



Legal Aid
Agency

Director of Legal Aid Casework Annual Report 2015-16



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Foreword

I am pleased to present the Annual Report of the Director of Legal Aid Casework for 2015-16.

The Director of Legal Aid Casework is a role created by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act) that is focused on decision-making on individual legal aid applications. The Director has sole responsibility for individual cases, ensuring that decision-making in this area is independent from Government.

This report provides a summary of the work carried out on behalf of the Director, decisions made and the processes followed.

I have undertaken this role since implementation of the LASPO Act on 1 April 2013 to 31 March 2016. On 1 April 2016 Shaun McNally was appointed as both Director of Legal Aid Casework and Chief Executive of the Legal Aid Agency.

This year, there were three Court of Appeal cases¹ which have provided greater clarity in relation to civil legal aid. These are set out in greater detail in this report. Generally, it would appear that the legal aid scheme has begun to settle down

following the significant changes introduced by the LASPO Act which I hope will provide greater stability for the future. Nevertheless, I am pleased with the ability of the LAA to adapt to the legislative and regulatory changes outlined in the following pages and commit to continuous improvement in the decision-making process for the benefit of the justice system as a whole.



Matthew Coats
Director of Legal Aid Casework
(1 April 2013 to 31 March 2016)
30 June 2016

¹ *R (on the application of Rights of Women) v (1) Lord Chancellor (2) Secretary of State for Justice* [2016] EWCA Civ 91; *Director of Legal Aid Casework v R (on the application of Sunita Sisangia)* [2016] EWCA Civ 24; and (1) *Director of Legal Aid Casework* (2) *Lord Chancellor v IS (a protected party by his litigation friend The Official Solicitor)* [2016] EWCA Civ 464. The last case was heard before 31 March 2016 and judgment was handed down on 20 May 2016.

Introduction

1. The Director of Legal Aid Casework (the Director) is appointed by the Lord Chancellor under section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act). The role of the Director is to make determinations on the provision of legal aid in individual cases.
2. The Director acts independently from the Lord Chancellor and clear internal processes and structures are in place in the Legal Aid Agency (LAA) to ensure that this independence is maintained. These are set out in more detail in this report.
3. In practice, many of the functions exercised by the Director are delegated to the LAA. The LAA came into existence on 1 April 2013 and is an executive agency of the Ministry of Justice (MoJ). This followed the abolition of the Legal Services Commission, a Non-Departmental Public Body sponsored by the MoJ, which had previously made determinations on the provision of legal aid in individual cases.
4. The Director is supported by the LAA Board in ensuring that robust practices are in place to maintain the independence of the decision-making process for granting legal aid.
5. The roles of the Director and the Chief Executive of the LAA may be held by the same person. However, different accountability and reporting arrangements exist for the two roles. Until 31 March 2016 both roles were held by Matthew Coats. From 1 April 2016 both roles have been held by Shaun McNally who was until then the Director of Case Management.
6. This report explains how the Director has carried out the functions specifically entrusted to him under the LASPO Act over the last financial year. The LAA is separately publishing its Annual Report and Accounts which covers the wider remit of the organisation.

Interaction with the Lord Chancellor and legislative/regulatory changes

7. Under the LASPO Act, the Lord Chancellor is able to issue directions and guidance to the Director about how to carry out his functions, but he must not issue such guidance in relation to individual legal aid applications. The Director must comply with any directions given and have regard to any guidance issued as well as acting in accordance with the LASPO Act and associated regulatory framework.
8. In 2015-16 the Lord Chancellor published the following new guidance documents:
 - 'Guide to Determining Financial Eligibility for Certificated Work' and the 'Guide to Determining Financial Eligibility for Controlled Work and Family Mediation'². These guidance documents set out the key elements that must be considered by the Director in determining an individual's financial eligibility for civil legal aid.
 - 'Post-judgment Notice to Director of Legal Aid Casework (DLAC): *IS v DLAC and The Lord Chancellor*: ECF Guidance (non-inquests)³. This added to the existing 'Lord Chancellor's Guidance on Exceptional Funding (Non-Inquests)' to reflect new relevant case law which is referred to later on in this report.
 - 'Note to the Director of Legal Aid Casework and Caseworkers' that caseworkers take into account the repeal of the Coroners Rules 1984 including rule 43 of those rules on 25 July 2013. Rule 43 concerned recommendations by Coroners made after an inquest in order to prevent further deaths. The rules were replaced by the Coroners (Investigations) Regulations 2013, in which regulation 28 replaced rule 43. The note required the Director and caseworkers to take this change into account when considering an application for inquest funding under section 10(4) of the LASPO Act.
9. The Lord Chancellor has also updated his guidance since January 2015 (under section 4 of the LASPO Act):
 - To take into account amendments to the Civil Legal Aid (Merits Criteria) Regulations in July 2015 which amended the categories of prospects of success (see below).
 - The Lord Chancellor also updated his Exceptional Funding Guidance (Inquests) to reflect new relevant case law in relation to certain cases which would automatically trigger the article 2 procedural duty for representation at an inquest.
 - The Lord Chancellor has in addition updated the Exceptional Funding Guidance (Non-Inquests) to take into account prior updates to case law.
10. The regulatory and legislative framework has also undergone the following changes:
 - Schedule 1 to the LASPO Act was amended by the Modern Slavery Act 2015 and the Serious Crime Act 2015. This widened the scope of funding to include Female Genital Mutilation Protection Orders and cases arising out of slavery, servitude or forced or compulsory labour.

2 These documents can be found online at <https://www.gov.uk/guidance/civil-legal-aid-means-testing>

3 This document can be found online at <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>

- As a consequence of the above, relevant changes were necessary to the Civil Legal Aid (Merits Criteria) Regulations 2013. These changes were implemented by the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2015.
 - The Civil and Criminal Legal Aid (Amendment) Regulations 2015 which also came into force in July 2015 made a number of amendments to the Civil Legal Aid (Procedure) Regulations 2012, again to take into account the amendments to the LASPO Act above. This also extended and clarified the evidential requirements for victims of human trafficking, domestic violence and child abuse.
 - The Civil and Criminal Legal Aid (Amendment) Regulations 2015 also amended a number of other legal aid regulations to take account of the Female Genital Mutilation Act 2003 and the Modern Slavery Act 2015.
 - The Criminal Legal Aid (Contribution Orders) (Amendment) Regulations 2015 came into force on 1 June 2015 and made amendments to the calculation of capital for the purposes of contribution orders.
 - The Civil and Criminal Legal Aid (Amendment) (No. 2) Regulations 2015 introduced various amendments to a number of legal aid regulations and came into force in October and November 2015. These were minor amendments following the introduction of the new 2015 Standard Civil Contract and in relation to provision of advice, assistance and representation in criminal legal aid. Amendments were also made in consequence of the Criminal Procedure Rules 2015 and because of the repeal of proceedings for the committal or transfer of cases to the Crown Court for trial by part 4 of schedule 37 of the Criminal Justice Act 2003.
 - The Civil Legal Aid (Merits Criteria and Information about Financial Resources) (Amendment) Regulations 2015 amended the definition of private law children cases to include orders for post-adoption contact under section 51A of the Adoption and Children Act 2002 as well as amending requirements regarding the assessment of financial resources.
 - The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 which came into force on 27 July 2015 amended the prospects of success criterion following the case of *IS (by the Official Solicitor as Litigation Friend) v (1) Director of Legal Aid Casework (2) Lord Chancellor [2015] EWHC 1965* (hereinafter 'IS'), which is referred to later in this report at paragraph 49.
11. The Lord Chancellor's amendment to the merits criteria [the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015] referred to above applies to both Exceptional Case Funding (ECF) and in-scope applications in all categories of law.

12. The regulations introduced a new category of prospects of success, that of 'very poor' for prospects of success less than 20%. 'Poor' prospects now mean prospects of success that are more than 20% but less than 50%. The general merits criteria were amended as were those categories with special merits criteria in respect of which a 'prospects of success' test, previously requiring at least moderate prospects, was required.
13. Under these amended criteria, cases determined as having 'very poor' prospects will always be refused without further consideration. Where the prospects are assessed as 'borderline' or as 'poor' then the Director must determine:
- (a) whether it is necessary for the Director to determine that the relevant 'prospects of success' criterion is nevertheless met in order to prevent a breach of the applicant's Convention rights or any rights of the applicant to the provision of legal services that are enforceable EU rights; or
 - (b) whether it is appropriate for the Director to determine that the 'prospects of success' criterion is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.
- Merits criteria regulations and procedure regulations' authorisations have also been amended so that providers no longer have delegated functions where prospects of success are assessed by the provider as 'borderline' or 'poor'. All such determinations must be made by the Director. This includes determinations of Controlled Legal Representation.
14. Changes also took place in 2015-16 in relation to private law family evidence requirements. Funding for most private law family cases is still only available where the matter involves domestic violence or child abuse, and specific evidence needs to be provided before funding can be granted.
15. In April 2014, following consultation with stakeholders, revised evidence requirements were introduced to make it easier to acquire the necessary evidence. As referred to above, further amendments to the evidence requirements were made in July 2015 in relation to applications made for Legal Representation for the final hearing where the client already has a certificate for Family Help (Higher) in the same matter. This change means that the client will not be required to provide further evidence, regardless of whether or not the original piece of evidence is still valid. This amendment does not apply to any application for new proceedings to be added to the certificate.
16. On 18 February 2016 the Court of Appeal handed down its judgment in the case of *R (on the application of Rights of Women) v (1) Lord Chancellor (2) Secretary of State for Justice [2016] EWCA Civ 91*, which was an appeal against the decision of the High Court that the evidential requirements were lawful. The appeal was successful in part. The Court of Appeal held that the LASPO Act had intended that legal aid in private law family proceedings should be available

Casework issues

- for the great majority of victims of domestic violence. The requirement that evidence of domestic violence must be dated within a period of 24 months before the application for legal aid excluded too many such victims. The Court made an order deleting all references to the 24 month time limit within the legislation. The order also required the Lord Chancellor to amend the legislation to allow applicants to rely on evidence to demonstrate domestic violence in the form of financial abuse. Legislation was laid on 21 April 2016 to reflect this order and came into force on 25 April 2016.
17. To ensure that the legal aid legislation and guidance laid down by the Lord Chancellor are applied in a consistent manner, advice and training has continued to be provided to all LAA caseworkers, tailored according to the particular role of each casework team.
 18. Although the Lord Chancellor has no role in relation to individual funding decisions, an annual meeting is arranged to cover the contents of this report, themes that have emerged relating to the Director's role, the legal aid scheme and lessons learned. This year the meeting will take place after the laying of the report.
 19. The changes to the civil legal aid scheme that were introduced by the LASPO Act in 2013 were significant. As was the case last year and the year before, there have continued to be further significant challenges to the legal aid funding scheme.
 20. Following on from last year, the ECF scheme, dealing with cases that would ordinarily be out of scope of legal aid but meet the 'human rights' criteria set out in the LASPO Act, was a key focus of legal challenge in IS (above). The Court of Appeal overturned the decision of Mr Justice Collins, reported in (1) *Director of Legal Aid Casework (2) Lord Chancellor v IS (a protected party by his litigation friend The Official Solicitor)* [2016] EWCA Civ 464. The Court of Appeal also decided in favour of the Director in *Director of Legal Aid Casework v R (on the application of Sunita Sisangia)* [2016] EWCA Civ 24 (hereinafter 'Sisangia'). Both cases are covered in more detail in the 'Litigation' section below.
 21. In last year's report reference was made to the transfer of criminal work from Her Majesty's Courts and Tribunals Service (HMCTS – another executive agency of the MoJ) to the LAA. This is now complete. Although there have been small fluctuations, there has been no significant change in the percentage of applications that have been granted or, where appropriate, appealed, since the transfer of work.

The decision-making structure

22. To ensure decisions are made independently and consistently, the LAA has a robust organisational structure with a number of review mechanisms. Legal advice for the Director is provided by the Central Legal Team with lawyers co-located from the Government Legal Department, who act solely for the LAA.
23. Decisions on individual cases are made by caseworkers in the LAA's Case Management directorate with escalation as appropriate. High profile cases (for example when funding has been sought for the Court of Appeal) require approval by a Deputy Director having first obtained legal advice from the Central Legal Team, in accordance with the Standard Operating Procedure for Reporting and Referral of High Profile Cases in Civil Case Management.
24. The Case Management directorate is divided into three groups, each managed by a Deputy Director:
- Civil Case Management
 - Crime Case Management
 - High Cost Civil and Exceptional Case Funding Determinations.
25. Within Civil Case Management there are separate merits, means and billing teams, as well as two dedicated customer services teams. These teams have embraced digital working and adjusted their processes so that they are now processing digital applications faster.
26. Within Crime Case Management, now that all the work has been transferred from HMCTS, the Criminal Applications Team expect to deal with approximately 500,000 applications a year, aiming to turn around 90% of these applications within two days.
27. A new area now dealt with by Crime Case Management is the grant of criminal legal aid for civil contempt proceedings for defendants who have allegedly breached the terms of a civil order and are at risk of custody because of that breach. Firms instructed in the civil matter but without a crime contract are awarded Individual Case Contracts to ensure continuity of representation for linked civil and criminal matters.
28. Both High Cost Crime and the National Taxing Team are now part of wider Crime Case Management and it is planned that they will integrate and merge over the coming months, becoming a single consolidated team towards the end of 2016. The combined team will deal with criminal Very High Cost Cases, special preparation, the assessment of Proceeds of Crime Act claims and claims out of Central Funds.
29. The High Cost Civil group deals with the most expensive and complex civil cases that are funded by the LAA. This team is staffed with a higher proportion of lawyers to support effective merits decision-making. A greater share of cases managed by the High Cost Cases group are high profile and so are subject to the escalation process mentioned above.
30. The ECF group was set up by the LAA to process applications for ECF made under section 10 of the LASPO Act. The ECF scheme covers funding for legal services that are not ordinarily within the scope of the legal aid scheme, but where the failure

Overview of cases funded

to provide legal aid would be a breach, or where there is a substantial risk of breach of:

- (a) the individual's Convention rights (within the meaning of the Human Rights Act 1998); or
- (b) any rights of the individual to the provision of legal services that are enforceable EU rights.

31. Following the judgment in IS and the consequential regulatory changes referred to above, the ECF team also considered all cases where legal aid had been requested in circumstances where prospects of success were 'borderline' or 'poor' and such a finding was determinative to the decision. Robust quality assurance and quality control processes continue to be in place for cases considered by this team which includes advice from the Central Legal Team as appropriate.

32. The LAA deals with a significant number of applications for legal aid across different categories of law. The LAA publishes official statistics on numbers of applications within the Legal Aid Statistics bulletin. This is published every quarter, and statistics covering the period to the end of March 2016 were published online on 30 June 2016⁴. In particular, statistics on the number of grants made in relation to the domestic violence evidence requirements referred to earlier are included within the Legal Aid Statistics bulletin.

Exceptional Case Funding

33. The official statistics for ECF applications and determinations are also included in the Legal Aid Statistics bulletin. The volume of applications appear at the time of drafting not to have altered dramatically. Most of the applications continue to be made by solicitors but a small percentage are made directly by applicants.
34. The ECF team consider cases on an individual basis, in light of the facts, the statutory requirements for funding and having regard to the guidance on ECF and case law. Whilst the number of applications received remained relatively constant post-IS, the number of cases granted has increased.
35. The majority of ECF applications continue to concern immigration or family cases and funding for inquests.

⁴ See <https://www.gov.uk/government/collections/legal-aid-statistics>

Appeals

36. Where an individual disagrees with the Director's determination that they do not qualify for Legal Representation or Family Help (Higher), they can apply to an Independent Funding Adjudicator (IFA) for reconsideration of that decision. Where the application is for ECF or if the determination on behalf of the Director is that the case is not in scope for funding, there is only a right of internal review. Statistics on numbers and outcomes of appeals are included in each annual edition of the Legal Aid Statistics bulletin.
37. The decision of the IFA on certain issues is binding on the Director. These are: any assessment of the prospects of success of a case, whether a matter has overwhelming importance to the client, the cost-benefit ratio of the proceedings and discharge or revocation on the basis of the client's behaviour. Other recommendations will be referred back to the Director for reconsideration.
40. There is also a Special Controls Review Panel which is formed of three members of the FCARP who consider appeals relating to certain high cost cases and other more complex cases.
41. The LAA is currently in the process of recruiting a new panel for 2016-19, working with the Public Appointments Panel to put together a proportionate, open and inclusive selection process. The LAA aims to recruit a panel of 100 members to reflect the general reduction in applications for funding.

The Panel

38. IFAs are members of a Funding and Costs Appeals Review Panel (FCARP). Panel members are not employees of the LAA and act independently.
39. The FCARP comprises 141 solicitors and barristers selected according to their legal knowledge and expertise to decide appeals. The efficiency and quality of their decision-making is monitored regularly and the LAA meets with the Chair and Vice-Chairs quarterly to review workload, timeliness and quality of decision-making by the panel members and to gather learning points for LAA staff to act upon.

Accountability

42. There has been no change to the manner in which the Director's functions continue to be open to public scrutiny. The mechanisms in place allowing the LAA's work to be scrutinised and interested parties to hold the Director to account are explained below.

Parliamentary questions and freedom of information requests

43. Members of Parliament and Peers can table parliamentary questions asking about the work carried out by the Director in respect of cases or individuals. Similarly, the public are able to submit requests for information held by the LAA under the Freedom of Information Act 2000.
44. In 2015-16 the LAA received 7 requests for information under the Freedom of Information Act and no parliamentary questions relating to the Director of Legal Aid Casework specifically.
45. Information about an individual legal aid client is likely to be personal data and can only be released where the case meets the criteria set out within the Data Protection Act 1998.

Complaints

46. The LAA thoroughly investigates every complaint it receives, using a two-tier complaints procedure. The initial complaint gives the LAA the chance to review the way the matter was handled at a local level and put the situation right if possible. If a complainant is not content with the initial response, they can escalate their complaint to the LAA's Central Customer Services

team and then finally to the Parliamentary and Health Service Ombudsman via their local MP.

47. The LAA does not separately record complaints which relate specifically to the remit of the Director. However, a significant proportion of all complaints the LAA receives relate to individual cases and casework decisions.

Litigation

48. Another avenue of redress that can be used to hold the Director to account is litigation in the courts. In particular, the Director's decision-making can be challenged by judicial review. During 2015-16 two cases were of particular importance, both ultimately decided by the Court of Appeal in favour of the Director.
49. Last year's report referred to the case of *R (on the application of Teresa Gudaviciene and Others) (Claimants/ Respondents) v (1) Director of Legal Aid Casework (2) Lord Chancellor (Defendants/ Appellants) and British Red Cross Society (Intervener) [2014] EWCA Civ 1622*, which challenged the Lord Chancellor's Exceptional Case Funding Guidance. IS was one of the determinations challenged in that decision and was funded by the Director following the Court of Appeal's judgment. However, that case also sought to challenge the operation of the ECF scheme as a whole, including the merits regulations and guidance set by the Lord Chancellor. On 15 July 2015 the Honourable Mr Justice Collins decided in

favour of the claimant on all three grounds of challenge, holding:

- (i) the ECF scheme, as it was operated, gave rise to an unacceptable risk that an individual would not be able to obtain legal aid where failure to provide it would be a breach of that individual's rights;
- (ii) the Civil Legal Aid (Merits Criteria) Regulations 2013 were unlawful; and
- (iii) the Lord Chancellor's amended Exceptional Case Funding Guidance (Non-Inquests) was unlawful – *[2015] EWHC 1965*.

That decision was appealed successfully with the judgment handed down on 20 May 2016 – *[2016] EWCA Civ 464*. Pending the outcome of the appeal a number of changes were made and processes implemented to give effect to the High Court judgment. Some of those changes have been referred to above; others are as follows:

- Legal aid providers can now be remunerated as to the costs of making an application.
- The legal aid application form was simplified.
- Applications which LAA staff agree are urgent are actioned within 5 days.
- 'Preliminary views' on applications are no longer given, following an amendment to the application form for non-inquest cases.

- The Provider Pack was amended to take account of the changes which were in turn reflected in the Costs Assessment Guidance.
- Prior to the appeal decision the ECF team considered all in-scope applications where the prospects of success were 'borderline' or 'poor'. In light of the successful appeal, the LAA has confirmed that this will no longer be necessary.

Any further changes will be detailed in the legal aid section on www.gov.uk and in next year's Director of Legal Aid Casework report.

50. The second case, also referred to in last year's report is *Sisangia*. This case concerned the interpretation of paragraph 21 of part 1 of schedule 1 to the LASPO Act which brings into scope cases involving 'abuse by a public authority of its position or powers'. The High Court had ruled that the requirements of paragraph 21(4) constituted a comprehensive definition of abuse of power or position, and accordingly that any deliberate (or dishonest) act by a public authority that caused reasonably foreseeable harm to another would fall within this definition.
51. The Court of Appeal accepted the Director's submission that abuse of position or power is a recognised judicial concept which, like many other public law concepts, is both flexible and context-specific. The effect of the judgment is that an allegedly unlawful act or omission of a public authority has to be more than deliberate for an application to fall in scope under paragraph 21 part 1 schedule 1 to the LASPO Act. The Director

must consider the overriding question of whether the act or omission amounted to an abuse of position or power. However, the Court of Appeal acknowledged that applications may be considered on the alternative basis of an alleged significant breach of human rights, under paragraph 22 part 1 schedule 1 to the LASPO Act. Further, any damages claim properly brought within a judicial review would fall in scope under paragraph 19 of that schedule.

quarters of 2015-16, to monitor the extent to which the LAA continues to cater for the diverse population of England and Wales. As with last year, there have been no significant changes since the implementation of the LASPO Act. The LAA published statistics relating to the diversity of legal aid clients over the period 2015-16 as part of the Legal Aid Statistics bulletin published on 30 June 2016, and the Director will continue to review this information over the coming year.

Equality and diversity

52. The LAA is subject to the public sector equality duty under section 149 (1) of the Equality Act 2010.
53. During 2015-16 the LAA continued to improve the knowledge and awareness of LAA staff about equality and diversity issues. All staff are required to complete Civil Service Learning courses on Equality and Diversity Essentials and Unconscious Bias. All line managers are also expected to complete an additional course on Disability Awareness. In addition, Diversity Awareness workshops were held in 13 of our 16 sites, which included a section on the requirements of the Public Sector Equality Duty.
54. The LAA requests that applicants for legal aid provide us with some personal equality information. This information enables the LAA to better understand the needs of potential legal aid applicants and compile statistics on their diversity.
55. The Director has reviewed the equal opportunity information that recipients of legal aid provided during the first three

Conclusion

56. As stated in the foreword, it seems that the scheme is now beginning to stabilise and the Director is pleased to see that the Court of Appeal have agreed with his position in two important decisions. The commitment to customer-focused and good quality decision-making remains and is shared by the new Director.
57. A copy of this report has been sent to the Lord Chancellor in accordance with section 7(3) of the LASPO Act. The Lord Chancellor will lay a copy of the report before Parliament.

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