

Scope of the Community Legal Service Fund

Lord Chancellor's Guidance

1. The Lord Chancellor has issued the following guidance under section 23 of the Access to Justice Act 1999, explaining the Government's intentions underlying paragraph 1 of Schedule 2 to the Act (Excluded services):
2. "Section 5 of the Act requires the Legal Services Commission to fund services as part of the Community Legal Service from a fund maintained for the purpose. The Commission may fund any services of the broad types listed in section 4(2) of the Act (subject to priorities and the availability of resources). By virtue of section 4(1), services may only be funded for individuals (i.e. not firms, companies or other corporate bodies). Section 4(3) provides that services that the Commission is required to fund as part of the Criminal Defence Service are not available as part of the Community Legal Service.
3. Schedule 2 to the Act prescribes other types of service that the Commission may not fund as part of the Community Legal Service.

Paragraph 1 of the Schedule lists areas of law in relation to which no services may be funded beyond the provision of general information about the law, the legal system and the availability of legal services. The Government's reasons for making these exclusions fall into two categories.

4. Paragraph 1(a) excludes services relating to allegations of negligently caused injury, death or damage to property, apart from allegations relating to clinical negligence. These cases are excluded because the great majority of them are suitable for funding under conditional fee agreements.
5. Paragraph 1(a) only excludes allegations of "negligently caused" injury or damage. It is not intended to exclude cases about personal injury arising from an alleged assault or deliberate abuse. Claims alleging assault or abuse by a public servant may well be brought against the responsible authority that employs him or her as well as, or instead of, the individual. The legal claim against the authority may be one of negligence. These claims are not prevented by paragraph 1(a) which turns on whether the injury itself was caused negligently or deliberately.
6. Similarly, paragraph 1(a) does exclude cases relating to injuries or damage caused by negligence, even when the legal claim is not cast in terms of the tort of negligence. So, for example, "tripping" cases are excluded when they take the form of a claim that a local authority breached its statutory duty to maintain the highway.
7. The other areas of law excluded by paragraph 1 are: conveyancing; boundary disputes; the making of wills; matters of trust law; defamation or malicious falsehood; matters of company or partnership law; and other matters arising out of the carrying on of a business. These are excluded because they are not considered to have sufficient priority to justify public funding. Some cases in these categories, for example claims for defamation, might well be suitable for conditional fees or other alternative forms of funding; but this is not the basis for their exclusion. In particular, it is not thought justified to spend public money helping businessmen who fail to insure against the risk of facing legal costs."

Exceptions to the exclusions

Lord Chancellor's Direction

1. This is a direction by the Lord Chancellor under Section 6(8) of the Access to Justice Act 1999 authorising the Legal Services Commission to fund in specified circumstances services generally excluded from the scope of the Community Legal Service Fund by paragraph 1 of Schedule 2 to the Act. In this direction “excluded services” means services which would, but for this direction, be excluded under that paragraph.
2. In this direction descriptions of types of case and other terms should be interpreted in accordance with definitions contained in the Act and in the Funding Code. For convenience, separate rules are given below in relation to the main levels of service under the Code. For the avoidance of doubt, nothing in this direction authorises the Commission to fund conveyancing services or the making of wills save where the direction specifically authorises this. Applications for funding under this direction must still satisfy all relevant criteria in the Funding Code and regulations.

Part 1 - Legal Help and Help at Court

3. Conveyancing

The Lord Chancellor authorises the Commission to fund conveyancing services as part of Legal Help where this is necessary to give effect to a court order made in proceedings in respect of which the Commission funded services, or to an agreement reached, with the help of funded services, to settle or avoid family proceedings.

4. Wills

The Lord Chancellor authorises the Commission to fund Legal Help in relation to the making of wills where the client is:-

- (a) aged 70 or over; or
- (b) a disabled person within the meaning of section 1 of the Disability Discrimination Act 1995; or
- (c) the parent of a disabled person (as defined in (b) above) who wishes to provide for that person in a will; or
- (d) the parent of a minor who is living with the client but not with the other parent, and the client wishes to appoint a guardian for the minor in a will,

5. In paragraph 4, “parent” includes a guardian appointed under section 5 of the Children Act 1989 and any other person with parental responsibility for the child.

6. Excluded Proceedings brought within Scope

The Lord Chancellor authorises the Commission to fund Legal Help or Help at Court in relation to proceedings or potential proceedings falling within paragraphs 7 to 9, 11 or 14 to 16 below (types of case for which Legal Representation may be provided).

Part 2 - Legal Representation

7. Case Categories

The Lord Chancellor authorises the Commission to fund Legal Representation, including excluded services, in any of the following types of case:

- (a) Proceedings under section 7 of the Code (Judicial Review), subject to the restrictions set out at paragraph 8 below.
 - (b) Proceedings under section 8 of the Code (Proceedings against public authorities concerning serious wrongdoing, abuse of position or power, or significant breach of human rights).
 - (c) Proceedings under section 10 of the Code (Housing) subject to the restrictions set out in paragraph 9 below.
 - (d) Proceedings under section 11 of the Code (Family Proceedings).
 - (e) Professional negligence proceedings, save where the alleged negligence relates to services provided to the client's business.
 - (f) Personal insolvency proceedings.
8. Paragraph 7 (a) above does not authorise the Commission to fund judicial review proceedings which arise out of the carrying on of the client's business unless those proceedings concern the serious wrongdoing, abuse of position or power or significant breach of human rights by a public authority.
9. Paragraph 7 (c) above does not authorise the Commission to fund housing proceedings relating to business tenancies or otherwise arising out of the carrying on of the client's business, save where possession of the client's home is in issue in those proceedings.

10. Public Interest Cases

The Lord Chancellor authorises the Commission to fund excluded services in Legal Representation in proceedings which have a significant wider public interest, other than proceedings arising out of the carrying on of the client's business.

11. Liberty of the client

The Lord Chancellor authorises the Commission to fund excluded services in Legal Representation in relation to hearings at which the liberty of the client is in issue.

12. Scope of specific exclusions

The following paragraphs limit the scope specific subparagraphs of paragraph 1 of Schedule 2 of the Act. Cases which benefit from paragraphs 13 to 16 below may still be excluded under any other subparagraph of paragraph 1 of Schedule 2. For example, a case concerning a constructive trust would still be excluded if the case arose out of the carrying on of a business.

13. Paragraph 1(b) conveyancing. Where the Commission is funding Legal Representation in proceedings, the Lord Chancellor authorises the Commission to fund conveyancing services as part of Legal Representation where this is necessary to give effect to a court order made in those proceedings. Where the Commission is funding Legal Representation in family proceedings the Lord Chancellor authorises the Commission to fund conveyancing services as part of Legal Representation where this is necessary to give effect to an agreement reached, with the help of funded services, to settle or avoid those proceedings.
14. Paragraph 1(e) matters of trust law. The Lord Chancellor authorises the Commission to fund services relating to matters of trust law as part of Legal Representation where the matters of trust law concern implied, resulting or constructive trusts, trusts arising when a person dies intestate or where matters of trust law arise in cases under section 14 of the Trusts for Land and Appointment of Trustees Act 1996 concerning the ownership or possession of the client's home.
15. Paragraph (g) matters of company or partnership law. The Lord Chancellor authorises the Commission to fund services relating to matters of partnership law as part of Legal Representation where the Commission is satisfied that the client needs to rely on partnership law only in order to dispute whether a partnership existed, for example in order to contest liability on the grounds of undue influence.
16. Paragraph (h) other matters arising out of the carrying on of a business. The Lord Chancellor authorises the Commission to fund services in relation to matters arising out of the carrying on a business as part of Legal Representation where the Commission is satisfied that the client is reasonably disputing whether he or she was carrying on a business, for example where the client is contesting liability on the grounds of undue influence.

17. Mixed Cases

The Lord Chancellor authorises the Commission to fund excluded services in Legal Representation when the excluded services relate to issues which are only minor or incidental to the main purpose of the proceedings.

18. The Lord Chancellor authorises the Commission to fund Legal Representation in *partially excluded proceedings* where any of the following conditions apply:
 - (a) The client is a defendant or third party in proceedings brought against him or her by an opponent.
 - (b) The excluded issues were introduced into existing proceedings by an opponent.
 - (c) The client is bringing the proceedings but it is or would have been impracticable for the client to bring proceedings without also covering the excluded services.
19. In paragraph 18 above "partially excluded proceedings" means proceedings which (apart from this direction) are mostly within scope but which also include specific **issues or causes** of action which are excluded under paragraph 1 of Schedule 2 of the Act.

Part 3 - Approved Family Help and Family Mediation

20. The Lord Chancellor authorises the Commission to fund excluded services as part of Approved Family Help or Family Mediation. In relation to Approved Family Help this may include conveyancing services which are necessary to give effect to a court order or to an agreement reached, with the help of funded services, to settle or avoid family proceedings.

Part 4 - Support Funding

21. The Lord Chancellor authorises the Commission to fund Investigative Support in relation to personal injury claims which satisfy the funding criteria for Investigative Support set out in the General Funding Code.
22. The Lord Chancellor authorises the Commission to fund Litigation Support in relation to personal injury claims which satisfy the funding criteria for Litigation Support set out in the General Funding Code.
23. The Lord Chancellor authorises the Commission to fund Investigative Support or Litigation Support in relation to personal injury claims which have a significant wider public interest.

Individual cases

Lord Chancellor's Guidance

1. Section 6(8)(b) of the Act empowers the Lord Chancellor to authorise funding in individual cases, following a request from the Commission. The Lord Chancellor has issued the following guidance to the Commission under section 23 of the Act, to indicate the types of case he is likely to consider favourably under this power:
2. "Schedule 2 of the Act, together with the general exceptions I have authorised, is designed to ensure that money is not spent on cases that do not have sufficient priority to demand a share of the available resources. I would therefore expect it to be extremely unusual for me to authorise the Commission to fund an individual case that remained outside scope.
3. Schedule 2 excludes funding for personal injury cases because they are generally suitable for conditional fees. I have authorised the Commission to fund personal injury cases with very high investigative or total costs, because this may not always be true of these cases. If a particular client was having difficulty finding a solicitor to take a case that was objectively suitable for a conditional fee, that is a case with reasonable prospects of success but not requiring very high costs, I would generally expect the Commission, through the Community Legal Service, to advise the applicant about solicitors willing to take cases under conditional fee agreements, rather than apply to me for exceptional funding.
4. The other categories in paragraph 1 of Schedule 2 are excluded because they are of low priority. I have authorised the Commission to fund cases raising significant issues of wider public interest that would otherwise be excluded by paragraph 1. The only other reason that would justify funding a case in a low priority category would be if it was of overwhelming importance to the client, affecting the life, liberty or physical safety of the client or his or her immediate family or the roof over their heads. I find it very hard to see how this could apply to cases in the categories concerned, which relate to business and property issues or to reputation. But if such a case did arise, I should of course be prepared to consider the Commission's application.
5. Paragraph 2 of Schedule 2 excludes the provision of advocacy services before coroners' courts and most tribunals. Coroners' courts are excluded because the inquisitorial nature of the process means that public funding for legal representation is not usually appropriate. Historically, most tribunals have been excluded from legal aid on the grounds that their procedures are intended to be simple enough to allow people to represent themselves. The 1999 Act excludes advocacy before the Lands Tribunal and Commons Commissioners for the first time because they do not have sufficient priority to justify public funding.

6. I would be prepared to consider applications from the Commission, in exceptional individual cases, to authorise funding for advocacy before a tribunal, inquest or public inquiry. To justify funding:
- (a) the client would have to be financially eligible for funded representation;
 - (b) the case would have to pass all the relevant Criteria in the General Funding Code; and either involve a significant wider public interest or have overwhelming importance (as defined in above) to the client (or clients) seeking funding; and
 - (c) there would have to be convincing evidence that, given the procedures and other arrangements in the court or tribunal concerned, legal representation was the only adequate way of establishing the facts and presenting the case; and that no alternative means of funding that representation was available;

so that taking these factors together, and having regard to our obligations under the European Convention on Human Rights, it was essential to provide public funding for representation in order to serve the interests of justice.

7. A good example of the type of case I have in mind is the second Marchioness inquest. My predecessor authorised exceptional funding for this case under the 1988 Legal Aid Act. In this case, apart from the personal importance and public interest of that hearing, the normal process had broken down in that the families of the deceased faced the expense of a second hearing following the quashing of earlier proceedings through judicial review."

Date: 2nd April 2001

Irvine of Lairg