

31/03/2010

**Guidance for Legal Representatives on the Partial Restatement of Regulation 17(9) of the Legal Aid (General) Regulations (Northern Ireland) 1965**

*(Property Recovered or Preserved for and Costs agreed to be paid to or awarded to an Assisted Person).*

**Background**

1. As part of the ongoing reform in the delivery of public legal services under the Access to Justice (Northern Ireland) Order 2003, the Commission is currently developing new regulations to replace the existing Legal Aid (General) (Northern Ireland) Regulations 1965.
2. The development of the new regulations will include the replacement of Regulation 17(9). The replacement of this regulation will be broken down into three phases as described below:-
  - **Phase 1** – a partial “restatement” of the regulation.
  - **Phase 2** – substantive amendments to the regulation.
  - **Phase 3** – the complete replacement of Regulation 17 with new regulations made under the Access to Justice (Northern Ireland) Order 2003

## **Phase 1**

3. The Commission has reviewed the current operation of the statutory charge under Regulation 17(9) and the previous guidance issued to legal representatives, particularly in relation to the exemptions from the statutory charge in matrimonial cases under Regulation 17(9)(a)(ii). This guidance replaces any previous guidance issued by the Commission and the former Legal Aid Department on the exemptions from the statutory charge under Regulation 17(9).

### **Why has the Commission restated Regulation 17(9)?**

4. In order to clarify the correct operation of the charge the Commission has carried out an exercise to “restate” those parts of Regulation 17(9) which provide for the exemptions from the charge in relation to family proceedings, and in relation to social security benefits.
5. The restatement sets out that the exemptions from the statutory charge include the recovery or preservation of money or property under the following legislative provisions:
  - (i) Articles 4 and 8 of the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979.
  - (ii) Articles 24, 25(1) and (2), 26A, 29(6), 33(1), 33(2)(a) to (dd), 33(2)(f) and 33(3) of the Matrimonial Causes (Northern Ireland) Order 1978.
  - (iii) Articles 4(1)(b) and (d), 8(1) and (5) and 22(2) of the Domestic Proceedings (Northern Ireland) Order 1980.
  - (iv) Article 15 of the Children (Northern Ireland) Order 1995 (paragraphs 2, 8 and 11 of Schedule 1).
  - (v) Income Support and Housing Benefit paid under the Social Security Contributions and Benefits (Northern Ireland) Act 1992.
  - (vi) Working Tax Credit and Child Tax Credit paid under the Tax Credits Act 2002.

## **The Matrimonial Causes (Northern Ireland) Order 1978**

6. It should be noted that the restatement exercise clarifies that the exemptions from the statutory charge only extend to the recovery or preservation of monies in ancillary relief proceedings under the ambit of Articles 24, 25, 29 and 33 of the Matrimonial Causes (Northern Ireland) Order 1978. Recovery under other articles of the 1978 Order is therefore subject to the charge. The Commission would particularly draw the attention of legal representatives to the fact that the recovery or preservation of property under Article 26 of the 1978 Order is **not** exempt from the statutory charge under the existing “restated” regulation.
7. The restatement of Regulation 17(9) comes into effect on 1 April 2010. The “restated” statutory charge will apply to legal aid certificates granted on or after that date. In cases where the Commission has not applied the charge in the past, it does not intend to apply it retrospectively to cases where the legal aid certificate was granted before 1st April 2010.

### **Transitional Arrangements**

8. The Commission is aware that there will be a number of legal aid applications received before 31<sup>st</sup> March 2010 where a legal aid certificate might be granted on or after the 1<sup>st</sup> of April 2010. The Commission is issuing a letter, to accompany the legal aid certificates in such cases, which will inform the assisted person of the restatement of Regulation 17(9), and give them an opportunity to consider their instructions in conjunction with the change to the application of the statutory charge (see Annex 1).
9. The Commission is continuing to review the application of the statutory charge in “transitional” applications, and will issue further guidance in due course.

## **Guidance for Legal Representatives: changes to legal aid forms**

10. Legal representatives will recognise that under the existing “restated” regulation the statutory charge will apply in some cases but not in others. In order to assist the Commission with making decisions on the application of the charge at the conclusion of proceedings, legal representatives will be required to answer more detailed questions on ancillary relief issues on a new “Statutory Charge Authority Form” which will be available to download from the “Members Area” of the Commission’s website from April 2010.
11. This new “Statutory Charge Authority Form” will be required to be completed in all cases where money or property has been recovered or preserved by the assisted person, and where the legal representative will be making a claim for costs on the legal aid fund. The form will be required to be submitted as soon as proceedings conclude, and in advance of any taxation of costs, in order to allow the Commission to authorise the release of any money or property which is exempt from the statutory charge to the assisted person, or to allow the Commission to enforce the charge in a timely manner.
12. There will be a question on the new “Statutory Charge Authority Form” where the legal representative can record that the matter is one that attracts an exemption from the statutory charge. So, for example, legal representatives may intend to conduct ancillary relief proceedings on the basis that the settlement terms will attract an exemption from the charge under Regulation 17(9)(a)(ii). When the case concludes they will be asked to identify on the new form the appropriate provisions of the 1978 Order which will allow any exemption under Regulation 17(9)(a)(ii).
13. Legal representatives should note that the Commission will consider that any property recovered or preserved will be subject to the statutory charge unless the appropriate statutory provision which will allow an exemption is recorded on the new “Statutory Charge Authority Form”. In support of the assumption that the statutory charge *will* apply, the Commission has amended the “A2” matrimonial civil legal aid application form to include an explicit statement that the charge *will*

apply *unless* there is an express and appropriate claim for an exemption pursuant to Regulation 17(9) (see Annex 2 Below).

14. Legal representatives should therefore clearly explain to the applicant, at the stage where they are completing the legal aid application form, the potential impact of the statutory charge.
15. The amended A2 application form will be available to download from the “Members Area” (<http://www.nilsc.org.uk/members.asp?on=members>) of the Commission’s website from the end of March 2010. The new statutory charge statement on form A2 replaces the existing statement. The Commission will require the amended form A2 to be submitted for all applications dated on or after 01/04/2010.
16. In addition to the administrative change detailed above the Commission will expand the question on the “Subject Matter Of Dispute” on the “CLA4” financial means assessment form. The current spacing for the answer to this question may not be large enough in some cases for the legal representative to record all the assets which are the subject matter of the dispute in a particular case (see Annex 3 Below).
17. The amended CLA4 form will be available to download from the “Members Area” (<http://www.nilsc.org.uk/members.asp?on=members>) of the Commission’s website from the end of March 2010. The Commission will continue to accept both the amended and the previous version of form CLA4 until September 2010, after which the amended version will become compulsory.

## Annex 1

The text of a letter which will accompany first time certificates issued to assisted persons on or after 01/04/2010, where the assisted person had previously applied for legal aid on the “old” version of the A2 matrimonial application form. This letter will be issued from 01/04/2010 for a limited period of time.

**“Dear Sir / Madam**

**I am writing to advise you that the Legal Services Commission is making a change in the way it applies the “*statutory charge*” in legally aided “ancillary relief” proceedings. “Ancillary relief” refers to financial provision and property matters which are connected to divorce proceedings. The change to the “statutory charge” may affect your decision to continue to bring or defend your case with the help of legal aid.**

*What is the statutory charge?*

**The statutory charge arises where a legally assisted person keeps or gains money or property as a result of legal aid funding, but where some or all of their legal costs are not recovered from their opponent, or from any “contributions” the assisted person had to pay towards their legal aid.**

**In these circumstances the Commission has a legal obligation to pay the assisted person’s legal costs. At the same time, the Commission has a legal obligation to recoup its expenditure, subject to some specified exemptions, from the money or property that the assisted person has kept or gained.**

**This means that an assisted person may be required to repay to the Commission some or all of their legal costs from any money or property which they have kept or gained with the help of legal aid. The procedure for recouping legal aid funds in this way is called the “statutory charge”.**

*What changes are being made to the statutory charge?*

**In any case where a legal aid certificate has been granted by the Commission on or after 01/04/2010, the Commission will apply the statutory charge to any property kept or gained by the assisted person in ancillary relief proceedings unless the assisted person can satisfy the Commission that the property should be treated as exempt from the statutory charge under Regulation 17(9)(a)(ii) of the Legal Aid (General) Regulations (Northern Ireland) 1965.**

**As your legal aid certificate has been granted on or after 01/04/2010 you may be affected by this change. However, it will only affect you if are disputing financial or property matters with your former partner. If that is the case, you may be required to repay some or all of your legal costs out of any money or property that you keep or gain at the end of the case.**

*If you want to find out if the change to the statutory charge will affect your case you should seek advice from your solicitor. If you decide not to proceed with legal aid, please instruct your solicitor to advise us accordingly.*

## Annex 2

The text of the new “statutory statement” which replaces the existing statement on application form “A2”.

**“I understand that if I recover or preserve property (including money) in the case in which I am applying for funding, and if the case is disposed of with me making a claim on the legal aid fund in respect of the costs incurred by my solicitor in bringing (or defending) the proceedings, the statutory charge will apply.**

**That is, the amount of the costs paid out of the legal aid fund in respect of my solicitor’s costs will be recouped as a first charge from any property (including money) I recover or preserve in the proceedings, in accordance with Article 12(5) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.**

**I understand that the statutory charge will apply in these circumstances unless I can satisfy the Legal Services Commission that my case falls within one of the exemptions to the statutory charge set out in Regulation 17(9) of the Legal Aid (General) Regulations (Northern Ireland) 1965.”**

Annex 3

The text of the revised “Subject Matter Of Dispute” question which expands on the existing question on the financial means assessment from “CLA4”.

**1. About your case – What is the dispute about?**

**Are you disputing any financial and / or property matters?**

<b>No</b>	<input type="checkbox"/>	<b>Go on to page 12</b>
<b>Yes</b>	<input type="checkbox"/>	<b>Please give details</b>

**Please consult your solicitor before answering this question.**

**Please list any financial resources, property, assets, or possessions that you or your opponent have made a claim to in your case.**

**Please include the address of any property and specific details of any assets in dispute. We do not take account of property in dispute at the beginning of the case, but if you win or keep it, we may take the costs of your case out of it.**