

1. Approach to Decision Making

3C-001

1.1 Status and Scope of the Guidance

1. This is guidance on making decisions under the Funding Code Criteria about whether the Legal Services Commission should fund or continue to fund services as part of the Community Legal Service (CLS). This guidance is issued by the Legal Services Commission and incorporates relevant guidance issued by the Lord Chancellor under section 23 of the Access to Justice Act 1999 (the “Act”). Under rule A9 of the Funding Code Procedures, all persons making decisions under the Code must have regard to this guidance.
2. The Funding Code contains a standard set of Criteria, called the General Funding Code, which apply to all cases except where there are specific Criteria which provide otherwise. Sections 1 to 13 of this guidance deal with decisions under the General Funding Code and with issues which are of fairly general application, and the remaining sections are specific to particular types of case or levels of service.
3. This guidance should be read together with the provisions of the Code itself, the Access to Justice Act 1999, directions, orders and regulations made under that Act, and the provisions of the Human Rights Act 1998.

1.2 Nature of the Code

3C-002

1. Decision making under the Code is fundamentally different from decision making under the Legal Aid Act 1988. The Legal Aid Act was based on an entitlement to funding in any individual case which satisfied the relevant merits tests, regardless of priorities and resources. By contrast, the Code is a flexible set of rules which seeks to direct the resources available to areas of work where the need is greatest and the priority highest.
2. Under the Legal Aid Act 1988 overall expenditure could be controlled only by restricting financial eligibility for services, restricting remuneration or by removing categories entirely from scope. A greater range of options is available under the Code. It will be possible, subject to Parliamentary approval, to vary the Code Criteria as required to control overall expenditure or to reflect changing priorities.
3. Criteria in the Code reflect the different purposes of public funding in different areas of law. In many areas the aim of the Code is to ensure that persons of limited means have the same access to justice as those who could afford to litigate privately. However this is not a universal principle in the Code, which is flexible enough to reflect other considerations. These include funding litigation where it is in the general public interest to do so, ensuring that public bodies are accountable for their actions and ensuring that children and other vulnerable persons are protected under the law. This guidance therefore seeks to explain not merely the meaning of the Criteria themselves, but the purpose the Criteria seek to achieve.
4. Decisions under the Code are more structured than decisions under the Legal Aid Act 1988. This has an important impact on the scope and structure of guidance. Rather than attempting to set out extensive and wide ranging guidance which all goes towards a single wide discretionary decision, each section of this guidance attaches to specific Criteria in the Code as an aid to more accurate and consistent decisions.

3C-003

1.3 Scope of the Code

1. The Code applies to all applications for funding out of the CLS fund from 1 April 2000. There are three important limits on the scope of the Code:
 - (a) Existing legal aid cases. Any case granted legal aid under the Legal Aid Act 1988 continues under the provisions of that Act. In particular, applications for civil legal aid or assistance by way of representation (“ABWOR”) which are signed by 31 March 2000 will continue under the 1988 Act until they come to be discharged or revoked. See Article 5 of the Access to Justice Act 1999 (Commencement No. 3 Transitional Provisions and Savings) Order 2000. Guidance on the merits test in the 1988 Act is set out in the Legal Aid Handbook 1998/99 and updated in Focus.
 - (b) Cases out of scope. Cases which are excluded under the terms of Schedule 2 of the Access to Justice Act 1999 and the Directions cannot be considered under the Funding Code. This is discussed further in section 3 of this Guidance.
 - (c) Criminal cases. Under Section 4(3) of the Act the Commission cannot fund as part of the Community Legal Service services which it is required to fund as part of the Criminal Defence Service. The services which the Commission is required to fund as part of the Criminal Defence Service are representation in criminal proceedings (Section 14 Schedule 3 of the Act). Therefore the Commission cannot fund Legal Representation under the Code in any proceedings which are criminal for the purpose of the Criminal Defence Service.
2. Under Section 12(2) of the Act criminal proceedings are defined to include proceedings before any court for dealing with an individual accused of an offence or for dealing with an individual convicted of an offence (including proceedings in respect of a sentence or order). In addition a range of other proceedings come within the definition of criminal either because they are listed in section 12 of the Act or because they are prescribed as criminal for this purpose under the Criminal Defence Service (General) Regulations 2001. The list includes:
 - (a) Proceedings for dealing with an individual under section 9 of, or paragraph 6 of Schedule 1 to, the Extradition Act 1989.
 - (b) Proceedings for binding an individual over to keep the peace or to be of good behaviour under section 115 of the Magistrates’ Courts Act 1980 and for dealing with an individual who fails to comply with an order under that section.
 - (c) Proceedings on an appeal brought by an individual under section 44A of the Criminal Appeal Act 1968.
 - (d) Proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court.
 - (e) Civil proceedings in a magistrates’ court arising from failure to pay a fine or to obey an order of that court where such failure carries the risk of imprisonment.
 - (f) Proceedings under section 1, 2 and 4 of the Crime and Disorder Act 1998 (“the 1998 Act”) relating to anti-social behaviour orders or sex offender orders.
 - (g) Proceedings under section 8(1)(b) of the 1998 Act relating to parenting orders made where an anti-social behaviour order or a sex offender order is made in respect of a child.
 - (h) Proceedings under section 8(1)(c) of the 1998 Act relating to parenting orders made on the conviction of a child.
 - (i) Proceedings under section 9(5) of the 1998 Act to discharge or vary a parenting order described in (g) or (h) above.
 - (j) Proceedings under section 10 of the 1998 Act to appeal against such a parenting order.

1. Approach to Decision Making

- (k) Proceedings under section 14B, 14D, 14G, 14H, 21B and 21D of the Football Spectators Act 1989 (banning orders and references to a court).
- (l) Proceedings under section 137 of the Financial Services and Markets Act 2000 to appeal against a decision of the Financial Services and Markets Tribunal.
- (m) Proceedings under sections 2, 5 and 6 of the Anti-Social Behaviour Act 2003 relating to closure orders.
- (n) Proceedings under sections 20, 22, 26 and 28 of the Anti-Social Behaviour Act 2003 relating to parenting orders in cases of exclusion from school and parenting orders in respect of criminal conduct and anti-social behaviour.
- (o) Proceedings under sections 97, 100 and 101 of the Sexual Offences Act 2003 relating to notification orders and interim notification orders.
- (p) Proceedings under sections 104, 108, 109 and 110 of the Sexual Offences Act 2003 relating to sexual offences prevention orders and interim sexual offences prevention orders.
- (q) Proceedings under sections 114, 118 and 119 of the Sexual Offences Act 2003 relating to foreign travel orders.
- (r) Proceedings under sections 123, 125, 126 and 127 of the Sexual Offences Act 2003 relating to risk of sexual harm orders and interim risk of sexual harm orders.
- (s) Proceedings under Part 1A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 relating to parenting orders for failure to comply with orders under section 20 of that Act; and
- (t) Proceedings under section 5A of the Protection from Harassment Act 1997 relating to restraining orders on acquittal.

Note: although proceedings at paragraphs (e) to (j) are criminal, a Representation Order can be obtained for certain of them under the Unified Contract Civil Specification (see paragraphs 10.79, 13.1 and 15.3 of the Specification).

- 3. Certain proceedings in the High Court are also excluded from the scope of the Code either because they are criminal under the above definitions or are to be treated as preliminary or incidental to criminal proceedings (see paragraph 3 of Schedule 3 to the Act). These include:
 - (a) Bail proceedings.
 - (b) Representations to the High Court against a voluntary bill of indictment.
 - (c) Proceedings under the Criminal Procedure and Investigations Act 1996 to quash an acquittal.
 - (d) Proceedings under RSC Order 115 in Schedule 1 to the Civil Procedure Rules 1998 for confiscation or forfeiture in connection with criminal proceedings.
- 4. Note that judicial review and habeas corpus proceedings which arise out of criminal investigations or proceedings do not fall within the above definitions and so may be funded as part of the Community Legal Service under the Funding Code. Such cases, which prior to April 2001 were funded under transitional provisions under the Legal Aid Act 1988, can now be funded either under the Unified Contract Civil Specification by firms with a supervisor in the Public Law or Crime Category or as Associated CLS Work under the General Criminal Contract.

1.4 The Statutory Purpose of the Community Legal Service (CLS)

3C-004

- 1. Section 4 of the Act establishes the CLS and lists the services which may be funded as part of it. The aim of the CLS is to promote the availability to individuals of those services and, in particular, to secure, within the resources available and the priorities set, that individuals have access to services that effectively meet their needs.
- 2. In addition, section 4(4) imposes obligations on every person who exercises functions relating to the Community Legal Service. The obligation is to have regard to the

desirability of exercising functions under the Community Legal Service, so far as practicable, so as to:

- (a) promote improvements in the range and quality of services provided as part of the Community Legal Service and in the ways in which they are made accessible to those who need them;
 - (b) secure that the services provided in relation to any matter are appropriate having regard to its nature and importance; and
 - (c) achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court.
3. These obligations have been taken into account in drawing up the Code Criteria. They must also be applied by persons making decisions under the Code in individual cases, both employees of the Commission and suppliers of services (that is, solicitors, advice agencies and mediators) who are authorised by contract to make decisions under the Code.
 4. The statutory objectives do not of course entitle a person to override the Criteria in the Code, but they should be considered where the Code allows for a discretion to be exercised. The obligations in paragraphs 2(b) and 2(c) above are the most relevant to decisions under the Code. For example, paragraph 2(b) requires that services provided are appropriate having regard to the nature and importance of the case. This would be relevant in an application for a certificate to cover Full Representation in which it was necessary to decide whether the nature and importance of the case was such that a different level of service, such as Legal Help or Help at Court, would be more appropriate in the circumstances.
 5. Similarly, paragraph 2(c) above encourages the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court. Under the Code there is no presumption that adversarial court proceedings are the only satisfactory means of resolving disputes. Where appropriate, Legal Representation in court proceedings may be limited or refused on the grounds that some form of Alternative Dispute Resolution should be pursued. Even in cases which are proceeding before the courts it may be appropriate to limit a certificate to give every opportunity for negotiation and settlement between the parties before allowing funding for the case to proceed to trial.
 6. Of equal importance to the statutory obligations under the Access to Justice Act are the obligations on public authorities established by the Human Rights Act 1998 which came into effect on 2 October 2000. Section 6 of the Human Rights Act requires public authorities so far as possible to act in a way which is consistent with rights under the European Convention on Human Rights. The nature and extent of this obligation when decisions are taken under the Code is considered in section 6 of this guidance.