



Legal Aid  
Agency

## Backdating Powers

Guidance on the backdating provisions for Licensed Work and Special Case Work

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## 1. Background

1. Regulation 35 of the Civil Legal Aid (Procedure) Regulations 2012 (as amended) (the Regulations) allows the Director of Legal Aid Casework (DLAC) to backdate the effect of certain “determinations” (e.g. decisions on whether to grant legal aid or allow an amendment) in relation to Licensed Work and Special Case Work. These provisions came into effect on 20<sup>th</sup> February 2019 and apply to determinations made after that date. This discretionary power applies to both initial applications and amendments, including determinations that occur after a review or appeal. Specific requirements must be met before the DLAC is permitted to backdate a determination. The backdating provisions do not apply to requests for prior authority which are governed by the standard civil contract provisions and for which there is separate guidance.
2. The purpose of this document is to provide guidance on this backdating power. It highlights the key considerations that may be taken into account when reaching a decision on whether or not it is appropriate to backdate a determination.

## 2. Backdating Requirements

### *Scope*

3. The backdating power is in principle available in all Licensed Work and Special Case Work matters to backdate the effect of:
  - An initial determination that an individual qualifies for civil legal aid; or
  - Any decision made about a limitation or condition, including via an application for an amendment.
4. The power to backdate is discretionary and is dependent on the requirements set out below being met. Where the DLAC decides to exercise this power, the effect is that the provider is covered in respect of that determination for all work reasonably carried out after the date to which the determination is backdated, subject to the usual cost assessment principles. This includes, in particular, work carried out on appealing a decision against the refusal of an application. In addition, the period that the client will have cost protection will also take effect from the earlier date.

### *Requirements/considerations*

5. In order for DLAC to be able to backdate a determination the following two requirements must be met:
  - (a) the application for the services was made as soon as reasonably practicable; and
  - (b) the Director is satisfied that—
    - (i) it was in the interests of justice for the services to be carried out prior to the date of the determination; and
    - (ii) the services could not have been carried out as Controlled Work; and

In addition, in cases where a determination is being reconsidered on review or following an appeal, before DLAC exercises their discretion to backdate a determination, they must take into consideration whether:

*“having regard to all the circumstances, including the information that was available to the provider when the application for the services or the application for the review was made, the DLAC is satisfied that it is appropriate for the determination to have effect from the earlier date.”*

6. These requirements/considerations must be met before any determination is backdated. The Lord Chancellor has not issued any guidance or directions to DLAC on how this function is to be exercised.

#### Requirement 1: The application was made as soon as reasonably practicable

7. The first requirement is an assessment as to whether the application for services was submitted as soon as reasonably practicable. The individual circumstances of the situation will be measured against this requirement, and the sort of questions that may be considered when deciding whether to backdate the effect of a determination are:
  - Was there a clear and significant delay between the need for services arising and an application for those services being made?
  - If so, was there nonetheless a legitimate reason for that delay? (e.g. missing information)
  - Has the ongoing urgency of the case prevented the application from being submitted at the relevant time?

#### Requirement 2: The “Interests of Justice” and “Controlled Work” tests

8. The second requirement relates to the nature of the work that was carried out before the determination was made. It has two limbs:
  - Was it in the interests of justice for the services to be carried out prior to the date of the determination?
  - Could the services have been carried out as Controlled Work?

#### Interests of Justice

9. This test mirrors the merits criteria for emergency representation and in making a decision regard may be had to the guidance on the “interest of justice” test set out at paragraph 7.28 of the Lord Chancellor’s Guidance on Civil Legal Aid which can be found here:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/774441/lord-chancellors-guidance-under-section\\_4-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774441/lord-chancellors-guidance-under-section_4-laspo.pdf). This sets the following considerations:
  - Whether the services carried out needed to be provided before there was time for DLAC to make a determination in order for those services to have been effective; and
  - The seriousness of the consequences if those services had not been provided before the determination had been made; for example, whether:
    - there would have been a risk to the life, liberty or physical safety of the applicant or his or her family or the roof over their heads; or
    - the delay in waiting for a determination would have caused a significant risk of miscarriage of justice, or unreasonable hardship to the applicant, or irretrievable problems in handling the case.

### Controlled Work

10. This requirement is about whether the work that was carried out urgently could have been undertaken as Controlled Work. For example, if there is a request for a determination be backdated to cover pre-action correspondence with an opponent there will be a consideration as to whether this work could legitimately have been carried out as Controlled Work instead of Licensed Work. Similarly, where the request is made to exercise this power following review or appeal, consideration may be given as to whether the only work that has been carried out was to lodge that review or appeal, which again could have been done under Controlled Work if such funding was already in place.

### *Further Consideration for Reviews/Appeals: Appropriate in all the circumstances*

11. Where a determination is being made following a review or appeal, there is a third factor that the DLAC must take into account before deciding whether to backdate the effect of a determination. DLAC must consider whether it is appropriate to backdate having regard to all the circumstances of the case. This limb of the Regulation highlights the importance of the information submitted on the initial application or at the review stage of any appeal to this decision and consideration may be given as to whether the DLAC's decision on the initial application would have been to grant legal aid had the provider originally submitted information they later relied on at the review or appeal stage. However, in these circumstances there are other factors that may be considered when making this decision:
  - Was there additional information submitted on review or appeal available to the provider? Otherwise, was it information that it would have been reasonable for them to have obtained having regard to urgency of case and the need to make a legal aid application?
  - Did the submissions put forward on review or appeal include new facts or arguments? Or was this just a reformulation of information that was already available to the original decision-maker?
  - Was the reviewer/adjudicator's decision to overturn the original decision largely on the basis of the additional information submitted? Or simply because they reached a different conclusion to the original decision-maker on broadly the same facts?

## **3. The Process - Initial Applications**

12. For most cases, providers have delegated functions to determine applications for emergency representation. It is expected that most providers will continue to rely on these powers to undertake urgent work. Therefore, the backdating provisions are only likely to be relevant to area of work where providers do not have delegated functions (e.g. judicial review).
13. Where a provider wishes to have the effect of a determination on an initial application backdated they should set out by completing the statement of case fields on CCMS or by including it in a separate document that is uploaded to the portal:
  - A brief justification setting out the reasons why it is appropriate for the determination to be backdated with reference to the requirements in the Regulations.
  - The date they want the certificate backdated to.

14. The Regulations state that the legal aid certificate must specify the date from which the determination has effect if that date is different from the date on which the determination is made.

*What date should the certificate be backdated to?*

15. In principle, certificates should be backdated to the point at which urgent work was required that could not have been carried out as Controlled Work. This is the date at which the criteria for emergency representation would have first been satisfied.

*Ex Post Facto Requests*

16. It is possible that the need to carry out urgent work will arise after an application for Licensed Work has been submitted but before there has been a determination. In this situation, the provider should submit a request to backdate by case enquiry unless an application for emergency representation is considered appropriate instead.

#### **4. The Process - Amendments**

17. When it comes to applications for an amendment there are two circumstances where the effect of an amended limitation or condition may be backdated:
  - The provider proactively requests an amendment be backdated, or;
  - It is clear from the circumstances of the case that it will be necessary to backdate the relevant limitation or condition.
18. The regulations state that the legal aid certificate must specify the date from which the new limitation or condition has effect if that date is different from the date on which the determination is made.

*Proactive requests*

19. Requests can be made that a decision on an amendment be backdated because urgent work has already started or because the application may not be determined before the urgent work needs to be carried out. The request for backdating should include a brief justification setting out the reasons why it is appropriate for the effect of the determination to be backdated with reference to the requirements in the Regulations and the date it is requested that the determination be backdated to.

*Backdating clearly necessary*

20. In other circumstances, there may not have been an explicit request that the effect of a decision be backdated, however, it may be clear from the facts of the case that backdating the amendment is necessary, in particular where there has been a significant delay in processing the request. For example, there may have been a request to an amendment to lodge an appeal and the deadline for that appeal may have already passed.

*Ex Post Facto Requests*

21. It is possible that the need to carry out urgent work will arise after an application for an amendment has been submitted but before a decision is made. In this situation a request for backdating should be submitted by case enquiry.

## 6. The Process - Reviews and Appeals

22. In terms of determinations/decisions made following a review or appeal the assumption will be that the effect of the determination/decision to be backdated is required even if that has not been specifically requested.

### *Additional Consideration*

- 23 For decisions made following a review or appeal there is an additional consideration that the DLAC must take into account before exercising their discretion to backdate:

*“having regard to all the circumstances, including the information that was available to the provider when the application for the services or the application for the review was made, the Director is satisfied that it is appropriate for the determination to have effect from the earlier date.”*

24. A refusal to backdate on these grounds is likely to be because:

- New information was submitted on review or appeal that was instrumental in the original decision being overturned; or
- There is another compelling reason not to backdate (e.g. the way that the provider approached the review or appeal generated unnecessary work it would not be equitable to remunerate).

## 7. Challenging Backdating Decisions

25. There is a right to apply for an internal review of a decision not to backdate. This should be submitted using the legal appeal task on CCMS and providing full reasons why a different decision ought to have been reached on the matter. If dis-satisfied with the outcome of the internal review, you will be notified of any right of appeal to an Adjudicator

**ANNEX: New Regulation 35 of the Civil Legal Aid (Procedure) Regulations 2012  
(as amended)**

Determinations: general

35.—(1) A determination that an individual qualifies for Licensed Work must specify—

(a) the maximum costs which may be incurred in providing the services to which the determination relates; and

(b) any other limitations and conditions to which the determination is subject.

(2) Where a limitation is exceeded or a condition is breached, the Director may—

(a) withdraw the determination; or

(b) amend the relevant limitation or condition.

(3) If the requirements in paragraph (4) are met, the Director may specify that a determination has effect from a date earlier than the date of the determination.

(4) The requirements are that—

(a) the application for the services was made as soon as reasonably practicable;

(b) the Director is satisfied that—

(i) it was in the interests of justice for the services to be carried out prior to the date of the determination; and

(ii) the services could not have been carried out as Controlled Work; and

(c) in the case of reconsidering a determination on review or following an appeal, having regard to all the circumstances, including the information that was available to the provider when the application for the services or the application for the review was made, the Director is satisfied that it is appropriate for the determination to have effect from the earlier date.

(5) In paragraphs (3) and (4), “determination” includes a limitation or condition.