

AMENDMENTS TO THE LORD CHANCELLOR'S GUIDANCE UNDER SECTION 4 OF THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

This amendment to the Lord Chancellor's guidance is issued by the Lord Chancellor to the Director of Legal Aid Casework under section 4(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the Act'). It is intended that paragraphs 8.2 and 8.7 to 8.12 of the current guidance is removed and replaced with the new paragraphs 8.2 and 8.7 to 8.13 inserted below, for all cases from 1st September 2019. The Director must have regard to this guidance in determining whether and how civil legal services are to be made available under section 11(1) of the Act.

8 Procedure Regulations

8.1 The procedure regulations generally reproduce the scheme under the Funding Code Procedures. In principle, they are self-contained and self-explanatory, with limited discretion available to the Director as compared with his or her function in making determinations under the merits regulations. The Act does, however, require significantly different terminology compared to that used in the Administration of Justice Act 1999, and there are some differences in substance, highlighted below.

8.2 The scope of procedure regulations has increased to include applications for Gateway Work (Part 2; see Paragraphs 8.7 to 8.13 below). However, applications for assistance under a Housing Possession Court Duty Scheme are not governed by the procedure regulations (regulation 14).

8.3 Under both Controlled and Licensed Work there is a duty for providers to report to the Director where the client has failed without good reason to comply with the requirement to provide information or documents in accordance with the regulations or has provided a statement or representation knowing or believing it to be false, overriding any privilege between the provider and that person (24, 41).

8.4 There are references to "determinations" rather than "decisions", and in particular the determination that a person qualifies for services replaces the notion of a grant of funding. Withdrawal of a determination means that the person will no longer receive services rather than that the original determination is deemed never to have been made. The latter effect is described by the determination being "disregarded". This occurs where the conditions on which a conditional determination in relation to emergency representation was made are not fulfilled (52(2)(b)). The decision to withdraw a determination is itself a form of determination.

8.5 The decision as to whether the services applied for are described in Part 1 of Schedule 1 to the Act (i.e. whether they are within the scope of the scheme) is also described as a "determination" by the Director. There is a right to request a review by the Director of a determination that the services are not so described in relation to an application for Licensed Work (44(1)(a), but no onward right of appeal to an Independent Funding Adjudicator (45(1)(b)).

8.6 The terms of powers delegated to providers are no longer described by guidance in relation to the procedural provisions but are contained in separate authorisations under the Act.

Gateway Work

8.7 In accordance with Part 2 of the Procedure Regulations any individual intending to apply for legal help in certain categories of law (defined as “Gateway Work” in the Regulations) must, in most circumstances, do so through the Gateway (the Civil Legal Advice (CLA) Telephone Gateway acts as this Gateway). The Regulations make provision for how to contact the Gateway, including by telephone and other electronic means. An application for legal help in Gateway Work cannot be made directly to a provider and providers cannot make determinations in these matters except in the circumstances set out below. The areas of work to which this Part applies are applications for legal help in the discrimination, education and debt categories to the extent described in Regulation 20 of the Procedure Regulations.

8.8 When the Director determines that an individual qualifies for Gateway Work, that determination must specify whether the services are to be provided by a specialist telephone provider or a face-to-face provider. In carrying out that determination for all categories of Gateway Work the Director should consider the following factors, taking into account any service adaptations or reasonable adjustments that are reasonably available to the client:

- (a) whether the provision of remote advice can be expected to enable the provider to understand and act on the individual’s instructions;
- (b) whether the client is able to understand and act on any advice given.

8.9 In carrying out that determination for Gateway Work in the categories of discrimination and education, the Director should also consider the following factors:

- (a) whether the individual has expressed a wish for services to be provided by a face-to-face provider; and
- (b) the location of the face to face providers nearest to the individual or the client’s wish to be assisted by a specific face-to-face provider;

8.10 This determination should only be carried out after the individual has been given a chance to make their views known on matters relevant to the determination. In making the determination, particular emphasis should be placed on any wish expressed by the individual for services to be provided by a face-to-face provider.

8.11 Certain clients will also be exempt from the requirement to seek advice through the Gateway and Providers may choose either to contact the Gateway or to seek face to face advice. These clients are described as “exempted persons”. They are:

- (a) Clients who have been deprived of their liberty;
- (b) Children under the age of 18; and
- (c) Clients who have been previously applied via the Gateway and assessed as being eligible for face to face advice and who now have a linked problem. The client must have been previously assessed as being eligible for face to face advice in the preceding 12 months and the current matter on which the client requires assistance must arise out of the first matter or be related to that matter. In those circumstances, the client does not need to first contact the Gateway.

8.12 Advice is also available in the categories of family and housing via the CLA Gateway. However, these are not categorised as Gateway areas and as such, clients are not required to contact the Gateway in the first instance, so they will have a choice as to whether to access advice over the telephone/email/post or by attending at a face to face provider.

8.13 Providers are able to make an application for licensed work in Gateway areas of law on behalf of a client. However, an application for licensed work should not be made until all work which could have been carried out under legal help has been completed. Unless, therefore, the matter is urgent and legal representation is immediately required it would usually be expected that an application for the initial legal help should be made through the Gateway. If not, the application for licensed work may be premature.