

9. Standard Criteria

CRITERIA APPLYING TO ALL CASES

3C-061

9.1 Nature of the Standard Criteria

1. Section 4 of the Code Criteria are standard Criteria which apply to all levels of service and types of case covered by the Funding Code. For the most part these Criteria are straightforward and are simply a check that the case applied for is broadly within the scope of the Community Legal Service. There are also Criteria at section 5.4 of the Code which apply to all forms of Legal Representation and Support Funding, but do not apply to Legal Help and other Levels of Service. These are considered in sections 9.11 onwards of this guidance.

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9.2 English Law

1. Criterion 4.2 provides that an application will be refused if it relates to law other than that of England and Wales, save where this is permitted by or under section 19 of the Act.
2. Section 19(1) of the Act provides that the Commission may not fund services relating to any law other than that of England and Wales unless such law is relevant for determining any issue relating to the law of England and Wales. It sometimes happens that points of foreign law arise in proceedings which are taking place in this jurisdiction. For example, it is possible for proceedings to take place in this country even if, because of the terms of some contract in issue in the proceedings, certain issues of foreign law need to be determined by the court. The existence of such issues does not prevent funding being granted under the Code. If the issue of foreign law is relevant in proceedings in England and Wales then it is authorised under section 19(1).
3. Under section 19(2) of the Act the Lord Chancellor has power to make an order allowing services relating to foreign law to be funded. Article 7 of the CLS (Funding) Order 2000 authorises Legal Help in relation to the preparation of applications for legal aid abroad. This is governed by the Strasbourg Convention on the Transmission of Legal Aid Applications – see guidance on funding outside England and Wales in Volume 1 of this Manual. Except for cases covered by that Order, all applications for Legal Help relating to foreign law must be refused.
4. Cases relating to international agreements ratified by English law are not excluded by section 19, despite the fact that they concern international issues. Examples include cases under the Child Abduction and Custody Act 1985 and the Maintenance Orders (Reciprocal Enforcement) Act 1972. Similarly, applications to the European Court in Luxembourg by virtue of the European Communities Act 1972 are included.
5. Although issues of foreign law may be funded in proceedings in England and Wales as explained above, Legal Representation and Support Funding may not be provided for proceedings abroad (whether or not such proceedings also involve English law). The main provisions of the Access to Justice Act 1999 extend only to England and Wales (section 109(6) of the Act).
6. The law as to which jurisdiction a case should be heard in is complex and is governed by a number of international conventions as well as the common law. For the purpose of applying the Code Criteria the usual approach will be to consider whether the events which gave rise to the proceedings primarily took place within England and

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Wales. If they did not, the solicitor should be asked for a justification of why it is believed that the proceedings will be allowed to be brought within this jurisdiction.

9.3 Excluded Services

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1. Under Criterion 4.3, application for the provision of Excluded Services must be refused. Excluded Services means services which are excluded by the Act and have not been brought back into scope by any directions or authorisations from the Lord Chancellor. Guidance on exclusions and the Lord Chancellor's directions which bring cases back into scope is set out in section 3.
2. Note that, in applications for Legal Representation, some types of proceedings will be entirely excluded under Schedule 2 of the Act. However it will often be the case that, within an action or proposed action, only some of the work will be excluded and other work will be in scope. The Lord Chancellor's authorisations on mixed cases allow, in some circumstances, for such cases to be fully funded. However, if the rules set out in those authorisations are not satisfied so that some of the work in the proceedings remains excluded, then the application for funding in the proceedings must be refused in its entirety. The normal ground for doing so will be Criterion 3.4, namely that effective representation cannot be provided in the proceedings without the provision of Excluded Services.

9.4 Directions on Scope

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1. Criterion 4.4 provides that where an application relies upon a direction or authorisation by the Lord Chancellor under section 6(8) of the Act, the application must be refused if any conditions specified in the direction or authorisation are not satisfied.
2. This Criterion is most relevant to mixed cases, that is proceedings in which some of the work is excluded and some is within scope. These conditions are set out in section 3.3 and examples of their application are set out in section 3.7.

9.5 Identity of Client

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1. Section 4 of the Act provides that the Community Legal Service exists for the purpose of promoting the availability of legal services to individuals. Individuals means people, not companies, partnerships or other corporate bodies. Note that, unlike the Legal Aid Act 1988, the Access to Justice Act 1999 contains no provision for funding to be granted to companies on the grounds that they are acting in a representative, official or fiduciary capacity. If the proposed client is a company, funding must always be refused.
2. Criterion 4.5 therefore provides that an application must be refused unless it is for the benefit of a client who is an individual and satisfies such other conditions as are specified in Code Procedures. The important issue in applying this Criterion is: who is the client?
3. For Controlled Work, the General Civil Contract defines the client as the individual for whom the supplier is performing, or has performed, contract work (see definition in paragraph 2 of the General Civil Contract Standard Terms 2000 set out in Volume 2 of this Manual).
4. In applications for Legal Representation, Rule C3 of the Code Procedures provides that the client must be a party or proposed party to the proceedings. The primary test is therefore who will be a party to the proceedings, not who will benefit from the outcome of the proceedings. For example, if a one man company had a contract dispute with another person and wished to bring proceedings alleging breach of contract, the cause of action would belong to the company, not the owner. Funding

could not be provided in such a case (even assuming it was not excluded as being a business case under Schedule 2). This exclusion applies even if the case would be as important to the owner of the company as if the proceedings had been brought in his own name.

5. The Criterion concerning the identity of the client arises in a number of situations:
 - (a) if a case is being brought by a child or patient, Part 21 of the Civil Procedure Rules provides that a person called a “litigation friend” must usually be appointed to conduct the proceedings on behalf of the child or patient. However, in those circumstances, it is still the child or patient who is the party to the proceedings and who is the client for the purpose of the Funding Code. In principle, funding could be granted in such cases even if the litigation friend was a company (although this is in practice unlikely);
 - (b) there are some proceedings which, under Rules of Court or other laws, must be brought by the personal representative of an estate or by a person who is acting wholly in the capacity of a trustee for other persons. A common example of this situation is where a client who is already funded dies and the proceedings are continued by the client’s personal representatives. In those circumstances it is the personal representative or trustee bringing the case who is the client under the Code. However, because the client may well have no personal interest in the case, the financial eligibility regulations provide for the means of the beneficiaries of the case to be considered rather than the means of the client. Also, when considering cost benefit under the Code, references to benefits to the client should be treated in those circumstances as benefits to the beneficiaries;
 - (c) in family proceedings a “guardian ad litem” may be appointed to represent the interest of the child and may sometimes be made a party to the proceedings in certain circumstances. Rule C3.3 of the Code Procedures provides that a professional guardian ad litem, that is one employed by a local authority to provide such services, cannot be granted funding unless the Director is satisfied that otherwise under Rules of Court the child could not be directly represented in family proceedings. Guidance on this issue is set out in section 20.4;
 - (d) the Code Procedures also contain a mechanism for issuing a prohibitory direction against a person so that they may not receive services in the future. The rules on this procedure are set out in section 8 of Part C of the Code Procedures.

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9.6 Identity of Supplier

1. Criterion 4.6 provides that an application will be refused unless the proposed supplier of services is of a description specified in the Code Procedures. Under the scheme of the Act most suppliers of services do so under the terms of a contract with the Commission. Rule A4 of the Code Procedures provides that services funded by the Commission as part of the CLS may only be carried out by persons authorised to supply such services under a contract with, or grant from, the Commission. Under Rule C4 a solicitor may only apply for a certificate if his or her firm holds a General Civil or Criminal Contract authorizing work of the type applied for (unless the application is for an Exceptional Case Contract).
2. Rule C4 of the Procedures goes on to provide that for any certificated work (whether Licensed or Non-Contracted) the application must specify the solicitor who is proposing to act for the client, who must not be a person disqualified from acting as such by his or her professional body. This means that, as in the old legal aid scheme, a solicitor must have a valid practising certificate to apply for funding.
3. Although Legal Representation under certificates must be provided by authorised litigators, this does not prevent other persons providing services which can be paid for under such a certificate. For example, the fees of an expert, mediator or arbitrator

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may be paid under a certificate as disbursements since such a person is not the direct “supplier” of the services for the purpose of the Code.

9.7 Contract Scope

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1. Under Criterion 4.7 where an application is for services which under Code Procedures can be provided only under contract, the application will be refused unless the supplier has a contract and is permitted to provide those services under the terms of the contract. This reinforces the rule that services may only be provided by suppliers acting under the terms of a contract with or a grant from the Commission. For example, applications for Legal Representation in family proceedings will be refused under this Criterion unless the supplier has a licence to undertake family work under a General Civil Contract.

9.8 Procedures

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1. Criterion 4.8 provides that an application may be refused or rejected if any Code Procedures have not been complied with. This is a general provision which ensures that applications for funding must be made in the proper manner and that, where the Commission requires a form to be completed, the correct form must be fully completed before funding can be granted.
2. This Criterion gives the Commission a discretion either to refuse funding or simply to reject the application. A refusal of an application gives rise to the same rights of review by the Regional Office and the Independent Funding Adjudicator as a refusal on the merits of the case. By contrast, rejecting an application is an administrative step; the only remedy for which is to make a further application with the forms properly completed.
3. Rejection is the appropriate step where the client or supplier of services has simply made an administrative error or mistake in making the application, such as leaving an essential part of the application form blank, failing to sign the form or applying for funding using the wrong form. However, rejection is not the appropriate course if there is a genuine dispute as to the subject matter of the case and which Criteria are to be applied. For example, if an application for funding is made on the family application form because the client and solicitor believe that the proceedings in question are Family Proceedings, as defined in the Code, the application should not be rejected merely because the Commission believe that the non-family application form should have been used. In those circumstances the Commission will apply the non-family Criteria provided sufficient information is available to do so. If funding is refused in those circumstances, the normal rights of review will apply.

9.9 Financial Eligibility

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1. Under the Act financial eligibility for services must be determined in accordance with regulations. Criterion 4.9 provides that an application must be refused unless the client is assessed as financially eligible under regulations, except where:
 - (a) under regulations services are available without reference to means – for example Special Children Act Proceedings;
 - (b) regulations provide for Code Procedures or contracts to authorise services to be provided before completion of the financial assessment – this covers Emergency Representation which can be provided before a full means assessment has been carried out. See further guidance in section 12.

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9.10 Conduct

1. Criterion 4.10 allows for an application to be refused if it appears unreasonable to grant funding in the light of the conduct of the client in connection with this or any other application or in connection with any proceedings.
2. Although this Criterion appears wide on its terms, it will only be applied in exceptional cases. Note also that conduct can only be taken into account insofar as it relates to any application for funding or to any legal proceedings. The general character and conduct of the client and whether they have a criminal record or high public profile are not relevant to funding decisions.
3. There may be some cases where the conduct of the client in relation to the case is so dishonest, abusive or violent that it would not be reasonable for further services to be provided. However, all the circumstances of the client would need to be considered. It would not be appropriate to refuse funding on conduct grounds for a client who was mentally ill or involved in Special Children Act Proceedings.
4. Conduct issues arise most often where a certificate is discharged or revoked because of the dishonesty of the client or failure to disclose information to the Commission when required to do so under the Procedures. The grounds for such revocation or discharge are set out at rule C53 of the Code Procedures.
5. Refusal of funding on the grounds of conduct is also appropriate where the Commission is satisfied that the client, with or without the assistance of the supplier, has sought to manipulate the rules in the Funding Code in such a way as to abuse the scheme. An example would be where a company has a cause of action, but assigns it to an individual in order to let the individual take advantage of services under the Act. Such cases will be treated as an abuse of the scheme and funding will be refused, whether or not the person to whom the cause of action was assigned has a financial interest in the proceedings of the company.
6. Conduct amounting to an abuse of the scheme can also lead to a prohibitory direction under section 8 of Part C of the Code Procedures.

STANDARD CRITERIA FOR LEGAL REPRESENTATION

3C-071

9.11 Standard Criteria in the General Funding Code

1. Section 5.4 of the General Funding Code Criteria sets out five Criteria which apply to applications for Investigative Help and Full Representation. As with all other Criteria in the General Funding Code, these apply except where case specific Criteria provide otherwise. In fact, the standard Criteria are only disapplied for certain family, mental health and immigration proceedings.

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9.12 Alternative Funding

1. An application may be refused if alternative funding is available for the client (through insurance or otherwise) or if there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case. This is a wide-ranging and important Criterion. It reflects the general principle that public funds should not be provided as part of the Community Legal Service if other sources of funding are available. Public funds are best used in circumstances where, without such funding, access to justice would be denied.
2. The regulations on financial eligibility determine what levels of income or capital a client may have and still be entitled to Legal Representation, and determine the contribution due in respect of the client's financial resources. Therefore this Criterion is concerned not with the client's own means but with other sources of funding. Examples include:

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- (a) insurance – if the client has the benefit of an insurance policy which could cover the legal costs of the proposed proceedings, CLS funding will almost inevitably be refused. Many people have some legal services cover attached to their normal household or motor insurance policies. Details of such policies must be disclosed on the application form – see paragraph 9 below;
 - (b) if the client is a member of a trade union which provides legal services to its members, funding will normally be refused. Note that the test in the Criterion is whether the other person, i.e. the union, “can reasonably be expected” to fund the case. The mere fact that the union refuses to fund a particular case does not mean that the client is entitled to CLS funding. However, it might not be appropriate to refuse funding under this Criterion if the union were denying that the case fell within the scope of the help they could provide (as opposed to simply refusing to provide help on the merits) or if the case was one of urgency or of overwhelming importance to the client;
 - (c) similarly, if the client is the beneficiary under a discretionary trust and under the terms of that trust the trustees would have power to fund litigation on behalf of the client, CLS funding should be refused. It would be wrong for taxpayers’ money to be used in such cases simply because the trustees refused to intervene;
 - (d) funding should also be refused if the client in practice has access to persons or companies who are able to provide funds for the client when required, thereby giving the client an aura of wealth and access to alternative funding. However, in most such cases, the client would be assessed as financially ineligible as the eligibility regulations contain powers for the Commission to take into account the assets of other persons supporting the client.
3. The Criterion covers not merely those who can be expected to fund proceedings but also other persons who can reasonably be expected to bring the proceedings in question. Funding may therefore be refused if the client has been put forward simply with a view to taking advantage of the financial eligibility rules. For example, if a child applies for funding to take proceedings, for example judicial review, which could more appropriately be brought by the parents, funding will usually be refused. This is particularly relevant to challenges concerning allocation of school places which should normally be brought by the parent (see *JC. v. Richmond* (2001 ELR 21, 31 July 2000)). Detailed guidance on when applications may be made in the name of a child is at section 21.5).
4. The other main application of the alternative funding Criterion arises where there are other persons who would benefit from the outcome of the proceedings proposed by the client and who could reasonably be expected to fund the case. For example if the client seeks Legal Representation to challenge a road widening scheme which affects not just the client’s house but all other houses on a particular road, it would be appropriate to consider whether all the other persons affected should fund the proceedings privately. Much would depend on the typical means of the other persons affected. If the case related to a housing estate in a deprived area where the great majority of clients affected would almost certainly be financially eligible, it would be inappropriate to refuse funding on this Criterion. The most effective way to bring the case might be for an individual sample client to bring the challenge.
5. By contrast, if a large number of other persons would benefit from the case, many of whom could easily afford to contribute towards legal costs, CLS funding should be refused. If the case is important to all residents in an area, it may be reasonable to expect those residents to get together a fighting fund to bring the case rather than relying on public funds.
6. Note that rule C18 of the Code Procedures and regulation 38(3) of the CLS (Financial) Regulations 2000 contain a power for the Commission to add a contribution under a certificate in respect of other persons and bodies who may

benefit from the proceedings. This power would be applied where such other persons exist but where it would not be reasonable to expect the case to be funded entirely on a private basis.

7. This issue arises most often in cases which have a significant wider interest. The Commission's approach is to encourage a partnership between public and private funding as explained in more detail in section 5.5 of this guidance. The guidance at section 5.5 should be applied whether or not the litigation in question has a significant wider public interest.
8. Sometimes the other persons who may benefit from the case are already parties or proposed parties to the proceedings. In a multi-party action the Commission's concern is that there should be fair and appropriate cost sharing arrangements between all the clients so that the CLS fund bears no more than an appropriate share of the total costs. Funding could be refused if the Commission felt that an unfair proportion of the total costs were being allocated to public funds through eligible clients. This is considered further in section 15.
9. From July 2005 the non-family application form CLS App 1 has a section requiring the client to identify any before-the-event legal expenses insurance, including any attached to a buildings, contents or motor policy. Legal expenses insurance policies vary in their scope, for example, some cover clinical negligence proceedings while others do not. If necessary, a copy of any policy may be enclosed with the application form. Solicitors are reminded of the importance of checking at the outset whether the client has any form of before-the-event insurance – see the guidance of the Court of Appeal in *Sarwar v Alam* [2001] EWCA Civ 1401.

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9.13 Alternatives to Litigation

1. Under Criterion 5.4.3, an application may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued. Guidance on this important Criterion is contained in section 7.
2. Funding may also be refused under this criterion if there are compensation schemes which a reasonable private paying client would pursue before or instead of court proceedings. Examples include:
 - (a) The Criminal Injuries Compensation Authority (this will only arise for personal injury claims which are within scope, for example those considered under section 8 of the Code);
 - (b) The Investors Compensation Scheme (ICS) which can provide compensation to clients who have suffered loss as a result of negligent investment advice or management from an authorised investment firm. ICS can compensate investors where the firm in default is no longer in business and has no funds to pay investors' claims.

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9.14 Other Levels of Service

1. Under Criterion 5.4.4, an application may be refused if it appears premature or if it appears more appropriate for the client to be assisted by some other Level of Service under the Code, such as Legal Help or Help at Court. Guidance on the boundary between Legal Help and Legal Representation is set out at Paragraphs 6.1 to 6.8 of the Unified Civil Contract Specification. The general rule is that a solicitor should, so far as practicable before making an application for Legal Representation, have obtained any information reasonably necessary to determine whether the Criteria in the Funding Code are satisfied.
2. The Criterion also allows an application for Legal Representation to be refused if it is premature. In deciding whether an application is premature it is appropriate to

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consider whether litigation would be pursued at that stage if the client were to pay for the case privately. For most private clients, litigation should be the last resort and protracted court proceedings should be avoided. If a little more investigation or discussions with the potential opponent might well resolve the matter or make it clear that no claim should be brought, Legal Representation may be refused.

3. It is not necessary to carry out all investigative work at the Legal Help level if the costs of investigation are substantial. Where this is the case, a certificate may be granted for Investigative Help. Guidance on this Level of Service is set out in section 10.
4. If proceedings have already started and a hearing date is pending, Legal Representation may be refused if it is more appropriate for the client to be helped by way of Help at Court. Help at Court is only appropriate for particular circumstances and types of hearing, particularly where the nature of the help is to provide mitigation for clients in housing and debt cases in which the client has no substantive legal defence to the proceedings. Because the relationship between Help at Court and Legal Representation is particularly relevant to housing cases, further guidance on this issue is included in section 19.3.

9.15 The Need for Representation

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1. Under Criterion 5.4.5 an application may be refused if it appears unreasonable to fund representation, for example in the light of the nature and complexity of the issues, the existence of other proceedings or the interests of other parties in the proceedings to which the application relates. This Criterion allows representation to be refused in a variety of situations where it is not necessary for the client to be represented, or where separate representation for the client would lead to over representation at court. The following are examples of the application of the Criterion:
 - (a) test cases – if a test case is being pursued to resolve an issue of principle, it would generally be unreasonable to grant Legal Representation to any other clients in relation to that same issue even if the other Criteria for Legal Representation are satisfied. In those circumstances a private paying client would wish to wait for the outcome of the test case before deciding whether to litigate with his or her own money, unless it was necessary to issue proceedings for limitation purposes;
 - (b) appeals – even if several parties are involved in a case at first instance, where an appeal is pursued it is not always the case that every party at first instance must be separately represented. The number of parties represented in an appeal should be determined primarily by the issues and the options placed before the court rather than the number of parties affected by the decision. Sometimes over-representation can be dealt with by parties remaining separately represented by different solicitors, but jointly instructing counsel for the purposes of an appeal.
 - (c) family cases – over-representation is a particular problem in children cases where a large number of parties often wish to be separately represented at any hearing. This issue is covered in section 20;
 - (d) straightforward proceedings – Legal Representation will be refused if, on account of the nature of the proceedings, a solicitor would not ordinarily be employed. Examples include undefended divorce proceedings and straightforward enforcement proceedings such as a judgment summons. In each case it is necessary to balance the nature and complexity of the issues against the circumstances and capabilities of the individual client to decide whether, on private client test principles, legal representation is required.

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9.16 Small Claims

1. Under Criterion 5.4.6 an application will be refused if the case has been or is likely to be referred to the small claims track. Note that this Criterion is mandatory – the Commission has no power to issue a certificate for a case in the small claims track. However, clients can sometimes receive Help at Court for a case in that track.
2. In deciding whether a case is likely to be allocated to the small claims track, the approach should be as set out in rules 26.6 to 26.8 of the Civil Procedure Rules. The small claims track is the normal track for claims which have a financial value of not more than £5,000, but, in general, personal injury claims and housing disrepair cases will only be allocated to the small claims track where they have a value of not more than £1,000 (in the case of personal injury claims, this limit applies to the general damages element of the claim). A claim by a tenant for harassment or unlawful eviction will not be allocated to the small claims track.