

# LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 1: Legal Aid**

##### **Provision of legal aid**

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

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

##### *Section 2: Arrangements*

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

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

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

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

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

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

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

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

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

*These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) which received Royal Assent on 1 May 2012*

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

### **Section 6: Authorisations**

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

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

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

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

## **Civil legal aid**

### **Section 8: Civil legal services**

91. **Section 8** defines civil legal services for the purposes of Part 1.
92. *Subsections (1) and (2)* explain what is meant by “legal services”, namely services comprising advice and assistance provided in relation to the law as it applies to a particular case, legal proceedings and the resolution of legal disputes. Those services include, in particular, representation and mediation (and other forms of dispute resolution).
93. *Subsection (3)* provides that “civil legal services” are all legal services other than those services that are required to be made available under the provisions about criminal legal aid. This is in order to avoid any overlap between civil and criminal legal aid.

### **Section 9: General cases**

94. **Section 9** makes provision about when civil legal services are to be made available.
95. *Subsection (1)* provides that civil legal services are to be made available subject to two conditions. The first is they are civil legal services described in Part 1 of Schedule 1 to the Act. The second is that the Director has determined, in accordance with the provisions of this Part of the Act, that the individual qualifies for those legal services and the Director has not withdrawn that determination (that is, the individual continues to qualify for those services).
96. *Subsection (2)* provides the Lord Chancellor with the power to add services to Part 1 of Schedule 1 or to vary or remove services described there. He would be able to do so by modifying Part 1, 2, 3 or 4 of Schedule 1. This will be subject to the affirmative procedure.
97. **Section 9** and Part 1 of Schedule 1 reverse the arrangements in the Access to Justice Act 1999, which provided for civil legal aid to be available in relation any matter not excluded by Schedule 2 to that Act. Under this Act, the types of case for which legal aid may be made available are set out in Part 1 of Schedule 1.

### **Schedule 1: Civil legal services**

#### **Introduction**

98. Each paragraph of Part 1 of Schedule 1 describes a type of civil legal services that may be made available under the Act. Each paragraph is subject to exclusions – either exclusions specific to the paragraph or the general exclusions set out in Parts 2 and 3 of the Schedule. For example, paragraph 2 of Part 1 of Schedule 1 describes civil legal services provided in relation to matters relating to special educational needs. It states that the exclusions in Part 2 and 3 of the Schedule apply.
99. **Part 2** of Schedule 1 lists civil legal services that are not to be available, even where they might otherwise fall within the descriptions of services in Part 1. Some paragraphs in Part 1 provide exceptions from the exclusions in Part 2, so that one or more of the general exclusions are disapplied. For example, under paragraph 41 of Part 1 of Schedule 1 civil legal services provided to an individual in relation to an inquest under the Coroners Act 1988 into the death of a member of the individual’s immediate family can be made available. However, the services provided cannot include the services listed in Part 2, with the exception of civil legal services provided in relation to personal injury or death. This means that civil legal services in relation to death could be made available by virtue of paragraph 41 of Part 1.

100. **Part 3** of Schedule 1 provides that the civil legal services listed in Part 1 of Schedule 1 do not include advocacy unless: (1) the type of advocacy in question is listed in Part 3 of the Schedule, except to the extent that Part 1 of Schedule 1 provides otherwise; or (2) Part 1 of Schedule 1 makes specific provision bringing other types of advocacy within scope for that particular matter which are not listed in Part 3 of the Schedule. Section 42(1) defines advocacy as meaning the exercise of a right of audience before a court, tribunal or other person.
101. **Part 4** of Schedule 1 makes provision about the interpretation of Schedule 1. Paragraph 1 of Part 4 provides that if one paragraph of Part 1 includes a type of civil legal service which is either expressly or impliedly excluded by another paragraph of Part 1, that type of service is still a type of civil legal service that may be made available. The remainder of Part 4 of Schedule 1 makes further provision about the interpretation of references to legislation and services that appear in the Schedule.
102. **Schedule 1** includes a number of powers for the Lord Chancellor to make regulations to clarify or adjust particular paragraphs. For example, under paragraph 6 of Part 1 civil legal services provided in relation to community care services can be made available. Paragraph 6(3) defines community care services as services which a relevant person may provide under a number of listed enactments. The definition of “relevant person” allows other relevant persons to be prescribed.
103. There is a table setting out the contents of Schedule 1 at Annex B and a more detailed explanation of the paragraphs in Schedule 1 at Annex C.

### ***Section 10: Exceptional cases***

104. **Section 10** gives the Director the power to provide individuals with civil legal services not included in Schedule 1 in exceptional circumstances subject to certain conditions.
105. **Subsections (1) and (2)** provide that civil legal services not included in Schedule 1 are to be provided to an individual if the Director has, first, made an exceptional case determination and, second, determined that the individual qualifies for those services (provided that neither determination has been withdrawn).
106. **Subsection (3)(a)** provides that an exceptional case determination is a determination by the Director that it is necessary to make legal services available to an individual because the failure to do so would amount to a breach of the individual’s Convention rights (as defined in s.1(1) of the Human Rights Act 1998) or any rights of the individual to the provision of legal services that are enforceable EU rights (as defined in section 2(1) of the European Communities Act 1972).
107. It will be necessary to make legal services available to an individual where the withholding of such services would clearly amount to a breach of Article 6 of the ECHR (‘right to a fair trial’), Article 2 of the ECHR (‘right to life’) or any other provision of the Convention giving rise to an obligation to provide such services. There will be a breach of the enforceable EU rights of the individual to the provision of legal services where the withholding of such services would be clearly contrary to the rights reaffirmed by Article 47 of the Charter of Fundamental Rights, or to the rights to legal services that are conferred on individuals by EU instruments.
108. **Subsection (3)(b)** provides that an exceptional case determination may also be made where the Director considers that the failure to provide legal services would not necessarily amount to a breach of an individual’s rights, but that it is nevertheless appropriate for the services to be made available, having regard to the risk of such a breach occurring.
109. **Subsections (1) and (4)** provide that advocacy services are to be made available to an individual for the purposes of an inquest under the Coroners Act 1988 into the death of a member of that individual’s family if the Director, first, has made a wider public interest determination in relation to the individual and the inquest and, second, has determined



that the individual qualifies for the services (provided that neither determination has been withdrawn). *Subsection (4)* does not preclude the making available of advocacy services in such inquest proceedings by virtue of an exceptional case determination under *subsection (3)*.

110. *Subsection (5)* provides that a wider public interest determination may be made in relation to advocacy for the purposes of an inquest into the death of a member of an individual's family where, in the particular circumstances of the case, the provision of advocacy is likely to produce significant benefits for a class of person other than the individual or the individual's family.
111. *Subsection (6)* defines when one individual is a member of another individual's family for the purposes of this section.

### ***Section 11: Qualifying for civil legal aid***

112. **Section 11** makes provision about how the Director must determine whether an individual qualifies for civil legal services.
113. *Subsection (1)* provides that in determining whether an individual qualifies for civil legal services, the Director must apply the provisions about means testing (section 21) and the merits criteria set out in regulations prepared by the Lord Chancellor.
114. *Subsection (2)* provides that when setting the criteria, the Lord Chancellor must consider the circumstances in which it is appropriate to make civil legal services available. It also provides that, in setting the criteria, the Lord Chancellor must in particular consider the extent to which they ought to reflect the factors set out in *subsection (3)*. The factors in *subsection (3)* are similar to the factors that the LSC is currently required to consider when setting the Funding Code criteria under section 8(2) of the Access to Justice Act 1999.
115. *Subsection (4)* provides that if more than one type of service is available for an individual, then the Lord Chancellor, in setting the criteria, must aim to ensure that the individual qualifies for the most appropriate service in all the circumstances (having regard to the criteria).
116. *Subsection (5)* requires the regulations to reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than court proceedings.

### ***Section 12: Determinations***

117. **Section 12** makes provision about the procedure for determinations made by the Director about whether an individual qualifies for civil legal aid.
118. *Subsection (1)* provides that in such a determination the Director must state the type of services (for example, advice and assistance) and for what those services are to be available (for example, a claim for judicial review). The Director will be also be able to set out in the determination any qualifications or exclusions that apply.
119. *Subsection (2)* provides that the Lord Chancellor may make regulations about determinations and the withdrawal of determinations. *Subsections (3) to (5)* make further provision about those regulations.
120. *Subsection (3)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be

withdrawn, provision requiring applicants to be given reasons for the making or withdrawal of a determination and provision about giving information to unsuccessful applicants about other ways in which they might obtain the advice they are seeking. This is similar to the provision about procedure that may be made in the LSC's Funding Code (see section 8(5) of the Access to Justice Act 1999).

121. *Subsection (4)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information or to make a payment under section 23.
122. *Subsection (5)* requires the regulations to include provision about the review of determinations and of the withdrawal of determinations. *Subsection (6)* enables the regulations to include provision about appeals against determinations and against the withdrawal of determinations.

## **Criminal legal aid**

### ***Section 13: Advice and assistance for individuals in custody***

123. **Section 13** makes provision about initial advice and assistance for an individual who is arrested and held in custody at a police station or other premises.
124. The current provision governing police station advice and assistance is at section 13(1) (a) of the Access to Justice Act 1999.
125. *Subsection (1)* requires initial advice and assistance to be made available to individuals who are arrested and held in custody at a police station or other premises if the Director has determined that the individual qualifies for advice and assistance and has not withdrawn that determination. "Initial advice" and "initial assistance" are defined in *subsection (7)* as the sort of advice and assistance that an individual might need while in custody. *Subsection (8)* enables the Lord Chancellor to make regulations providing that certain advice and assistance is not initial advice and assistance for the purposes of this section.
126. In making a determination, *subsection (2)* places a duty on the Director to have regard to the interests of justice.
127. *Subsection (3)* provides that any determination under this section must specify the types of advice or assistance to be made available. *Subsection (4)* provides that the Lord Chancellor may make regulations about determinations and the withdrawal of determinations. *Subsections (5) and (6)* make further provision about the procedure for determinations under this section.
128. *Subsection (5)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and about how an application or determination must be made or withdrawn. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn and provision requiring applicants to be given reasons for the making or withdrawal of a determination.
129. *Subsection (6)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information under section 23.

### ***Section 14: Criminal proceedings***

130. **Section 14** defines "criminal proceedings" for the purposes of this Part of the Act and is based on the existing provision at section 12(2) of the Access to Justice Act 1999.

131. “Criminal proceedings” include criminal trials (section 14(a)), sentencing hearings (section 14(b)), extradition hearings (section 14(c)), binding over proceedings (section 14(d)), appeals on behalf of a convicted person who has died (section 14(e)), proceedings on a reference on a point of law following acquittal on indictment (section 14(f)) and proceedings for contempt in the face of a court (section 14(g)). Section 14(h) allows the Lord Chancellor to specify in secondary legislation further types of proceedings that are to be considered to be criminal proceedings for the purposes of this Part of the Act.

***Section 15: Advice and assistance for criminal proceedings***

132. **Section 15** gives the Lord Chancellor the power to prescribe in regulations when advice and assistance must be made available to individuals in connection with criminal proceedings (*subsection (1)*). The power broadly reflects the provision about advice and assistance in section 13(1)(b) of the Access to Justice Act 1999.
133. *Subsection (2)* describes the individuals in respect of whom provision can be made under this section. It covers those involved in investigations that could lead to criminal proceedings (other than where the individual has been arrested and held in custody), those who are before a court, tribunal or other person in criminal proceedings, and those who have been the subject of criminal proceedings.
134. When making the regulations, the Lord Chancellor must take into account the interests of justice (*subsection (3)*) and the regulations must require the Director, in making a determination whether an individual qualifies for advice and assistance, to take into account the interests of justice (*subsection (4)*).
135. *Subsection (5)* provides that the regulations may also require the Director, in making determinations, to apply the means testing provisions (section 21) and any other criteria specified in the regulations.
136. *Subsection (6)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (7) to (9)* make further provision about the procedure for determinations under this section.
137. *Subsection (7)* provides that the regulations may include provision about the form and content of applications and determinations (for example specifying an application form) and provision that an application or determination may or must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of a determination.
138. *Subsection (8)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information or to make a payment under section 23.
139. *Subsection (9)* provides that the regulations may make provision about reviews of and appeals to a court, tribunal or other person against a decision of the Director that an individual does not qualify for advice and assistance on the grounds that the interests of justice or other criteria set out in regulations made under *subsection (5)(b)* are not met.
140. *Subsection (10)* ensures that under this section “assistance” can include advocacy (as defined in section 42(1)) undertaken on behalf of the individual.



### **Section 16: Representation for criminal proceedings**

141. **Section 16** identifies the circumstances and conditions under which representation for the purposes of criminal proceedings is to be made available.
142. *Subsection (1)* provides that representation is to be available if the individual is a specified individual in relation to the proceedings (see *subsection (6)*) and the Director or, as the case may be, a court has determined, provisionally or otherwise, that the individual qualifies for representation.
143. *Subsection (2)* requires representation for the purposes of criminal proceedings to be made available on appeal to the Crown Court to private prosecutors whom the Director or court has determined, provisionally or otherwise, qualify for such representation.
144. *Subsection (3)* provides that where an individual qualifies for representation for the purposes of criminal proceedings, representation is also to be made available for the purposes of any related bail proceedings as well as any preliminary or incidental proceedings. *Subsection (4)* enables the Lord Chancellor in secondary legislation to specify whether proceedings are or are not preliminary or incidental for this purpose and also to make exceptions to *subsection (3)*. Under the current regulations made under the Access to Justice Act 1999, for example, proceedings dealing with an individual for non-compliance with a Crown Court order are not to be regarded as incidental.
145. *Subsection (5)* provides that regulations under *subsection (4)(b)* making exceptions from *subsection (3)* may make provision by reference to proceedings that take place more than a specific period of time before or after the main proceedings. This would allow, for example, a period of time to be specified after which the original determination on representation would not cover advice on an appeal or after which a new determination would be needed for the purposes of applying to vary or appeal against an order made at the conclusion of the proceedings.

### **Section 17: Qualifying for representation**

146. **Section 17** makes provision about how the Director or a court must make determinations about whether an individual qualifies for representation for the purposes of criminal proceedings.
147. *Subsection (1)* requires the Director or a court to determine (whether provisionally or otherwise) whether an individual qualifies for representation by applying the means testing provisions (section 21) and the interests of justice test provided for in *subsection (2)*.
148. *Subsection (2)* sets out the factors that are to be considered in assessing whether an individual meets the interests of justice. These mirror the existing provision at paragraph 5 of Schedule 3 to the Access to Justice Act 1999. *Subsection (3)* enables the Lord Chancellor to add to or vary these factors. The Lord Chancellor may also make regulations specifying circumstances in which the interests of justice will be considered to be met (*subsection (4)*).

### **Section 18: Determinations by Director**

149. **Section 18** makes provision about the power of the Director to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.
150. *Subsection (1)* provides that the Director may determine whether an individual is eligible for representation for criminal proceedings unless a court is authorised to do so under section 19. This reverses the default position in the Access to Justice Act 1999 where the decision as to whether to grant legal aid is for the court unless the LSC is given the power to make the decision. However, over recent years, most decision-

making powers have transferred in practice to the LSC and there are now only limited circumstances in which the court can make a determination.

151. *Subsection (2)* requires the Director, in the determination, to specify the criminal proceedings in respect of which the individual qualifies for representation. *Subsection (3)* provides that the regulations may make provision about determinations and the withdrawal of determinations. *Subsections (4) to (7)* make further provision about the procedure for determinations under this section.
152. *Subsection (4)* provides that the regulations may include provision about the form and content of applications and determinations and provision that an application or determination must be made and withdrawn in writing, by telephone or by other prescribed means. The regulations may also include provision about time limits, provision about conditions that must be satisfied by an applicant before a determination is made, provision requiring information and documents to be provided, provision about when a determination may or must be withdrawn, and provision requiring applicants to be given reasons for the making or withdrawal of determinations. Provision may also be made about the review of a decision by the Director that the individual does not qualify, or no longer qualifies, for representation on the grounds that the interests of justice are not met.
153. *Subsection (5)* ensures that circumstances in which a determination may or must be withdrawn can relate to compliance by the individual with requirements imposed on the individual under Part 1 of the Act, for example, to provide information or to make a payment under section 23.
154. *Subsection (6)* provides that in cases where representation is refused or withdrawn on the grounds that the interests of justice do not require it, the individual has a right of appeal to a court, tribunal or other person prescribed by regulations. The right of appeal is subject to exceptions specified in regulations under *subsection (7)*.
155. *Subsection (8)* provides that this section does not authorise the Director to make a provisional determination, and as such any reference to a determination in this section does not include a provisional determination. Section 20 makes provision about provisional determinations.

### ***Section 19: Determinations by court***

156. **Section 19** makes provision about the power of a court to make determinations about representation for the purposes of criminal proceedings and the procedure to be followed.
157. *Subsection (1)* enables the Lord Chancellor to make regulations providing for a court to determine whether an individual qualifies for representation. Under the current provisions made under the Access to Justice Act 1999, the Crown Court may grant a representation order for contempt proceedings, for proceedings that arise from an alleged failure to comply with an order of the Crown Court where it appears to the court that there is no time to instruct a solicitor and for proceedings where the individual is brought before the court following the issue of a bench warrant. The High Court and the Court of Appeal (Criminal Division) may grant a representation order for proceedings before those courts and the Supreme Court.
158. *Subsection (2)* enables regulations to make provision about the procedure for determinations, including the form of the application to the court and the form of the determination of the court, provision that applications and determinations may or must be made and withdrawn in writing, by telephone or by other prescribed means, and provision about time limits and circumstances in which a determination may or must be withdrawn.
159. *Subsection (3)* ensures that the circumstances in which a determination may or must be withdrawn may relate to whether an individual has complied with requirements

imposed on them under Part 1, for example, a requirement to provide documents or to make a payment under section 23.

160. *Subsection (4)* requires the regulations to provide that, subject to prescribed exceptions, in cases where representation is refused on the grounds that the interests of justice do not require it, the individual has a right of appeal to such court, tribunal or other person, as may be prescribed.
161. *Subsection (6)* provides that regulations under this section may not authorise a court to make a provisional determination, and as such any reference to a determination in this section does not include a provisional determination. Section 20 makes provision about provisional determinations.

### ***Section 20: Provisional determinations***

162. **Section 20** makes provision about the power of the Director or a court to make a provisional determination about whether an individual qualifies for representation in certain cases. This reflects paragraph 1A of Schedule 3 to the Access to Justice Act 1999.
163. *Subsection (1)* enables the Lord Chancellor to make regulations to allow the Director or a court to make a provisional determination about whether an individual qualifies for representation where the individual is involved in an investigation which may result in criminal proceedings, the determination is for the purposes of criminal proceedings that may result from that investigation and other specified conditions are met. A provisional grant of a representation order is currently permitted in investigations where the prosecution has initiated plea discussions under the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud.
164. *Subsection (2)* provides that the regulations may make provision about the stage of an investigation when a provisional determination may be made, provision about when the provisional determination becomes a full determination and ceases to be provisional, and provision about the withdrawal of a provisional determination.

## **Financial resources**

### ***Section 21: Financial resources***

165. **Section 21** relates to financial eligibility for legal aid services. In the Access to Justice Act 1999 separate provision is made in respect of financial eligibility for different types of legal aid (in section 7, in respect of civil legal aid and in paragraph 3B of Schedule 3, in respect of criminal legal aid in the form of representation). This section contains provisions on financial eligibility that are applicable to both civil and criminal legal aid.
166. *Subsection (1)* specifies the basic rule, applicable to both civil and criminal aid, that legal aid will only be granted to an individual who is determined to be financially eligible for the services. As under the Access to Justice Act 1999, the financial eligibility rules will be contained in regulations made by the Lord Chancellor (see *subsection (2)*). The basic rule in *subsection (1)* applies to decisions on granting civil legal aid and decisions on granting criminal legal aid for representation in criminal proceedings. It also applies to decisions on granting criminal legal aid for advice and assistance for criminal proceedings, if regulations under section 15 provide for that (see the definition of a "relevant determination" in *subsection (8)*).
167. *Subsection (2)(b)* makes clear that regulations may provide for exceptions from the basic rule, so that an individual may receive certain services regardless of their financial means.
168. *Subsections (3) and (4)* enable regulations to provide that an individual is to be treated as having or not having particular financial resources, including providing that an individual is to be treated as having financial resources of a person of a specified

description. This allows, for example, for regulations on financial eligibility to provide that the resources of the partner of a legal aid applicant are to be treated as the resources of the applicant.

169. *Subsections (5) and (6)* enable regulations to make provision about making and withdrawing financial eligibility determinations. *Subsection (6)* is a non-exhaustive list of matters that such regulations may contain, including provision requiring information and documents to be provided and provision establishing procedures for the review of financial eligibility determinations.

### ***Section 22: Information about financial resources***

170. **Section 22** provides a gateway for the disclosure of information to the Director (or other prescribed person) by the Secretary of State (in practice, the Secretary of State for Work and Pensions), the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"), the Department for Social Development in Northern Ireland or the Department of Finance and Personnel in Northern Ireland (a "relevant Northern Ireland Department").
171. *Subsection (1)* enables the Director (or other prescribed person) to make a request for certain information to the Secretary of State, a relevant Northern Ireland Department or the Commissioners. *Subsection (2)* provides that such a request may only be made for the purpose of facilitating a determination about an individual's means, that is, for the purpose of finding out whether they are financially eligible for legal aid.
172. *Subsection (3)* lists the categories of information which may be requested from the Secretary of State or the relevant Northern Ireland Department. It includes a power to add further categories of information by secondary legislation.
173. *Subsection (4)* sets out the categories of information which may be requested from the Commissioners. It includes a power to add further categories of information by secondary legislation, with the Commissioners' consent (see *subsection (6)*).
174. *Subsection (7)* provides that the Secretary of State, the relevant Northern Ireland Department and the Commissioners may disclose to the Director (or other prescribed person) information specified in an information request made under this section.

## **Contributions and costs**

### ***Section 23: Payment for services***

175. **Section 23** concerns payments for services by legally aided individuals. The section largely reflects powers in sections 10, 17 and 17A of the Access to Justice Act 1999 and brings together provisions on payments for services into a single provision applicable (for the most part) to both civil and criminal legal aid.
176. *Subsection (1)* sets out the basic rule that an individual who receives legal aid can only be required to make a payment in connection with the provision of the services where regulations require them to do so. Any regulations made under *subsection (1)* must provide for repayment to the individual of any amount paid by the individual that exceeds the amount required to be paid by regulations under this section and section 24 (see *subsection (11)*).
177. *Subsection (2)* is a non-exhaustive list of ways in which regulations made under this section can require payments from individuals. Regulations can, in prescribed circumstances, require payment of the cost of the services, a contribution in respect of those costs or an amount in respect of administration costs.
178. *Subsection (3)* permits regulations to provide that, in civil disputes only, legally aided individuals may be required to make a payment of an amount which exceeds the costs of the services provided. This allows for a so-called 'Supplementary Legal Aid

Scheme' whereby a percentage of certain damages obtained by a successful legally-aided claimant may be required to be paid to a prescribed person, such as the Lord Chancellor. The response to the consultation paper *Proposals for the Reform of Legal Aid in England and Wales* confirmed the Government's intention to create such a scheme. There is an equivalent provision at section 10(2)(c) of the Access to Justice Act 1999.

179. *Subsection (4)* permits regulations made under this section to include provision about how the costs of services made available to a legally-aided individual are to be determined. This reproduces provisions currently found in sections 10(6)(b), 17(3)(c) and 17A(2)(b) of the Access to Justice Act 1999.
180. *Subsections (5), (8) and (9)* make further provisions about the contents of regulations that may be made under this section. Regulations may, for example, provide for liability to pay to arise on a determination by a prescribed person (as is currently the case for criminal contributions and orders to pay costs) and for the variation or withdrawal of a determination about liability to make a payment. Regulations may also make provision for payment by periodical payments or lump sums out of income or capital and for procedural matters, such as when payment is to be made and to whom.
181. *Subsections (6) and (7)* make provision in identical terms to section 21(3) and (4), explained at paragraph 168 above.
182. *Subsection (10)* permits regulations to provide that a legally-aided individual can be required to pay interest on loans, payments required to be made after the provision of the relevant services and overdue payments. Similar provision is currently made in section 10(4) and section 17(2)(d) of the Access to Justice Act 1999.

#### ***Section 24: Enforcement***

183. **Section 24** permits regulations to provide for the enforcement of a requirement to make a payment imposed by regulations under section 23. The regulations can include provision for the recovery of the costs of enforcement from the individual (*subsection (2)*) and can require documents and information to be provided (*subsection (4)*).
184. Under *subsection (3)* regulations will be able to provide that overdue sums are recoverable summarily as a civil debt, that is to say through magistrates' courts in accordance with the Magistrates' Courts Act 1980. The regulations will also be able to provide that overdue sums are recoverable, if the county court or High Court so orders, as if they were payable under an order of the High Court or county court in accordance with rule 70.5 of the Civil Procedure Rules, thereby making it unnecessary to begin fresh proceedings in respect of the debt. These provisions are similar to the regulation-making powers relating to criminal legal aid in sections 17(4) and 17A(2A) of the Access to Justice Act 1999 (as inserted by the Coroners and Justice Act 2009).
185. *Subsection (5)* introduces Schedule 2.

#### ***Schedule 2: Criminal legal aid: motor vehicle orders***

186. **Schedule 2** enables regulations to be made to authorise a court to make motor vehicle orders as a form of enforcement action in relation to criminal legal aid. "Motor vehicle orders" consist of clamping orders and vehicle sale orders. A clamping order is an order that a motor vehicle be fitted with an immobilisation device. Under a vehicle sale order, a motor vehicle which has been fitted with an immobilization device in accordance with enforcement regulations may be sold and the proceeds of sale may be applied in paying the overdue sum. Schedule 2 includes further detailed provision regarding the content of regulations about motor vehicle orders, including procedural matters and requirements that must be met before a court may make an order. Schedule 2 is based on provisions



in section 17(2A) to (2E) of, and Schedule 3A to, the Access to Justice Act 1999 (as inserted by the Coroners and Justice Act 2009).

### ***Section 25: Charges on property in connection with civil legal services***

187. *Subsection (1)* provides for a statutory charge to arise on any property recovered or preserved by an individual in receipt of civil legal aid, including costs payable to the individual, whether the property or costs are recovered, preserved or payable following legal proceedings or as part of a compromise or settlement of a dispute. Such a charge currently arises under section 10(7) of the Access to Justice Act 1999.
188. *Subsection (2)* describes the amounts of money to which the statutory charge relates. These are the amounts spent by the Lord Chancellor in securing the provision of the civil legal services and any other amounts payable by the individual by virtue of sections 23 and 24. As under the Access to Justice Act 1999, regulations may make provision about the statutory charge. Such regulations can provide for circumstances in which the charge does not apply, provide for the charge to be in favour of the Lord Chancellor or the service provider, modify the charge for the purposes of its application in prescribed cases or circumstances, and provide for the enforcement of the charge (*subsections (3) and (4)*).
189. *Subsection (5)* permits regulations made for the purpose of enforcing the statutory charge to require amounts of money awarded or payable to the legally-aided individual to be paid to the Lord Chancellor or the service provider and to make provision about matters such as the timing and manner of payment, about how such monies are to be dealt with and about the enforcement of the requirement to pay.

### ***Section 26: Costs in civil proceedings***

190. **Section 26** relates to costs in civil proceedings where a party is legally-aided and substantially reproduces provisions currently found in section 11 of the Access to Justice Act 1999.
191. *Subsection (1)* limits the costs that can be awarded against an individual receiving civil legal aid to the amount (if any) that is reasonable given the financial resources of both parties and their conduct during the case.
192. *Subsection (3)* provides that this protection may be disapplied by regulations.
193. Subject to the restriction in *subsection (1)*, regulations may be made under this section about costs in proceedings where an individual is in receipt of civil legal aid. Such regulations may, among other things, specify the principles that are to be applied in determining the amount of any costs awarded for or against a party receiving civil legal aid, limit the circumstances in which a costs order may be enforced against the individual receiving civil legal aid and make provision about when a court can require the Lord Chancellor to pay any costs incurred by the opponent of the legally-aided party (*subsections (5) and (6)*). *Subsections (7) and (8)* make provision in identical terms to section 21(3) and (4), explained at paragraph 168 above.

### **Providers of services etc**

#### ***Section 27: Choice of provider of services etc***

194. **Section 27** makes provision about an individual's choice of provider of criminal and civil legal aid.
195. *Subsections (1) and (2)* provide that the Lord Chancellor's duty under section 1(1) does not include a duty to secure that legal aid is provided by the means selected by the individual. For example, in certain cases, the Lord Chancellor may arrange for some services to be provided only by telephone or by other electronic means.

196. *Subsection (3)* provides that the Lord Chancellor's duty under section 1(1) does not include a duty to secure that legal aid is provided by a person selected by an individual, except as provided in *subsections (4) to (10)*. For example, in civil cases, as at present, the intention is that an individual must select a person with whom the Lord Chancellor has entered into a contract or other arrangement (for example, provision of services by telephone or by other electronic means) for the provision of those services.
197. In relation to representation for criminal proceedings, *subsection (4) and (5)* provide that an individual may select a legal representative of their own choice and that choice will be respected, subject to regulations made under *subsection (6)*. Those regulations may limit choice in the ways referred to in *subsection (6)*. For example, the regulations may limit the choice to a specified group of providers or may limit the number of legal representatives who can act for any individual at any one time. They may also restrict the right of the individual to appoint a new legal representative in place of one previously chosen.
198. Similar powers exist in section 15 of the Access to Justice Act 1999 in relation to a right to representation. Under that section provision has been made, for example, limiting an individual's choice to providers who hold a contract with the LSC to provide legal services and about the circumstances in which an individual may be represented by Queen's Counsel or by more than one junior advocate, and limitations have been placed on an individual's right to transfer a representation order to a new provider.
199. [Section 26](#) does not prevent regulations restricting an individual's choice to a person employed by the Lord Chancellor (unlike section 15(4) of the Access to Justice Act 1999).

### ***Section 28: Position of providers of services***

200. [Section 28](#) makes provision similar to the provisions currently set out at section 22(1), (2) and (3) of the Access to Justice Act 1999.
201. *Subsection (1)* provides that, unless regulations state otherwise, the provision of legal aid to an individual does not affect the relationship between the individual and the provider of the services, including any lawyer-client privilege.
202. *Subsection (2)* provides that providers of legal aid may not seek remuneration (or a "top up" payment) from their clients in addition to that provided under the legal aid scheme, unless the Lord Chancellor authorises them to do so.
203. *Subsection (3)* provides that regulations may allow for a provider to be entitled to be paid for work done up to the time when a determination that a person qualifies for legal aid is withdrawn.

### ***Section 29: Code of conduct***

204. [Section 29](#) makes provision about a code of conduct to be observed by certain types of persons when providing legal aid.
205. *Subsection (1)* provides that the Lord Chancellor must publish a code of conduct to be followed by civil servants and by employees of any body set up by the Lord Chancellor to provide legal aid, such as a body like the Public Defender Service that has been established by the LSC.
206. *Subsection (2)* provides that the code is to include the same range of duties currently listed at section 16(2) of the Access to Justice Act 1999, namely duties to avoid discrimination, duties to protect the interests of the individuals for whom services are provided, duties to the courts and tribunals, duties to avoid conflicts of interest, duties of confidentiality and duties to act in accordance with professional rules.

207. *Subsection (4)* provides that the persons to whom the code applies are not subject to the direction of the Lord Chancellor when they provide services. This is to ensure their independence in providing such services.

### ***Section 30: Position of other parties, courts and tribunals***

208. *Section 30* makes provision similar to section 22(4), (5) and (6) of the Access to Justice Act 1999.
209. *Subsection (1)* provides that unless regulations provide otherwise, the fact that legal aid is provided to an individual does not affect the rights of any third party or the principles governing the exercise of a court's or tribunal's discretion.
210. *Subsections (2) and (3)* enable regulations to make provision about court or tribunal procedures in cases involving legal aid services.

## **Supplementary**

### ***Section 31 and Schedule 3: Legal aid for legal persons***

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

### ***Schedule 3: Legal aid for legal persons***

212. *Schedule 3* provides for the possibility that civil and criminal legal aid may be made available to a legal person, that is a legal entity other than an individual, for example a body corporate. All determinations in relation to legal aid for legal persons will be made by the Director.
213. *Paragraph 2* defines an exceptional case determination for the purposes of this Schedule. This is the same as an exceptional case determination under section 10(3).
214. *Paragraph 3(1)* makes provision about when civil legal services are to be made available to a legal person. First, the Director must have made (and not have withdrawn) an exceptional case determination in relation to the person and the services. Second, the Director must have determined that the person qualifies for the services in accordance with Part 1 of the Act (and not withdrawn that determination). *Paragraph 3(2)* requires the Director to make such a determination in accordance with the means testing provisions (section 21) and the criteria in regulations made under section 11(1)(b). It also requires a determination that a legal person qualifies for civil legal services to specify the type of service and the matters in relation to which the services are to be available. *Paragraph 3(3)* applies the powers in section 12(2) to (6) to make provision about procedures for the making and withdrawal of determinations.
215. *Paragraph 4(1) and (2)* enables the Lord Chancellor to make regulations enabling prescribed advice and assistance for criminal proceedings to be made available to legal persons who are involved in investigations which may lead to criminal proceedings and to legal persons who are before a court, tribunal or other person in criminal proceedings. In order for such prescribed advice and assistance to be made available, prescribed conditions must be met, the Director must have made (and not withdrawn) an exceptional case determination in relation to the legal person and the proceedings, and the Director must have determined that the legal person qualifies for such advice and assistance in accordance with the regulations (and not withdrawn that determination).
216. The effect of *paragraph 4(3)* is that, when making the regulations, the Lord Chancellor must have regard in particular to the interests of justice and the regulations must require the Director to make determinations having regard in particular to the interests of justice and may require the Director to do so in accordance with the means testing provisions (section 21) and in accordance with criteria set out in the regulations. Paragraph 4(3) also applies provisions in section 15(6) to (9) about procedures for the making and withdrawal of determinations.

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

### **Section 32: Foreign law**

223. *Section 32* concerns the availability of legal aid services in relation to foreign law. This section reflects the current provision about legal aid in relation to foreign law at section 19 of the Access to Justice Act 1999.
224. *Subsection (1)* restricts the applicability of the civil legal services made available under the Act to the law of England and Wales only, except where the Act specifies otherwise, where foreign law is relevant to proceedings in England and Wales, or where the Lord Chancellor specifies otherwise by order. *Subsection (2)* makes similar provision in relation to criminal legal aid.

225. *Subsection (3)* limits the Lord Chancellor's ability to make an order under *subsections (1) and (2)*.

***Section 33: Restriction on disclosure of information about financial resources***

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

***Section 34: Restriction on disclosure of other information***

231. **Section 34** provides for the protection of information other than information to which section 33 applies (see *subsection (7)*) which is given to the Lord Chancellor, the Director, a court, tribunal or any other person or body which has functions under Part 1 of this Act.
232. *Subsection (1)* describes the information to which the provisions apply: information provided to the persons referred to in the paragraph above in connection with an individual applying for or in receipt of legal aid.
233. Subject to the exceptions in section 35, *subsection (2)* prevents such information from being disclosed. *Subsection (3)* makes disclosure contrary to this section a criminal offence and sets out the maximum penalties for that offence. The penalty for the offence will be, on summary conviction, a fine not exceeding level 4 on the standard scale, which is currently £2,500.
234. *Subsection (4)* provides a statutory defence for a person charged with the offence where they reasonably believed that the disclosure was lawful.
235. *Subsection (5)* requires the consent of the Director of Public Prosecutions before proceedings can be brought in relation to an alleged breach of this section.



236. *Subsection (6)* provides that section 34 does not apply to information provided to a provider of services by or on behalf of an individual for whom the services are, or would be, provided under Part 1 of the Act.

### **Section 35: Exceptions from restriction under section 34**

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

### **Section 36: Misrepresentation**

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

**Section 37: Status of the Director and Lord Chancellor**

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

**Section 38: Abolition of Legal Services Commission**

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

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

253. **Schedule 4** provides for employees of the LSC to become civil servants and for the transfer of property, assets and liabilities held in the name of the LSC to the Lord Chancellor or to the Secretary of State.
254. LSC employees are currently public sector employees rather than civil servants. *Paragraph 1* of Schedule 4 provides that, when the new arrangements for legal aid come into force, LSC employees become civil servants on their existing terms and conditions (save as to pensions and severance). It makes provision to ensure that the transfer does not break the continuity of their employment.
255. *Paragraph 4* enables the Lord Chancellor to make a scheme transferring the LSC's rights and liabilities in respect of occupational pension schemes or compensation schemes to the Lord Chancellor or the Secretary of State.
256. *Subparagraph (7)* provides that a transfer scheme may apply legislation relating to compensation schemes and occupational schemes with modifications, so far as is necessary for giving effect to the scheme.
257. *Subparagraph (8)* provides that the transfer scheme may amend or otherwise modify a compensation scheme.

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

### ***Section 39 and Schedule 5: Consequential amendments***

262. *Subsection (1)* provides that Schedule 5 of the Bill has effect. Schedule 5 makes various amendments and repeals which are consequential on the changes to legal aid made by Part 1. There are, for example, a number of amendments to delete references to the LSC in other legislation, such as in Schedule 1 to the Public Records Act 1958 (paragraph 1 of Schedule 5) and in Schedule 2 to the Parliamentary Commissioner Act 1967 (paragraph 2 of Schedule 5). There are also, for example, a number of amendments to replace references to the Community Legal Service and the Criminal Defence Service, such as in the Solicitors Act 1974 (paragraphs 7 to 9 of Schedule 5) and in the Prosecution of Offences Act 1985 (paragraphs 22 to 25 of Schedule 5).
263. *Subsections (2) to (10)* ensure that the Lord Chancellor is able abolish the LSC in advance of some or all of the provisions of Part 1 of the Bill being brought into force.
264. *Subsection (2)* gives the Lord Chancellor the power, where the Lord Chancellor considers it appropriate as part of the arrangements for moving from the legal aid arrangements under the Access to Justice Act 1999 to the operation of the legal aid arrangements under Part 1 of this Act, to make regulations requiring or enabling prescribed services that immediately before the date of such regulations may be funded under the Access to Justice Act, to be made available under Part 1 of this Act for a temporary period specified or described in the regulations.
265. *Subsection (4)* provides the Lord Chancellor with the power, where the Lord Chancellor considers it appropriate for the LSC to cease to exist before Part 1 of this Act is brought into force, to make regulations making provision for the Lord Chancellor and the Director, or persons authorised by them, to carry out functions of the LSC under Part 1 of the Access to Justice Act for a temporary period specified or described in the regulations. *Subsection (6)* provides that regulations under *subsection (4)* may not provide for the Lord Chancellor to take decisions about whether services should be funded in individual cases and regulations may not provide for the Lord Chancellor to give directions or guidance about the carrying out of functions under Part 1 of the Access to Justice Act 1999 in relation to individual cases.
266. *Subsection (7)* provides that regulations under section 39 may amend, appeal, revoke or otherwise modify Part 1 of the Access to Justice Act, Part 1 of this Act, or any other Act or instrument made under an Act, and that a temporary period described by such

regulations may be described, in particular, by reference to the coming into force of a provision of this Act or the repeal of a provision of Part 1 of the Access to Justice Act 1999.

267. Any regulations made under section 39 that amend or repeal a provision of an Act are subject to the affirmative procedure unless they revoke such regulations or insert or repeal provision previously repealed or inserted by such regulations, in which case they would be subject to the negative procedure (see section 41(7)(k)).

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

268. *Section 40* and Schedule 6 provide a gateway for the disclosure of information to the chief executive of the Northern Ireland Legal Services Commission (or other prescribed person) by the Secretary of State (in practice, the Secretary of State for Work and Pensions), the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"), the Department for Social Development in Northern Ireland or the Department of Finance and Personnel in Northern Ireland (the "relevant Northern Ireland Departments"). It also provides restrictions on the disclosure of that information. These provisions closely mirror the provisions in sections 22 and 33 that relate to information requests by the Director (or other prescribed persons).
269. *Paragraph 1(1)* of Schedule 6 enables the chief executive (or other prescribed person) to make a request for certain information to the Secretary of State, a relevant Northern Ireland Department or the Commissioners. *Paragraph 1(2)* provides that such a request may only be made for the purpose of facilitating a determination about an individual's financial eligibility for legal aid under the Northern Ireland legislation that governs the provision of legal aid.
270. *Paragraph 1(3)* lists the categories of information which may be requested from the Secretary of State or the relevant Northern Ireland Departments. It includes a power to add further categories of information by secondary legislation.
271. *Paragraph 1(4)* lists the categories of information which may be requested from the Commissioners. It includes a power to add further categories of information by secondary legislation, with the Commissioners' consent (see *paragraph 1(6)*).
272. *Paragraph 1(7)* provides that the Secretary of State, the relevant Northern Ireland Departments and the Commissioners may disclose to the chief executive (or other prescribed person) information specified in an information request made under this Schedule.
273. *Paragraph 2* of Schedule 6 provides for the protection of information obtained under the information gateway in paragraph 1. *Paragraph 2(1) and (2)* provide that a person who receives information under paragraph 1 of this Schedule may only disclose or use that information if it is necessary or expedient to do so in connection with determining financial eligibility for legal aid.
274. *Paragraph 2(3)* qualifies *paragraph 2(2)* by providing for limited circumstances in which the information may be used for purposes other than assessing financial eligibility. Disclosure is permitted if it would be in accordance with an enactment or in accordance with a court order, if it is for the purposes of the investigation or prosecution of an offence or suspected offence or if it for the purposes of proceedings before a court, including instituting such proceedings. Disclosure is also permitted if the information has already been lawfully disclosed to the public.
275. *Paragraph 2(4)* provides that disclosure or use of information contrary to this section is a criminal offence and specifies the maximum penalties. The penalty for the offence will be, on conviction on indictment, imprisonment for a term not exceeding two years or a fine (or both) and, on summary conviction in England and Wales, imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or

both), and in Northern Ireland to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (currently £5,000), or both.

276. *Paragraph 2(5)* provides a statutory defence to the criminal offence detailed in *paragraph 2(4)* where the person charged with the offence reasonably believed that the disclosure or use was lawful.
277. *Paragraph 2(7)* clarifies, in relation to the summary penalty in England and Wales for an offence under this paragraph committed before the commencement of section 154(1) of the 1991 Act, that the reference to 12 months imprisonment has effect as if it were a reference to 6 months.
278. *Paragraph 3* of Schedule 6 enables the Department for Justice in Northern Ireland to make consequential, supplementary, incidental or transitional provision by regulations in relation to the provisions of this Schedule. *Paragraph 4* makes provision about the powers to make regulations under the Schedule. Those powers are conferred on the Department for Justice in Northern Ireland. Under *paragraph 4(4)* the first regulations under paragraph 1 and any regulations under paragraph 3 that amend or repeal Northern Ireland legislation will be subject to the affirmative resolution procedure but otherwise regulations under the Schedule are subject to the negative resolution procedure.

#### ***Section 41: Orders, regulations and directions***

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

#### ***Section 42: Interpretation***

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