

*These notes refer to the Access to Justice Act 1999  
(c.22) which received Royal Assent on 27th July 1999*

# **ACCESS TO JUSTICE ACT 1999**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Access to Justice Act 1999. They have been prepared by the Lord Chancellor's Department in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### **OVERVIEW**

3. This Act replaces the legal aid system with two new schemes; and makes provision about private methods of funding litigation; the provision of legal services; the handling of complaints about lawyers; appeals, courts, judges and court proceedings; magistrates and magistrates' courts; and immunity from legal action and costs and indemnities for certain officers exercising judicial functions.
4. The provisions in the Act form part of the wide-ranging programme of reforms to legal services and the courts described in the Government's White Paper, *Modernising Justice*, published on 2 December 1998.
5. Except where noted, the Act only affects England and Wales.
6. These Notes are in five main parts, reflecting the main topics in the Act.

#### ***Funding of legal services (Parts I & II – sections 1-34 )***

7. Part I of the Act provides for two new schemes, replacing the existing legal aid scheme, to secure the provision of publicly-funded legal services for people who need them.
8. It establishes a Legal Services Commission to run the two schemes; and enables the Lord Chancellor to give the Commission orders, directions and guidance about how it should exercise its functions.
9. It requires the Commission to establish, maintain and develop a Community Legal Service. The Community Legal Service fund will replace the legal aid fund in civil and family cases. The Commission will use the resources of the fund in a way that reflects priorities set by the Lord Chancellor and its duty to secure the best possible value for money, to procure or provide a range of legal services. The Commission will also have a duty to plan what can be done towards meeting need for legal services, and to liaise with other funders of legal services to facilitate the development of co-ordinated plans for making the best use of all available resources. The intention is to develop comprehensive referral networks of legal service providers of assured quality, offering the widest possible access to information and advice about the law and help with legal problems.

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10. The Commission will also be responsible for a Criminal Defence Service, which will replace the current legal aid scheme in criminal cases. The new scheme is intended to ensure that people suspected or accused of a crime are properly represented, while securing better value for money than is possible under the legal aid scheme.
11. Part II makes changes to facilitate the private funding of litigation. It amends the law on conditional fee agreements between lawyers and their clients, in particular to allow the uplift payable in successful cases to be recovered in costs from the other side. It also changes the law on the recovery of costs between the parties to litigation, and allows for third parties to establish funds to support litigation on a conditional basis.
12. Part II also makes three changes to the legal aid scheme in Scotland.

***Provision of legal services (Part III – sections 35-53)***

13. Part III of the Act reforms the law on lawyers' rights of audience before the courts and rights to conduct litigation; and makes changes relating to complaints against lawyers. It:
  - replaces the Lord Chancellor's Advisory Committee on Legal Education and Conduct with a new Legal Services Consultative Panel;
  - provides that, in principle, all lawyers should have full rights of audience before any court, subject only to meeting reasonable training requirements;
  - reforms the procedures for authorising further professional bodies to grant rights of audience or rights to conduct litigation to their members; and for approving changes to professional rules of conduct relating to the exercise of these rights; and
  - gives additional powers to the Law Society and the Legal Services Ombudsman to strengthen the system for handling complaints against lawyers, and creates a Legal Services Complaints Commissioner to set targets for the handling of complaints by the professional bodies.
14. Part III also provides for applicants for appointment as Queen's Counsel to be charged a fee; establishes a system of practising certificates for barristers; amends the law on the fee payable for a solicitor's practising certificate; and abolishes the monopoly of the Scriveners' Company of the provision of notarial services in and around the City of London.

***Appeals, courts, judges and court proceedings (Part IV - sections 54-73)***

15. Part IV of the Act reforms the system for appeals in civil and family cases. It:
  - establishes the principles that should underlie the jurisdiction of the civil courts to hear appeals;
  - gives the Lord Chancellor power to define the venue for appeal in different categories of case; and
  - changes the law relating to the constitution of the Civil Division of the Court of Appeal.

The intention is to ensure that the appellate system reflects the principle, which underlies the Government's wider programme of civil justice reforms, that cases should be dealt with in a way that is proportionate to the issue at stake.

16. Part IV also confirms the powers of the High Court when hearing cases stated by the Crown Court for an opinion of the High Court. It enables these and certain other applications to the High Court to be heard by a single judge. It empowers the Crown Court, rather than a magistrates' court, to deal with breaches of community sentences imposed by the Crown Court, and changes the law about time limits when a defendant

is sent directly to the Crown Court for trial. It provides for the secondment of UK judges to international courts and establishes the post of Vice-President of the Queen's Bench Division. It eliminates duplication between a public inquiry into a disaster and the inquest into the deaths. It prohibits the publication of material likely to identify a child involved in proceedings under the Children Act 1989 before the High Court or a county court; and allows for children under 14 to attend criminal trials.

***Magistrates and magistrates' courts (Part V - sections 74-97)***

17. Part V of the Act contains a range of provisions relating to magistrates and magistrates' courts. It:
- provides for various changes to the organisation and management of magistrates' courts, and in particular establishes a single Magistrates' Courts Authority for Greater London;
  - unifies the provincial and metropolitan Stipendiary Magistrates into a single bench;
  - removes the requirement for magistrates to sit on cases committed to the Crown Court for sentence; and
  - extends and clarifies the powers of civilians to execute warrants - this is intended to enable this function to be transferred from the police to the magistrates' courts.

***Immunity and indemnity (Parts VI - sections 98-104)***

18. Part VI of the Act makes provision about immunity from action and costs and indemnities for certain officials exercising judicial functions.

19. Part VII (sections 105-110) makes general supplementary provisions.

A.

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

***Summary***

20. The Act reforms the legal aid system in England and Wales, and amends the law relating to conditional fee agreements between lawyers and their clients, and the award of costs between the parties to litigation. It also makes minor amendments to the legal aid scheme in Scotland.
21. The Government's intention is to increase access to justice, by:
- reforming the legal aid scheme, which provides public funding for legal services, in order to ensure that resources can be allocated in a way that reflects priorities and to secure better value for money;
  - co-ordinating central Government funding with funding from other sources, in particular local authority grants to advice centres, to ensure that the available resources are used to the best effect overall; and
  - extending the scope and improving the operation of conditional fees, in order to allow more people to fund litigation privately.
22. The Act replaces the existing legal aid system with two separate schemes for funding services in civil and criminal matters. These will be known as the Community Legal Service and the Criminal Defence Service respectively. Both schemes will be run by a new body, the Legal Services Commission, which will replace the Legal Aid Board. Both will secure legal services for people who need them largely through contracts with quality assured providers. But the Commission will also be able to make grants and loans, and employ staff to provide services directly.

### ***Community Legal Service***

23. The Legal Services Commission will have two main duties in respect of the Community Legal Service (CLS).

- It will manage a Community Legal Service fund, which will replace legal aid in civil and family cases. The CLS fund will be used to secure the provision of appropriate legal services, within the resources made available to it and according to priorities. A Funding Code, drawn up by the Commission and approved by the Lord Chancellor, will set out the criteria for deciding whether to fund individual cases.

The Legal Aid Board published a draft Funding Code for consultation in January 1999. The closing date for comments was 30 April 1999. Copies of the draft Code can be obtained from the Legal Aid Board, 85 Gray's Inn Road, London, WC1X 8AA.

- The Commission will also take the lead in developing the wider Community Legal Service. It will co-operate with local funders and others to develop local, regional and national plans to match the delivery of legal services to identified needs and priorities.

The Lord Chancellor's Department published a consultation paper about the Community Legal Service in May 1999. Copies can be obtained by phoning 0171 210 0733/1325. The closing date for comments is 30 July 1999.

24. The development of the CLS depends on the formation of Community Legal Service Partnerships (CLSPs) in each local authority area. These do not require specific provisions in the Act. Each CLSP will provide a forum for the local authority, the Legal Services Commission, and others, jointly to plan and co-ordinate funding of local advice and other legal services, ensuring that delivery of these services better matches local needs.

25. Overall, the creation of the Community Legal Service is intended to:

- make best use of all the resources available for funding legal services, by facilitating a co-ordinated approach to planning;
- improve value for money through contracting and the development of quality assurance systems;
- establish a flexible system for allocating central Government funding in a transparent way within a controlled budget, so as to provide legal services where they are judged to be most needed; and
- ensure that the scheme is capable of adapting to meet changing priorities and opportunities.

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

26. The purpose of the Criminal Defence Service (CDS) is to secure the provision of advice, assistance and representation, according to the interests of justice, to people suspected of a criminal offence or facing criminal proceedings.

27. The Legal Services Commission will be empowered to secure these services through contracts with lawyers in private practice, or by providing them through salaried defenders (employed directly by the Commission or by non-profit-making organisations established for the purpose). This will necessarily mean that suspects' and defendants' choice of representative is limited to contracted or salaried defenders, although the intention is to offer a choice in all but exceptional cases (see paragraph 114 below). All contractors will be expected to meet quality-assurance standards; and contracts will, wherever possible, cover the full range of services from arrest until the case is completed. (The current arrangements for criminal legal aid are fragmented:

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a person can receive assistance in respect of the same alleged offence under several separate schemes, each resulting in a separate payment for the lawyers involved.)

28. There will be a transitional period while contracts are developed and extended to cover the full range of services. The Commission will therefore be able to pay lawyers on a case by case basis for representation provided on a non-contractual basis, according to remuneration scales set by order (that is broadly on the same basis as the current criminal legal aid scheme).
29. The Commission will gradually take over the functions currently undertaken by the higher courts in respect of criminal legal aid. At first, Court Service staff will continue to determine costs in most Crown Court cases; but the number of cases dealt with like this will diminish as the Commission increases the proportion of cases covered by contracts. Court staff will also continue to determine costs in cases before the Court of Appeal (Criminal Division) and the House of Lords; the scope for the Commission to contract for these cases as well will be considered in due course.
30. As now, the courts will grant representation under the scheme to defendants according to the interests of justice. But the courts will no longer have to conduct a means test as well before granting representation. Instead, at the end of a case before any court other than a magistrates' court, the judge will have power to order a defendant to pay some or all of the cost of his or her defence. The Commission may investigate the defendant's means in order to assist the judge. The intention is to abolish the system of means testing every defendant, which the Government considers an ineffective and wasteful aspect of the current scheme, while ensuring that in the more expensive cases defendants continue to pay towards the cost of their defence when they can afford to do so.
31. Under the current criminal legal aid scheme, most defendants (about 95%) are not required to make a contribution to their defence costs. Those who do contribute and are acquitted usually have their contributions returned. The cost of means testing and enforcing contribution orders is high in relation to the contributions recovered. In 1997/98, criminal legal aid contributions totalled £6.2 million, while the direct cost of administering the system was about £5 million. Means testing also leads to delays in cases being brought to court, because cases have to be adjourned when the evidence required to conduct the test is not produced.

***Conditional fees etc.***

32. The Act reforms the law relating to conditional fees and "after the event" legal expenses insurance (see paragraphs 46 & 48 below). It will enable the court to order a losing party to pay any uplift on the successful party's lawyers' normal fees and any premium paid by the successful party for insurance against being ordered to pay the other side's costs. The intention is to:
  - ensure that the compensation awarded to a successful party is not eroded by any uplift or premium - the party in the wrong will bear the full burden of costs;
  - make conditional fees more attractive, in particular to defendants and to plaintiffs seeking non-monetary redress - these litigants can rarely use conditional fees now, because they cannot rely on the prospect of recovering damages to meet the cost of the uplift and premium;
  - discourage weak cases and encourage settlements; and
  - provide a mechanism for regulating the uplifts that solicitors charge - in future, unsuccessful litigants will be able to challenge unreasonably high uplifts when the court comes to assess costs.

## **Background**

### **Legal Aid**

33. The present scheme is contained in the Legal Aid Act 1988.
34. A common feature of existing civil and criminal legal aid schemes is that expenditure on them is demand-led. Any lawyer can do legal aid work for a client who passes the relevant means test (if any), and whose case passes the statutory merits test (in the case of civil legal aid), or the interests of justice test (in the case of criminal legal aid). Lawyers are paid on a case-by-case basis, usually at rates or fees set in regulations, but in some cases on the same basis as a privately-funded lawyer.
35. This means that there are few mechanisms or incentives for promoting value for money or assuring the quality of the services provided; and that neither the Government nor the Legal Aid Board is able to exert adequate control over expenditure or determine the priorities for that expenditure.
36. Over the last 6 years, total *net* expenditure on legal aid has increased by £529 million, from £1,093 million in 1992/93 to £1,622 million in 1998/99, a rise of 48%. This compares with general inflation of 16% over the same 6 years. Meanwhile, the total number of people helped by legal aid increased by 7% to 3.5 million. Over the same period, spending on civil and family legal aid rose from £463 million to £659 million, an increase of 42%, while the number of people helped fell by almost 30%. The average *gross* cost of civil or family cases rose by 86%, from £1,739 in 1992/93 to £3,239 in 1998/99. Spending on criminal legal aid rose by 50% from £418 million to £625 million, while the numbers helped increased by 11%. The average cost of a criminal case went up by 8% in the magistrates' courts and 53% in the Crown Court.

### **Quality assurance and contract pilots**

37. Since August 1994, the Legal Aid Board has operated a voluntary quality assurance scheme, known as franchising. Currently, some 2,900 solicitors' firms have franchises in one or more of the 10 subject categories in which they are awarded (criminal, family, personal injury, housing etc.) Over 3,100 further applications for franchises are pending. The Board is continuing to develop the franchising scheme, and introduce new categories, in order to underpin the move to a generally contracted scheme under the reforms in this Act.
38. In 1994, the Board set up a pilot scheme that showed that non-profit-making advice agencies could provide legally-aided advice and assistance to the same standard as solicitors' firms. In October 1996, a second stage of the pilot was established, involving a larger number of agencies, to develop systems for contracting for advice and assistance work.
39. In November 1996, the Board began to pilot contracts with solicitors' firms to provide advice and assistance in civil matters. A pilot of contracts to provide mediation in family cases under the legal aid scheme commenced in May 1997. A pilot covering advice and assistance in criminal cases began in June 1998, and was extended in February 1999 to cover representation in youth courts.
40. Since October 1997, the Board has set up a Regional Legal Services Committee in each of its 13 Areas to advise it about priorities for contracting.
41. The Government has announced that all civil advice and assistance, and all family work, will be provided exclusively under contract from January 2000. Only organisations with a relevant franchise will be eligible to bid for these contracts. Also, a new clinical negligence franchise came into effect in February 1999; and from July 1999 only firms with that franchise will be able to take these cases under the legal aid scheme.

42. Four documents published by the Legal Aid Board explain aspects of the approach to contracting:
- *Legal Aid Quality Assurance Franchise Standard. Third Edition. Draft for Consultation*, Legal Aid Board, September 1998.
  - *Reforming the Civil Advice and Assistance Scheme. Exclusive Contracting - The Way Forward. Report Following Consultation*, Legal Aid Board, October 1998.
  - *Exclusive Contracting of legal advice and assistance for civil matters and certificated legal aid for family/matrimonial matters. Contract documentation*, Legal Aid Board, April 1999.
  - *Access to Quality Services in the Immigration category. Exclusive contracting. Recommendations to the Lord Chancellor*, Legal Aid Board, May 1999.

### ***Advice sector***

43. There are over 1,500 non-profit-making advice agencies in England and Wales. They receive their funding from many different sources, mainly local authorities, but also the National Lottery Charities Board, central Government, the Legal Aid Board, charities and business.
44. The provision of advice services is not spread consistently across the country. Some areas appear to have relatively high levels of both legal practitioners and voluntary outlets, while others have little or none. For example, the Legal Aid Board's South East Area has one Citizens Advice Bureau per 46,000 people, but in the East Midlands 138,000 people share a Citizens Advice Bureau. The Government believes that the fragmented nature of the advice sector obstructs effective planning, and prevents local needs for legal advice and help from being met as rationally and fully as possible.

### ***Conditional fees***

45. Section 58 of the Courts and Legal Services Act 1990 allowed the use of conditional fee agreements in such types of case as the Lord Chancellor specified by order (and subject to any requirements made by him in regulations). Section 58(10) excludes from the potential scope of conditional fees all criminal and family proceedings.
46. Conditional fee agreements allow clients to agree with their lawyers that the lawyer will not receive all or part of his or her usual fees or expenses if the case is lost; but that, if it is won, the client will pay an uplift to the solicitor in addition to the usual fee. In July 1995, conditional fee agreements were allowed for a limited range of cases (personal injury, insolvency and cases before the European Commission of Human Rights). The maximum uplift that could be charged if the lawyer was successful was set at 100% of the normal fee. In addition the Law Society recommended that lawyers should voluntarily limit the uplift to a maximum of 25% of the damages if that was lower than the 100% uplift of the fee. At the same time, insurance policies were developed which allowed the client to take out insurance to cover the costs of the other party, and the client's own costs other than the solicitor's fees, if the case should be lost. Generally the uplift and the premium are taken from any damages recovered by the client. In July 1998, the Government extended the availability of conditional fees to all civil cases (excluding family cases).
47. Since the introduction of conditional fees, the common law has been developed by two recent decisions of the courts (*Thai Trading Co. (A Firm) v Taylor*, [1998] 3 All ER 65 CA; and *Bevan Ashford v Geoff Yeandle (Contractors) Ltd*, [1998] 3 All ER 238 ChD). In the first of these cases the Court of Appeal held that there were no longer public policy grounds to prevent lawyers agreeing to work for less than their normal fees in the event that they were unsuccessful, provided they did not seek to recover more than their normal fees if they were successful. (The latter was only permissible in those proceedings in which conditional fee agreements were allowed). In *Bevan Ashford*, the

Vice Chancellor held that it was also lawful for a conditional fee agreement to apply in a case which was to be resolved by arbitration (under the Arbitration Act 1950), even though these were not court proceedings, provided all the requirements specified by regulations as to the form and content of conditional fee agreements were complied with.

48. In addition, it is now possible for someone contemplating litigation to take out an insurance policy to cover, in the event that the case is lost, both the costs of the other party and his or her own legal costs (including the solicitor's fees if these are not subject to a conditional fee agreement). Some of these policies were developed to support the use of conditional fee agreements but others are used to meet lawyers' fees charged in the traditional way. The Act makes premiums paid for protective insurance recoverable in costs.
49. The principles behind the Government's desire to see an expansion in the use of conditional fee arrangements were set out in a consultation paper, *Access to Justice with Conditional Fees*, Lord Chancellor's Department, March 1998.

### **Commentary**

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

### **The Commission**

50. **Section 1: The Legal Services Commission.** This section establishes the new Legal Services Commission, and makes provision for appointments to it. The Commission will replace the Legal Aid Board. It is considered necessary to establish a new body to reflect the fundamentally different nature of the Community Legal Service (CLS) compared to civil legal aid. Within the broad framework of priorities set by the Lord Chancellor, the Commission will be responsible for taking detailed decisions about the allocation of resources. It will also be required to liaise with other funders to develop the CLS more widely.
51. The Commission will also have a wider role in respect of the Criminal Defence Service than the Legal Aid Board does in respect of criminal legal aid. The Board has very limited responsibilities for legal aid in the higher criminal courts.
52. **Section 1** is similar to section 3 of the Legal Aid Act 1988 ("the 1988 Act"), which established the Legal Aid Board. However, the membership of the Commission will differ from that of the Board, to reflect a shift in focus from the needs of providers to the needs of users of legal services. Also, the Commission is to be rather smaller than the Board: with between 7 and 12 members rather than 11 to 17. This is intended to facilitate focused decision-making.
53. **Section 1(6)** gives effect to **Schedule 1 (Legal Services Commission)** which makes further provisions about the Commission. Paragraphs 1-10, 12 and 17, concerning the members, staff and proceedings of the Commission, mirror provisions about the Board in Schedule 1 to the 1988 Act, except that Treasury consent to arrangements for the pay, pensions and compensation of members and the staff of the Commission will not be required. Paragraph 11 provides for the Commission's administrative budget, mirroring section 42(1)(b) & (2) of the 1988 Act. Paragraph 13 requires the Commission to provide any information requested by the Lord Chancellor; this mirrors a provision in section 5 of the 1988 Act. Paragraph 16 requires the Commission to prepare accounts and provides for them to be audited. This mirrors section 7 of the 1988 Act, except that the Comptroller and Auditor General, rather than an appointed auditor, will audit the Commission's accounts.
54. **Paragraph 14** requires the Commission to prepare an annual report on the discharge of its functions. This will be laid before Parliament. It will include a report on the impact of the Commission's activities on the supply and development of legal services within



the wider CLS. (Section 5 of the 1988 Act provides for the Legal Aid Board's annual report).

55. **Paragraph 15** requires the Commission to prepare an annual plan, which will be laid before Parliament. This will include the Commission's detailed plans for allocating the resources available to the CLS fund (see paragraph 68 below). This is a new requirement. The Legal Aid Board produces annual corporate and business plans, but these are not statutory documents nor laid before Parliament.
56. **Part II of Schedule 14** makes transitional provisions for the replacement of the Legal Aid Board by the Commission. Briefly, it provides that, on an appointed day, the Commission shall take over all the property, rights and liabilities of the Board. Staff of the Board will automatically become staff of the Commission, and their employment and pension rights are preserved.
57. The intention is that the provisions of the 1988 Act will remain in force for any cases that have already started when the new schemes come into effect. The Commission will be responsible for the continued administration of these cases.
58. **Section 2: Power to replace Commission with two bodies.** This section allows the Lord Chancellor, by order subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)), to split the Legal Services Commission into two separate bodies, one responsible for the Community Legal Service and the other for the Criminal Defence Service.
59. This allows for the possibility that, because of the different nature and objectives of the two schemes, it may prove more effective in the longer term to administer them separately. It would not be practicable to set up two bodies from the outset. This is because of the need to retain, in substance, the existing infrastructure and expertise of the Legal Aid Board to manage the transition from legal aid to the two new schemes. This involves both administering existing cases under the old scheme and developing contracting as the principal means of procuring services under the new schemes.
60. There is no definite intention to split the administration of the two schemes in future. Rather, the intention is to review the situation once the new schemes are firmly established, probably after about 5 years.
61. **Section 3: Powers of Commission.** This section gives the Legal Services Commission similar general powers to those presently enjoyed by the Legal Aid Board (section 4 of the 1988 Act). These powers will allow the Commission to do whatever it believes is necessary in the discharge of its functions. Later sections exemplify the ways in which the powers may be used in the provision of specific services (see sections 6(3), 13(2) and 14(2)).
62. **Section 3(4)** provides that the Commission may delegate its functions to others. For example, it might delegate to contracted providers certain decisions about the funding of particular cases (much as the Legal Aid Board delegates some decisions to franchised firms now). Section 3(5) empowers the Lord Chancellor to make orders about whether and how the Commission should delegate certain functions. For example, he might make an order requiring the Commission to monitor the decisions made by providers under a delegation.

## **The Community Legal Service**

63. **Section 4: The Community Legal Service.** This section requires the Legal Services Commission to establish, maintain and develop the Community Legal Service (CLS). It sets out the purpose of the CLS and defines the services which may be provided under the CLS. These range from the provision of general information about the law and legal services to providing help towards preventing or resolving disputes and enforcing decisions which have been reached (section 4(2)). The scheme will encompass advice, assistance and representation by lawyers (which have long been available under

the legal aid scheme), and also the services of non-lawyers. It will extend to other types of service, including for example mediation in appropriate family or other cases.

64. **Section 4(3)** provides that the CLS does not cover services funded as part of the Criminal Defence Service, in order to avoid any overlap between the two schemes.
65. The purpose of the CLS (section 4(1)) is in two parts, reflecting the Commission's two key roles. First, the Commission will facilitate the development of the wider CLS, by working with other funders of services, such as local authorities, to plan for the most appropriate use of available resources in order to match the provision of services to identified needs and priorities. Section 4(6) describes this function further. The intention is to build on the work already being carried out by the Legal Aid Board's Regional Legal Services Committees in order to establish systems for determining (i) the need for legal services at regional level, and (ii) the ability of providers to supply those services, to the required standard, within the available resources. Secondly, the Commission will itself fund the provision of services through the CLS Fund (which is described further in section 5).
66. The Commission will help to ensure that the services provided are of a high quality by setting and monitoring standards and establishing quality accreditation systems (section 4(7) & (8)). The intention is that only accredited providers will be eligible for funding from the CLS fund and that other funders of legal services will be able to impose a similar requirement. Section 4(9) makes clear that the Commission (and any bodies it authorises) may charge fees to cover the cost of providing accreditation.
67. **Section 4(10)** empowers the Lord Chancellor to give the Commission orders about how it should exercise its functions under subsections (6)-(9). There are similar powers in relation to the Commission's other main functions in sections 6(4), 13(3) and 14(3)(b).
68. **Section 5: Funding of services.** This section establishes the CLS fund and the mechanisms by which the Lord Chancellor will provide resources for the fund. Each year, as part of the general public expenditure planning process, the Lord Chancellor will set an annual budget for the CLS fund. This will take account of the receipts from contributions and other payments expected under the regulations made under sections 10 and 11, with the balance of the budget provided by the Lord Chancellor from money voted by Parliament. The CLS fund will therefore not be open-ended in the way that the legal aid fund is now.
69. **Section 5(2)(a)** provides for the Lord Chancellor to determine how much to pay into the CLS fund. (Section 5(3) requires him to take account of the assessment of need made by the Legal Services Commission under section 4(6).) Section 5(2)(b) provides for the practical arrangements for paying that money into the fund – this will be by regular instalments throughout the year to meet immediate outgoings. Section 5(4) requires the Lord Chancellor to lay a statement of the budget he determines before Parliament. This would also require him to publish any redetermination, should it ever be necessary to change the budget during the course of a financial year.
70. **Section 5(6)** empowers the Lord Chancellor to direct the Commission to use specified amounts within the fund to provide services of particular types. The intention is that the Lord Chancellor will divide the fund into two main budgets, for providing services in (i) family and (ii) other civil cases, while allowing the Commission limited flexibility to switch money between the two areas. The Lord Chancellor may set further requirements within these two budgets, by specifying the amount, or the maximum or minimum amount, that should be spent on, say, services from the voluntary sector, mediation, or cases involving a wider public interest. In this way, it will be possible to ensure that resources are allocated in accordance with the Government's priorities.
71. **Section 5(7)** places a duty on the Commission to aim to obtain the best value for money - a combination of price and quality - when using the resources of the fund to provide services. Section 4 describes how the Commission will seek to ensure that services are

of high quality. Section 5, in providing for a controlled budget, and section 6 in setting out the ways, principally contracting, through which services will be procured, provide the means to control cost.

72. **Section 6: Services which may be funded.** This section builds on the general powers contained in section 3, by setting out the ways in which the Legal Services Commission may use the CLS fund to provide services. These include making contracts with, or grants to, service providers in the private and voluntary sectors; itself providing services directly to the public, whether by employing staff to provide them or by any other means; and making grants or loans to individuals so they can purchase services for themselves.
73. These flexible powers are intended to give effect to one of the principal objectives of the reform of publicly funded legal services: that is the ability to tailor the provision of services, and the means by which services are delivered, to the needs of local populations and particular circumstances. They will also allow the Commission to test new forms of service provision through pilot projects.
74. **Section 6(6)** gives effect to **Schedule 2 (Community Legal Service: excluded services)** which excludes from the scope of the CLS fund specified types of service which would otherwise fall within the broad definition provided by section 4(2). Section 6(7) empowers the Lord Chancellor to make regulations, subject to the affirmative resolution procedure (by virtue of section 25(9)), to amend the Schedule. Section 6(8) empowers the Lord Chancellor to direct or authorise the Commission to fund services within the excluded categories in specified exceptional circumstances; or, following a request by the Commission, to authorise it to fund an individual case. For example, the Lord Chancellor intends to authorise funding for personal injury cases (which are generally excluded by the Schedule because most such cases are suitable for conditional fees) where exceptionally high investigative or overall costs are necessary, or where issues of wider public interest are involved.
75. In effect, Schedule 2 defines the scope of the CLS fund for the time being. People (but not corporate bodies) will be able to obtain general information about any matter of English law, the English legal system or the availability of legal services. Subject to any exceptions authorised by the Lord Chancellor, more substantial services will not be available in the categories listed in paragraph 1. In the categories of case listed in paragraph 2, it will be possible (subject to priorities) to fund any of the services listed in section 4(2). For categories that are not listed in either paragraph, it will be possible to fund any service except advocacy in court or other proceedings.
- Corporate bodies are excluded because section 4(1) defines the overall scope of the Community Legal service in terms of individuals. Section 19 limits the scope of the scheme to English law.
76. Subject to the changes described in paragraphs 77 & 78 below, the scope of the CLS fund will initially mirror the current scope of civil legal aid; but it may be changed over time. In particular:
- as conditional fees, legal expenses insurance and other forms of funding develop more widely, it may be possible to exclude further categories which can generally be funded privately; but on the other hand
  - as resources become available through the greater value for money and control of spending provided by the new scheme and the development of private alternatives, it may be possible to extend the scope of the fund to cover services that are excluded now because, although they would command some priority, they are unaffordable.
77. The following changes to the scope of the current legal aid scheme will take effect immediately. In future, subject to any exceptions that the Lord Chancellor may make, only general information will be available about the following issues.

*These notes refer to the Access to Justice Act 1999  
(c.22) which received Royal Assent on 27th July 1999*

- Allegations of damage to property or the person (i.e. personal injury) caused by negligence, apart from those about clinical negligence. These cases are generally considered suitable for conditional fees.
  - Allegations of malicious falsehood. Legal aid is not currently available for representation in defamation cases, but it is sometimes possible to get legal aid by categorising the case as one of malicious falsehood. The Government's view is that these cases do not command sufficient priority to justify public funding; and, in any event, they may often be suitable for a conditional fee.
  - The law about companies and partnerships and other matters arising in the course of business. Legal aid is not available for firms and companies, but a sole trader can currently get legal aid to pursue a business dispute. Businessmen have the option of insuring against the possibility of having to take or defend legal action. The Government does not believe that the taxpayer should meet the legal costs of sole traders who fail to do so.
  - Boundary disputes and the law relating to trusts. The Government does not consider that these command sufficient priority to justify public funding.
78. In addition, funding for advocacy before the Lands Tribunal or Commons Commissioners will no longer be available. Other services, including assistance with preparing a case, will continue to be available.
79. **Section 7: Individuals for whom services may be funded.** This section allows the Lord Chancellor to set financial eligibility limits for people to receive services funded by the CLS fund. It allows him to set different limits, or no limit at all, in different circumstances or for different types of service case.
80. In essence, the section re-enacts provisions in the 1988 Act about financial eligibility: sections 9 (advice and assistance), 13B (family mediation), and 15 (civil legal aid). There are no immediate plans to make any substantive changes to the present financial eligibility limits (apart from any upratings to reflect inflation). In due course, the Government hopes to extend eligibility for advice and assistance to those who can afford to pay contributions (see Annex A to these Notes).
81. **Section 8: Code about provision of funded services.** This section provides for the Legal Services Commission to prepare a code setting out the criteria for determining whether services funded by the CLS fund should be provided in a particular case, and if so what services it is appropriate to provide. The code will also set out the procedures for making applications.
82. The funding assessment under the code will replace the merits test for civil legal aid (set out in sections 15(2) & (3) of the Legal Aid Act 1988, and supplemented by Notes for Guidance published annually by the Legal Aid Board). The new assessment is intended to be more flexible than the existing merits test. It will be possible to apply different criteria in different categories according to their priority. It will also be possible to take account of new factors, such as the wider public interest.
83. **Section 8(2)** lists factors that the Commission must consider when preparing the code. The criteria for funding various types of service in different categories of case will be defined in terms of these factors. The code will set out which factors are relevant in a given category, how they should be taken into account, and what weight should be given to them.
84. **Section 8(3)** requires the code to reflect the principle that in many family disputes mediation is more appropriate than court proceedings. This is intended to reinforce the development, under the Family Law Act 1996, of mediation as a means of resolving private law family disputes in a way that promotes as good a continuing relationship between the parties concerned as is possible in the circumstances. The Government

believes that mediation is more constructive than adversarial court proceedings, and that litigation in these cases usually serves only to reinforce already entrenched positions and further damage the relationship between the parties. In addition, the cost of court proceedings is higher than that of mediation, and additional costs have to borne by the property of the family, reducing the amount available to the parties and their children in future.

85. **Section 8(9)** empowers the Lord Chancellor to give orders to the Commission about the contents and operation of the code. Section 25(9) makes such orders subject to Parliamentary approval under the affirmative resolution procedure.
86. **Section 9: Procedure relating to funding code.** This section provides for the Lord Chancellor and Parliament to approve the funding code before it takes effect. The original code and any revisions to it must be approved by the Lord Chancellor and laid before Parliament. The original code and any revisions which affect the criteria for funding cases (as opposed to those parts of the code dealing with procedures and guidance) must also be approved by an affirmative resolution in both Houses of Parliament.
87. **Section 9(7) & (8)** provides for an exceptional procedure so that urgent changes can take effect without delay. The Lord Chancellor can certify a change as urgent. That change then would take effect immediately, but fall after 120 days if not confirmed by affirmative resolution.
88. **Section 10: Terms of provision of funded services.** This section enables the Lord Chancellor to set financial conditions to apply to people receiving services funded by the CLS fund. Subject to two additions, the effect of section 10 is generally to replicate the provisions of the 1988 Act.
89. As now, it will be possible to make regulations requiring people to contribute towards the cost of the services they receive by way of flat rate fees, contributions related to disposable income and capital, and from any property recovered or preserved as a result of the help given. In general, the intention is to replicate the existing regulations. But the Government also intends to consult about a number of possible changes to the financial conditions. These are described in Annex A to these Notes.
90. **Section 10** extends the potential scope of financial conditions in two ways (although there are no immediate plans to use either of these wider powers).
  - Section 10(2)(b) is the power to set contributions. Unlike the current Act, this power does not preclude contributions from income payable after the end of the case. This would make it possible to provide services in some categories of case in the form of a loan scheme, with contributions continuing until the full cost had been repaid. Section 10(4)(b) would allow for interest to be added to the outstanding cost that the former assisted person remained liable to repay.
  - Under section 10(2)(c), it will be possible to make the provision of services in some types of cases subject to the assisted person agreeing to repay an amount in excess of the cost of the services provided in the event that his or her case is successful. This might make it possible to fund certain types of case on a self-financing basis, with the additional payments from successful litigants applied to meet the cost of unsuccessful cases. It would also be possible to provide public funding to supplement a private conditional fee arrangement. This might be appropriate, for example, where a case could not be taken under a wholly private arrangement, because the solicitors' firm was not large enough to bear the risk of the very high costs likely to be involved.
91. **Section 10(6)(b)** provides for regulations about determining the cost of services for the purpose of applying regulations about contributions and the charge on property recovered or preserved. This is necessary to allow for the possibility of block contracts which do not define the costs of individual cases, or which are based on an average

price for a set number of cases. Some cases require less work, and some more; and such contracts would remunerate the service provider on a ‘swings and roundabouts’ basis. However, it would often be inequitable to make every assisted person liable to contribute or repay the same amount (i.e. the average price under a contract covering many cases).

92. **Section 11: Costs in funded cases.** This section contains provisions about determining the award of legal costs between the parties in cases involving persons supported by the Community Legal Service fund. In effect, it section brings together provisions which are presently contained in sections 12, 13, 17, 18 and 34(2)(b) of the Legal Aid Act 1988. Subject to the changes described in Annex A, it is intended to replicate the position that currently applies under the legal aid scheme.
93. **Section 11** limits the costs that can be awarded against a person receiving funded services to an amount that is reasonable given the financial resources of both parties and their conduct during the case.
94. This protection may be disapplied by regulations subject to the affirmative resolution procedure (by virtue of section 25(9)). This might be appropriate where funding was provided (under section 6(3)(e)) in the form of a grant or loan made directly to the assisted person, in order to allow them to purchase legal services themselves as a private litigant. It would also be necessary to use this power if public funding was used to supplement a conditional fee agreement (see paragraph 90 above). It would not be appropriate to prevent opponents in such cases, who would be liable for a success fee if they lost, from recovering their full costs if they won.
95. **Section 11** also provides that regulations may, among other things, specify the principles that are to be applied in determining the amount of any costs awarded for or against the party receiving funded services; limit the circumstances in which a costs order may be enforced against the person receiving funded services; and provide for circumstances in which the court can require the Commission to meet any costs incurred by the opponent of the party receiving funded services.
96. Regulations which limit the circumstances in which costs may be enforced against a person receiving funded services, or which define the liability of the Commission to meet the costs of the opponent of a person receiving funded services, are made subject to Parliamentary approval under the affirmative resolution procedure by section 25(9). Making these provisions subject to affirmative procedure regulations, rather than in primary legislation as at present, is intended to provide greater flexibility. This is necessary to allow for the greater range of ways in which services may be provided under the Act.

### **The Criminal Defence Service**

97. **Section 12: The Criminal Defence Service.** This section requires the Legal Services Commission to establish, maintain and develop a Criminal Defence Service, for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require. The Criminal Defence Service will consist of the advice, assistance and representation provided under sections 13 and 14.
98. **Section 12(2)** defines “criminal proceedings”. These include criminal trials (subsection (2)(a)), appeals and sentencing hearings ((b)), extradition hearings ((c)), binding over proceedings ((d)), appeals on behalf of a convicted person who has died ((e)), and proceedings for contempt in the face of any court ((f)). Subsection (2)(g) allows the Lord Chancellor to add further categories by regulation. This power will be used, for example, to prescribe Parole Board reviews of discretionary life sentences.

99. **Section 12(3)-(5)** empowers the Commission to accredit providers of criminal defence services, and to charge for that service. This mirrors the provisions of section 4(7)-(9) for the Community Legal Service.
100. **Section 13: Advice and assistance.** This section requires the Legal Services Commission to provide such advice and assistance as it considers appropriate in the interests of justice for individuals who are arrested and held in custody, and in other circumstances to be prescribed by the Lord Chancellor in regulations.
101. Initially, it is intended that regulations will provide for advice and assistance in broadly the categories for which it is currently available to people subject to criminal investigations or proceedings. These categories include advice and assistance provided by duty solicitors at a magistrates' court, at a solicitor's office, to a "volunteer" at a police station or to someone being interviewed in connection with a serious service offence.
- A serious service offence* is an offence under any of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 which cannot be dealt with summarily or which appears to an interviewing service policeman to be serious.
102. **Section 13(2)** enables the Commission to comply with its duty to secure advice and assistance by making contracts with, or payments or grants to, providers (i.e. solicitors' firms, barristers or law centres); by employing people to provide advice and assistance; by establishing and maintaining separate bodies to provide it; and by making grants to individuals to allow them to purchase it directly. Subsection (4) enables the Commission to secure the provision of advice and assistance by different means in different areas in England and Wales and in relation to different descriptions of cases.
103. The aim of section 13 is to provide the Commission with a range of options for securing advice and assistance in criminal matters. Contracting with quality assured suppliers should produce better value for money and give greater control over expenditure and quality of service. The power to provide services through lawyers employed by Commission (or by separate bodies it establishes for the purpose) offers additional flexibility if, for example, there is limited coverage by private lawyers in rural areas. Using employed lawyers should also provide the Commission with better information about the real costs of providing these services.
104. **Section 14: Representation.** This section requires the Legal Services Commission to fund representation for individuals granted a right to representation in accordance with Schedule 3. It enables the Commission to comply with this duty in the same ways as section 13 does for advice and assistance. The power to make direct case-by-case payments to representatives (subsection (2)(b)) will allow the Commission to continue to pay non-contracted lawyers to provide representation during the transitional period while contracting develops; and possibly after that where this proves to be the best means of securing the necessary services.
105. **Section 14(3)(a)** requires the Lord Chancellor to make remuneration orders to set rates for such direct payments. Section 14(5) provides for reviews of, or appeals against, determinations of fees required for the purposes of a remuneration order.
106. **Section 14(1)** gives effect to **Schedule 3 (Criminal Defence Service: right to representation)** which deals with the grant of rights to representation. Paragraph 1 provides that a right may be granted to individuals involved in criminal proceedings as defined in section 12(2) (see paragraph 98 above). Paragraph 1(2) provides that a right may also be granted to private prosecutors to resist appeals to the Crown Court by people they had prosecuted in a magistrates' court. (This mirrors section 21(1) of the Legal Aid Act 1988).
107. **Paragraph 2** provides that a right may be granted by the court hearing the proceedings and by other courts prescribed in regulations. In most cases, a right will be granted by

a magistrates' court and will also cover the case if it goes on to the Crown Court. (This is currently the position under section 20(4) of the 1988 Act.)

108. **Paragraph 2(5)** provides for regulations about when a court must consider withdrawing a right to representation. The prescribed circumstances are likely to include where the charges are reduced so that imprisonment is no longer likely, and where the defendant has refused to co-operate with an inquiry into his or her means (see paragraph 119 below).
109. **Paragraph 5** provides that a right should be granted where the interests of justice require it, and sets out the factors to be considered in assessing the interests of justice. The factors mirror those in section 22(2) of the 1988 Act. Paragraph 5(3) allows the Lord Chancellor to make an order amending the criteria, and paragraph 4 provides for regulations about appeals. Section 25(9) makes both these powers subject to Parliamentary approval under the affirmative resolution procedure; the equivalent powers in the 1988 Act, sections 22(3) & 21(10) respectively, are subject to the negative procedure. Paragraph 5(4) allows for cases in which a right must always be granted. This power will be used to mirror section 21(3) of the current Act.
110. **Section 15: Selection of representative.** This section provides that defendants granted a right of representation can choose their representative, restricted only as provided in regulations under section 15(2). It is intended that regulations (under subsection (2)(d)) will, in due course, provide in particular that a defendant's choice of representatives is limited to those holding contracts with the Legal Services Commission. In time, the Commission will provide all, or nearly all, representation through contracted representatives.
111. It is also expected that contracts with solicitors' firms will cover both initial advice and assistance (at a police station or elsewhere) and any subsequent representation at court. Section 15(2)(b) provides that in prescribed circumstances a defendant may be deemed to have chosen as representative the person who had previously advised him or her. It is important to ensure continuity of representation wherever possible in order to minimise delay and avoid the extra cost of instructing a different representative. This power only applies where a suspect chose the duty solicitor or another firm to advise him or her. Suspects advised by a duty solicitor because their chosen adviser was not available at the time will be allowed to use their original choice as representative in court. Regulations under section 15(4) will provide that suspects who do not express any preference will be deemed to have chosen the duty solicitor. Regulations under subsection (2)(f) will prescribe that defendants may not subsequently change their representative without good reason.
112. In certain types of complex case - such as serious fraud trials - defendants' choice may be limited to representatives from panels of firms and advocates specialising in such cases. Membership of a panel will depend on meeting pre-determined criteria. In this way, the Commission will be able to ensure that defendants in these exceptional cases are represented by those with the necessary expertise, experience and resources to do so effectively.
113. **Section 15(5)** provides for regulations prescribing when the Commission may stop funding a defendant's chosen representative – in effect, requiring that defendant to make a fresh choice. This might be necessary, for example, in cases that turned out to be more complex than originally expected, making it appropriate to require the defendant to change to a panel member.
114. **Section 15(2)(a)** enables the Lord Chancellor to make regulations defining circumstances where a defendant will not have a right to choose a representative, but will instead have a representative assigned to them. This power might be used, for example, to assign an advocate to an otherwise unrepresented defendant charged with a serious sexual offence against a child. (Defendants charged with certain violent or sexual offences may not cross-examine child witnesses directly.)



115. Regulations under subsections (5) and (2)(a) will be subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)).
116. **Section 15(3)** secures that regulations under section 15(2) may not provide for defendants' choice of representative to be restricted to employees of the Commission or any bodies it establishes to employ salaried defenders. The intention is that in most cases there should be a choice between several contracted firms and possibly a salaried defender. In some circumstances, for example when a representative is assigned under subsection (2)(a), it may be that the only person available at the time is an employee of the Commission. Section 15(3) would not prevent that employee providing representation; but it would preclude regulations saying that the representative in such circumstances must always or whenever possible be an employee.
117. **Section 16: Code of conduct.** This section provides that salaried defenders employed by the Legal Services Commission, or by any bodies established by the Commission to provide criminal defence services, should be subject to a code of conduct. The code is to include duties to avoid discrimination; to protect the interests of the individuals for whom services are provided; to the court; to avoid conflicts of interest; of confidentiality; and to act in accordance with professional rules. Before preparing or revising the code, the Commission is required to consult. The code must be approved by a resolution of each House of Parliament, and published.
118. **Section 17: Terms of provision of funded services.** This section provides that suspects and defendants do not have to pay towards the cost of services provided as part of the Criminal Defence Service, except where the court orders them to pay some or all of the cost of their representation. Section 17(2) provides that magistrates' courts do not have the power to make such orders. This means that only defendants in the more expensive cases that go to the higher courts may be ordered to repay their defence costs, but such an order could include the cost of any representation before a magistrates' court.
119. **Section 17(3)** empowers the Lord Chancellor to make regulations about how this new power should be used. It will generally only apply to convicted defendants able to make a substantial repayment. Defendants may be required to provide information about their means to inform a decision, and it will be possible to freeze their assets while their means are being investigated (subsection (3)(d) and (e)).
120. **Section 18: Funding.** This section requires the Lord Chancellor to provide the necessary funding of criminal defence services secured by the Commission in accordance with sections 13 and 14. As a result, like legal aid but unlike the Community Legal Service fund (see paragraph 68 above), the Criminal Defence Service will be a demand-led scheme. The section also enables the Lord Chancellor to determine the timing and way in which this money should be paid to the Commission, and requires the Commission to seek to secure the best possible value for money in funding the Criminal Defence Service.

## **Supplementary**

121. **Section 19: Foreign law.** This section limits the Community Legal Service and Criminal Defence Service to providing information, advice and other services only in relation to the law of England and Wales (except where foreign law is relevant to proceedings in England and Wales). The Lord Chancellor is given a power to order further exceptions where this is necessary to fulfil the United Kingdom's international obligations. This restriction is the same as that currently existing.
122. **Section 20: Restriction of disclosure of information.** This section provides for the protection of information given to the Commission, the court or any other person or body authorised to undertake functions conferred by the Act.
123. **Section 20** largely repeats the provisions presently found in section 38 of the Legal Aid Act 1988. But it allows information to be disclosed, subject to any regulations

to the contrary, for the purposes of the investigation or prosecution of *any* offence or suspected offence. At present, information can only be disclosed for the purpose of prosecuting offences under the 1988 Act itself. This prevents information which indicates that other offences may have been committed from being made available to the appropriate authority for investigation or prosecution. For example, information provided to allow the Commission to assess the means of a claimant might show or suggest that a fraud was being perpetrated in relation to the receipt of social security benefits. This could not be disclosed under the 1988 Act, but it could be disclosed under section 20. Section 20(3)(b) makes clear that information may be disclosed about the value of payments made by the Commission to particular firms or lawyers. This reflects current practice.

124. Disclosure of information in contravention of this section will be an offence punishable by a fine not exceeding level 4 on the scale (currently £2,500). This mirrors the provisions of section 38(4) of the 1988 Act. No prosecution may be brought without the written approval of the Director of Public Prosecutions.
125. **Section 21: Misrepresentation etc.** This section provides criminal penalties for people who give false information about their finances, or otherwise make false statements, in applying for publicly-funded help under the Act. The section largely replicates the equivalent provisions in section 39 of the Legal Aid Act 1988, but extends beyond the person receiving help to anyone who furnishes information. It sets out the proceedings and penalties where those seeking help fail to furnish information required of them under the Act, or make false statements or representations in doing so. It also enables the Legal Services Commission to take proceedings in the county courts for recovering any losses caused by these acts.
126. **Section 22: Position of service providers and other parties etc.** Section 22(1) & (4) provides that, unless regulations say otherwise, the fact that services are funded as part of Community Legal Service or Criminal Defence Service shall not affect lawyer-client privilege or the rights of any third party. This mirrors section 31(1) of the 1988 Act.
127. Section 22(2) makes clear that service providers under either scheme may not seek additional remuneration to that funded by the Legal services Commission from their clients. Section 22(3) makes clear that a person chosen to represent a defendant with a right to representation is entitled to be paid if the right is later withdrawn. These provisions mirror sections 31(3) and 31(4) of the 1988 Act respectively. Section 22(5) provides for regulations about court procedures in cases involving funding under the two schemes. This mirrors section 34(2)(b) of the current Act.
128. **Section 23: Guidance.** This section enables the Lord Chancellor to give guidance to the Commission about the discharge its functions. He is required to publish any guidance. However, the Lord Chancellor may not give guidance about the handling of individual cases. The Commission is required to consider any guidance given by the Lord Chancellor.
129. **Sections 24-26 and Schedule 4** make consequential amendments and provisions about orders, regulations and directions under Part I and its interpretation.
130. Section 25(2)-(4) provides for remuneration orders, under sections 6(4), 13(3) and 14(3), about the payments which the Legal Services Commission may make to providers. Before making a remuneration order affecting payments to lawyers, the Lord Chancellor is required to consult the General Council of the Bar and the Law Society. This mirrors provisions in the 1988 Act about regulations dealing with remuneration. Section 25(3) sets out factors which the Lord Chancellor is required to consider before making a remuneration order. These are the need to secure a sufficient number of competent providers; the costs to public funds; and the need to secure value for money. This differs in several respects from the current list of factors in section 34(9) of the 1988 Act.

131. **Section 25(9)** lists the orders and regulations under Part I of the Act which require Parliamentary approval under the affirmative resolution procedure (see paragraphs 58, 74, 85, 96, 109 & 115 above). All other orders and regulations under this part are subject to the negative resolution procedure – that is they take effect without debate unless there is a successful motion to annul them.

## **Part II: Other funding of legal services**

### **Conditional fee and litigation funding agreements**

132. **Section 27: Conditional fee agreements.** This section replaces the existing section 58 of the Courts and Legal Services Act 1990 with two new sections: section 58 and 58A. New section 58 takes into statute law the decisions in the *Thai Trading* and *Bevan Ashford* cases described in paragraph 47 above. It does this by making all agreements which provide that legal fees should be payable only in certain circumstances subject to the provisions of the new sections. Section 58(5) excepts from this principle agreements between solicitors and their clients in relation to services (such as conveyancing) that do not relate to litigation or prospective litigation.
133. New section 58 also draws a distinction between agreements which do, and do not, provide for an additional success fee to be paid. It empowers the Lord Chancellor to define the proceedings in which such fees are to be permitted, and to prescribe their maximum size. New section 58A(6) allows for success fees can be recovered in costs from the losing party in the case. Paragraph 32 above sets out the reasons for this change
134. New section 58A replicates the existing bar on conditional fees in family and criminal proceedings, but makes an exception for proceedings under section 82 of the Environmental Protection Act 1990. These cases, which are technically criminal proceedings, concern orders requiring people to put right a statutory nuisance (e.g. the failure of a landlord to maintain rented housing in a habitable condition). The *Thai Trading* case permitted conditional fees without an uplift in these cases, and the exception in section 58A(1)(a) is necessary to preserve that position. Section 58A also clarifies the existing law in several respects. Subsection (3)(a) makes clear that requirements to provide information to a client apply before a conditional fee agreement is actually made. Subsection (4) ensures that the legislation covers tribunal cases, cases that are settled before court proceedings are issued, and cases that go to arbitration.
135. **Section 28: Litigation funding agreements.** This section provides for a new type of agreement called a litigation funding agreement. Like conditional fee agreements, litigation funding agreements would allow litigants to pursue cases on the basis that they would not be liable for their legal costs if the case was unsuccessful. The difference between the two types of agreement is that a litigation funding agreement would be with a third party funder, not the lawyer taking the case. The funder would pay the lawyer in the normal way and, in successful cases, would be able to recover those costs and a success fee from the other side. The success fee would be paid into the fund to help meet the cost of lawyers' fees in unsuccessful cases.
136. **Section 28** provides for the Lord Chancellor to prescribe in regulations who may fund services in this way, and impose similar requirements as apply to conditional fee agreements on the amount of the success fee.

### **Costs**

137. **Section 29: Recovery of insurance premiums by way of costs.** This section makes provision to allow the court to include, in any costs it may award against the losing party, any premium paid for an insurance policy taken out specifically against the need to meet the other side's costs in those proceedings. It is not limited to insurance policies taken out alongside a conditional fee agreement.

138. **Section 30: Recovery where body undertakes to meet costs liabilities.** This section is a parallel provision to section 29. It applies to bodies, such as trade unions, which fund litigation on behalf of their members from the body's own resources; and do not, therefore, take out separate insurance against having to meet the other side's costs. When such a body supports a successful case, section 30 will allow the costs awarded to include an amount equivalent to the insurance premium that would have been recoverable (under section 29) if a policy had been in place.
139. **Section 30** empowers the Lord Chancellor to prescribe which bodies may operate in this way and on precisely what terms. This will enable him to ensure that the amounts recovered fairly reflect the risk that the body had borne.
140. **Section 31: Rules as to costs.** This section allows rules of court about the award of costs to provide that the amount awarded need not be limited to the amount that the litigant would have been liable to pay his or her own lawyers if costs had not been awarded.
141. **Section 31** is a general provision allowing rules of court to limit or abolish the common law principle known as the indemnity principle. This is that the successful party in an action has a right to be indemnified (wholly or partly) against a liability for costs actually incurred in bringing or defending the proceedings, and no more. If no actual costs have been agreed for payment by the client, then no costs should be paid by the losing party. For many years, this was held to prevent recovery from the unsuccessful party of any part of a solicitor's fee which was contingent on the success of the case. More recently, a combination of case law and statutory provisions (most notably the 1990 Act) have greatly reduced the application of the indemnity principle in its pure form. Recent case law has also made its application more cumbersome in practice. The Government believes that the partial survival of the principle is anomalous; section 31 is intended to rationalise the position.

### **Legal aid in Scotland**

142. **Section 32: Regulations about financial limits in certain proceedings.** This section empowers Scottish ministers to make regulations to disapply the financial eligibility and contributions tests for assistance by way of representation in respect of certain proceedings.
143. Assistance by way of representation is a category of advice and assistance under the Legal Aid (Scotland) Act 1986. Advice and assistance, and assistance by way of representation are defined in section 6(1) of the 1986 Act. Advice or assistance is provided by a solicitor or counsel in relation to a matter of Scots law. Assistance by way of representation is provided by a solicitor or counsel in connection with any proceedings before a court, tribunal or statutory inquiry. At present, advice and assistance is available under Part II of the 1986 Act provided financial and contributions criteria are met. Section 8 of the Act sets out the income and capital limits that determine eligibility for advice and assistance. Section 11(2) provides for contributions to be paid by a person in receipt of advice and assistance based on a sliding scale set in regulations.
144. Under section 9 of the 1986 Act, the Scottish ministers may by regulations provide that Part II of the Act as it applies to advice and assistance also applies to assistance by way of representation. Therefore, the financial limits and contributions which apply to advice and assistance are also applicable to assistance by way of representation. Ministers also have the power under section 9 to prescribe different provision for different cases and modify the financial limits which may apply to assistance by way of representation. However, it is not currently possible under section 9 to disapply the financial eligibility and contributions tests completely. Section 32 of this Act amends section 9 of the 1986 Act to permit this. The immediate intention is to use the power to disapply the tests for proceedings before Mental Health Review Tribunals.

145. **Section 33: Recipients of disabled person's tax credits.** This section disapplies the financial eligibility and contributions tests from persons seeking or receiving advice and assistance who are in receipt of disabled person's tax credit.
- The Tax Credits Act 1999 provides disabled person's tax credit to replace disability working allowance (under section 129 of the Social Security Contributions and Benefits Act 1992).
146. At present, sections 8 and 11 of the Legal Aid (Scotland) Act 1986 provide for advice and assistance to be available without a means test or contributions to people in receipt of income support, income-based job seekers' allowance or family credit. Section 33 adds to disabled person's tax credit to that list. Paragraph 12 of **Schedule 14** provides for this change to apply to disability working allowance, should section 33 come into force before section 1 of the Tax Credits Act.
147. **Section 34: References by Scottish Criminal Cases Review Commission.** This section corrects an oversight regarding the availability of legal aid for references from the Scottish Criminal Cases Review Commission to the High Court in Scotland. Under the previous arrangements, the only test that applied to legal aid for references from the Secretary of State for Scotland was that relating to financial eligibility. The Crime and Punishment (Scotland) Act 1997 did not amend the Legal Aid (Scotland) Act 1986 to continue this arrangement for references from the Review Commission. Consequently, when the Commission was set up on 1 April 1999, legal aid was not explicitly made available on the same basis as before. Section 34 restores the previous position.

**B.**

**PROVISION OF LEGAL SERVICES (SECTIONS 35-53)**

*Summary*

148. The Act makes various changes about the provision of legal services and complaints against lawyers. It reforms the law about lawyers' rights of audience and rights to conduct litigation by:
- abolishing the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) and creating a new body, the Legal Services Consultative Panel, which will take over ACLEC's functions in advising the Lord Chancellor on legal education, changes to authorised bodies' rules and the designation of new authorised bodies;
  - simplifying procedures for approving changes to rules and the designation of new authorised bodies;
  - giving the Lord Chancellor power, with the approval of Parliament, to change rules which unduly restrict rights of audience or rights to conduct litigation or the exercise of such rights;
  - establishing the principle that all barristers and solicitors should enjoy full rights of audience, and in particular enabling employed advocates, including Crown Prosecutors, to appear in the higher courts if otherwise qualified to do so, regardless of any professional rules designed to prevent their doing so because of their employed status; and
  - enacting a statutory statement that lawyers' ethical duties override all their other legal obligations.
149. The Act also amends the law about complaints against providers of legal services, and makes various other changes (see paragraph 14 above). In particular, it:

*These notes refer to the Access to Justice Act 1999  
(c.22) which received Royal Assent on 27th July 1999*

- widens the powers of the Law Society to investigate unprofessional conduct and inadequate professional service by solicitors' firms, and to take action against them;
- empowers the Legal Services Ombudsman to make binding determinations in appropriate cases;
- provides for the appointment of a Legal Services Complaints Commissioner with powers to investigate the complaints handling procedures of the professional bodies, make recommendations and set targets; and
- enables the Lord Chancellor to require professional bodies to contribute towards the cost of the Ombudsman and the Complaints Commissioner.

## **Background**

### ***Rights of audience etc.***

150. The background to these proposals is set out in a consultation paper issued by the Lord Chancellor's Department in June 1998 - *Rights of Audience and Rights to Conduct Litigation in England and Wales: The Way Ahead*.
151. Rights to appear as an advocate in court (rights of audience) and rights to do the work involved in preparing cases for court (rights to conduct litigation) are governed by the Courts and Legal Services Act 1990. The 1990 Act leaves it to 'authorised bodies' (currently the Bar Council, the Law Society and the Institute of Legal Executives) to set the rules which govern the rights of their members, subject to a statutory approval process under which new or altered rules must be submitted for the approval of the Lord Chancellor and the four 'designated judges' (the Lord Chief Justice, Master of the Rolls, President of the Family Division and Vice-Chancellor). Before making their decisions the Lord Chancellor and designated judges receive and consider the advice of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) and of the Director General of Fair Trading. The Lord Chancellor and each of the designated judges must approve the application before it can succeed. Applications for designation as a new authorised body follow a similar procedure, with the additional requirement that the designation of the new body is made by Order in Council subject to Parliamentary approval.
152. The Government believes that the existing approval procedures are convoluted and slow, and that rights of audience are currently too restrictive. Some applications for approval have taken several years to be processed, in part due to the need for applications to meet the approval of several parties. Rights of audience in the higher courts (the House of Lords, Court of Appeal, High Court and Crown Court) remain restricted to barristers in private practice and a small number of solicitor advocates.
153. The Act will make the Bar Council and the Institute of Legal Executives authorised bodies for the purpose of granting rights to conduct litigation to their members. At present the Law Society is the only body able to grant these rights; so currently only solicitors are able to conduct litigation

### ***Complaints handling***

154. The relevant professional body is responsible, in the first instance, for dealing with complaints about the conduct or competence of one of its members. Solicitors constitute by far the biggest branch of the legal profession, and complaints about them are handled by the Office for the Supervision of Solicitors, which is an arm of the Law Society. The Law Society's powers to discipline solicitors are contained in the Solicitors Act 1974 (or, in the case of solicitors practices' incorporated as companies, in the Administration of Justice Act 1985 which provided for that form of organisation). Serious disciplinary cases are heard by the independent Solicitors Disciplinary Tribunal, which consists of experienced solicitors and lay members appointed by the Master of the Rolls.

155. The Legal Services Ombudsman was established by the Courts and Legal Services Act 1990. The current Ombudsman is Ann Abraham. She is responsible for overseeing the complaints handling procedures of (currently) four professional bodies: the General Council of the Bar, the Law Society, the Institute of Legal Executives and the Council on Licensed Conveyancers. (The Ombudsman would also oversee any other bodies authorised under the provisions of the 1990 Act – see paragraphs 151 above & 169 below). The Ombudsman investigates allegations about the way in which a professional body has handled a complaint against one of its members. She has power to make recommendations to the professional body or the individual practitioner, including recommendations that either should pay compensation or costs to the complainant.
156. The measures in the Act about complaints handling are motivated primarily by concerns, expressed by the Legal Services Ombudsman and others, about the performance of the Office for the Supervision of Solicitors (OSS). The OSS receives over 2,500 cases a month. There are currently 17,000 unresolved cases and a waiting-list of over 6 months. The Ombudsman criticised the OSS in her annual report for 1998, “*Modernising Justice*”... *Modernising Regulation?*, published on 30<sup>th</sup> June 1999.

### ***Commentary***

#### ***The Legal Services Consultative Panel***

157. **Section 35: Replacement of ACLEC by Consultative Panel.** This section abolishes the Lord Chancellor’s Advisory Committee on Legal Education and Conduct, and replaces it with a new Legal Services Consultative Panel.
158. The Lord Chancellor’s Advisory Committee (ACLEC) was created by section 19 of the Courts and Legal Services Act 1990. ACLEC’s replacement, the Legal Services Consultative Panel will differ from ACLEC in a number of ways but will continue to fulfil much of ACLEC’s role. The Act makes no provision for the number of the Panel’s membership, which will be appointed by the Lord Chancellor. The Lord Chancellor will be required to have regard to criteria setting out appropriate knowledge and experience among the Panel’s membership (specified in new section 18A(2) of the 1990 Act as inserted by this section).
159. The Panel’s general duty will be to provide the Lord Chancellor with any advice he requires about legal services, legal education and related matters. It will have an active role in assisting in the maintenance and development of standards in the education, training and conduct of persons offering legal services. The Panel will be required to draw up its own programme of work on these topics, to be agreed with the Lord Chancellor, and will be able to make recommendations on particular issues when appropriate. The Panel will also carry out a significant role in the system of statutory approvals set out in Schedule 5 (see below), which inserts a new Schedule 4 into the 1990 Act.
160. This section also provides that the Panel cannot be sued for defamation in respect of any advice it publishes. This is to ensure that the Panel is able to give frank advice to the Lord Chancellor, and that it need not hesitate to point out, for example, if a body applying for authorised status under the 1990 Act is corrupt or incompetently run, and therefore unsuitable to be designated an authorised body.

#### ***Rights of audience and rights to conduct litigation***

161. **Section 36: Barristers and solicitors.** This section provides that every barrister and every solicitor has a right of audience before every court in relation to all proceedings. These general rights were not present for solicitors in the 1990 Act. The section also restates the current position, that all solicitors have rights to conduct litigation before all courts. These rights are not unconditional; in order to exercise them, solicitors and barristers must obey the rules of conduct of the professional bodies and must have met any training requirements that may be prescribed (such as the requirement to

complete pupillage in the case of the Bar, or to have obtained a higher courts advocacy qualification in the case of solicitors who wish to appear in the higher courts).

162. **Section 37: Rights of audience: employed advocates.** This section provides that Crown Prosecutors and other employed advocates (whether solicitors or barristers) should enjoy the same rights of audience as if they were in private practice. It does so by invalidating any professional rules that discriminate against qualified advocates on the grounds of their employment status. It does not invalidate professional rules which currently prevent employed advocates from exercising rights of audience on behalf of their employers' clients or other members of the public (although it does not prevent professional rules from being amended to allow this).
163. **Section 38: Employees of Legal Services Commission.** This section ensures that advocates and litigators employed by the Legal Services Commission, or by bodies established by the Commission to provide services, can provide their services directly to members of the public and without the need to receive instructions through a solicitor or other person acting for the client. Without this section, they might be prevented from doing so by professional rules.
164. **Section 39: Rights of audience: change of authorised body.** This section provides that an advocate who has been granted and was entitled to exercise a right of audience by one authorised body, for example the Bar Council, should retain that right if he becomes a member of a different authorised body, for example the Law Society. Without this section, they might be prevented from doing so by professional rules.
165. **Section 40: Rights to conduct litigation: barristers and legal executives.** This section gives the General Council of the Bar and the Institute of Legal Executives the power to grant their members rights to conduct litigation. There will be no requirement to grant such rights and it would be a matter for the authorised bodies to propose, subject to approval under the provisions contained in Schedule 5, whether and in what form such rights might be granted.
166. **Section 41/Schedule 5: Authorised bodies: designation and regulations and rules.** **Section 41** gives effect to Schedule 5 which replaces sections 29 and 30 of, and Schedule 4 to, the Courts and Legal services Act 1990. The new Schedule 4 contains simplified procedures by which the Lord Chancellor may:
- authorise bodies to grant rights of audience and rights to conduct litigation;
  - approve applications by such authorised bodies to alter their qualification regulations or conduct rules; and
  - revoke any authorisation of a body to grant rights of audience or rights to conduct litigation.
167. New Schedule 4 also gives the Lord Chancellor a new power to alter the qualification regulations or rules of conduct of an authorised body by order.
168. The existing procedures for approving applications by bodies for authority to grant rights of audience or rights to conduct litigation, and for approving applications by authorised bodies to alter their qualification regulations or conduct rules, have proved slow and convoluted (see paragraph 151 above).
169. The new procedures do not contain the existing requirement for each of the designated judges to approve an application before it can succeed, although the Lord Chancellor must seek, and have regard to, their advice. An applicant body will first submit its application to the Lord Chancellor. In the case of an application to become an authorised body, the Lord Chancellor must consult the Legal Services Consultative Panel (established by section 35), the Director-General of Fair Trading (DGFT), and the designated judges. In the case of an application to amend an authorised body's regulations or rules, the Lord Chancellor will decide whether he needs to consult the



Panel and/or the DGFT, but he will be required to consult the designated judges. He may not refuse an application without having consulted the Panel. As now, new authorised bodies will be designated by Order in Council, subject to Parliamentary approval by the affirmative resolution procedure.

170. The Lord Chancellor currently has power to revoke a body's authorisation, although this has never been used. This power only applies to those bodies designated by Order in Council (currently only the Institute of Legal Executives). At present, if the Lord Chancellor believes there are grounds for revoking authorisation, he must seek ACLEC's advice. (ACLEC may also advise the Lord Chancellor on its own initiative to revoke an authorisation.) The Lord Chancellor must then consult the designated judges, each of whom must approve any proposed revocation.
171. The Act amends the revocation procedure to remove the requirement for each of the designated judges to approve any proposed revocation before an Order in Council can be made, and to refer to the Panel rather than ACLEC. The Lord Chancellor will also be required to obtain the advice of the DGFT. An Order in Council revoking a body's authorisation will continue to be subject to Parliamentary approval by affirmative resolution.
172. The Schedule will confer on the Lord Chancellor a new power to amend the qualification regulations or rules of conduct of an authorised body by order, if he considers that they place unreasonable restrictions on rights of audience or rights to conduct litigation, or the exercise of those rights. He will be required to consult the Panel, the DGFT and the designated judges before doing so; and his order will be subject to Parliamentary approval by the affirmative resolution procedure.
173. **Section 42: Overriding duties of advocates and litigators.** This section imposes on advocates and litigators a statutory duty to the court to act with independence in the interests of justice; and a duty to comply with their professional bodies' rules of conduct. Those duties override any other civil law obligation which a person may be under, including the duty to the client or a contractual obligation to an employer or to anyone else. A barrister, solicitor or other authorised advocate or authorised litigator must refuse to do anything required, either by a client or by an employer, that is not in the interests of justice (eg. suppress evidence). The purpose of this section is to protect the independence of all advocates and litigators.
174. **Section 43/Schedule 6: Minor and consequential amendments.**Section 43 gives effect to Schedule 6 which makes minor and consequential amendments to other Acts. Paragraphs 1 to 3 of the Schedule provide that where an alteration to the Law Society's rules has been approved by the Lord Chancellor under the new procedure which will be inserted into the Courts and Legal Services Act 1990, the alteration concerned needs no further approval under the Solicitors Act 1974. Paragraph 5 gives the Lord Chancellor a new power to impose reasonable time limits on the giving of advice under the 1990 Act; this is in order to avoid the delays which have affected some applications for the approval of rule alterations under the current procedure. The Schedule makes several amendments which are intended to improve and clarify the drafting of the 1990 Act, in particular it redefines 'right of audience' and 'right to conduct litigation' in order to reflect the fact that it is possible to have a right in principle which cannot be exercised in practice.
175. **Part III of Schedule 14** makes transitional provisions. Paragraph 13 enables the Lord Chancellor by order to make provisions in connection with the abolition of ACLEC. Paragraphs 14 and 15 provide that the existing rules and regulations of the Bar Council and the Law Society are deemed to have been approved, and that all existing barristers and solicitors are deemed to have been granted full rights of audience before all courts on their call or admission to the profession. Paragraph 16 preserves the effect of section 83 of the Supreme Court Act 1981, which enables solicitors who have not obtained the Law Society's higher courts qualifications to exercise certain rights of audience before the Crown Court when it sits in areas specified in directions by the Lord

Chancellor. Paragraph 17 provides that Orders in Council designating other authorised bodies (for example, the Institute of Legal Executives), and any alterations made in the rules of such bodies which have been approved under the current provisions of the Courts and Legal Services Act 1990 will continue to have effect once those provisions have been replaced.

### ***Barristers and solicitors***

176. **Section 44: Barristers employed by solicitors etc.** This section enables a barrister employed in a solicitors' firm to provide legal services, including full rights of audience, direct to his employer's clients. At present, solicitors employed by firms of solicitors are treated by the Law Society's rules as being in private practice. They may therefore offer their services to the public and, if they have the necessary qualifications, may exercise full rights of audience.
177. In contrast, barristers employed by firms of solicitors are classified under Bar Council rules as "non-practising". This means that they may offer limited legal services to members of the public but they have no rights of audience in any court under the Bar's rules, no matter how well qualified they are, and no matter how many years they may have spent as barristers in private practice.
178. **Section 44** disapples Bar Council rules which impose a prohibition or limitation on the provision of legal services by barristers employed by solicitors (or other authorised litigators). It also provides that barristers employed by solicitors etc. are able to provide legal services directly to the public, without the need to receive instructions through a solicitor or other person acting for the client.

By virtue of section 40, the Institute of Legal Executives is authorised to grant its members rights to conduct litigation. It is possible that others, such as Patent Agents, may become authorised litigators in future.

179. **Section 45: Fees on application for appointment as Queen's Counsel.** This section provides for the Lord Chancellor to introduce a fee, payable by applicants for the rank of Queen's Counsel, to meet the cost of the appointment system.
180. Currently, the only power to charge a fee in relation to Queen's Counsel relates to the Crown Office and its costs. These costs, which in 1999 were about £10,000, are limited to the actual grant of Letters Patent to successful applicants.
181. However, most of the cost of the appointment system relates to the work involved in processing applications and providing feedback to unsuccessful candidates who request it. Indeed, most applications are unsuccessful - during the competition for 1998/99, only 69 of 553 applications were successful. Providing feedback is an increasing burden; so far, over twice the number of unsuccessful applicants in the 1998/99 competition have requested it, as in the whole of the previous year.
182. Handling the applications and giving feedback to applicants, many of whom have applied on previous occasions, is a time-consuming process, costing about £185,000 in 1998/99. The Government intends to set a fee of £335 for the 1999/2000 competition and, subject to any unexpected changes in the cost of running the competition or the number of applicants, to review that figure every three years.
183. **Section 46: Bar practising certificates.** This section enables the Bar Council to require barristers to hold a certificate in order to practise, and to charge for those certificates. At present the Bar Council has no power to levy a compulsory subscription from its members. The Government considers it right in principle that a regulatory body should be able to charge fees to those who benefit from its regulation.
184. **Section 46** enables the Bar Council to make rules prohibiting barristers from practising unless authorised by a practising certificate. The rules could require the payment of fees to the Bar Council for the issue of the certificates; these fees could vary according

to the circumstances of the individual barrister, for example whether he or she was employed or in private practice. The Bar Council's rules on practising certificates have to be approved by the Lord Chancellor.

185. Subsection (2)(b) provides that the total amount raised by the Bar Council from the issue of practising certificates should not exceed that applied by the Council for the purposes of the regulation, education and training of barristers. The Government does not believe that barristers should be obliged to pay subscriptions for other non-regulatory functions which they may not support. Subsection (3) gives the Lord Chancellor, after consulting the Bar Council, power to make an order subject to Parliamentary approval under the affirmative resolution procedure, to extend the purposes for which the Council might apply money generated from practising certificates.
186. **Section 47: Fees for solicitors' practising certificates.** This section enables the Lord Chancellor, after consulting the Master of the Rolls and the Law Society, to make an order amending the Solicitors Act 1974 to limit the purposes for which the Law Society may use its income from practising certificate fees. The use of fees could be limited solely to the regulation, education and training of solicitors, or could include any other purposes that the Lord Chancellor considers appropriate. Any order would require an affirmative resolution of both Houses of Parliament. The Law Society already has a power under section 11 of the 1974 Act to charge compulsory fees for the issue of practising certificates. At present, the use the Society may make of this income is not restricted. The Government has announced that it will not restrict the purposes for which the Law Society may use its income from practising certificate fees for at least 18 months after Royal Assent.
187. **Section 48/Schedule 7: Law Society's powers in relation to conduct of solicitors etc.** Section 47 gives effect to Schedule 7 which extends the powers of the Law Society in relation to the practice, conduct and discipline of solicitors and clerks.
188. **Paragraph 1** amends section 31 of the Solicitors Act 1974 which gives the Law Society the power to make rules as to professional practice, conduct and discipline. This amendment will give the Society the power to monitor compliance by solicitors with the rules made under this section whether or not there has been a complaint about a particular case.
189. **Paragraph 3** inserts a new section 33A into the Solicitors Act which will allow the Law Society to make rules, with the concurrence of the Master of the Rolls, requiring solicitors to provide details of bank accounts operated in connection with their practice or any trust of which they are or were a trustee. Currently, the Society only has the power to make rules concerning client accounts.
190. **Paragraph 6** will allow the Law Society to close down a solicitors' firm that has been the subject of frequent and serious complaints about inadequate professional service. At present, the Society can only do this in cases of dishonesty or financial impropriety.
191. **Paragraph 7** concerns non-qualified employees of solicitors found guilty of dishonesty. It will allow the Law Society and the Solicitors Disciplinary Tribunal to order that such a person may not be employed by any solicitors' firm. There would be right of appeal against such an order made by the Society to the Tribunal. There is also a new power allowing the Society to direct such a person to pay towards the costs of investigating the matter.
192. **Paragraph 11** amends section 44B of the Solicitors Act 1974 which gives the Law Society the power to examine solicitors' files. At present, the Society can only require access to a solicitor's papers where a complaint about a particular case has been received. However, the Society often receives general information about unsatisfactory solicitors' firms. Paragraph 11 will allow the Society (in the shape of the OSS) to require solicitors to produce documents and files when there are reasonable grounds to suspect

that there has been professional misconduct by a solicitor or a breach of the Society's rules, or the professional services provided by a solicitor are not of an adequate quality.

193. **Paragraph 13** gives the Law Society a new power to direct solicitors to pay any costs incurred during the course of an investigation of professional misconduct or failure to comply with rules. Currently the Society has power to order costs against solicitors only in cases of inadequate professional service, not in more serious disciplinary matters.
194. The other provisions of Schedule 7 make equivalent amendments to the Administration of Justice Act 1985 (incorporated practices), and other minor, technical amendments to the 1974 and 1985 Acts.

### ***Legal Services Ombudsman***

195. **Section 49: Powers of Ombudsman.** This section extends the powers of the Legal Services Ombudsman. It will allow her to make binding orders that a professional body or individual practitioner pay compensation or costs to a complainant. At present, she can only make recommendations. Before such an order can be made, the body or practitioner will be entitled to appear before the Ombudsman to make representations.
196. **Section 50: Funding of Ombudsman by professional bodies.** This section empowers the Lord Chancellor to order a professional body to make an appropriate contribution towards the cost of the Legal Services Ombudsman's office. At present, these costs are met by the taxpayer. The usual practice elsewhere is for ombudsman schemes to be financed directly by the professions concerned. However, the Government does not intend to use this power unless or until a Legal Services Complaints Commissioner is appointed (see the commentary below on section 51).

### ***Legal Services Complaints Commissioner***

197. **Section 51: The Commissioner.** This section provides for the appointment of a Legal Services Complaints Commissioner and gives effect to **Schedule 8 (Legal Services Complaints Commissioner)** which makes detailed provision about the new post. These largely mirror the provisions for the post of Legal Services Ombudsman (in Schedule 3 to the Courts and Legal Services Act 1990) so that the two posts could be combined, if considered appropriate. The Government has announced that it does not intend to appoint a Commissioner for at least 18 months after Royal Assent, and then only if a professional body is fulfilling its responsibility for complaints inadequately. Paragraph 10 of Schedule 8 allows for the appointment of an Acting Commissioner, for example to undertake particular functions if there might be a conflict of interest if the Commissioner undertook them.
198. **Paragraphs 1 & 2** of Schedule 8 allow the Commissioner to make appropriate provision for the discharge of his or her functions, including their delegation to others, subject to any directions made and published by the Lord Chancellor. Paragraphs 3 & 4 provide for the remuneration of the Commissioner, and the appointment of staff and their pay and pensions. Paragraph 5 requires the Commissioner to make an annual report, and paragraph 6 provides for the audit of accounts.
199. Where (under section 52) the Lord Chancellor has directed the Commissioner to exercise functions in relation to a professional body, paragraph 7 empowers the Lord Chancellor to require that body to contribute towards the Commissioner's costs. It is in these circumstances that the Lord Chancellor might also require the body to contribute towards the costs of the Legal Services Ombudsman (see paragraph 196 above).
200. **Section 52: Commissioner's functions.** This section sets out the powers of the Commissioner, and provides for the Lord Chancellor to direct the Commissioner to exercise one or more of those powers in relation to a relevant professional body. (The relevant bodies are those supervised by the Legal Services Ombudsman – see paragraph 155 above). The Lord Chancellor may only make a direction when he considers that

a body is not handling complaints against its members effectively and efficiently. This means that the Commissioner's powers might be brought into effect for some professional bodies but not others.

201. Subsection (2) lists the Commissioner's powers. These include the power to order a professional body to produce a plan for improving its complaints-handling procedures. If a body fails to produce or implement a plan, subsection (3) empowers the Commissioner to impose a penalty, proportionate to the size of the body and the number of complaints against it. The Lord Chancellor may set a maximum amount for any penalty, by order subject to Parliamentary approval under the affirmative resolution procedure (subsections (5) & (9)).

### ***Public notaries***

202. **Section 53: Abolition of scriveners' monopoly.** This section ends the statutory monopoly held by the Incorporated Company of Scriveners of London over notarial work in the central London area. This monopoly was placed on a statutory basis by section 13 of the Public Notaries Act 1801, and confirmed by section 6 of the Public Notaries Act 1843 and section 57 of the Courts and Legal Services Act 1990. Section 53 provides that a notary may practise in the City of London or within three miles of its boundaries, whether or not he is a member of the Scriveners' Company.
- *Notaries* authenticate certain legal documents, mainly for use abroad, by signing and sealing them. They also prepare legal documents for use abroad, undertake conveyancing and probate work, translate foreign legal documents, administer oaths and take affidavits.

## **C.**

### **APPEALS, COURTS, ETC. (PART IV - SECTIONS 54-73)**

#### ***Summary***

203. Part IV of the Act contains provisions to reform the system of appeals in civil and family cases (including appeals by way of case stated); makes various changes relating to the High Court and the Crown Court; facilitates the secondment of British judges to international courts; enables inquests to be adjourned where a public inquiry has been established that will investigate the deaths; prohibits the publication of information likely to identify a child who is subject to proceedings under the Children Act 1989 in the High Court or a county court; and allows for children under 14 to attend adult criminal trials.
- *Appeal by way of case stated* is a form of appeal where the outcome of proceedings is questioned on the basis that it was wrong in law or outside the jurisdiction of the court. The person questioning the outcome of the proceedings applies to the court to state a case in writing for the opinion of the High Court.
204. In relation to civil appeals, the Act will:
- provide that permission to appeal may be required at all levels in the system;
  - provide that, where a second appeal would lie to the Court of Appeal, it will be allowed to proceed only in limited circumstances;
  - introduce a power for the Lord Chancellor to vary appeal routes by secondary legislation, with a view to ensuring that appeals generally go to the lowest appropriate level of judge;
  - ensure that cases which merit the consideration of the Court of Appeal can reach that court; and

*These notes refer to the Access to Justice Act 1999  
(c.22) which received Royal Assent on 27th July 1999*

- give the Civil Division of the Court of Appeal flexibility to exercise its jurisdiction in courts of one, two or more judges.
205. Together, these proposals are intended to ensure that appeals are heard at the right level, and dealt with in a way which is proportionate to their weight and complexity; that the appeals system can adapt quickly to other developments in the civil justice system; and that existing resources are used efficiently, enabling the Court of Appeal (Civil Division) to tackle its workload more expeditiously.
206. The provisions relating to the High Court will:
- place on a statutory footing the powers of the High Court to deal with appeals by way of case stated coming from the Crown Court;
  - allow judicial review applications, appeals by way of case stated and applications for *habeas corpus* which relate to criminal matters, plus appeals from inferior courts and tribunals in contempt of court cases, to be heard by a single judge of the High Court, rather than, as now, by a Divisional Court of two or more judges;
  - enable the High Court to impose a different sentence when it finds that a fine defaulter has been committed to prison illegally; and
  - create a statutory post of Vice-President of the Queen’s Bench Division.

**Background**

207. In his 1994-95 Annual Report on the Court of Appeal, the then Master of the Rolls, Lord Bingham, stated that: “the delay in hearing certain categories of appeal in the Civil Division of the Court of Appeal has reached a level which is inconsistent with the due administration of justice”.
208. In his report *Access to Justice* (July 1996), Lord Woolf set out his proposals for the reform of the civil justice system. At the heart of his proposals was the allocation of civil cases to ‘tracks’, which would determine the degree of judicial case management. Broadly speaking, cases would be allocated to the small claims track, the fast track or to the multi-track, depending upon the value and complexity of the claim. The principle that underlies this system of tracks is the need to ensure that resources devoted to managing and hearing a case are proportionate to the importance and complexity of that case. So that the benefits of these reforms should not be weakened on appeal, Lord Woolf recommended that the system of appeals should be based on similar principles.
209. In 1996, Sir Jeffery Bowman chaired a Review of the Civil Division of the Court of Appeal (*Review of the Court of Appeal (Civil Division) - Report to the Lord Chancellor*, September 1997).
210. Sir Jeffery identified a number of problems affecting the Court of Appeal. In particular, he noted that the Court was being asked to consider appeals that were not of sufficient weight or complexity to require two or three of the country’s most senior judges, and which had sometimes already been through one or more levels of appeal. He also concluded that existing provisions on the constitution of the Court were too inflexible to deal appropriately with its workload. The Bowman report therefore recommended changes to the jurisdiction and constitution of the Court of Appeal. The Lord Chancellor has consulted on proposals to effect some of these changes (*Reform of the Court of Appeal (Civil Division): Proposals for change to Constitution and Jurisdiction*, Lord Chancellor’s Department, July 1998).
211. Due to the complex nature of routes of appeal in family matters, Sir Jeffery recommended that a specialist committee should examine this area with a view to rationalising the arrangements for appeals in family cases in line with the principles he had outlined for civil appeals generally. The Family Appeal Review Group, chaired by Lord Justice Thorpe, published recommendations to this effect in July 1998. The

Lord Chancellor will be consulting on his proposals in the light of this report during the summer.

212. The provisions in the Act to allow certain matters to be heard by a single High Court judge are also intended to ensure that the most appropriate use can be made of judicial resources. On 22 March 1999, the Lord Chancellor invited Sir Jeffery Bowman to conduct a review of the Crown Office list. Sir Jeffery is due to report by the end of 1999. No changes affecting cases listed for hearing by the Crown Office will be implemented until Sir Jeffery has reported.

The *Crown Office* is the administrative office in the High Court responsible for the special supervisory and appellate jurisdiction of the Queen's Bench Division (QBD). Under that jurisdiction, the QBD oversees the legality of decisions by inferior courts and tribunals, ministers, local authorities and other executive bodies.

## **Commentary**

### **Appeals**

213. **Section 54: Permission to appeal.** This section allows rules of court to provide, for all levels of court, that the permission of the court is needed to exercise a right of appeal in a civil case. At present, permission is required for most cases going to the Civil Division of the Court of Appeal, but not elsewhere. In future, it is proposed that, with few exceptions, rules will require permission to appeal to be obtained for all appeals to the county courts, High Court or Civil Division of the Court of Appeal. The exceptions will include orders affecting the liberty of the individual; (appeals against committal to prison, refusal to grant *habeas corpus*, and the making of secure accommodation orders under section 25 of the Children Act 1989 are currently excepted from the requirement to seek permission to appeal to the Court of Appeal). There will be no appeal against a decision of the court to give or refuse permission, but this does not affect any right under rules of court to make a further application for permission to the same or another court.

*A secure accommodation order* enables a local authority to place a child in care in accommodation which is designed to restrict his or her liberty.

214. **Section 55: Second appeals.** This section provides that, where a county court or the High Court has decided a matter brought on appeal, there will be no possibility of a further appeal of that decision, unless the appeal would raise an important point of principle or practice, or there is some other compelling reason it to be heard. All applications for permission to bring a further appeal must be made to the Court of Appeal, regardless of the court which heard the first appeal. If permission is given, the appeal will be heard by the Court of Appeal.

215. **Section 56: Power to prescribe alternative destination of appeals.** This section enables the Lord Chancellor to vary, by order, the routes of appeal for appeals to and within the county courts, the High Court, and the Civil Division of the Court of Appeal. Before making an order, the Lord Chancellor will be required to consult the Heads of Division, and any order will be subject to Parliamentary approval under the affirmative resolution procedure. The intention is that the following appeal routes will be prescribed:

- in fast track cases heard by a district judge, appeals will be to a Circuit judge;
- in fast track cases heard by a Circuit judge, appeals will be to a High Court judge;
- in multi-track cases, appeals against interlocutory decisions by a district judge will be to a Circuit judge, by a master or Circuit judge to a High Court judge, and by a High Court judge to the Court of Appeal; and
- in multi-track cases, appeals of final orders will be to the Court of Appeal, regardless of the court of first instance.

The *Heads of Division* are the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, and the Vice-Chancellor.

A decision is *interlocutory* if it does not determine the final outcome of the case.

*Masters* are judicial officers of the High Court who decide interlocutory issues.

216. The Lord Chancellor will also use this power to determine routes of appeal in family matters. Whilst his proposals for civil non-family appeals have been subject to widespread consultation, this has not been the case for family appeals. Although the Lord Chancellor proposes that the appeal routes in family cases will be based upon similar principles, the exact way in which the Lord Chancellor will use this power in family cases will be subject to further consultation.
217. **Section 57: Assignment of appeals to Court of Appeal.** This section provides for the Master of the Rolls, or a lower court, to direct that an appeal that would normally be heard by a county court or the High Court should be heard instead by the Court of Appeal. The power conferred on courts below the Court of Appeal by this section will be subject to rules of court.
218. **Section 58: Criminal appeals: minor amendments.** This section makes minor amendments to existing legislation on criminal appeals. The need for these amendments came to light in the course of preparing a Bill (for a future session of Parliament) to consolidate the law in this area.
219. Subsections (1) and (4)-(6) provide for rights of appeal against an order returning someone to prison to serve the remainder of a sentence from which he or she has been released early (under Part II of the Criminal Justice Act 1991).
220. Subsection (2) makes it clear that, where the Court of Appeal has ordered a retrial that has not begun within two months of that order, the Court can set aside the order for retrial if it decides that a verdict of acquittal should be entered because of the delay. Subsection (3) makes clear that the Court of Appeal can deal with appeals against Crown Court convictions for summary offences that were linked with more serious offences committed to the Crown Court. Subsection (7) ensures that the same right to appeal against a Crown Court decision in a case originally dealt with by a magistrates' court applies to a sentence to detention by a Youth Court as to a sentence of imprisonment.

A *summary offence* is one that (unless linked to more serious offences) can only be tried by a magistrates' court.

### ***Civil division of Court of Appeal***

221. **Section 59: Composition.** This section makes provision about the number of judges of which a court must be constituted for the Court of Appeal to hear appeals. Currently, section 54 of the Supreme Court Act 1981 provides that the Court of Appeal is constituted to exercise its jurisdiction if it consists of an uneven number of judges not less than three (or two judges in certain limited circumstances). Section 59 of this Act amends section 54 of the 1981 Act to allow the Master of the Rolls, with the concurrence of the Lord Chancellor, to give directions about the minimum number of judges of which a court must consist for specified types of proceedings. Subject to any directions, the Master of the Rolls, or a Lord Justice of Appeal designated by him for the purpose, will be able to determine the number of judges to hear any particular appeal.
222. **Section 60: Calling into question of incidental decisions.** This section takes account of the abolition (by section 70) of the post of registrar of civil appeals, by substituting for section 58 of the Supreme Court Act 1981 a provision that incidental decisions by a single judge or any officer or member of staff of the Court of Appeal may be challenged



as prescribed by rules of court. No appeal shall lie to the House of Lords from a decision which may be challenged under such rules.

Under paragraph 2 of Schedule 1 to the Civil Procedure Act 1997, it is possible for rules of court to devolve functions of the court to officers or other staff of the court.

### **High Court**

223. **Section 61: Cases stated by Crown Court.** The Supreme Court Act 1981 gives the High Court specific powers to deal with appeals by way of case stated coming from a magistrates' court. However it does not do the same for cases coming from the Crown Court. This section provides a statutory footing for the powers of the High Court to deal with appeals by way of case stated coming from the Crown Court. It enacts a recommendation made by the Law Commission in its 1994 Report *Administrative Law: Judicial Review and Statutory Appeals*.
224. **Section 62: Power to vary committal in default.** This section closes a loophole in section 43 of the Supreme Court Act 1981, which came to light in the recent case of *Regina v St Helens Justices ex parte Marlene Ann Jones and others*. Section 43 of the 1981 Act provides that the High Court may, instead of quashing a conviction that has wrongfully been imposed by a lower court, amend it by substituting any sentence which the lower court had power to impose. In the St Helens case, the Court of Appeal found that this power, to substitute a sentence, did not apply when the Court quashed a decision to commit a fine defaulter to prison, because the committal was not the sentence originally imposed on conviction. This had the effect of leaving the original sentences (the fines) outstanding.
225. **Section 62** therefore inserts a new section 43ZA into the 1981 Act to cover this situation. The new section provides that, where the High Court quashes a decision of a lower court to commit a fine defaulter to prison, the High Court may deal with the person in any way that the lower court could have. The effect is that the High Court can quash the incorrect committal and reconsider the case in the light of the present circumstances of the wrongfully committed offender.
226. **Sections 63-65: Criminal causes and matters; contempt of court; habeas corpus.** These sections will allow certain cases to be routinely heard by a single judge of the High Court. The route of appeal for these cases is to the House of Lords, but the Administration of Justice Act 1960 provides that the House of Lords will only hear appeals from a Divisional Court of the High Court. Sections 63-65 amend the 1960 Act, so that the House of Lords can hear appeals from a single High Court judge. It will then be possible to make rules of court to provide for these cases to be heard by a single judge, while enabling the judge to refer particularly complex cases to a Divisional Court.
227. The cases in question are:
- judicial reviews and appeals by way of case stated in criminal causes and matters (section 63);
  - appeals from inferior (civil and criminal) courts and tribunals in contempt of court cases (section 64); and
  - applications for *habeas corpus* in criminal cases (section 65).

A *Divisional Court* is composed of two or more High Court judges.

### **Crown Court**

228. **Section 66/Schedule 9 - Enforcement of community orders.** Section 66 gives effect to Schedule 9 which changes the way in which breaches of certain community orders imposed by the Crown Court are dealt with. Where the sentencing judge has so directed, the breach will return directly to the Crown Court, rather than going first to

a magistrates' court as now. The Schedule also provides that applications to revoke a relevant Crown Court community order will be made to the Crown Court and not to a magistrates' court.

- The relevant *community orders* are the first 4 listed in the second part of Annex B to these Notes.

Breaches and revocations of drugs treatment and testing orders are automatically dealt with by the court that made the order. Schedule 9 does not change this.

229. **Section 67: Time limits where accused sent for trial.** Section 67 makes various amendments to earlier Acts to facilitate the implementation of section 51 of the Crime and Disorder Act 1998, which provides for indictable-only cases to be sent directly to the Crown Court for trial, without formal committal proceedings in a magistrates' court. The new arrangements are currently being piloted in several parts of the country.

*Indictable-only cases* can only be tried by the Crown Court, i.e. not by a magistrates' court.

230. Schedule 3 of the 1998 Act provides for regulations to be made about the service of evidence in cases sent to the Crown Court under section 51 of the 1998 Act. The intention was to set a fixed timetable to ensure these cases proceeded speedily. But the regulations can only set a single period for serving evidence which applies to all cases. Some cases are more complex than others, and require more preparation time. So the regulations made for the pilots had to prescribe a time limit of one year, to ensure the requirement could be met in more complex cases. This length of time is not necessary in the vast majority of cases. Section 67(1) therefore amends the 1998 Act to give the judge discretion to extend the period set by the regulations. This will allow a shorter period to be set in the regulations.
231. **Section 67(2)** amends section 13 of the Criminal Procedure Investigations Act 1996 to provide for the time by when the prosecutor must disclose unused material in cases sent for trial without committal proceedings.
232. **Section 67(3)** amends section 22 of the Prosecution of Offences Act 1985 to allow the Crown Court to extend time limits in the preliminary stages of cases sent for trial under section 51 of the 1998 Act.

### ***Judges etc.***

233. **Section 68: Judges holding office in European or international courts.** This section makes it possible to appoint British judges to international courts, without those judges having to resign judicial office in the United Kingdom. This will guarantee that seconded judges can resume office in the UK when their secondment ends, making such appointments more attractive and so ensuring that this country can play its full part in these courts.
234. **Section 68** applies to any court of the European Union and any other international court (e.g. the International Court of Justice in the Hague) designated by the Lord Chancellor or the Secretary of State for Scotland. (The European Court of Human Rights is excluded by the second paragraph (b) in subsection (2) because similar provisions for that court already exist in the Human Rights Act 1998.)
235. Subsection (3)(a) & (b) ensures that seconded judges will not be paid their UK salaries, or receive pension benefits under a UK judicial pensions scheme, while working for an international court. Subsection (3)(c) provides that a seconded judge should not count towards any statutory maximum complement of a UK court while working abroad; and subsection (5) allows the relevant minister to deal with any problems (including the temporary breach of a maximum complement) that may arise when a judge returns to office here.

236. **Section 69: Vice-president of the Queen's Bench Division.** This section puts on a statutory footing the existing practice of the Lord Chancellor appointing, at the request of the Lord Chief Justice, a senior member of the Court of Appeal to assist the Lord Chief Justice in his administrative duties as president of the Queen's Bench Division of the High Court.
237. **Section 70: Registrar of civil appeals.** This section abolishes the post of registrar of civil appeals. The registrar of civil appeals is a judicial officer provided for by Schedule 2 to the Supreme Court Act 1981. The post has both judicial and administrative functions. The administrative functions have now been taken over by a civil servant appointed to manage the Civil Appeals Office.

### ***Court proceedings***

238. **Section 71: Adjournment of inquest in event of judicial inquiry.** This section provides for the indefinite adjournment of an inquest when a judicial inquiry is established that would constitute adequate investigation into the death or deaths concerned. The intention is to prevent duplication of proceedings which can cause unnecessary distress to the bereaved and other witnesses. Subsection (4) allows for the coroner to resume the inquest after the completion of the inquiry in exceptional circumstances, for example if there was a doubt whether the death had in fact been caused by the incident subject to the inquiry.
239. **Section 72: Reporting of proceedings relating to children.** This section amends section 97 of the Children Act 1989 to prohibit the publication of information identifying a child who is (or has been) the subject of proceedings under that Act in the High Court or a county court. Section 97(4) of the 1989 Act allows the court to authorise publication where that is in the interests of the child. Section 72 unifies the law on the reporting of Children Act cases in all levels of court, by extending the existing prohibition which applies only to magistrates' courts.
- For this purpose, a *child* means any person under 18 years of age.
240. **Section 73: Power to allow children to attend criminal proceedings.** Section 73(1) permits children under 14 to attend criminal trials in England and Wales, with the consent of the court. It does so by amending section 36 of the Children and Young Persons Act 1933, which prohibits children (that is, young people under the age of 14) from attending criminal trials unless they are a defendant, a witness, an infant in arms, or their presence is required for the purposes of justice. Section 73(2) makes a comparable change for Scotland. The purpose of this section is to allow children to visit courts for educational purposes.

### ***D.***

## **MAGISTRATES AND MAGISTRATES' COURTS (PART V - SECTIONS 74-97)**

### ***Summary***

241. Part V of the Act contains provisions to reform the organisation and management of the magistrates' courts service; to unify the stipendiary bench; and to extend and clarify the powers of civilians to execute warrants.
242. The Government's objective is to develop a magistrates' courts service which is effectively and efficiently managed, at a local level by local people, within a consistent national framework. The Government announced its plans for developing this framework in statements to both Houses of Parliament on 29 October 1997 (Official Report, Lords, cols. 1057-1067; Commons, cols. 901-914). As part of this programme of reform, the Act:

*These notes refer to the Access to Justice Act 1999  
(c.22) which received Royal Assent on 27th July 1999*

- reforms the organisation and management of the magistrates' courts by:
  - creating more flexible powers to alter the various territorial units that make up the magistrates' courts service, and to allow summary cases to be heard outside the commission area in which they arise;
  - establishing a single authority to manage the magistrates' courts in London;
  - providing for a code of conduct for members of magistrates' courts committees (MCCs) and the panels that select them, and expanding the potential membership of MCCs by removing the limit on co-opted members;
  - giving the Lord Chancellor powers to require MCCs to procure common goods and services where this will lead to more effective or efficient administration, and to direct MCCs to implement recommendations of the Magistrates' Courts Service Inspectorate;
  - removing the requirement for justices' chief executives to be qualified lawyers, and transferring responsibility for certain administrative functions from justices' clerks to justices' chief executives;
- unifies the provincial and metropolitan stipendiary magistrates into a single bench of District Judges (Magistrates' Courts), able to sit in any magistrates' court in the country;
- removes the requirement for lay magistrates to sit as judges in the Crown Court on committals for sentence; and
- extends and clarifies the powers of civilians to execute warrants.

## ***Background***

### ***Organisation and management of the magistrates' courts service***

#### ***Altering territorial units***

243. The administration of the magistrates' courts service is based on three organisational units - the magistrates' courts committee (MCC) area, the commission area and the petty sessions area.
244. New powers to change organisational units reflect the Government's intention to develop a more coherent geographical structure for the criminal justice system as a whole. Common boundaries should enable the various criminal justice agencies to co-operate more effectively.
245. The **MCC area** is the unit on which the administration of the courts is based. MCCs are the bodies responsible for the administration of the magistrates' courts service. There are currently 84 MCCs in England and Wales. Each MCC appoints a justices' chief executive to manage the courts in its area.
246. The Justices of the Peace Act 1997 already provides power to change the boundaries of MCC areas. The Government believes that a structure with fewer and larger areas would be more efficient and effective. The number of MCCs has been reduced in recent years, and will continue to reduce as part of the policy of a greater alignment of boundaries between criminal justice agencies.
247. The **commission area** is the unit on which the appointment of magistrates and the jurisdiction of the magistrates' courts to hear summary cases is based. Magistrates are appointed to a particular commission area, on the basis of where they reside; and most summary offences must be tried in the commission area where the alleged offence took place.

248. Historically, MCC and commission areas have aligned with one another and with county and metropolitan county borders. However, most commission areas are defined in primary legislation, and can be changed by secondary legislation only to reflect changes in local government boundaries. Increasingly there are MCCs that cover two or more commission areas. These MCCs can only transfer magistrates or cases between those areas in strictly prescribed circumstances. The ability to change commission area boundaries is intended to enable MCCs to allocate cases and deploy magistrates between the courts in their MCC area more effectively and efficiently.
249. MCC areas consist of one or more petty sessions areas. Petty sessions areas are defined in terms of local authority boundaries, and some are broken down into smaller areas called petty sessional divisions. These are the benches, the basic unit of local court organisation. The definition of these areas in terms of local authority boundaries can limit an MCC's ability to organise its internal structure effectively, particularly where an amalgamation of MCCs has occurred. As a result, the full benefits of amalgamation may not be realised.
250. The Act redefines the basis of these units, to allow MCCs to decide the most appropriate and efficient structure for their area. It also removes the artificial distinction of terminology between a petty sessions area and a petty sessional division.

### ***Constitution and funding of MCCs***

251. Each MCC comprises up to 12 members and is composed primarily of lay magistrates, appointed by their peers, who undertake the task in addition to their magisterial duties. Individuals are appointed to the MCC on the basis of their skills and experience. Where an MCC believes that additional skills are required which cannot be found amongst the applicants for membership of the MCC, they may co-opt individuals who need not be magistrates. Currently the number of co-options is limited to two. These may be in addition to the maximum membership of twelve. In addition, the Lord Chancellor may appoint up to two individuals to an MCC. Neither lay magistrates nor co-opted and appointed non-magistrates receive remuneration for their committee work. The Act removes the limit on the number of co-opted and appointed members, and provides power for MCCs to remunerate those members.
252. Local authorities are responsible for providing the accommodation that an MCC requires for the magistrates' courts in its area and for paying the expenses the MCC incurs. Local authorities recoup up to 80% of the net cost from the Lord Chancellor's Department in the form of specific grant. In cases where an MCC area encompasses two or more authorities, the costs and accommodation are divided between the authorities, but a "lead" authority is appointed to receive the grant and pay the expenses.

### ***A single authority for London***

253. The Greater London area comprises a significantly larger number of MCCs (22) and local authorities (33) than any other area. The consequences of this for issues like funding and accommodation make amalgamation under the provisions of the Justices of the Peace 1997 impractical. The Act creates a Greater London Magistrates' Courts Authority, with special provision for its funding, accommodation, constitution and other necessary powers to enable the existing MCCs to be amalgamated effectively.

### ***Justices' clerks and justices' chief executives***

254. Most cases in magistrates' courts are heard by magistrates who are not qualified lawyers. They rely heavily on the legal advice of justices' clerks and their deputies, acting as court clerks. All justices' clerks are legally qualified and can exercise certain powers of magistrates. Some of these powers are conferred on them by particular statutes and some are delegated to them by rules. (Section 45 of the Justices of the Peace Act 1997 provides for rules to delegate functions exercisable by a magistrate acting alone to justices' clerks or staff appointed to assist them.)

255. The post of justices' chief executive (JCE) was introduced in 1994, since when every MCC has appointed a JCE. The JCE supports the MCC in planning and managing the efficient and effective administration of the courts within the area of the MCC. At present, however, justices' clerks continue to be responsible in statute for many administrative matters. In practice many of these tasks are delegated to other staff. Last year, the Government published a consultation paper about the functions of justices' clerks (*The Future Role of the Justices' Clerk*, Lord Chancellor's Department, September 1998).
256. The provisions in the Act about the qualifications and functions of justices' chief executives are intended to clarify their role and the lines of responsibility and accountability between the JCE, the MCC and the other staff of the MCC. In particular they facilitate a greater separation of the legal and administrative functions carried out by justices' clerks and JCEs. The primary function of justices' clerks will continue to be the giving of legal advice to lay magistrates. Under the new management structure, the JCE will be able to delegate any administrative function to any member of staff, including the justices' clerks, depending on local needs.

### ***Unification of the stipendiary bench***

257. Stipendiary magistrates are qualified lawyers who are appointed to sit as full-time professional judges in magistrates' courts. They support and complement the work of the lay magistracy, in particular helping to maintain consistency with respect to sentencing. Stipendiary magistrates usually sit alone, whereas lay magistrates sit in benches of at least two. There are currently 92 stipendiary magistrates in England and Wales, and some 30,000 lay magistrates.
258. Metropolitan stipendiary magistrates can sit in the London commission areas and the counties of Essex, Hertfordshire, Kent and Surrey. Provincial stipendiary magistrates are appointed to a particular commission area in the rest of England and Wales.
259. In April 1998, the Government published a Consultation Paper about creating a unified stipendiary bench with national jurisdiction (*Unification of the Stipendiary Bench: Consultation Paper*, Lord Chancellor's Department, April 1998) in order to increase the efficiency of the administration of justice at summary level.

### ***Committals for sentence***

260. Currently, cases committed to the Crown Court for sentence must be heard in the Crown Court by a bench composed of a High Court Judge, Circuit Judge or Recorder sitting with between two and four justices of the peace. In October 1997, a new procedure was implemented requiring defendants to indicate how they intend to plead *before* the decision is made about whether the case should be heard in the magistrates' court or the Crown Court (section 17A of the Magistrates' Courts Act 1980, as amended by section 49 of the Criminal Procedure and Investigations Act 1996). This has led to an increase in the number and seriousness of cases committed to the Crown Court solely for sentence. (Previously, all more serious cases were committed for trial, although many defendants subsequently pleaded guilty).
261. The change in procedure has meant that magistrates are dealing in the Crown Court with cases which are outside their normal range of experience. Last year, the Government issued a consultation paper (*Magistrates sitting as judges in the Crown Court*, Lord Chancellor's Department, August 1998) which examined the role of magistrates in the Crown Court. The majority of responses agreed that the requirement for magistrates to sit on committals for sentence should be removed.

### ***Execution of warrants***

262. Until now, the police have been primarily responsible for arresting fine defaulters and people who breach community sentences. Increasingly, however, some police forces

have given this work a low priority. The Government therefore intends to transfer responsibility for the execution of warrants from the police to the magistrates' courts; and to enable the courts to obtain information from other Government agencies to help trace fine defaulters and those in breach of community sentences. Fines worth over £50 million were written off in 1997-98, and it is estimated that inability to trace the offender could account for as much as 30% of this total. The Government's objective is to ensure that fines and community sentences are seen as credible and effective punishments, by ensuring that they can be effectively enforced.

263. A number of MCCs already employ civilian enforcement officers (CEOs), who work with the police under local arrangements. However, under current legislation, the powers of CEOs are unclear in certain respects. In order to enable the courts to take on this new function effectively, the Act contains provisions to clarify and extend the powers of appropriate civilians to execute certain kinds of warrant issued by a magistrates' court.
264. The Act will make it possible for a magistrates' court to issue a warrant in such terms that it can be executed by any constable within his own police area; any CEO employed by a prescribed authority for any area named in the warrant; any authorised employee of any company or firm authorised by the court's own MCC, or any other individual named in the warrant, without the warrant having to specify which. While it is not intended that courts should address warrants to the CEOs of other MCCs as a matter of routine, they will be able to do so where appropriate (e.g. two MCCs might reach an agreement to enforce one another's warrants, either in individual cases or on a continuing basis).

### **Commentary**

#### ***Territorial organisation***

265. **Section 74: Commission areas.** This section enables the boundaries of *all* commission areas to be changed by secondary legislation. It empowers the Lord Chancellor of his own volition, or following a proposal from a relevant magistrates' courts committee, to combine commission areas or parts of commission areas or otherwise adjust commission area boundaries, after consulting the parties concerned. It also establishes the procedural framework for changing commission areas by secondary legislation. The new power replaces Her Majesty's power under section 2(3) of the Justices of the Peace Act 1997 ("JPA 1997") to alter, by an Order in Council, the boundaries of commission areas in Greater London (apart from the City of London).
266. **Section 74** is concerned exclusively with changes to commission areas instigated for magistrates' courts purposes, not as a consequence of local government re-organisation. Changes to commission areas to reflect local government boundary changes will continue to be made under sections 19 and 26 of the Local Government Act 1992 or sections 55 and 63 of the Local Government (Wales) Act 1994 as necessary.
267. **Section 75: Petty sessions areas.** This section redefines petty sessions areas in terms of commission areas, and removes the unnecessary distinction between petty sessions areas and petty sessional divisions (see paragraphs 149-150 above). It also makes consequential amendments to the procedural framework for changing petty sessions areas by secondary legislation and incorporates a power to amend the names of petty sessions areas within the general order-making power, but does not change the way in which these procedures operate.
268. The principal purpose of section 75 is to provide MCCs with greater flexibility to change their petty sessions areas. This flexibility is currently restricted by the use of local government boundaries as the basis for defining petty sessions areas.
269. **Section 76/Schedule 10: Areas: consequential provision.** Section 76 and Schedule 10 make further changes consequential on the changes relating to commission areas and petty sessions areas.

270. **Section 76(1)** removes the automatic right of the Lord Mayor and the aldermen of the City of London to be magistrates by virtue of their office. The Lord Mayor and the aldermen currently have special rights originally granted to them in a charter of 1741 by King George II. They are the only people in the country who have the right to be magistrates through election as aldermen.
271. In future, the Lord Mayor and the aldermen will only become justices of the peace after passing through the selection procedure that applies to all other magistrates in England and Wales.
272. **Section 77: Youth courts.** This section provides a common statutory framework, applicable throughout the country, for the establishment of panels of magistrates to sit in youth courts. Detailed provisions for the appointment of youth panels and the constitution of youth courts will be contained in rules.
273. At present, the second Schedule to the Children and Young Persons Act 1933 provides different arrangements for the “metropolitan area” (the City of London and the Inner London boroughs) and the rest of the country. In the metropolitan area, members of youth panels and youth court chairmen are nominated by the Lord Chancellor. Elsewhere, they are appointed by the local bench. The Government believes there should be a uniform approach, and intends to consult on the arrangements to be preferred. The new provisions allow for different arrangements to continue for different areas for the interim period.
274. **Part V of Schedule 14** contains transitional provisions about territorial organisation. Paragraphs 19 and 20 require the first orders specifying commission areas and petty sessions areas to list all such areas in England and Wales. This ensures that, for the first time, these will all be listed in the same place. Paragraph 21 allows the current Lord Mayor and aldermen to remain justices as if they had been appointed under the existing arrangements. Paragraph 28 preserves for the time being the existing combined youth court panel for the metropolitan area.

### **Justices**

275. **Section 78/Schedule 11: Unification and renaming of stipendiary bench.** This section establishes a unified bench of professional judges to sit in magistrates’ courts. It also creates a new judicial title for stipendiary magistrates, who will in future be called District Judge (Magistrates’ Courts). It gives effect to Schedule 11 which makes consequential changes to other Acts, including providing for District Judges (Magistrates’ Courts) to sit alone in a youth court.
276. The purpose of section 78 is to create a unified national bench which can be deployed anywhere in the country to deal with fluctuations in workload or particularly complex cases. The new title is intended to recognise more fully the status of stipendiary magistrates as members of the professional judiciary.
277. **Section 78** replaces sections 11-20 of the JPA 1997, which contain separate provisions for metropolitan and provincial stipendiary magistrates. The main differences from the existing provisions are as follows.
- A District Judge (Magistrates’ Courts) has jurisdiction for every commission area (new section 10C(1)).
  - A Senior District Judge (Chief Magistrate) will be appointed as a national head of all District Judges (Magistrates’ Courts) (section 10A(2)). Currently, there is a Chief Metropolitan Stipendiary Magistrate, but no equivalent head of the provincial stipendiary bench.
  - The Lord Chancellor will be able to remove a District Judge (Magistrates’ Courts) from office on the grounds of “incapacity or misbehaviour” (section 10A(3)). Currently, the Lord Chancellor can remove a metropolitan stipendiary from office



on the grounds of “inability or misbehaviour”. Provincial stipendiary magistrates can only be removed from office on the Lord Chancellor’s recommendation, but no criteria are specified in statute (section 11(3)(b) of the JPA 1997). The test and procedure for removal have been unified to remove this inconsistency. The word “incapacity” has replaced “inability” to bring the language into line with that which applies to circuit judges.

- The Lord Chancellor may appoint Deputy District Judges (Magistrates’ Courts) (new section 10B(1)). Unlike the appointment of acting stipendiary magistrates under the current provisions, these appointments are not limited to 3 months duration, or permitted solely for the purpose of avoiding delays in the administration of justice.
- Section 10A(1): a 7 year *general qualification* is defined in the Courts and Legal Services Act 1990 as “a right of audience in any class of proceedings in the county courts or magistrates’ courts”.

Section 10D(2): The Stipendiary Magistrates Act 1858 allowed a single stipendiary to exercise the jurisdiction of two lay justices. Any express provision to the contrary made after the date that Act came into force survives by virtue of this subsection.

278. **Section 79: Justices not to sit on committals for sentence.** This section enables a case committed to the Crown Court for sentence to be heard by a High Court Judge, Circuit Judge or Recorder sitting alone.
279. **Section 80: Jurisdiction over offences outside area.** This section enables either the prosecution or the defence to apply to have a summary case transferred to a magistrates’ court in another commission area. It gives the Lord Chancellor powers to make regulations setting out the criteria which should be considered by a court in determining an application and specifying circumstances in which a court must grant or refuse an application.
280. At present, apart from a few exceptions (e.g. where several defendants are to be tried together), all summary offences must be tried by a magistrates’ court in the commission area where the alleged offence was committed. Section 80 allows for a case to be transferred to a more convenient or appropriate magistrates’ court that is outside the commission area. Reasons for such a transfer might include the security or convenience of witnesses, the circumstances of the defendant or the facilities of the court-house.
281. **Part V of Schedule 14** makes transitional provisions about justices. Paragraphs 22-23 provide for existing stipendiary magistrates to become District Judges (Magistrates’ Courts) automatically and for acting stipendiary magistrates to become Deputy District Judges (Magistrates’ Courts) for the remainder of the period for which they are authorised to act. Paragraphs 24-25 preserve their pension rights. Paragraph 27 provides that section 79 (Justices not to sit on committals for sentence) does not apply to any proceedings that have already begun when that section comes into force.

### ***Magistrates’ courts committees (MCCs)***

282. **Section 81: Areas outside Greater London.** This section removes the definition of MCC areas in terms of local government boundaries (and re-enacts the existing procedure for changing MCC areas outside Greater London as sections 27A & 27B of the JPA 1997). MCCs are currently based on local government areas, except where there have been changes in the interests of efficient administration under section 32 of the JPA 1997 (in which case they are based on the area defined in the order under that Act). In future, MCC areas will be as specified by the Lord Chancellor by order.
283. **Section 82: Constitution of committees outside Greater London.** This section replaces the existing provisions of the JPA 1997 about the constitution of MCCs. The new provisions differ in the following respects. They do not apply to Greater London (or re-enact the automatic right to reserved seats on the Inner London MCC for the Chief

Stipendiary Magistrate and two other stipendiary magistrates). They do not re-enact the current limits (of 2) on the number of additional members who may be co-opted by an MCC or appointed by the Lord Chancellor. They provide power to remunerate co-opted or appointed members. They allow regulations to make different provisions for MCCs in different parts of the country.

284. The main purpose of these changes is to increase the ability of MCCs to determine their own membership and to assist in attracting and retaining co-opted and appointed members.
285. **Section 83: Greater London Magistrates' Courts Authority.** This section, which inserts seven new sections in the JPA 1997, creates a single body to administer all the Greater London magistrates' courts, replacing the existing 22 magistrates' courts committees. This new body will be known as the Greater London Magistrates' Courts Authority (GLMCA).
286. **Section 83(1)** establishes the GLMCA as the magistrates' courts committee for Greater London. It provides that, as with other MCCs, the Lord Chancellor will be able to make regulations about the GLMCA's membership, constitution and procedure. Unlike other MCCs, the GLMCA's membership is not defined in terms of local magistrates plus any co-opted or appointed members.
287. The GLMCA will have a significantly larger caseload (and consequently more staff and a larger budget) and be responsible for a wider range of functions (including accounting, pay-roll, pensions and property management). Its membership will therefore need a different mix of skills, experience and representation. The regulations may also provide for any member of the GLMCA to be remunerated.
288. **Section 83(2)** provides for the GLMCA's different functions and financial arrangements. It will take on much of the "paying authority" role, i.e. it will be responsible for providing the accommodation and other resources needed by the magistrates' courts in Greater London, will receive grants directly from the Lord Chancellor's Department plus funding from the local authorities.
289. **Section 83(3)** gives effect to **Schedule 12 (Greater London Magistrates' Courts Authority)** which makes amendments to other Acts consequential on the creation of the GLMCA. Paragraph 5 of this Schedule enables the GLMCA (unlike other MCCs) to borrow money, by defining it as a local authority under Part IV of the Local Government and Housing Act 1989. Paragraph 11 allows regulations about the appointment of justices' chief executives (under section 40(8) of the JPA 1997) to be different for the GLMCA and other MCCs.
290. **Section 84: Standard goods and services.** This section allows the Lord Chancellor, if he considers that it would be in the interests of the efficiency and effectiveness of the magistrates' courts generally, to make regulations to require all (or specified) MCCs to obtain specified goods or services, or goods or services of a specified description. Section 84 does not apply to petty sessions court-houses and other accommodation, as these are not goods or services.
291. The intention is to underpin the national framework (see paragraph 242 above) which requires magistrates' courts to work to national standards and co-operate with other criminal justice agencies. This may be promoted by ensuring that MCCs adopt the same systems and services. Also, better value for money may be achieved by procuring goods and services from the same source. Local management will remain responsible for deploying goods and services to best effect and managing the providers of those goods and services.
292. Subsections (3) and (4) of section 84 make consequential amendments. Subsection (3) makes clear that regulations under the new power may relieve the paying authority (usually the local authority) of the obligation to provide goods and services affected by regulations under this section. Subsection (4) makes clear that such regulations may

supersede the power of the MCC to determine what goods and services the paying authority should provide.

293. **Section 85: Power to direct implementation of inspectors' recommendations.** This section adds a new section 62(4A) to the JPA 1997. This gives the Lord Chancellor power to direct an MCC to implement a recommendation made by Her Majesty's Magistrates' Courts Inspectorate
294. MCCs are subject to inspection by the Magistrates' Courts Service Inspectorate. The Inspectorate's reports include recommendations for improvement. Most MCCs take steps to implement them. Section 85 gives the Lord Chancellor a means of dealing with failure to respond adequately to Inspectorate recommendations. It is not intended that it should be used as a matter of routine. It will be used, for example, to require the implementation of important recommendations where an MCC has had the opportunity to take action but has failed to do so.
295. A failure to comply with a direction would, in certain circumstances, permit the Lord Chancellor to exercise the default powers contained in section 38 of the JPA 1997 which may lead to the removal of one or more members of the MCC.
296. **Section 86: Code of conduct.** This section inserts two new sections in the JPA 1997. New section 39A empowers the Lord Chancellor, subject to appropriate consultation and Parliamentary approval, to promulgate a code of practice for members of magistrates' courts committees and the panels that select them. New section 39B empowers the Lord Chancellor to suspend or dismiss members of committees or panels who fail to comply with the code, and to provide that a dismissed person may not be re-appointed for a specified period or ever.
297. **Part V of Schedule 14** makes transitional provisions about MCCs.
- Paragraph 29 requires the first order specifying MCC areas to list all such areas in England and Wales (see also paragraph 274 above).
  - Paragraphs 30-31 provide for the constitution of the MCCs in Greater London in the period before the establishment of the GLMCA. Paragraphs 30(2)(c) & 31 preserve, for that period, the reserved places for stipendiary magistrates (or District Judges (Magistrates' Courts)) on the Inner London MCC, but not the automatic right of the Chief Stipendiary Magistrate to chair that MCC.
  - Paragraph 32 gives the Lord Chancellor power, by order, to make transitional arrangements for establishing the GLMCA, including arrangements to enable the GLMCA to incur expenditure and exercise functions before it takes on its full role as the MCC for London.
  - Paragraph 33 allows the Lord Chancellor to provide for the transfer of property, rights and liabilities to the GLMCA. The transfer of court property from the local authorities is intended to enable the GLMCA to manage property strategically across the whole of London. Sub-paragraph (7) preserves the employment rights of staff affected by the transfer of rights and liabilities.

### *Justices' chief executives, justices' clerks and staff*

298. **Section 87: Qualification for appointment as chief executive.** This section, by repealing section 40(5) of the JPA 1997, removes the requirement for a justices' chief executive (JCE) to be a qualified barrister or solicitor. The intention is to enable MCCs to attract the best possible applicants, including specialists in management and administration. The provision does not compel MCCs to appoint a person who is not a qualified lawyer.
299. **Section 88: Role of chief executives.** This section substitutes a new section 41 of the JPA 1997. The new section 41 clarifies the role and responsibilities of JCEs in ensuring

the effective and efficient administration of the magistrates' courts within the area of their MCC, and the lines of accountability between the MCC, JCE and other employees of the MCC.

300. The JCE is responsible for making arrangements for the effective and efficient administration of the magistrates' courts in an MCC area. He or she will allocate responsibilities to staff and determine administrative procedures. The allocation of duties and determination of procedures has previously been the duty of the MCC itself (under section 31(2) of the JPA 1997, repealed by section 88(2) of this Act). The JCE will be required to carry out his or her functions in accordance with any directions given by the MCC. The JCE will be able to give directions to justices' clerks and other staff about how they should carry out their administrative functions; but this power does not extend to legal functions (see the commentary below on section 89).
301. **Section 88** also amends two other sections of the JPA 1997. Subsection (3) amends section 40 to clarify certain expressions used in relation to JCEs in Schedule 13 of this Act. Subsection (4) amends section 61 to allow the Lord Chancellor to pay compensation in cases of default by a JCE.
302. **Section 89: Independence of clerks and staff exercising legal functions.** This section confirms the independence of justices' clerks in the exercise of their legal and judicial functions.
303. **Section 89(1)** substitutes a new section 48 of the JPA 1997 to clarify the range of functions in respect of which the justices' clerks are not subject to direction by the JCE or anyone else. The new section 48 applies to:
- any function also exercisable by magistrates (see paragraph 254 above); and
  - the function of advising magistrates about the law.
304. The new provision is wider than the original section 48 in two respects. First, it covers judicial functions conferred on justices' clerks directly by statute, while the current section applies only to functions exercisable by a single justice delegated to justices' clerks or other staff by rules. Second, it is not limited to legal advice about individual cases.
305. **Section 89(2)** amends sections 45(4) & (5) of the JPA 1997 to make clear that advice about the law includes matters of legal procedure and practice.
306. **Section 90/Schedule 13: Transfer of clerks' functions to chief executives.** **Section 90** gives effect to Schedule 13 which amends a large number of earlier Acts so as to transfer to JCEs administrative functions imposed by those Acts on justices' clerks. Section 90 also empowers the Lord Chancellor to transfer to JCEs, by order, any other administrative functions that may be identified in future. The intention is to facilitate the greater separation of responsibilities for legal and administrative functions in magistrates' courts, enabling justices' clerks to concentrate on their legal and judicial functions.
307. **Section 91: Accounting etc. functions of chief executives.** This section deals with the collection, banking and disposal of, and accounting for, monies received by JCEs. It introduces a new section 41A to the JPA 1997, so as to transfer the functions of justices' clerks as "collecting officers" to JCEs. In future, JCEs will be accountable for the collection of fines and fees.
308. In order to raise the standards of accounting practice and financial management in magistrates' courts, section 91 introduces new accounting requirements in respect of all monies passing through magistrates' courts, irrespective of to whom they are payable. It adds a new section 60A to the JPA 1997, giving the Lord Chancellor power to make regulations in three areas. The first relates to the times and manner in which JCEs must pay monies, due to the Lord Chancellor or anyone else. The second relates to

the keeping, production, inspection and audit of the accounts of JCEs in respect of any money they receive (apart from their salaries and expenses). The third relates to the banking arrangements which may be used by JCEs.

### ***Execution of warrants***

309. **Section 92: Civilian enforcement officers.** This section extends the range of warrants issued by a magistrates' court which may be executed by civilian enforcement officers (CEOs) employed by MCCs, local authorities or police authorities. At present, CEOs may only execute warrants relating to the enforcement of money adjudged to be paid under a court order. Section 92 also removes the present geographical restrictions which limit the areas in which CEOs may execute warrants.
310. In future, the types of warrant that CEOs may execute will be listed in an order made jointly by the Lord Chancellor and the Home Secretary. It is intended that the list should include warrants of distress, commitment, arrest or detention in connection with the payment of any sum, and also warrants of arrest issued in connection with breaches of a range of non-financial penalties. A list of the warrants that the Government intends CEOs to be able to execute is at Annex B to these Notes.
311. **Section 93: Approved enforcement agencies.** This section allows MCCs to approve and appoint private enforcement agencies to execute certain kinds of warrant (to be defined by order made under section 92).
312. Some MCCs already use private enforcement agencies or bailiffs to execute distress warrants. However, it is unclear at present whether warrants can be executed by employees of enforcement agencies who are not personally named on the warrant. Section 93 is designed to clarify the law, so that warrants can be addressed to approved agencies for the area concerned, rather than just to a named bailiff. In future, the authorised employees of approved enforcement agencies will be able to execute the same range of warrants as CEOs anywhere in England and Wales.
313. **Section 93** also provides for the Lord Chancellor to make regulations governing the conditions which must be satisfied by a person or body in order to qualify as an approved enforcement agency, and the procedure by which a MCC may grant approval. Each MCC will be required to keep a register of all the enforcement agencies it authorises, and make this available for public inspection at every magistrates' court within the MCC's area. An enforcement agency listed in an MCC's register will be able to issue its employees with written authority to execute warrants issued by any magistrates' court in the area for which the authorising MCC is responsible. If necessary, the MCC will be able to remove an enforcement agency from the register without giving reasons for the decision.
314. **Sections 92 and 93** require a CEO or authorised employee seeking to execute a warrant to have with them, and show on demand, a written statement saying (in essence) who they are and by whom they are authorised.
315. **Section 94: Disclosure of information for enforcing warrants.** This section allows the courts to check whether other Government agencies hold a more recent address in their records for fine defaulters and those in breach of community sentences.
316. **Section 94** empowers the Lord Chancellor to designate by order relevant public authorities from whom the courts may request this information. These are likely to include the police, the Department of Social Security, Inland Revenue, local authorities, the Passport Agency, the Home Office Immigration and Nationality Directorate and HM Customs and Excise.
317. The information that may be obtained in this way is limited to those details that will allow the offender's whereabouts to be traced. That is: name, address, date of birth and National Insurance number. The information may only be disclosed to court employees and employees of an approved enforcement agency, and it may only be used for the

purpose of enforcing the warrant. It will be an offence to disclose the information, whether intentionally or recklessly, to any other person or for any other purpose. Punishment will be by fine, subject to the statutory maximum (currently £5,000) if the fine is imposed by a magistrates' court.

318. **Sections 95 & 97: Warrants of detention; cessation of warrants.** These sections will enable changes to be made to the Magistrates' Courts Rules 1981 to clarify the circumstances in which a warrant for the enforcement of a sum adjudged to be paid shall cease to have effect. The intention is to ensure that these warrants will cease to have effect when payment or tender of payment of the sum due is made, or when a receipt for the sum due given by the court issuing the warrant is produced to any person authorised to execute the warrant.
319. **Section 96: Execution by person not in possession of warrant.** This section will empower CEOs and the authorised employees of approved enforcement agencies to execute the full range of warrants to be defined by order under section 92, without necessarily having to have the warrant in their possession at the time. The section also extends the powers of the police to execute warrants in this way.
320. At present, civilian enforcement officers and bailiffs may only execute a warrant if they have it in their possession at the time. Police constables may execute certain types of warrants without having them in their possession, provided the warrant is shown to the person concerned as soon practicable.
321. The Government also intends to change the Magistrates' Courts Rules 1981 to oblige anyone seeking to execute an arrest warrant without having it in his possession to inform the person being arrested promptly, in a language which he understands, of the reasons for his arrest and the charges against him.

## ***E.***

### **IMMUNITY AND INDEMNITY (PART VI - SECTIONS 98-104)**

#### ***Summary***

322. The Act contains provisions that change the circumstances in which costs can be awarded against justices of the peace, justices' clerks and their assistants, General Commissioners of income tax and their clerks, and coroners.
323. The purpose of these provisions is to provide justices of the peace, General Commissioners of income tax and coroners, in the exercise of their duties, with statutory protection against personal liability for costs as a result of legal proceedings.
324. The Act will:
- provide General Commissioners of income tax with immunity against legal action in respect of any act or omission arising out of the execution of their duties;
  - extend the immunity against legal action currently enjoyed by justices of the peace and justices' clerks to justices' clerks' assistants exercising the function of a single justice;
  - provide justices of the peace, justices' clerks and their assistants, and General Commissioners of income tax, statutory immunity against being ordered to pay costs in legal proceedings about the exercise of their judicial functions, except where it is proved that they acted in bad faith;
  - provide for the costs of other parties in such cases, which would have been awarded against a judicial officer but for the immunity described above, to be paid by the Lord Chancellor, or in the case of General Commissioners in Scotland, the Secretary of State; and

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- provide for justices of the peace, justices' clerks and their assistants, General Commissioners of income tax and their clerks, and coroners, to be indemnified for any costs that they reasonably incur in legal proceedings arising out of the exercise of their judicial functions.

325. The provisions relating to General Commissioners and their clerks extend to the United Kingdom. The Act makes equivalent provisions for Northern Ireland in respect of immunity from costs for justices and their clerks, and indemnity for coroners.

***Background***

326. There are just over 30,000 lay magistrates who are unpaid volunteers, and there are presently 94 stipendiary magistrates who are qualified lawyers. Justices' clerks are qualified lawyers appointed by magistrates' courts committees. They give advice to justices about the law, and they and their assistants may exercise the powers of a single justice of the peace (see paragraph 302 above).

327. General Commissioners of income tax are unpaid lay volunteers appointed by the Lord Chancellor, (or the Secretary of State in Scotland). There are approximately 3,500 General Commissioners and they sit in Divisions throughout the United Kingdom to determine appeals and other matters in respect of decisions of the Inland Revenue on a variety of tax matters. General Commissioners appoint a clerk in each Division who provides administrative support to the Commissioners, arranges appeal meetings and advises the Commissioners on points of law and procedure.

328. Coroners are appointed by local authorities in England and Wales. Most are part-time appointments of appropriately qualified lawyers or doctors. In accordance with the Coroners Act 1988, they conduct inquests into deaths (and treasure finds) in prescribed circumstances and deal with certain related matters.

329. At present, like all other judges, justices of the peace, and justices' clerks exercising the functions of a single justice, cannot be sued in relation to anything they say or decide when exercising their judicial functions. The Act will extend this protection to General Commissioners of income tax and justices' clerks' assistants.

330. However, there are certain circumstances in which judicial officers may become involved in legal proceedings, not brought against them directly, but nonetheless arising out of their judicial decisions. These include judicial review proceedings, where the judicial officer appears or is represented as a respondent; appeals to the High Court by way of case stated; and applications to the High Court made by or under the authority of the Attorney General for an inquest or a fresh inquest. At present, justices of the peace, justices' clerks and their assistants, General Commissioners and their clerks, and coroners, may personally be ordered to pay the costs of other parties in these proceedings.

331. When this happens, under current legislation, justices of the peace, justices' clerks and their assistants may be indemnified, and in certain circumstances must be indemnified, against costs from the funds of their magistrates' courts committee. There is currently no equivalent statutory protection for General Commissioners and their clerks or coroners. In practice, General Commissioners may be indemnified on a non-statutory basis from central Government funds (the formal position is that they are treated in the same way as members of non-departmental public bodies). Similarly, coroners may in practice be indemnified by their paying local authority.

332. The Act provides that in future justices of the peace, justices' clerks and their assistants, and General Commissioners should have immunity from being ordered to pay another party's costs in any legal proceedings arising out of the exercise of their judicial functions; except where it is proved that they acted in bad faith, or they are themselves subject to criminal proceedings. The Act also provides that where the court could have made a costs order but is prevented from doing so, it can instead order the costs of a

party to be paid by the Lord Chancellor (or the Secretary of State in the case of General Commissioners in Scotland).

333. The Act also includes provisions relating to the indemnification of judicial officers for costs reasonably incurred in legal proceedings arising out of the exercise of their judicial functions. In the case of those judicial officers who will be given immunity against costs orders, this indemnity will mainly be relevant in respect of their own costs. The Act:
- amends the existing provision for magistrates' courts committees to indemnify justices of the peace, justices' clerks and their assistants, to provide that they shall not be indemnified if they are proved to have acted in bad faith;
  - provides for General Commissioners and their clerks to be indemnified by the Lord Chancellor (or, in Scotland, the Secretary of State) against costs reasonably incurred, unless it is proved that they acted in bad faith; and
  - provides for coroners to be indemnified by their paying local authority against costs reasonably incurred.
334. In the case of General Commissioners' clerks and coroners, the indemnity will be relevant to costs orders as well as other costs incurred. Coroners, who are funded by local authorities, will be indemnified, rather than given immunity, in order to avoid the need to make separate new funding arrangements to meet other parties' costs.
335. The provisions in this part of the Act follow the consultation paper *Liability of judicial officers and others for costs in court proceedings*, Lord Chancellor's Department, August 1996.

### ***Commentary***

#### ***Justices and their clerks***

336. **Section 98: Justices and clerks: immunity from costs.** This section inserts a new section 53A in the Justices of the Peace Act 1997 ("JPA 1997") to give immunity against costs orders to justices of the peace in proceedings arising from the execution of their duty. New section 53A also gives immunity to justices' clerks (and those appointed to assist a justices' clerk) in proceedings which arise from their exercise of a function which could be exercised by a single justice of the peace. It excludes proceedings in which bad faith is proved and makes clear that the immunity does not apply where the justice, clerk or assistant is the subject of criminal proceedings. The new section also provides for the court to order the payment by the Lord Chancellor of the costs of any party to proceedings against a justice of the peace or clerk where, but for the provisions of the section, it would order the costs to be paid by the justice or clerk. It provides for the Lord Chancellor to make regulations, subject to the affirmative resolution procedure, covering how the court is to exercise the power to award costs and how those costs are to be determined
337. Under the provisions of section 54 of the JPA 1997, a justice or justices' clerk may be indemnified by their magistrates' courts committee against any costs order, and in certain circumstances must be indemnified. Nevertheless the possibility remains that an individual could be faced with a costs order. This section will remove the fear of costs orders by putting the position beyond doubt.
338. **Section 98(2)** makes a similar change for Northern Ireland.
339. **Section 99: Justices and clerks: indemnity.** This section amends section 54 of the JPA 1997, so that justices of the peace, justices' clerks and their assistants may be indemnified by the magistrates' courts committee against costs orders in any proceedings, not only proceedings taken against them. It also removes the discretion to grant indemnity in non-criminal matters where bad faith is proved.



340. Despite the new immunity which will be provided by section 98, there will be circumstances in which indemnification continues to be appropriate. These are: where justices or clerks incur costs themselves (as opposed to being ordered to pay the costs of other parties); where costs have been incurred before the new immunity takes effect; and where costs ordered against a justice's clerk or assistant are not covered by the immunity provisions (that is where the proceedings do not arise from the exercise of a function of a single justice).
341. **Section 100: Assistant justices' clerks: immunity from action.** This section amends sections 51 and 52 of the JPA 1997 in order to extend the immunity against action which is given to justices of the peace and justices' clerks to those appointed to assist a justice's clerk. Justice's clerks' assistants may, like justice's clerks, perform functions which are authorised to be performed by a single justice of the peace. The amendment made by this section will provide consistency of treatment.

### ***General Commissioners of income tax and their clerks***

342. **Section 101: General Commissioners: immunity from action.** This section provides General Commissioners of income tax with immunity from action in respect of any act or omission in the execution of their duty. It brings the position of General Commissioners into line with that of justices.
343. **Section 102: General Commissioners: immunity from costs and expenses.** This section provides General Commissioners of income tax with immunity against costs orders in cases arising from the execution of their duties, unless bad faith is proved. It also provides for the court to order the payment by the Lord Chancellor, or in Scotland the Secretary of State, of the costs of any party to proceedings against a General Commissioner where, but for the provisions of the section, it would order the costs to be paid by the General Commissioner. It provides for the Lord Chancellor (or the Secretary of State) to make regulations, subject to the affirmative resolution procedure, covering how the court is to exercise the power to award costs and how those costs are to be determined.
344. **Section 103: General Commissioners and clerks: indemnity.** This section provides for General Commissioners and their clerks to be indemnified in relation to costs or expenses which they reasonably incur, or are ordered to pay, in legal proceedings arising out of the execution of their duties, unless they are proved to have acted in bad faith. General Commissioners' clerks are not covered by the immunity against costs orders provided by section 102. General Commissioners may have to be indemnified in respect of their own costs. The Lord Chancellor will indemnify the General Commissioners and their clerks, except in Scotland where it will be the Secretary of State.

### ***Coroners***

345. **Section 104: Indemnity.** This section inserts a new section in the Coroners Act 1988 to require the councils responsible for appointing coroners to indemnify them against certain costs which coroners, in their official capacity, may reasonably incur, or which they are ordered to pay, in the course of legal proceedings. There is a similar change for Northern Ireland.

### ***Commencement***

#### ***Funding of legal services***

346. The provisions of Part I of the Act (The Legal Services Commission) will come into force on a day or days appointed by the Lord Chancellor by order. It is the Government's current intention to bring all or as many as possible of the provisions into force by April 2000.

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347. In Part II, sections 27 to 31 (Conditional fee agreements etc.) will come into force on a day appointed by the Lord Chancellor by order. The Government intends to bring these provisions into force in January 2000 or as soon as possible after that.
348. [Sections 32-34](#) (Legal aid in Scotland) will come into force two months after Royal Assent.

***Provision of legal services***

349. [Sections 35-44](#) and [46-53](#) will come into force on a day or days appointed by the Lord Chancellor by order.
- The Government currently intends to bring the following sections into force two months after Royal Assent: sections 36 (Barristers and solicitors), 40 (Rights to conduct litigation), 42 (Overriding duties of advocates and litigators), 46 (Bar practising certificates), 48 (Law Society's powers), 49 (Powers of Ombudsman) and 53 (abolition of scriveners' monopoly).
  - Section 35 (Replacement of ACLEC by Consultative Panel) will probably be brought into force at the beginning of January 2000.
  - Section 41 and Schedule 5 (Authorised bodies: designation and regulations and rules) will also be brought into force in January 2000. The Government intends to work with the professional bodies on the implementation of those sections which require changes to their rules (under the revised procedures in Schedule 5). These sections – 37 (Rights of audience: employed advocates); 38 (Employees of Legal Services Commission); 39 (Rights of audience: change of authorised body) and 44 (Barristers employed by solicitors) – will be brought into force in April 2000 or as soon as possible thereafter. This will provide an opportunity for the Legal Services Consultative Panel to advise on the rule changes.
  - Sections 47 (Fees for solicitors' practising certificates) and 50-52 (Funding of Ombudsman; Legal Services Complaints Commissioner) will not be brought into force until at least 18 months after Royal Assent.
350. [Section 45](#) (Fees on application for appointment as Queen's Counsel) came into force on Royal Assent, allowing fees to be charged for this year's round of appointments.

***Appeals, courts, judges and court proceedings***

351. With three exceptions, Part IV of the Act (sections 54-73) will come into force two months after Royal Assent. The exceptions are section 66 and Schedule 9 (Enforcement of community orders), section 67(2) (Time limits where accused sent for trial) and section 71 (Adjournment of inquests). These provisions will come into force on a day or days appointed by the Lord Chancellor by order.
- Section 66 and Schedule 9 will be brought into force as soon as possible after Royal Assent.
  - Section 67(2) will be brought into force as soon as possible for those areas where the new procedures introduced by the Crime and Disorder Act 1998 are being piloted; it will be extended to other areas when the 1998 Act is implemented nation wide.
  - Section 71 will be brought into force as soon as the necessary changes to the Coroners Rules 1984 can be made.

***Magistrates and magistrates' courts***

352. The following provisions of Part V will be brought into force on a day or days appointed by the Lord Chancellor by order.

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- Section 77 (Youth courts) and section 78 (Unification and renaming of stipendiary bench). The Government's current intention is to bring these provisions into force during Spring 2000, following consultation on youth court rules (see paragraph 272 above) and consideration of various practical issues relating to the unified bench (e.g. the procedures for deploying District Judges (Magistrates' Courts) to different areas in response to fluctuations in workload).
  - Section 79 (Justices not to sit on committals for sentence) and section 80 (Jurisdiction over offences outside area). It is intended to bring these changes into force as soon as the necessary secondary legislation can be made.
  - Section 83 (Greater London Magistrates' Courts Authority). It is intended that the Authority will commence with a period of preparatory running, prior to taking up its full role as the MCC for London in April 2001.
  - Section 85 (Power to direct implementation of inspectors' reports). It is intended to bring this provision into force before the end of 1999, following consultation with the Inspectorate and the magistrates' courts service.
  - Sections 88-89 (Role of justices' chief executives and independence of justices' clerks). It is intended that these changes will be brought into effect in Autumn 1999.
  - Sections 90-91 (Transfer of functions from justices' clerks to justices' chief executive). It is intended that these changes will be brought into effect on 1 April 2000.
  - Sections 92-97 (Execution of warrants). It is intended that magistrates' courts should assume full responsibility for the enforcement of financial warrants on 1 October 2000. The transfer of responsibility for the enforcement of arrest warrants in connection with non-financial penalties could be brought into effect at the same time, or a later date.
353. The other provisions of Part V (Territorial organisation; areas and constitution of magistrates' courts committees outside Greater London; standard goods and services; code of conduct for MCC members etc., qualification of justices' chief executives) will come into force two months after Royal Assent.

***Immunity and indemnity***

354. [Sections 98-103](#) (Justices of the peace, justices' clerks and their assistants; General Commissioners of income tax and their clerks) will be brought into force on a day or days appointed by the Lord Chancellor by order. It is the Government's intention to bring these provisions into force in early 2000.
355. [Section 104](#) (Coroners) will come into force two months after Royal Assent.

***Parliamentary Progress***

356. The Access to Justice Bill was introduced in the House of Lords on 2 December 1998. It received its Second Reading on 14 December 1998 (Official Report, cols. 1107-1127 & 1140-1201). The Committee Stage took place on 19 January 1999 (cols. 475-572); 21 January 1999 (cols. 701-752 & 771-792); 26 January 1999 (cols. 878-935 & 951-1008); and 28 January 1999 (cols. 1137-1193 & 1210-1278). The Report Stage took place on 11 February 1999 (cols. 329-384 & 390-456) and 16 February 1999 (cols. 551-571, 580-619 & 627-672). The Third Reading was on 16 March 1999 (cols. 611-628 & 646-693).
357. The Bill was brought to the House of Commons on 17 March 1999. It received its Second Reading on 14 April 1999 (Official Report, cols. 230-332). The Bill was considered by Standing Committee E in 8 sittings from 27 April to 13 May. Report Stage and Third Reading took place on 22 June 1999 (cols. 980-1079).

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358. The House of Lords considered the amendments made by the Commons on 14 July 1999 (Official Report, cols. 398-538) and disagreed with certain of them. The Commons considered the Lords' reasons for disagreement on 21 July 1999 (cols. 1201-1243) and proposed alternative amendments. The Lords considered and approved these on 26 July 1999 (cols. 1295-1312). The Access to Justice Act received the Royal Assent on 27 July 1999.

## **ANNEX A: COMMUNITY LEGAL SERVICE**

### **ELIGIBILITY, FINANCIAL CONDITIONS AND COSTS RULES**

1. A number of changes are planned to the financial conditions for publicly-funded help from the Community Legal Service fund, as compared to the conditions for civil legal aid. The timing of these changes will depend on how quickly the new systems can be developed to bring spending under control. The necessary regulation-making powers are contained in sections 7, 10 and 11 of the Act. This annex sets out the changes to the existing position which, subject to consultation, the Government intends to make in due course under those powers.

#### ***Eligibility for Help***

2. Eligibility for advice and assistance is presently limited to those who would qualify for full legal aid without a contribution. The Government intends to change this so that in future, eligibility for advice and assistance and more substantial help are aligned at the same level. Both would be available *free* for people whose disposable income and capital were below the relevant limit; and available subject to contributions for people between the free and upper limits.
3. This change reflects the Government's intention to give greater priority to advice and assistance, especially in social welfare issues and from the not-for-profit advice sector, rather than litigation. It will also remove the anomaly created by the present eligibility limits, where some people are driven to apply for full legal aid (for which they are more likely to be eligible), when advice and assistance, which is generally cheaper, would have met the needs of the case.

#### ***Financial Conditions***

4. Financial conditions are intended to target the neediest cases by requiring people to pay what they can reasonably afford, but not more, towards the cost of their cases; and by generating receipts to increase the overall amount of help that the system can afford to give. Several changes are planned.

#### ***Graduated contributory scales***

5. At the moment, all assisted parties asked for contributions for full legal aid pay one-third of their disposable income above the free limit, every month for the lifetime of the case. In future, it is proposed to introduce a graduated scale for calculating contributions, with those nearer to the free limit being asked for a smaller proportion of their income, and those with more being asked for a larger proportion. Disposable income would be banded to decide the level of contribution, and the proportion for each income band would apply *only* to income in that band. This change would better reflect ability to pay.

#### ***Capital allowance***

6. At present, a contribution from capital assets towards the cost of a case can be required at two stages.
  - An assisted person has to contribute any disposable capital above a free limit of £3,000 at the start of the case. The property in dispute, and the first £100,000 of equity value that the assisted person owns in his or her home, are discounted when calculating disposable capital. People with disposable capital in excess of £6,000 are generally ineligible for legal aid.
  - If, at the end of a successful case, the Legal Aid Board needs to recover any outstanding costs that have not been recovered from the other side, a statutory charge applies to the property in dispute, including the *full equity* value of the family

home if that was in dispute; but *not* including maintenance payments and the first £2,500 won in a matrimonial case.

The assisted person's liability to contribute towards the cost of his or her case therefore depends on the nature of the case and whether or not a home was in dispute.

7. In future, there would be a single allowance (initially £3,000) covering both capital contributions and the statutory charge. Any unused allowance from the start of the case could be carried forward to defray the statutory charge. This would replace the £2,500 allowance in matrimonial cases, and produce a simpler and more coherent system with the same rules applying to everyone.

#### ***Equity value of the assisted person's home***

8. In addition, the full equity value of the home would in future be counted towards the calculation of disposable capital for the purpose of assessing contributions, with no initial exemption beyond the general £3,000 allowance. The first £100,000 would continue to be discounted for the purpose of assessing eligibility. But the assisted person would not be required to make a contribution from capital tied up in equity at the start of the case. It would only become payable at the end of the case, when the amount of any outstanding costs was known. Furthermore, as with the existing statutory charge, the Legal Services Commission would have discretion to postpone enforcing payment until the next time the home is sold or where its enforcement would cause hardship.
9. The *entire* equity value of the home in dispute is already liable to the statutory charge now. The position in these cases would not change significantly. This proposal would mainly affect people who owned equity in a home which was not in dispute. They might be required to pay significantly more towards the cost of their case than now. But the ability to postpone enforcement would ensure that no-one was forced to sell their home in order to repay costs incurred by the CLS fund. This proposal is intended to provide more equitable treatment between people whose capital is held in different forms.

#### ***Statutory charge enforcement***

10. Where the statutory charge applies to a home, its enforcement is usually postponed until the next time the house is sold. Simple interest runs on the money due to the Board. Furthermore, unlike a second mortgage, there are no ongoing repayments (although it is open to an assisted person to repay the charge by instalments).
11. In future, where the statutory charge is postponed, it is proposed that a more realistic rate of interest should be charged. This change would help place assisted people in a position closer to that faced by private clients.

#### ***Costs Rules***

12. The Government's view is that the rules governing costs between the parties in a case involving public funding should seek to ensure that people with worthwhile cases are not unreasonably deterred by the fear of costs they cannot afford; but that, so far as possible, they face a similar costs discipline as other litigants. The Government proposes to make two changes to the costs rules under the Legal Aid Act 1988.

#### ***Costs protection for assisted parties***

13. Unlike the general position on costs, the court is currently required to consider the means of *both* parties, before ordering costs against an unsuccessful litigant in receipt of legal aid. Furthermore, the assisted party's home cannot be taken into account in assessing his or her means, or be subject to any enforcement process. In practice, costs are rarely awarded against litigants on legal aid.
14. In future, assisted parties would retain most of their protection against paying their opponent's legal costs. But where courts were considering costs orders against assisted

parties, the value of their homes would be counted towards their assets and the bar on enforcing against homes would be removed. This limited proposal is intended to reflect the fact that most assisted parties are unlikely to be able to pay costs even if an order is made against them; but that those who own their homes may have enough capital to pay costs. It also parallels the proposal about contributions from capital.

***The costs position of unassisted parties***

15. Because costs are not normally awarded against assisted parties who lose their case, their successful opponents hardly ever get their costs back. But if a successful unassisted party who was defending a case can satisfy the court that he or she would otherwise suffer “severe financial hardship”, the court can order their costs to be paid from the legal aid fund. In future, it is proposed that this test should be relaxed to mere “financial hardship”. Also, the procedure for seeking costs orders against an assisted person or the CLS fund would be simplified. The courts would consider costs immediately at the end of the case, instead of adjourning, because the parties would be asked to supply evidence of their means at the time of the trial.
16. These proposals are designed to improve the position of successful unassisted opponents, which is a major cause of complaint against the existing scheme. The funding code (under section 8), which will replace the existing merits test, will also help to reduce the number of weak cases that unassisted parties have to contest.

## **ANNEX B: EXECUTION OF WARRANTS**

### **WARRANTS TO BE COVERED BY AN ORDER MADE UNDER SECTION 92**

It is intended that an order made under section 92 should cover the following types of warrant:

#### ***Financial Penalties***

- warrants of distress\* and warrants of commitment (committing the defaulter to prison), issued under the Magistrates' Courts Act 1980 (MCA) s.76.
- warrants for overnight detention in a police station, issued under MCA s.136.
- warrants of arrest for the purpose of bringing defaulters before the court, issued under MCA ss. 83(1), 83(2), 86(4) and 93(5).
- warrants issued under s.40 of the Child Support Act 1991.
- warrants of arrest and commitment issued under regulations 47(3)(a) and 48(5)(b) of the Council Tax (Administration and Enforcement) Regulations 1992.
- warrants of arrest and commitment issued under regulations 16(3)(a) and 17(5)(b) of the Non-Domestic Rating (Collection etc.) Regulations 1989.
- warrants of arrest and commitment issued under regulations 41(1) and 42(5)(b) of the Community Charges Regulations 1989.
- confiscation orders under the Drug Trafficking Act 1994.
- 'all crime' confiscation orders made under Part VI of the Criminal Justice Act 1988. (these are treated for enforcement purposes as if they were fines imposed by the magistrates' court).

#### ***Non-Financial penalties***

Arrest warrants issued for the purpose of securing the attendance at court of a person who has breached the terms of one of a number of 'community orders':

- probation order: Criminal Justice Act 1991, Sch. 2, paragraph 2(1)(b).
- community service order: Criminal Justice Act 1991, Sch. 2, paragraph 2(1)(b).
- combination order\*: Criminal Justice Act 1991, Sch. 2, paragraph 2(1)(b).
- curfew order: Criminal Justice Act 1991, Sch. 2, paragraph 2(1)(b).
- drug treatment and testing order: Criminal Justice Act 1991, Sch. 2, paragraph 2(1)(b), as amended by s.64(5) of the Crime and Disorder Act 1998.
- supervision order: Children and Young Persons Act 1969, s.16(2).
- suspended sentence supervision order: Powers of Criminal Courts Act 1973, s.27(1).
- attendance centre order: Criminal Justice Act 1982, s.19(1)).
- supervision part of secure training order: Criminal Justice and Public Order Act 1994 s.4(1).
- detention and training order: Crime and Disorder Act 1998, s.77(1).
- action plan order\*: Crime and Disorder Act 1998, Sch. 5, paragraph 4(2).
- reparation order\*: Crime and Disorder Act 1998, Sch. 5, paragraph 4(2).
  - Warrants of distress are issued for the purpose of levying a sum adjudged to be paid. They allow the person executing the warrant to seize a fine defaulter's money or goods in lieu of the outstanding amount.



*These notes refer to the Access to Justice Act 1999 (c.22) which received Royal Assent on 27th July 1999*

- A combination order is an order requiring an offender to be both under the supervision of a probation officer and to perform unpaid work.
- An action plan order requires an offender to comply with a three month action plan. Such a plan will impose certain requirements as to an offender's behaviour and whereabouts for the period of that order.
- A reparation order requires a young person to make reparation to a victim of an offence or to the community at large.