART I

CITATION, COMMENCEMENT AND INTERPRETATION

Citation and commencement

1.—(1) This Order may be cited as the Access to Justice (Northern Ireland) Order 2003.

(2) Except as provided by paragraph (3), this Order shall come into operation on such day or days as the Lord Chancellor may by order appoint.

(3) The following provisions come into operation on the expiration of one month from the date on which this Order is made—

- (a) this Part,
- (b) Article 45,
- (c) Article 46(4) to (6), and
- (d) Article 48(1).

Interpretation

2.—(1) The Interpretation Act (Northern Ireland) 1954⁽¹⁾ shall apply to Article 1 and the following provisions of this Order as it applies to an Act of the Northern Ireland Assembly.

(2) In this Order—

“advice” means any oral or written advice—

- (a) on the application of the law to any particular circumstances that have arisen in relation to the individual seeking the advice; and
- (b) as to any steps which that person might appropriately take, having regard to the application of the law to those circumstances;

“assistance” means any assistance (other than advocacy) to any individual in taking any of the steps which an individual might take, including steps with respect to proceedings, having regard to the application of the law to any particular circumstances that have arisen in relation to him, whether the assistance is given by taking such steps on his behalf or by assisting him in taking them on his own behalf;

“child” has the meaning given by Article 2(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998⁽²⁾;

“civil legal services” has the meaning given by Article 10;

“the Commission” means the Northern Ireland Legal Services Commission;

(1) 1954 c. 33 (N.I.)

(2) 1998 N.I. 9.

“court-ordered youth conference” has the meaning given by Article 33A(5) of the Criminal Justice (Children) (Northern Ireland) Order 1998;

“criminal defence services” has the meaning given by Article 21(1);

“diversionary youth conference” has the meaning given by Article 10A(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998;

“the Law Society” means the Law Society of Northern Ireland;

“magistrates' court” has the meaning assigned to that expression by Article 2(2)(b) of the Magistrates' Courts (Northern Ireland) Order 1981(3);

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the Lord Chancellor;

“relevant proceedings” has the meaning given by Article 25;

“representation” means representation for the purposes of proceedings and includes—

- (a) all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings;
- (b) in the case of civil proceedings, all such assistance as is usually so given in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings;

“solicitor” means a solicitor of the Supreme Court;

“statutory provision” has the meaning assigned to it by section 1(f) of the Interpretation Act (Northern Ireland) 1954(4);

“tribunal” includes an inquiry or proceedings before an arbitrator or umpire, however appointed, whether such inquiry or proceedings take place under a reference by consent or otherwise.

(3) References to counsel and solicitors shall be construed in accordance with Article 10 of the European Communities (Services of Lawyers) Order 1978(5) and regulation 14 of the European Communities (Lawyer’s Practice) Regulations 2000(6).

PART II

NORTHERN IRELAND LEGAL SERVICES COMMISSION

Northern Ireland Legal Services Commission

3.—(1) There shall be a body known as the Northern Ireland Legal Services Commission (in this Order referred to as “the Commission”).

(2) The Commission shall have such functions as are conferred or imposed on it by the provisions of this Order or any other statutory provision.

(3) The Commission shall exercise its functions for the purpose of—

- (a) securing (within the resources made available, and priorities set, in accordance with this Part) that individuals have access to civil legal services that effectively meet their needs, and promoting the availability to individuals of such services, and
- (b) securing that individuals involved in criminal investigations or relevant proceedings have access to such criminal defence services as the interests of justice require.

(3) 1981 N.I. 26.

(4) 1954 c. 33 (N.I.)

(5) S.I.1978/1910.

(6) S.I. 2000/1119.

(4) Schedule 1 (which makes further provision about the Commission) has effect.

Membership of the Commission

4.—(1) The Commission shall consist of—

- (a) a member who is to chair it, and
- (b) not fewer than six, nor more than ten, other members,

but the Lord Chancellor may by order substitute for either or both of the numbers for the time being specified in sub-paragraph (b) such other number or numbers as he thinks appropriate.

(2) Both the member who is to chair the Commission, and the other members, shall be appointed by the Lord Chancellor.

(3) In appointing persons to be members of the Commission the Lord Chancellor shall have regard to the desirability of securing that the Commission includes members who (between them) have experience in or knowledge of—

- (a) the provision of services which the Commission can fund as civil legal services or criminal defence services,
- (b) the work of the courts,
- (c) consumer affairs,
- (d) social conditions, and
- (e) management.

(4) The Lord Chancellor may by order amend paragraph (3) by adding, omitting or substituting areas of experience or knowledge.

(5) In making appointments under this Article, the Lord Chancellor shall as far as practicable secure that the members of the Commission, as a group, are representative of the community in Northern Ireland.

Power to replace Commission with two bodies

5.—(1) The Lord Chancellor may by order establish in place of the Commission two bodies—

- (a) one to have functions relating to civil legal services, and
- (b) the other to have functions relating to criminal defence services.

(2) An order under paragraph (1) shall include amendments of—

- (a) any provisions of, or amended by, this Order which refer to the Commission, and
- (b) any other statutory provisions which so refer,

to replace references to the Commission with references to either or both of the bodies established by the order.

Planning

6.—(1) The Commission shall inform itself about—

- (a) the need for, and the provision of, civil legal services and criminal defence services, and
- (b) the quality of the services provided.

(2) The Commission shall plan what can be done towards meeting that need by the performance by the Commission of its functions.

(3) The Commission may co-operate with such authorities and other bodies and persons as it considers appropriate in facilitating the planning of what can be done by them to meet that need by the use of any resources available to them.

(4) The Commission shall notify the Lord Chancellor of what it has done under this Article.

(5) The Lord Chancellor may by order require the Commission to discharge the functions in paragraphs (1) to (4) in accordance with the order.

Powers of Commission

7.—(1) Subject to the provisions of this Part and Article 41, the Commission may do anything which it considers—

- (a) is necessary or appropriate for, or for facilitating, the discharge of its functions, or
- (b) is incidental or conducive to the discharge of its functions.

(2) In particular, the Commission shall have power—

- (a) to enter into any contract,
- (b) to make grants (with or without conditions),
- (c) to make loans,
- (d) to invest money,
- (e) to promote or assist in the promotion of publicity relating to its functions,
- (f) to undertake any inquiry or investigation which it may consider appropriate in relation to the discharge of any of its functions, and
- (g) to give to the Lord Chancellor any advice which it may consider appropriate in relation to matters concerning any of its functions.

(3) Paragraphs (1) and (2) do not confer on the Commission power to borrow money.

(4) The Commission may make such arrangements as it considers appropriate for the discharge of its functions, including the delegation of any of its functions.

(5) The Lord Chancellor may by order require the Commission—

- (a) to delegate any function specified in the order or to delegate any function so specified to a person (or person of a description) so specified,
- (b) not to delegate any function so specified or not to delegate any function so specified to a person (or person of a description) so specified, or
- (c) to make arrangements such as are specified in the order in relation to the delegation of any function so specified.

(6) In considering any question as to the remuneration of persons or bodies providing civil legal services or criminal defence services (whether in individual cases, or by reference to the provision of such services in specified numbers of cases), the Commission shall have regard, among the matters which are relevant, to—

- (a) the time and skill which the provision of services of the description to which the question relates requires;
- (b) the number and general level of competence of persons providing those services;
- (c) the cost to public funds of the remuneration of persons or bodies providing those services; and
- (d) the need to secure value for money.

(7) Where the Commission sets fees which are to be paid to persons or bodies in respect of the provision of services by them, nothing in paragraph (6) requires it to have regard to any fee payable, otherwise than in accordance with this Order, in respect of the provision of such services.

Guidance

8.—(1) The Lord Chancellor may give guidance to the Commission as to the manner in which he considers it should discharge its functions.

(2) The Commission shall take into account any such guidance when considering the manner in which it is to discharge its functions.

(3) Guidance may not be given under this Article in relation to individual cases.

(4) The Lord Chancellor shall either—

- (a) publish, or
- (b) require the Commission to publish,

any guidance given under this Article.

Northern Ireland law and foreign law

9.—(1) The Commission may not fund—

- (a) civil legal services, or
- (b) criminal defence services,

relating to any law other than that of Northern Ireland, unless any such law is relevant for determining any issue relating to the law of Northern Ireland.

(2) But the Lord Chancellor may, if it appears to him necessary to do so for the purpose of fulfilling any obligation imposed on the United Kingdom by any international agreement, by order specify that such civil legal services or criminal defence services as are specified in the order, relating to the application of such other law as may be so specified, may be funded by the Commission.

(3) For the purposes of the application of paragraph (2) in the case of an obligation to provide for the transmission to other countries of applications for public funding of legal services under their laws, the reference to civil legal services or criminal defence services relating to the application of other laws includes a reference to advice or assistance for the purposes of making and transmitting such an application.

Civil legal services

Civil legal services

10.—(1) For the purposes of this Order “civil legal services” means advice, assistance and representation, other than advice, assistance or representation which the Commission is required to fund as criminal defence services.

(2) The Lord Chancellor may by order provide that “civil legal services” is to include services (other than advice, assistance and representation) which—

- (a) are specified in the order,
- (b) fall within any of the descriptions specified in paragraph (3), and
- (c) are not services which the Commission is required to fund as criminal defence services.

(3) The descriptions of services referred to in paragraph (2) are—

- (a) the provision of general information about the law and legal system and the availability of legal services,
 - (b) the provision of help by the giving of advice as to how the law applies in particular circumstances,
 - (c) the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties,
 - (d) the provision of help in enforcing decisions by which such disputes are resolved, and
 - (e) the provision of help in relation to legal proceedings not relating to disputes.
- (4) An order under paragraph (2) may make provision, including provision amending this Order—
- (a) about financial matters relating to services specified in the order (including, in particular, provision about eligibility, contributions, charges, remuneration and costs);
 - (b) modifying the application of Articles 11 to 20 in relation to such services.
- (5) Every person who exercises any function relating to civil legal services shall have regard to the desirability of exercising it, so far as is reasonably practicable, so as to—
- (a) promote improvements in the quality of those services and in the ways in which they are made accessible to those who need them,
 - (b) secure that the services provided in relation to any matter are appropriate having regard to its nature and importance, and
 - (c) achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court.

Funding of services

11.—(1) The Commission shall establish and maintain a fund from which it shall fund civil legal services.

(2) The Lord Chancellor—

- (a) shall pay to the Commission the sums which he determines are appropriate for the funding of civil legal services by the Commission, and
- (b) may determine the manner in which and times at which the sums are to be paid to the Commission and may impose conditions on the payment of the sums.

(3) In making any determination under paragraph (2) the Lord Chancellor shall take into account (in addition to such other factors as he considers relevant) the need for civil legal services as notified to him by the Commission under Article 6(4).

(4) The Lord Chancellor shall lay before each House of Parliament a copy of every determination under paragraph (2)(a).

(5) In funding civil legal services the Commission shall aim to obtain the best possible value for money.

(6) Subject to regulations, the Commission shall pay into the fund established under paragraph (1)

- (a) sums received from the Lord Chancellor under paragraph (2),
- (b) sums received by the Commission by virtue of regulations under Articles 17 and 20,
- (c) sums received by the Commission by virtue of an order by a court under Article 19(7), and
- (d) such other receipts of the Commission as the Lord Chancellor may, with the concurrence of the Treasury, determine.

(7) The Commission shall pay out of the fund established under paragraph (1) any costs payable under a court order under Article 19(2) or under regulations under Article 20(2)(d).

(8) Where the Commission considers that the amount in the fund established under paragraph (1) significantly exceeds the amount which will be paid out before the next payment by the Lord Chancellor under paragraph (2), it shall—

- (a) inform the Lord Chancellor, and
- (b) if he so directs, pay to the Lord Chancellor so much of the excess as is specified in the direction.

(9) The Lord Chancellor—

- (a) may by direction impose requirements on the Commission as to the descriptions of services to be funded from any specified amount paid into the fund established under paragraph (1);
- (b) may by order require the Commission to establish and maintain two funds in place of the fund established under paragraph (1), being—
 - (i) a fund from which the Commission shall fund civil legal services in connection with any such matter as is specified in the order, and
 - (ii) a fund from which the Commission shall fund other civil legal services.

(10) An order under paragraph (9)(b) may make such amendments to this Order as the Lord Chancellor considers appropriate in consequence of the establishment of two funds in place of the fund established under paragraph (1).

Services which may be funded

12.—(1) The Commission shall set priorities in its funding of civil legal services, and the priorities shall be set—

- (a) in accordance with any directions given by the Lord Chancellor, and
- (b) after taking into account the need for such services.

(2) The Commission may fund civil legal services by—

- (a) entering into contracts with persons or bodies for the provision of services by them,
- (b) making payments to persons or bodies in respect of the provision of services by them,
- (c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, services,
- (d) establishing and maintaining bodies to provide, or facilitate the provision of, services,
- (e) making grants or loans to individuals to enable them to obtain services,
- (f) itself providing services, or
- (g) doing anything else which it considers appropriate for funding services,

but this paragraph is subject to Article 41.

(3) The Lord Chancellor may by order require the Commission to discharge the function in paragraph (2) in accordance with the order.

(4) The Commission may fund different civil legal services, or civil legal services provided by different means—

- (a) in relation to different areas in Northern Ireland, and
- (b) in relation to different descriptions of cases.

(5) The Commission may not fund as civil legal services any of the services specified in Schedule 2.

(6) Regulations may amend Schedule 2 by adding new services or omitting or varying any services; and regulations under this paragraph may, in particular, describe the services which are not to be funded as civil legal services by reference to—

- (a) the court or tribunal before which proceedings are to take place,
- (b) the issues involved, or
- (c) the capacity in which a person seeking a service is concerned.

(7) If the effect of regulations amending Schedule 2 under paragraph (6) is that no advice or assistance of any description is to be funded as regards any area, then, so long as Schedule 2 so provides, Article 14(2)(b), 3(b), (6) and (7), and the words “advice, assistance and” in Article 10(1), shall not have effect.

(8) The Lord Chancellor—

- (a) may by direction require the Commission to fund the provision of any of the services specified in Schedule 2 in circumstances specified in the direction, and
- (b) may authorise the Commission to fund the provision of any of those services in circumstances specified in the authorisation or, if the Commission requests him to do so, in an individual case so specified.

(9) A direction or authorisation under paragraph (8) may impose limitations on the funding of a service specified in Schedule 2, and may, in particular, require or authorise the Commission to fund the service for a limited period, for the purposes of specified proceedings only, or for the purposes of limited aspects of proceedings.

(10) Articles 13 to 20 do not apply to civil legal services funded under a direction or authorisation under paragraph (8) unless they are applied (with or without modifications) by the provisions of the direction or authorisation.

(11) The Lord Chancellor shall either—

- (a) publish, or
- (b) require the Commission to publish,

any authorisation under paragraph (8)(b), unless it relates to an individual case (in which case he or the Commission may publish it if appropriate).

Individuals for whom services may be funded

13.—(1) The Commission may only fund civil legal services for an individual if his financial resources are such that, under regulations, he is an individual for whom the services may be funded by the Commission.

(2) Regulations may provide that, in prescribed circumstances and subject to any prescribed conditions, services of a prescribed description may be funded by the Commission for individuals without reference to their financial resources.

(3) Regulations under this Article may include provision requiring the furnishing of information.

Decisions about provision of funded services

14.—(1) The services which the Commission may fund as civil legal services are those which the Commission considers appropriate (subject to Article 12(5) and the priorities set under Article 12(1)).

(2) Any decision as to whether to fund civil legal services for an individual shall—

- (a) in the case of representation, be taken—
 - (i) by the Commission, or

- (ii) in prescribed circumstances, by such person as may be prescribed;
 - (b) in the case of advice and assistance, be taken by the person from whom the advice or assistance is sought.
- (3) The grant of representation for the purposes of proceedings includes any such advice and assistance as to an appeal—
- (a) as may be specified by the Commission, or
 - (b) as may be prescribed in relation to representation granted by virtue of paragraph (2)(a)(ii).
- (4) The Commission may fund representation for an individual for a limited period, for the purposes of specified proceedings only, or for the purposes of limited aspects of proceedings, and may amend, withdraw or revoke the representation, or vary or remove any limitation imposed on the representation.
- (5) Without prejudice to the generality of paragraph (4), the grant of representation may be limited under that paragraph as regards the persons who may represent the individual to representation only in pursuance of a contract made with the Commission.
- (6) Regulations may—
- (a) prohibit the giving of advice or assistance without the approval of the Commission to the extent that the costs of giving it exceed such limit as may be prescribed;
 - (b) prohibit the funding of advice or assistance by the Commission except where it is provided by a person in pursuance of a contract made with the Commission.
- (7) No decision may be taken under this Article to fund advice and assistance for an individual in connection with any proceedings at a time when he has been granted a right to representation in respect of those proceedings under any provision of this Part (but this does not affect paragraph (3) or any assistance included in representation).

Funding code

- 15.—**(1) The Commission shall prepare a code setting out the criteria according to which any decision is to be taken as to—
- (a) whether to fund (or continue to fund) civil legal services for an individual for whom they may be funded by the Commission, and
 - (b) if so, what services are to be funded for him.
- (2) In settling the criteria to be set out in the code the Commission shall consider the extent to which they ought to reflect the following factors—
- (a) the likely cost of funding the services and the benefit which may be obtained by their being provided,
 - (b) the availability of sums in the fund established under Article 11(1) for funding civil legal services and (having regard to present and likely future demands on that fund) the appropriateness of applying them to fund the services,
 - (c) the importance of the matters in relation to which the services would be provided for the individual,
 - (d) the availability to the individual of services not funded by the Commission and the likelihood of his being able to avail himself of them,
 - (e) if the services are sought by the individual in relation to a dispute, the prospects of his success in the dispute,
 - (f) the conduct of the individual in connection with civil legal services funded by the Commission (or an application for funding) or in, or in connection with, any proceedings,

- (g) the public interest, and
- (h) such other factors as the Lord Chancellor may by order require the Commission to consider.

(3) The code shall seek to secure that, where more than one description of service is available, the service funded is that which (in all the circumstances) is the most appropriate having regard to the criteria set out in the code.

(4) The code shall also specify procedures for the making of decisions about the funding of civil legal services by the Commission, including—

- (a) provision about the form and content of applications for funding,
- (b) provision imposing conditions which must be satisfied by an individual applying for funding,
- (c) provision requiring applicants to be informed of the reasons for any decision to refuse an application,
- (d) provision for the giving of information to individuals whose applications are refused about alternative ways of obtaining or funding services, and
- (e) provision establishing procedures for reviews of decisions about funding and for the giving of information about those procedures.

(5) The Commission may from time to time prepare a revised version of the code.

(6) Before preparing the code the Commission shall undertake such consultation as appears to it to be appropriate; and before revising the code the Commission shall undertake such consultation as appears to it to be appropriate unless it considers that it is desirable for the revised version to come into force without delay.

(7) The Lord Chancellor may by order require the Commission to discharge its functions relating to the code in accordance with the order.

Procedure relating to funding code

16.—(1) After preparing the code or a revised version of the code, the Commission shall send a copy to the Lord Chancellor.

(2) If he approves it he shall lay it before each House of Parliament.

(3) The Commission shall publish—

- (a) the code as first approved by the Lord Chancellor, and
- (b) where he approves a revised version, either the revisions or the revised code as appropriate.

(4) The code as first approved by the Lord Chancellor shall not come into force until it has been approved by a resolution of each House of Parliament.

(5) A revised version of the code which does not contain changes in the criteria set out in the code shall not come into force until it has been laid before each House of Parliament.

(6) Subject as follows, a revised version of the code which does contain such changes shall not come into force until it has been approved by a resolution of each House of Parliament.

(7) Where the Lord Chancellor considers that it is desirable for a revised version of the code containing such changes to come into force without delay, he may (when laying the revised version before Parliament) also lay before each House a statement of his reasons for so considering.

(8) In that event the revised version of the code—

- (a) shall not come into force until it has been laid before each House of Parliament, and

- (b) shall cease to have effect at the end of the period of 120 days beginning with the day on which it comes into force unless a resolution approving it has been made by each House (but without that affecting anything previously done in accordance with it).

Terms of provision of funded services

17.—(1) An individual for whom civil legal services are funded by the Commission shall not be required to make any payment in respect of the services except where regulations otherwise provide.

(2) Regulations may provide that, in prescribed circumstances, an individual for whom civil legal services are so funded shall—

- (a) pay a fee of such amount as is fixed by or determined under the regulations,
- (b) if his financial resources are, or relevant conduct is, such as to make him liable to do so under the regulations, pay the cost of the services or make a contribution in respect of the cost of the services of such amount as is so fixed or determined, or
- (c) if the services relate to a dispute and he has agreed to make a payment (which may exceed the cost of the services) only in specified circumstances, make in those circumstances a payment of the amount agreed, or determined in the manner agreed, by him;

and in sub-paragraph (b) “relevant conduct” means conduct in connection with the services (or any application for their funding) or in, or in connection with, any proceedings in relation to which they are provided.

(3) The regulations may include provision for any amount payable in accordance with the regulations to be payable by periodical payments or one or more capital sums, or both.

(4) The regulations may also include provision for the payment by an individual of interest (on such terms as may be prescribed) in respect of—

- (a) any loan made to him by the Commission in connection with civil legal services,
- (b) any payment in respect of the cost of services required by the regulations to be made by him later than the time when the services are provided, or
- (c) so much of any payment required by the regulations to be made by him which remains unpaid after the time when it is required to be paid.

(5) The regulations shall include provision for the repayment to an individual of any payment made by him in excess of his liability under the regulations.

(6) The regulations may—

- (a) include provision requiring the furnishing of information, and
- (b) make provision for the determination of the cost of services for the purposes of the regulations.

(7) Except so far as regulations otherwise provide, where civil legal services have been funded by the Commission for an individual, sums expended by the Commission in funding the services (except to the extent that they are recovered under Articles 18 to 20), and other sums payable by the individual by virtue of regulations under this Article, shall constitute a first charge—

- (a) on any costs which (whether by virtue of a judgment or order of a court or an agreement or otherwise) are payable to him in respect of the matter in connection with which the services are provided, and
- (b) on any property (of whatever nature and wherever situated) which is recovered or preserved by him (whether for himself or any other person) in connection with that matter, including any property recovered or preserved in any proceedings and his rights under any compromise or settlement arrived at to avoid or bring to an end any proceedings.

(8) Regulations may make provision about the charge, including—

- (a) provision as to whether it is in favour of the Commission or the body or person by whom the services were provided, and
- (b) provision about its enforcement.

Costs orders against assisted parties

18.—(1) Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including—

- (a) the financial resources of all parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate;

and for this purpose proceedings, or a part of proceedings, are funded for an individual if civil legal services relating to the proceedings or part are funded for him by the Commission.

(2) In assessing for the purposes of paragraph (1) the financial resources of an individual for whom civil legal services are funded by the Commission, his clothes and household furniture and the tools and implements of his trade shall not be taken into account, except so far as may be prescribed.

Costs of successful unassisted parties

19.—(1) This Article applies to proceedings—

- (a) to which an individual, for whom civil legal services relating to the proceedings, or to a part of the proceedings, are funded by the Commission, is a party, and
- (b) which are finally decided in favour of a party for whom such services are not so funded (“the unassisted party”).

(2) In any proceedings to which this Article applies the court by which the proceedings were so decided may, subject to paragraphs (3) and (4), make an order for the payment by the Commission to the unassisted party of the whole or any part of the costs incurred by him in the proceedings.

(3) Before making an order under this Article, the court shall consider what orders should be made for costs against the party for whom civil legal services relating to the proceedings, or to a part of the proceedings, are funded by the Commission and for determining his liability in respect of such costs.

(4) An order under this Article in respect of any costs may only be made if—

- (a) an order for costs would be made in the proceedings apart from this Order;
- (b) as respects the costs incurred in a court of first instance, those proceedings were instituted by the party for whom civil legal services relating to the proceedings, or to a part of the proceedings, are funded by the Commission and the court is satisfied that the unassisted party will suffer financial hardship unless the order is made; and
- (c) in any case, the court is satisfied that it is just and equitable in all the circumstances of the case that provision for the costs should be made out of public funds.

(5) Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under this Article, or against a refusal to make such an order, except on a point of law.

(6) In this Article “costs” means costs as between party and party, and includes the costs of applying for an order under this Article.

(7) For the purposes of this Article proceedings shall be treated as finally decided in favour of the unassisted party—

- (a) if no appeal lies against the decision in his favour,

- (b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted, or
- (c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal,

and where an appeal against the decision is brought out of time the court by which the appeal (or any further appeal in those proceedings) is determined may make an order for the repayment by the unassisted party to the Commission of the whole or any part of any sum previously paid to him under this Article in respect of those proceedings.

(8) Where a court decides any proceedings in favour of the unassisted party and an appeal lies (with or without leave) against that decision, the court may, if it thinks fit, make or refuse to make an order under this Article forthwith, but if an order is made forthwith it shall not take effect—

- (a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted;
- (b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.

(9) Where a party begins to receive civil legal services after the proceedings have been instituted, or ceases to receive such services before they are finally decided, or otherwise receives such services in connection with part only of the proceedings, the reference in paragraph (2) to the costs incurred by the unassisted party in the proceedings shall be construed as a reference to so much of those costs as is attributable to that part.

(10) For the purposes of this Article “court” includes a tribunal.

Regulations about costs in funded cases

20.—(1) Subject to Articles 18 and 19, regulations may make provision about costs in relation to proceedings in relation to which, or to a part of which, civil legal services are funded for any of the parties by the Commission.

(2) The regulations may, in particular, make provision—

- (a) specifying the principles to be applied in determining the amount of any costs which may be awarded against a party for whom civil legal services are funded by the Commission,
- (b) limiting the circumstances in which, or the extent to which, an order for costs may be enforced against such a party,
- (c) as to the cases in which, and extent to which, such a party may be required to give security for costs and the manner in which it is to be given,
- (d) requiring the payment by the Commission of the whole or part of any costs incurred by a party for whom civil legal services are not funded by the Commission,
- (e) specifying the principles to be applied in determining the amount of any costs which may be awarded to a party for whom civil legal services are funded by the Commission,
- (f) requiring the payment to the Commission, or the person or body by which the services were provided, of the whole or part of any sum awarded by way of costs to such a party, and
- (g) as to the court, tribunal or other person or body by whom the amount of any costs is to be determined and the extent to which any determination of that amount is to be final.

Criminal defence services

Criminal defence services

21.—(1) The Commission shall establish and maintain a fund from which it shall fund—

- (a) advice and assistance in accordance with Article 23, and
- (b) representation in accordance with Articles 24 and 30,

and in this Order services which can be so funded are referred to as “criminal defence services”.

(2) The Lord Chancellor shall pay to the Commission such sums as are required to meet the costs of any criminal defence services funded by the Commission.

(3) The Lord Chancellor may—

- (a) determine the manner in which and times at which the sums referred to in paragraph (2) shall be paid to the Commission, and
- (b) impose conditions on the payment of the sums.

(4) In funding criminal defence services the Commission shall aim to obtain the best possible value for money.

(5) The Commission shall pay into the fund established under paragraph (1)—

- (a) sums received from the Lord Chancellor under paragraph (2),
- (b) sums received by the Commission by virtue of an order by a court under Article 31,
- (c) sums received by the Commission by virtue of an order by a court under section 4 or 6 of the Costs in Criminal Cases Act (Northern Ireland) 1968(7), and
- (d) such other receipts of the Commission as the Lord Chancellor may, with the concurrence of the Treasury, determine.

(6) Where the Commission considers that the amount in the fund established under paragraph (1) significantly exceeds the amount which will be paid out before the next payment by the Lord Chancellor under paragraph (2), it shall—

- (a) inform the Lord Chancellor, and
- (b) if he so directs, pay to the Lord Chancellor so much of the excess as is specified in the direction.

Criminal defence services: code of conduct

22.—(1) The Commission shall prepare a code of conduct to be observed by employees of the Commission, and employees of any body established and maintained by the Commission, in the provision of criminal defence services.

(2) The code shall include—

- (a) duties imposed in accordance with any scheme made by the Commission under Schedule 9 to the Northern Ireland Act 1998(8) (equality schemes),
- (b) duties to protect the interests of the individuals for whom criminal defence services are provided,
- (c) duties to the court,
- (d) duties to avoid conflicts of interest, and
- (e) duties of confidentiality,

and duties on employees who are members of a professional body to comply with the rules of the body.

(3) The Commission may from time to time prepare a revised version of the code.

(7) 1968 c. 10. (N.I.)

(8) 1998 c. 47.

(4) Before preparing or revising the code the Commission shall consult the Law Society and the General Council of the Bar of Northern Ireland and such other bodies or persons as it considers appropriate.

(5) After preparing the code or a revised version of the code the Commission shall send a copy to the Lord Chancellor.

(6) If he approves it he shall lay it before each House of Parliament.

(7) The Commission shall publish—

(a) the code as first approved by the Lord Chancellor, and

(b) where he approves a revised version, either the revisions or the revised code as appropriate.

(8) The code, and any revised version of the code, shall not come into force until it has been approved by a resolution of each House of Parliament.

Advice and assistance

23.—(1) The Commission shall fund such advice and assistance as it considers appropriate—

(a) for individuals who are arrested and held in custody at a police station or other premises, and

(b) in prescribed circumstances, for individuals who—

(i) are not within sub-paragraph (a) but are involved in investigations which may lead to relevant proceedings,

(ii) are before a court or other body in such proceedings, or

(iii) have been the subject of such proceedings.

(2) The Commission may comply with the duty imposed by paragraph (1) by—

(a) entering into contracts with persons or bodies for the provision of advice or assistance by them,

(b) making payments to persons or bodies in respect of the provision of advice or assistance by them,

(c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, advice or assistance,

(d) establishing and maintaining bodies to provide, or facilitate the provision of, advice or assistance,

(e) making grants to individuals to enable them to obtain advice or assistance,

(f) employing persons to provide advice or assistance, or

(g) doing anything else which it considers appropriate for funding advice and assistance.

(3) The Lord Chancellor may by order require the Commission to discharge the function in paragraph (2) in accordance with the order.

(4) The Commission may fund advice and assistance by different means—

(a) in different areas in Northern Ireland, and

(b) in relation to different descriptions of cases.

Representation

24.—(1) The Commission shall fund representation to which an individual has been granted a right in accordance with Articles 25 to 29.

(2) Subject to the following provisions, the Commission may comply with the duty imposed by paragraph (1) by—

- (a) entering into contracts with persons or bodies for the provision of representation by them,
- (b) making payments to persons or bodies in respect of the provision of representation by them,
- (c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, representation,
- (d) establishing and maintaining bodies to provide, or facilitate the provision of, representation,
- (e) making grants to individuals to enable them to obtain representation,
- (f) employing persons to provide representation, or
- (g) doing anything else which it considers appropriate for funding representation.

(3) The Lord Chancellor—

- (a) shall by order make provision about the payments which may be made by the Commission in respect of any representation provided by non-contracted private practitioners, and
- (b) may by order make any other provision requiring the Commission to discharge the function in paragraph (2) in accordance with the order.

(4) For the purposes of paragraph (3)(a) representation is provided by a non-contracted private practitioner if it is provided, otherwise than pursuant to a contract entered into by the Commission, by a person or body which is neither—

- (a) a person or body in receipt of grants or loans made by the Commission under paragraph (2), nor
- (b) the Commission itself or a body established or maintained by the Commission.

(5) The provision which the Lord Chancellor is required to make by order under paragraph (3)(a) includes provision for reviews of, or appeals against, determinations for the purposes of the order.

(6) The Commission may fund representation by different means—

- (a) in different areas in Northern Ireland, and
- (b) in relation to different descriptions of cases.

Individuals to whom right to representation may be granted

25.—(1) A right to representation may be granted—

- (a) for the purposes of any kind of proceedings specified in paragraph (2), to an individual such as is mentioned in that paragraph in relation to that kind of proceedings;
- (b) to an individual for the purposes of enabling him to resist an appeal in proceedings specified in paragraph (2) otherwise than in an official capacity;
- (c) for the purposes of a diversionary youth conference, to a child with respect to whom the conference has been, or is to be, convened,
- (d) to an individual for the purposes of proceedings concerning him which are of such a kind, and are before such court or other body, as may be prescribed,

and in this Order proceedings mentioned in paragraphs (a) to (d) are referred to as “relevant proceedings”.

(2) The proceedings referred to in paragraph (1)(a) and (b) are—

- (a) proceedings before any court for dealing with an individual accused of an offence,
- (b) proceedings before—

- (i) any court, or
 - (ii) the Life Sentence Review Commissioners,
- for dealing with an individual convicted of an offence (including proceedings in respect of a sentence or order),
- (c) proceedings for dealing with an individual under section 9 of, or paragraph 6 of Schedule 1 to, the Extradition Act 1989⁽⁹⁾ or under section 2 of the Backing of Warrants (Republic of Ireland) Act 1965⁽¹⁰⁾,
 - (d) proceedings for binding an individual over to keep the peace or to be of good behaviour under Article 127 of the Magistrates' Courts (Northern Ireland) Order 1981, and for dealing with an individual who fails to comply with an order under that Article,
 - (e) proceedings on an appeal brought by an individual under section 47A of the Criminal Appeal (Northern Ireland) Act 1980⁽¹¹⁾,
 - (f) proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court, and
 - (g) proceedings for dealing with an individual in respect of whom an application has been made under—
 - (i) Article 44 or 45 of the Police and Criminal Evidence (Northern Ireland) Order 1989⁽¹²⁾, or
 - (ii) paragraph 29 or 36 of Schedule 8 to the Terrorism Act 2000⁽¹³⁾,but do not include any proceedings for a writ of habeas corpus or other prerogative remedy.

Grant of right to representation by court

26.—(1) A court before which any relevant proceedings take place, or are to take place, has power to grant a right to representation in respect of those proceedings except in such circumstances as may be prescribed.

(2) Where a right to representation is granted for the purposes of relevant proceedings then, subject to paragraph (5)—

- (a) it includes the right to representation for the purposes of any related bail proceedings, any related court-ordered youth conference, and any preliminary or incidental proceedings; and regulations may make provision specifying whether any proceedings are or are not to be regarded as preliminary or incidental; and
- (b) it includes the right to such advice and assistance, as to any appeal, as may be prescribed.

(3) A court also has power to grant a right to representation for the purposes of relevant proceedings before another court in such circumstances as may be prescribed.

(4) A magistrates' court also has power to grant a right to representation for the purposes of a diversionary youth conference.

(5) A court has power to grant representation for a limited period, for the purposes of specified proceedings only or for the purposes of limited aspects of proceedings, and to vary or remove any limitation imposed on representation.

(6) Regulations may make provision—

- (a) as to the form of any application for a grant of a right to representation under this Article;

⁽⁹⁾ 1989 c. 33.

⁽¹⁰⁾ 1965 c. 45.

⁽¹¹⁾ 1980 c. 47.

⁽¹²⁾ 1989 N.I. 12.

⁽¹³⁾ 2000 c. 11.

- (b) as to the information which must be supplied with any such application;
- (c) as to the form of any grant of a right to representation under this Article;
- (d) requiring the court granting a right to representation under this Article to indicate the grounds on which the right was granted.

(7) Before making any regulations under paragraph (6) the Lord Chancellor shall consult the Lord Chief Justice.

(8) The refusal of a right to representation before a hearing shall not prevent the applicant being granted a right to representation at the hearing.

(9) A right to representation in respect of proceedings may be withdrawn—

- (a) by any court before which the proceedings take place, or
- (b) in the case of a diversionary youth conference, by a magistrates' court;

and a court must consider whether to withdraw a right to representation in such circumstances as may be prescribed.

(10) In this Article “court” includes any body before which relevant proceedings take place.

Grant of right to representation by Commission

27.—(1) Regulations may provide that the Commission shall have power to grant rights to representation in respect of any one or more of the descriptions of proceedings prescribed under Article 25(1)(d), and to withdraw any rights to representation granted by it.

(2) Regulations under paragraph (1) may provide that the Commission shall have power to grant representation for a limited period or for the purposes of specified proceedings only or for the purposes of limited aspects of proceedings, and to vary or remove any limitation imposed on representation.

(3) Regulations under paragraph (1) may make provision—

- (a) as to the form of any application for a grant of a right to representation under those regulations;
- (b) as to the information which must be supplied with any such application;
- (c) as to the form of any grant of a right to representation under those regulations;
- (d) requiring the Commission to indicate the grounds on which any right to representation is granted under those regulations.

Appeals

28. Except where regulations otherwise provide, an appeal shall lie to such court or other person or body as may be prescribed against a decision—

- (a) to refuse a right to representation in respect of relevant proceedings;
- (b) to impose or vary a limitation on such a right;
- (c) not to extend such a right; or
- (d) to withdraw such a right.

Criteria for grant of right to representation

29.—(1) Any question as to whether a right to representation should be granted or extended, or whether a limitation on representation should be imposed, varied or removed, shall be determined according to the interests of justice.

(2) In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account—

- (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation,
- (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,
- (c) whether the individual may be unable to understand the proceedings or to state his own case,
- (d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
- (e) whether it is in the interests of another person that the individual be represented.

(3) The Lord Chancellor may by order amend paragraph (2) by adding new factors or varying any factor.

(4) A right to representation shall always be granted in such circumstances as may be prescribed.

Selection of representative

30.—(1) An individual who has been granted a right to representation in accordance with Articles 25 to 29 may, subject to Article 35, select any representative or representatives willing to act for him; and, where he does so, the Commission is to comply with the duty imposed by Article 24 by funding representation by the selected representative or representatives.

(2) Regulations may provide that in prescribed circumstances—

- (a) the right conferred by paragraph (1) is not to apply in cases of prescribed descriptions,
- (b) an individual who has been provided with advice or assistance funded by the Commission under Article 23 by a person whom he chose to provide it for him is to be taken to have selected that person as his representative pursuant to that right,
- (c) that right is not to include a right to select a representative of a prescribed description,
- (d) that right is to select only a registered person within the meaning of Article 36, or only a representative of a prescribed description,
- (e) that right is to select not more than a prescribed number of representatives to act at any one time,
- (f) that right is not to include a right to select a representative in place of a representative previously selected.

(3) Regulations under paragraph (2)(b) may prescribe circumstances in which an individual is to be taken to have chosen a person to provide advice or assistance for him.

(4) Regulations under paragraph (2) may not provide that only a person employed by the Commission, or by a body established and maintained by the Commission, may be selected.

(5) Regulations may provide that in prescribed circumstances the Commission is not required to fund, or to continue to fund, representation for an individual by a particular representative (but such provision shall not prejudice any right of the individual to select another representative).

(6) The circumstances which may be prescribed by regulations under paragraph (2) or (5) include that a determination has been made by a prescribed body or person.

(7) A representative who has been selected to act for an individual under this paragraph may select another person to act for that individual, as the agent of the representative, if that other person is of such a description that nothing in Article 35 would prohibit the individual selecting him as his representative.

Terms of provision of funded services

31.—(1) An individual for whom criminal defence services are funded by the Commission shall not be required to make any payment in respect of the services except where paragraph (2) applies.

(2) Where representation for an individual in respect of relevant proceedings in any court is funded by the Commission under Article 24, the court may, subject to regulations under paragraph (3), make an order requiring him to pay some or all of the cost of any representation so funded for him (in proceedings in that or any other court, or in any related court-ordered youth conference).

(3) Regulations may make provision about—

- (a) the descriptions of courts by which, and individuals against whom, an order under paragraph (2) may be made,
- (b) the circumstances in which such an order may be made and the principles to be applied in deciding whether to make such an order and the amount to be paid,
- (c) the determination of the cost of representation for the purposes of the making of such an order,
- (d) the furnishing of information and evidence to the court or the Commission for the purpose of enabling the court to decide whether to make such an order and (if so) the amount to be paid,
- (e) prohibiting individuals who are required to furnish information or evidence from dealing with property until they have furnished the information or evidence or until a decision whether to make an order, or the amount to be paid, has been made,
- (f) rights of appeal against such an order,
- (g) the person or body to which, and manner in which, payments required by such an order must be made and what that person or body is to do with them, and
- (h) the enforcement of such an order (including provision for the imposition of charges in respect of unpaid amounts).

*Supplementary***Restriction of disclosure of information**

32.—(1) Information which is furnished—

- (a) to the Commission or any court, tribunal or other person or body on whom functions are imposed or conferred by or under this Part, and
- (b) in connection with the case of an individual seeking or receiving civil legal services or criminal defence services funded by the Commission,

shall not be disclosed except as permitted by regulations.

(2) Paragraph (1) does not limit the disclosure of—

- (a) information in the form of a summary or collection of information so framed as not to enable information relating to any individual to be ascertained from it, or
- (b) information about the amount of any grant, loan or other payment made to any person or body by the Commission.

(3) Paragraph (1) does not prevent the disclosure of information for any purpose with the consent of the individual in connection with whose case it was furnished and, where he did not furnish it himself, with that of the person or body who did.

(4) A person who discloses any information in contravention of this Article shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(5) Proceedings for an offence under this Article shall not be brought except by or with the consent of the Attorney General.

(6) Nothing in this Article applies to information furnished to a person providing civil legal services or criminal defence services funded by the Commission by or on behalf of an individual seeking or receiving such services.

Misrepresentation etc.

33.—(1) Any person who—

- (a) intentionally fails to comply with any requirement imposed by virtue of this Part as to the information to be furnished by him, or
- (b) in furnishing any information required by virtue of this Part makes any statement or representation which he knows or believes to be false,

shall be guilty of an offence.

(2) A person guilty of an offence under paragraph (1) is liable on summary conviction to—

- (a) a fine not exceeding level 4 on the standard scale, or
- (b) imprisonment for a term not exceeding three months,

or to both.

(3) Notwithstanding any statutory provision prescribing the period within which summary proceedings may be commenced, proceedings in respect of an offence under paragraph (1) may be commenced at any time within the period of six months beginning with the date on which evidence, sufficient in the opinion of the Attorney General to justify a prosecution for the offence, comes to his knowledge.

(4) But paragraph (3) does not authorise the commencement of proceedings for an offence at a time more than two years after the date on which the offence was committed.

(5) For the purposes of paragraph (3) a certificate purporting to be signed by the Attorney General as to the date on which evidence such as is mentioned in that paragraph has come to his knowledge, shall be conclusive evidence thereof.

(6) A county court shall, notwithstanding any limitation imposed on the jurisdiction of a county court under any other statutory provision, have jurisdiction to hear and determine any action brought by the Commission to recover loss sustained by reason of—

- (a) the failure of any person to comply with any requirement imposed by virtue of this Part as to the information to be furnished by him, or
- (b) a false statement or false representation made by any person in furnishing any information required by virtue of this Part.

Position of service providers and other parties etc.

34.—(1) Except as expressly provided by regulations, the fact that civil legal services or criminal defence services provided for an individual are or could be funded by the Commission, shall not affect—

- (a) the relationship between that individual and the person by whom they are provided or any privilege arising out of that relationship, or
- (b) any right which that individual may have to be indemnified, in respect of expenses incurred by him, by any other person.

(2) A person who provides civil legal services or criminal defence services funded by the Commission shall not take any payment in respect of the services apart from—

- (a) that made by way of that funding, and
- (b) any authorised by the Commission to be taken.

(3) Where civil legal services funded by the Commission are provided in connection with any proceedings, any expenses incurred in connection with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the person providing the services, shall be so paid except where they are paid by the Commission.

(4) The withdrawal of a right to representation previously granted to an individual shall not affect the right of any person who has provided to him civil legal services or criminal defence services funded by the Commission to remuneration for work done before the date of the withdrawal.

(5) Except as expressly provided by regulations, any rights conferred by or by virtue of this Part on an individual for whom civil legal services or criminal defence services are funded by the Commission in relation to any proceedings shall not affect—

- (a) the rights or liabilities of other parties to the proceedings, or
- (b) the principles on which the discretion of any court or tribunal is normally exercised.

(6) Regulations may make provision about the procedure of any court or tribunal in relation to civil legal services or criminal defence services funded by the Commission.

(7) Regulations made under paragraph (6) may in particular authorise the exercise of the functions of any court or tribunal by any member or officer of that or any other court or tribunal.

Solicitors and barristers

35.—(1) The Commission shall not fund any civil legal services or criminal defence services provided by a solicitor who is for the time being prohibited from providing such services by an order under Article 51B(1) or (3) of the Solicitors (Northern Ireland) Order 1976⁽¹⁴⁾.

(2) The Commission shall not fund any civil legal services or criminal defence services provided by a barrister who is for the time being prohibited from providing such services by any determination of the General Council of the Bar of Northern Ireland, or by any determination of any such committee as may be established by that Council to determine charges preferred against barristers.

(3) The Commission—

- (a) may make a complaint to the Law Society about the provision of civil legal services or criminal defence services by a solicitor;
- (b) may refer to the Law Society any complaint which is made to the Commission about the provision of such services by a solicitor;
- (c) may make a complaint to the General Council of the Bar of Northern Ireland about the provision of civil legal services or criminal defence services by a barrister; and
- (d) may refer to the General Council of the Bar of Northern Ireland any complaint which is made to the Commission about the provision of such services by a barrister.

(4) Any right conferred on an individual by virtue of this Part to select a person to provide civil legal services or criminal defence services for him shall not prejudice the law and practice relating to the conduct of proceedings by a solicitor or barrister or the circumstances in which a solicitor or counsel may refuse or give up a case or entrust it to another.

(14) 1976 N.I. 12.

Register of persons providing services

36.—(1) Regulations may—

- (a) make provision for the registration by the Commission of persons who are eligible to provide civil legal services or criminal defence services funded by the Commission;
- (b) provide that only those persons who are registered (“registered persons”) may provide such services; and
- (c) require registration of firms or organisations with which registered persons are connected.

(2) Regulations may require the Commission to prepare a code of practice in relation to—

- (a) the conditions to be complied with in order to qualify for registration, and
- (b) the carrying out by registered persons, and any firm or organisation which is registered in connection with a registered person, of their functions with regard to civil legal services or criminal defence services funded by the Commission.

(3) Regulations—

- (a) may require registered persons, and any firm or organisation which is registered in connection with a registered person, to comply with any such code of practice;
- (b) require the Commission or persons authorised by the Commission to monitor compliance with any such code of practice; and
- (c) may make provision about procedures for cases in which—
 - (i) it appears to the Commission or a person authorised by the Commission that a registered person, or any firm or organisation which is registered in connection with a registered person, may not be complying with any such code of practice, or
 - (ii) a person who holds any judicial office asks the Commission to investigate whether a registered person, or any firm or organisation which is registered in connection with a registered person, is complying with any such code of practice,

and the sanctions which may be imposed under this sub-paragraph may include provision for a person, firm or organisation to cease to be registered.

(4) Regulations under this Article—

- (a) may make provision imposing charges;
- (b) may make provision with respect to the powers of investigation which may be exercised by the Commission, or by persons authorised by the Commission, for the purpose of monitoring compliance with any code of practice prepared under the regulations;
- (c) may make provision for obstruction of the exercise of powers conferred by virtue of sub-paragraph (b) to be certified to the High Court in prescribed circumstances, and for any power of the court in relation to contempt of court to be exercisable in relation to such obstruction.

(5) Before making any regulations under this Article the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
- (b) may undertake such other consultation as appears to him to be appropriate.

PART III

OTHER FUNDING OF LEGAL SERVICES

Conditional fee and litigation funding agreements

Interpretation of Part III

37.—(1) In this Part—

“advocacy services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;

“a conditional fee agreement” is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;

“a litigation funding agreement” is an agreement under which—

- (a) a person (“the funder”) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (“the litigant”); and
- (b) the litigant agrees to pay, in addition to any fee payable on the making of the agreement, a sum to the funder in specified circumstances;

“litigation services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;

“proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated;

“a right of audience” means the right to appear before and address a court including the right to call and examine witnesses;

“a right to conduct litigation” means the right—

- (c) to issue proceedings before any court, and
- (d) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions).

(2) For the purposes of this Part, a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

Conditional fee agreements

38.—(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to paragraph (4)) any other conditional fee agreement shall be unenforceable.

(2) The following conditions are applicable to every conditional fee agreement—

- (a) it must be in writing;
- (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
- (c) it must comply with such requirements (if any) as may be prescribed.

(3) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—

- (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
- (b) it must state the percentage by which the amount of fees which would be payable if it were not a conditional fee agreement is to be increased; and
- (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.

(4) If a conditional fee agreement is an agreement to which Article 71A of the Solicitors (Northern Ireland) Order 1976⁽¹⁵⁾ (non-contentious business agreements between solicitor and client) applies, paragraph (1) shall not make it unenforceable.

Conditional fee agreements: supplementary

39.—(1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—

- (a) criminal proceedings; and
- (b) family proceedings.

(2) In paragraph (1) “family proceedings” means proceedings under any one or more of the following—

- (a) the Matrimonial Causes (Northern Ireland) Order 1978⁽¹⁶⁾;
- (b) the Domestic Proceedings (Northern Ireland) Order 1980⁽¹⁷⁾;
- (c) the Adoption (Northern Ireland) Order 1987⁽¹⁸⁾;
- (d) Part IV of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989⁽¹⁹⁾;
- (e) Parts II, III, V and XV of the Children (Northern Ireland) Order 1995⁽²⁰⁾;
- (f) the Family Homes and Domestic Violence (Northern Ireland) Order 1998⁽²¹⁾,

and the inherent jurisdiction of the High Court in relation to children.

(3) The Lord Chancellor may by regulations amend paragraph (1) or (2) by adding proceedings or omitting or varying any proceedings; and regulations under this paragraph may, in particular, describe the proceedings which cannot be the subject of an enforceable conditional fee agreement by reference to the court or tribunal before which proceedings are to take place, or the issues involved.

(4) The requirements which the Lord Chancellor may prescribe under Article 38(2)(c)—

- (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
- (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(5) Before making an order under Article 38(3), the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and

⁽¹⁵⁾ 1976 N.I. 12.

⁽¹⁶⁾ 1978 N.I. 15.

⁽¹⁷⁾ 1980 N.I. 5.

⁽¹⁸⁾ 1987 N.I. 22.

⁽¹⁹⁾ 1989 N.I. 4.

⁽²⁰⁾ 1995 N.I. 2.

⁽²¹⁾ 1998 N.I. 6.

(b) may undertake such other consultation as appears to him to be appropriate.

(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of fees payable under a conditional fee agreement which provides for a success fee.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).

Litigation funding agreements

40.—(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) The following conditions are applicable to a litigation funding agreement—

- (a) the funder must be a prescribed person or a person of a prescribed description;
- (b) the agreement must be in writing;
- (c) the agreement must not relate to proceedings which by virtue of Article 39(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed;
- (d) the agreement must comply with such requirements (if any) as may be prescribed;
- (e) any fee payable on the making of the agreement must not exceed such amount as may be prescribed;
- (f) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates, together with an amount calculated—
 - (i) in prescribed circumstances, by reference to the funder's anticipated expenditure in funding the provision of the services; and
 - (ii) in prescribed circumstances, by reference to any damages recovered by the litigant in the proceedings; and
- (g) the amount calculated in accordance with sub-paragraph (f)(i) or (ii) must not exceed such limit (whether expressed as a figure, as a percentage of the anticipated expenditure or damages mentioned in that sub-paragraph, or otherwise) as may be prescribed in relation to proceedings of the description to which the agreement relates.

(3) Regulations under paragraph (2)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.

(4) The requirements which may be prescribed under paragraph (2)(d) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made.

(5) Before making regulations under this Article, the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
- (b) may undertake such other consultation as appears to him to be appropriate.

Litigation funding agreements: the Commission

41. The Commission, and any body established or maintained by the Commission, may not—

- (a) fund services under a litigation funding agreement, or
- (b) make any payment to any person for the purpose of enabling services to be funded under a litigation funding agreement.

Litigation funding agreements: costs

42.—(1) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.

(2) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.

(3) In any proceedings—

- (a) to which an individual, for whom advocacy or litigation services relating to the proceedings, or to a part of the proceedings, are funded under a litigation funding agreement, is a party, and
- (b) which are finally decided in favour of a party for whom such services are not so funded (“the unfunded party”),

the court by which the proceedings were so decided may, subject to paragraph (4), make an order for the payment by the funder to the unfunded party of the whole or any part of the costs incurred by the unfunded party in the proceedings.

(4) An order under paragraph (3) in respect of any costs may only be made if an order for costs would be made in the proceedings apart from this Order.

(5) Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under paragraph (3), or against a refusal to make such an order, except on a point of law.

(6) In this Article “costs” means costs as between party and party, and includes the costs of applying for an order under paragraph (3).

(7) For the purposes of this Article proceedings shall be treated as finally decided in favour of the unfunded party—

- (a) if no appeal lies against the decision in his favour,
- (b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted, or
- (c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal,

and where an appeal against the decision is brought out of time the court by which the appeal (or any further appeal in those proceedings) is determined may make an order for the repayment by the unfunded party to the funder of the whole or any part of any sum previously paid to the unfunded party under this Article in respect of those proceedings.

(8) Where a court decides any proceedings in favour of the unfunded party and an appeal lies (with or without leave) against that decision, the court may, if it thinks fit, make or refuse to make an order under paragraph (3) forthwith, but if an order is made forthwith it shall not take effect—

- (a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted;
- (b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.

(9) Where a party begins to receive advocacy or litigation services funded by the funder after the proceedings have been instituted, or ceases to receive advocacy or litigation services so funded before they are finally decided, or otherwise receives advocacy or litigation services so funded in connection with part only of the proceedings, the reference in paragraph (3) to the costs incurred by the unfunded party in the proceedings shall be construed as a reference to so much of those costs as is attributable to that part.

(10) For the purposes of this Article “court” includes a tribunal.

Costs

Recovery of insurance premiums by way of costs

43. Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.

Recovery where body undertakes to meet cost liabilities

44.—(1) This Article applies where a body of a prescribed description undertakes to meet (in accordance with arrangements satisfying prescribed conditions) liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings.

(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to paragraph (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities.

(3) But the additional amount shall not exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

(4) Regulations under paragraph (1) may, in particular, prescribe as a description of body one which is for the time being approved by the Lord Chancellor or a prescribed person.

PART IV

SUPPLEMENTARY

Application to Crown

45. This Order binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.

Orders, regulations and directions

46.—(1) Any direction given by the Lord Chancellor to the Commission under Part II may be varied or revoked.

(2) No directions may be given by the Lord Chancellor to the Commission under Part II in relation to individual cases.

(3) The Lord Chancellor shall either—

- (a) publish, or
- (b) require the Commission to publish,

any directions given by him under Part II.

(4) Any order or regulations made by the Lord Chancellor under this Order may contain such incidental, supplemental, consequential, saving or transitional provisions as the Lord Chancellor

thinks fit; and, without prejudice to section 17(5) of the Interpretation Act (Northern Ireland) 1954⁽²²⁾, any power conferred by this Order to make regulations or orders includes power to make different provision for different areas.

(5) No order shall be made under Article 4(4), 5, 10(2), 11(9)(b), 15(7), 29(3) or 38(3) and no regulations shall be made under Article 12(6), 18(1), 20(2)(b) or (d), 28, 30(2)(a) or (5), 32(1), 36 or 39(3) unless a draft of the order or regulations has been laid before, and approved by resolution of, each House of Parliament.

(6) Any other order or regulations under this Order, other than an order under Article 1(2) or 48 or paragraph 2(6) of Schedule 3, shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946⁽²³⁾ shall apply accordingly.

Remuneration orders

47.—(1) When making any remuneration order the Lord Chancellor shall have regard, among the matters which are relevant, to—

- (a) the time and skill which the provision of services of the description to which the order relates requires;
- (b) the number and general level of competence of persons providing those services;
- (c) the cost to public funds of any provision made by the regulations; and
- (d) the need to secure value for money.

(2) Before making any remuneration order, the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society, the General Council of the Bar of Northern Ireland and, if the remuneration order relates to criminal defence services, the Director of Public Prosecutions, and
- (b) may undertake such other consultation as appears to him to be appropriate.

(3) When the Lord Chancellor is making provision in a remuneration order which prescribes fees which are to be paid to persons or bodies in respect of the provision of services by them, nothing in paragraph (1) requires him to have regard to any fee payable, otherwise than in accordance with a remuneration order, in respect of the provision of such services.

(4) In paragraphs (1) to (3) “remuneration order” means an order under Article 12(3), 23(3) or 24(3) which relates to the payment by the Commission of remuneration—

- (a) for the provision of services by persons or bodies in individual cases, or
- (b) by reference to the provision of services by persons or bodies in specified numbers of cases.

(5) Until the Attorney General is a person appointed under section 22(2) of the Justice (Northern Ireland) Act 2002⁽²⁴⁾, the reference in paragraph (2) to the Director of Public Prosecutions shall be construed as a reference to the Attorney General.

Transitional provisions and savings

48.—(1) The Lord Chancellor may by order make such transitional provisions and savings as he considers appropriate in connection with the coming into operation of any provision of this Order.

(2) Schedule 3 (transitional provisions and savings) shall have effect.

⁽²²⁾ 1954 c. 33 (N.I.)

⁽²³⁾ 1946 c. 36.

⁽²⁴⁾ 2002 c. 26.

(3) Nothing in Schedule 3 limits paragraph (1) or the operation of sections 28 and 29 of the Interpretation Act (Northern Ireland) 1954.

Minor and consequential amendments and repeals

49.—(1) The statutory provisions specified in Schedule 4 shall be amended as specified in that Schedule.

(2) The statutory provisions specified in Schedule 5 are hereby repealed to the extent specified in column 3 of that Schedule.

A. K. Galloway
Clerk of the Privy Council