



Legal Aid
Agency

Director of Legal Aid Casework Annual Report 2016-17



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Foreword

I am pleased to present the Annual Report of the Director of Legal Aid Casework for 2016-17.

My role as Director of Legal Aid Casework was created under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It involves 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.

I have held this role since 1 April 2016, which is when I took over the roles of both Director of Legal Aid Casework and Chief Executive of the Legal Aid Agency.

This report summarises the work carried out on behalf of the Director and includes decisions made and the processes followed.

This year there were a number of regulatory amendments affecting civil legal aid funding which are set out in the report. Examples of such changes include evidence requirements in domestic violence or child abuse cases, backdating of legal aid in family mediation cases and the 'prospects of success' threshold for funding.

I believe the Legal Aid Agency continues to demonstrate great flexibility in the way it responds to legislative and regulatory changes while safeguarding the role of the Director of Legal Aid Casework.

Shaun McNally
Director of Legal Aid Casework
11 July 2017

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. From 1 April 2016 both roles have been held by Shaun McNally.
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.

The Role of the Director

7. The Director is responsible for making determinations on individual applications for civil and criminal legal aid as set out in Part 1 of the LASPO Act.¹
8. 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 the Lord Chancellor 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.
9. The Lord Chancellor has not published any new guidance documents in 2016-17.
10. The Lord Chancellor updated her guidance (under section 4 of the LASPO Act):
 - To take into account amendments made by the Civil Legal Aid (Merits Criteria) Regulations in July 2016. These regulations amended the categories of prospects of success and are referred to below.
11. The regulatory and legislative framework has also undergone the following changes in 2016-17:
 - The Civil Legal Aid (Procedure) (Amendment) Regulations 2016 amended regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012. Funding for most private law family cases continues to be available where the matter involves domestic violence or child abuse, and specific evidence needs to be provided before funding can be granted. This amendment made it easier to acquire the necessary evidence by extending the time period that such evidence remained valid from 24 to 60 months and by introducing a new form of qualifying evidence where the domestic abuse relates to financial matters. This amendment was made following the decision of the Court of Appeal in *R (on the application of Rights of Women) v (1) Lord Chancellor (2) Secretary of State for Justice [2016] EWCA Civ 91* and following consultation with stakeholders. The definition of 'protective injunction' was also extended to include female genital mutilation protection orders and violent offender orders.
 - The Civil Legal Aid (Procedure) (Amendment) (No.2) Regulations 2016 added a new regulation into the Civil Legal Aid (Procedure) Regulations 2012 allowing the backdating of legal aid for legal services relating to family mediation in certain circumstances.

¹ <http://www.legislation.gov.uk/ukpga/2012/10/part/1/enacted>

- The Civil and Criminal Legal Aid (Financial Eligibility and Contributions) (Amendment) Regulations 2016 amended regulations made under the Access to Justice Act 1999 and the LASPO Act which deal with financial eligibility and contributions towards legal aid by an individual, adding to the list of payments to be disregarded for the purposes of income calculation. These amendments also made changes in readiness for the introduction of Universal Credit and Personal Independence Payments to Northern Ireland, further to the Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 3) Order 2016; thus ensuring recipients of these benefits in Northern Ireland will be treated the same as their counterparts in England and Wales.²
- The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 followed the Court of Appeal decision 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 (hereafter referred to as "IS"). This case was heard on 21 and 22 March 2016 and judgment was handed down on 20 May 2016. These regulations amended the Civil Legal Aid (Merits Criteria) Regulations 2013 to remove the category of "very poor" prospects of success and amended the definition of "poor" prospects of success to mean a case with less than a 45% chance of obtaining a successful outcome.
- It also created a "marginal" category of prospects of success, meaning a case with a 45% or more chance, but less than 50% chance. Notwithstanding the decision in IS that it was proportionate for a legal aid scheme to set a prospects of success threshold of 50% the amendment went slightly further. It provided that the criteria will be met (a) if the Director is satisfied that the prospects of success are "moderate", "good" or "very good" or (b) where the prospects are "borderline" or "marginal" and the case is of "significant wider public interest" or of "overwhelming importance to the individual". Certain types of case will also meet the prospects of success criteria with "marginal" or "borderline" prospects if the substance of the case concerns a breach of the applicant's human rights. Other types of case with such prospects will automatically meet the "prospects of success" criteria. However, where applicable, cases assessed as having "poor" prospects of success cannot be funded. These changes apply to both Exceptional Cases Funding ("ECF") and in-scope civil applications.

² Universal Credit has been a passporting benefit in England and Wales since 2013, Personal Independence Payments are disregarded payments.

- The Civil Legal Aid (Remuneration and Statutory Charge) (Amendment) Regulations 2016 amend both the Civil Legal Aid (Remuneration) (Regulations) 2013 and the Civil Legal Aid (Statutory Charge) Regulations 2013. The amendments were a consequence of the commencement of the 2015 Standard Civil Contract (Welfare Benefits) on 1 November 2016. That Contract governs certain arrangements made under the LASPO Act regarding the provision of face to face work in the Welfare Benefits Category. These amendments make reference to the new Contract as necessary to ensure that existing arrangements for the remuneration of those services and the exclusion of certain civil costs from the statutory charge continue to apply.³
 - The Civil Legal Aid (Procedure) (Amendment) Regulations 2017 amended the Civil Legal Aid (Procedure) Regulations 2012 to allow the Director to waive the requirement for services under legal help to be provided by a contracted provider in relation to an inquest, in certain circumstances. Where the waiver is applied, it may be conditional on the proposed provider entering into an individual case contract with the Lord Chancellor, and such determinations may also be backdated.
12. Although the Lord Chancellor has no role in relation to individual funding decisions, an annual meeting is also arranged to discuss the carrying out of the functions of the office. This is to include the discussion of any themes that have emerged relating to the Director's role, the legal aid scheme and lessons learned. This year the meeting took place on 27 April 2017. The topics referred to in this report were discussed.

³ The statutory charge is a reference to the charge on any property recovered or preserved as a result of the provision of legal aid in respect of any shortfall to the legal aid fund as per section 25 of the LASPO Act.

Decision-Making Process and Structure

13. Decisions on cases and the functions of the Director are delegated to the LAA. Specifically, these determinations are made by the Case Management Directorate. This Directorate is divided into three groups, each managed by a Deputy Director:
 - Civil Case Management
 - Crime Case Management
 - Exceptional and Complex Cases Team ("ECCT"). This is a new group combining the former High Cost Civil Team, Exceptional Case Funding Team and National Immigration and Asylum Team which became operational from 1 November 2016.
14. Civil Case Management includes legal merits, family high cost cases, means, civil finance, records management and central business support teams as well as a dedicated customer services team. The mandatory use of the Client and Cost Management System ("CCMS") has ensured all teams work digitally and 85% of applications and bills are now processed within 10 working days.
15. Within Crime Case Management there has been the creation of the Criminal Cases Unit which merged the High Cost Crime Team with the National Taxing Team on 1 September 2016. This team deals with high cost criminal cases, special preparation, the assessment of Proceeds of Crime Act claims and claims out of Central Funds.
16. The ECCT deals with the more costly and complex civil cases funded by the LAA as well as immigration cases except those funded via controlled work.
17. ECF now falls under the ECCT. The ECF scheme covers all applications outside the scope of ordinary civil legal aid funding under the LASPO Act. As set out in section 10 of the LASPO Act, ECF applies where the failure to provide legal aid would be a breach, or where there is a substantial risk of a 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 relating to enforceable EU rights.
18. ECF applications have to be considered 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. Applications can be, and sometimes are, made directly by applicants. The operation of the entire scheme was in fact challenged by IS and initially the Honourable Mr Justice Collins in a decision dated 15 July 2015 decided in favour of the Claimant. However, as is set out below (see *Litigation*) this decision was overturned by the Court of Appeal.

19. To ensure that legal aid legislation and guidance laid down by the Lord Chancellor are applied in a consistent manner, advice and training have continued to be provided to all LAA caseworkers, tailored according to the particular role of each casework team.
20. To ensure decisions are made independently and consistently there are a number of review mechanisms. Legal advice for the Director is provided by the Central Legal Team staffed by lawyers employed by the Government Legal Department, but assigned to and co-located within the LAA, and who act solely for the LAA when exercising functions of the Director or operational legal aid functions of the Lord Chancellor.
21. Decisions on individual cases are delegated to caseworkers with the opportunity for escalation as necessary. This includes a referral mechanism for high profile matters which include cases proceeding to the Court of Appeal or the Supreme Court. This process of escalation and referral provides the Director with the requisite assurance that any decisions made are lawful.

Appeals and Reviews

22. All determinations made by the Director are subject to a right of internal review where requested. Furthermore, unless the application is for ECF or the Director determines that the case is not within the scope of the LASPO Act there is a further right of appeal to an Independent Funding Adjudicator (“IFA”) who would be a solicitor or barrister from private practice. IFAs are members of a Funding and Costs Appeals Review Panel (“FCARP”).⁴ Panel members are not employees of the LAA and act independently. Statistics on numbers and outcomes of appeals are included in each annual edition of the Legal Aid Statistics bulletin, with the figures for the year ending March 2017 published on 29 June 2017.
23. 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 a client’s behaviour. Other issues are referred back to the Director for reconsideration. Some panel members consider appeals against the provisional assessment of costs by the Agency’s staff.

⁴ A recruitment process took place in the spring of 2016, the first to be covered by the Commissioner for Public Appointments Code. Following shortlisting and interviews, panel members formally took up their appointments from 1 July 2016 for a two year term. An induction and training event was held in London for the new panel. FCARP now comprises 107 solicitors and barristers.

24. There is also a Special Controls Review Panel ("SCRCP") which, when convened, is formed of three specialist members of the FCARP who consider appeals relating to certain high cost cases and other more complex cases. Within the FCARP there are 22 SCRCP members.
 25. If a client is dissatisfied with the final determination following a review and/or appeal, then the only recourse left is litigation.
- The regulations were lawful. They offered a balanced, proportionate approach to the grant of legal aid, which could not be condemned as arbitrary. The merits criteria were carefully specified and exceptions were carefully spelt out. There was an internal review procedure, and judicial review was also available and effectively deployed.

Litigation

26. The Director's decision-making can be challenged by a claim for judicial review. During 2016-17 the most prominent decision was *IS [2016] EWCA Civ 464*. The case of IS concerned a challenge to the operation of the entire ECF scheme as well as the merits regulations and guidance set by the Lord Chancellor. The Honourable Mr Justice Collins originally held that 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 as well as finding that the merits regulations and Lord Chancellor's guidance was unlawful. The Court of Appeal disagreed (Briggs LJ dissenting) and held in that case as follows:

- The ECF scheme was not inherently or systematically unfair.

- Paragraph 8 of the guidance, which referred to limited resources being refocused on the highest priority cases, did not restrict grants of legal aid to such cases. In any event, it was a legitimate purpose of the LASPO Act that the availability of civil legal services be confined to cases judged to be of the greatest need.

An application for permission to appeal to the Supreme Court was subsequently made and refused. In light of that decision, as referred to earlier, the regulations were changed.⁵

5 <http://legislation.data.gov.uk/uksi/2016/781/made/data.html>

27. Another ECF decision of some interest was the case of *Sherlett Thompson v Director of Legal Aid Casework [2017] EWHC 230 (Admin)*. The Claimant applied for judicial review of the Director's refusal to grant ECF. She applied for legal aid in respect of an appeal to the First Tier Tribunal against the Secretary of State for the Home Department's decision not to revoke a deportation order. The director accepted that the Claimant's rights under ECHR Article 8 were engaged, but did not accept that the legal issues which arose in her case were particularly complex. He concluded that, for the purposes of section 10(3)(a) of the LASPO Act, it did not appear to be a case where her Article 8 rights required her to have representation paid for by the state or that, for the purposes of section 10(3)(b), there was a sufficient risk that her rights would be violated if funding was not provided. The court refused the Applicant's claim and agreed with the Director's approach to the ECF test on this case. In particular the court held Article 8 does not require ECF to be provided in order to better the Claimant's prospects of their appeal succeeding.
28. Another theme which has arisen this year has concerned the application of the statutory charge. This applies where a legally-aided person recovers money or property in proceedings but not all their legal aid costs are paid by the other side. In these circumstances the money or property will be subject to the statutory charge to recover those costs.⁶
29. The first case, albeit under the provisions that were in force prior to the LASPO Act, considered the discretion in certain cases to waive the statutory charge where the case has 'significant wider public interest'. This discretion lies where the Director has made such a determination and the Director in making that determination took into account that there were other claimants or potential claimants who might benefit from the proceedings.⁷
30. In the case of *R (on the application of Faulkner) v Director of Legal Aid Casework [2016] EWHC 717* the Claimant wanted the Director to exercise discretion and so waive the statutory charge. The Director's position was that the power to waive the charge could not have applied in Mr Faulkner's case because his case was not cost effective to fund over other cases which were not funded (regulation 47 of the Community Legal Service (Financial) Regulations 2000). Mr Faulkner was refused permission to appeal by the Court of Appeal on 6 February 2017 and is applying to renew his application orally, which is expected to be heard this year.
31. The transitional provisions for the previous statutory regime meant that the Director would have inherited the role of exercising any discretion to waive the statutory charge that arose in that case. Under LASPO, on the other hand, the position is clarified that, whilst the pre-conditions for the existence of a discretion to waive the statutory charge depend on decisions of the Director when granting legal aid for the case, the exercise of the discretion will be a matter for the Lord Chancellor.

6 See footnote 3 above.

7 Regulation 9 of the Civil Legal Aid (Statutory Charge) Regulations 2013.

Accountability

32. The point concerning the pre-conditions for the discretion to waive the statutory charge in cases of significant wider public interest has been of further relevance in relation to an issue that has become increasingly significant over the past year: the potential application of the statutory charge to awards of damages under the Human Rights Act ("HRA") made in favour of children and parents in family public law proceedings, as a result of failures by local authorities or other public bodies coming to light within or at the same time as those proceedings.
33. Receipt of such damages by the victim of the HRA breach is likely to be substantially reduced or even extinguished if the full costs of the public law family proceeding form a statutory charge on the recovery, unless the local authority is ordered to pay those costs. The question of whether there is sufficient connection between the public law family proceedings and the recovery of HRA damages for the statutory charge to attach in the costs of those proceedings in full, under section 25(1) of the LASPO Act, has been found to depend on the facts of the individual case. In *P v A Local Authority [2016] EWHC 2779 (Fam)* the court confirmed that when considering waiver of the statutory charge, the determination of the Director that gave rise to the ability to waive (namely that the case is of significant wider public interest) can only be made when granting legal aid. In particular, the question as to whether the costs of public law family proceedings would form a charge on HRA damages could not itself make those proceedings of significant wider public interest.
34. 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

35. 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.
36. In 2016-17 the LAA received 20 requests for information under the Freedom of Information Act and 6 parliamentary questions relating to the Director of Legal Aid Casework specifically. The majority related to ECF, plus there was some interest in the referral process for high profile cases.
37. 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.

Statistics

Complaints

38. 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 and request a further review. If the complainant remains dissatisfied with the response they have the right to refer their complaint to the Parliamentary and Health Service Ombudsman via their local MP.
39. 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.
40. The LAA deals with applications for legal aid across various categories of law. The LAA publishes National 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 2017 were published online on 29 June 2017.⁸ 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.

Equality and Diversity

41. The LAA is subject to the public sector equality duty under section 149 (1) of the Equality Act 2010.
42. During 2016-17 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.
43. The LAA requests that applicants for legal aid provide us with some personal equality information. This information enables the LAA to understand the needs of potential legal aid applicants better and compile statistics on their diversity.
44. The Director has reviewed the equal opportunity information that recipients of legal aid provided during the first three quarters of 2016-17 to monitor the extent to which the LAA continues to cater for the diverse population of England and Wales. The LAA published statistics relating to the diversity of legal aid clients over the period 2016-17 as part of the Legal Aid Statistics bulletin on 29 June 2017, and the Director will continue to review this information over the coming year.

Conclusion

45. The LAA continues to demonstrate flexibility in the way it responds to legislative and regulatory changes while safeguarding the role of the Director of Legal Aid Casework.
46. The Director notes that the Court of Appeal has now confirmed that the operation of the ECF scheme was not inherently or systematically unfair. The LAA is committed to continuous improvement of its administration of the legal aid scheme.
47. 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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