



Legal Aid
Agency

Director of Legal Aid Casework

Annual Report 2018-19





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Presented to the House of Commons pursuant to Section 7(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Ordered by the House of Commons to be printed 4 July 2019.

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Any enquiries regarding this publication should be sent to us at Legal Aid Agency, 102 Petty France, London, SW1H 9AJ

ISBN 978-1-5286-1441-2

CCS0619468214 07/19

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

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Foreword

I am pleased to present the Annual Report of the Director of Legal Aid Casework for 2018-19.

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 the independence of decision-making 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.

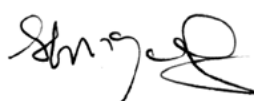
This report summarises the work carried out on behalf of the Director and includes decisions made and the processes followed including the mechanisms that exist for holding the Director to account and scrutinising the Legal Aid Agency's work.

The report deals with regulatory changes and amendments to the Lord Chancellor's guidance during the year. Many of these were driven by the introduction of new civil contracts. There were also changes to arrangements for urgent work carried out before a determination can be made on specific legal aid applications.

Other items featured in the report include crime fees for advocates and the expansion of the scope of legal aid in specific areas of prison law. Also, amended guidance to better support bereaved families in the exceptional case funding application process for representation at inquests.

I would also like to welcome Calum Mercer, Deep Sagar and Professor Suzanne Rab who have recently joined the Legal Aid Agency Board. This has an important role in helping the Director maintain the independence of the legal aid decision-making process.

Finally, I want to thank Andrew Lockley and Eric Gregory who stepped down as Board members this reporting year and John Grosvenor who stepped down on 30 April 2019 for their professionalism, service and contribution during their tenure.



Shaun McNally
Director of Legal Aid Casework

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. There are three new non-executive members who have been appointed to the board. These are Calum Mercer (finance), Deep Sagar (commercial) and Professor Suzanne Rab (legal).
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 can 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.
9. The Lord Chancellor has published one new guidance document in 2018-2019. On 26 July 2018 guidance was introduced allowing Exceptional Cases Funding (ECF) applications by or on behalf of separated migrant children to be made without detailed evidence of issues relating to vulnerability and ability to participate in proceedings without legal aid (as this will be presumed). This is intended to be an interim measure whilst legislation and guidance is being drafted to bring immigration matters for separated migrant children into the scope of the LASPO Act.
10. The Lord Chancellor has also made amendments to pre-existing guidance documents to take account of the introduction of the 2018 Standard Civil Contract and following a commitment of the Ministerial Board on Deaths in Custody to review guidance in relation to the availability of legal aid for representation in certain inquests. *“The Lord Chancellor’s Exceptional Funding Guidance (Inquests)”* was, therefore, updated in June 2018 to better support families going through the legal aid application process. It made clear that legal aid is likely to be awarded for representation of the bereaved at an inquest following the non-natural death or suicide of a person detained by the police, in prison or in a mental health institution. It also added that particular consideration should be given to the circumstances of the bereaved, for example the distress and anxiety suffered as a result of the death, when a decision is being made whether to apply the financial means test. The guidance also now sets out that only the individual applicants’ financial means will be tested and not the means of family members, helping to ease the burden of the application process.
11. The Lord Chancellor also updated guidance made in relation to determinations in respect of individuals’ financial resources in accordance with Part 1 of the LASPO Act for controlled work and family mediation. The *“Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2018 (updated September 2018)”* ensured the guidance complied with changes that came into force on the implementation of the 2018 Standard Civil Contract.

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

12. The regulatory and legislative framework has also undergone the following changes in 2018-2019:

- i. The Civil Legal Aid (Procedure) (Amendment) Regulations 2019 made amendments to the Civil Legal Aid (Procedure) Regulations 2012. The amendments allow for a determination as to whether an individual qualifies for certain legal services to have effect from a date prior to the date of the determination in certain circumstances. This power is subject to the following conditions: (a) the application for legal aid is made as soon as reasonably practicable; (b) it is in the interests of justice for work to be carried out before the relevant determination or amendment is made and such work cannot be carried out as Controlled Work; and (c) in relation to 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 be treated as having effect from the earlier date. These regulations came into force on 20 February 2019 and mean that legal aid can be available to cover some urgent work carried out before the LAA is able to make a determination.

Please also see paragraph 29 below for the background to this change.

- ii. The Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2018 amended three statutory instruments relating to the provision of civil legal services as a result of the coming into force of the 2018 Standard Civil Contract and the 2018 Civil Legal Advice Contract (the 2018 CLA Contract) on 1 September 2018. Regulation 2 amended the Civil Legal Aid (Procedure) Regulations 2012 to make reference to the 2018 Standard Civil Contract and the 2018 CLA Contract in relation to provisions governing the procedures for making applications for Gateway Work, Controlled Work, Licensed Work and Exceptional Cases Funding. It also removed legal representation for proceedings in the Immigration and Asylum Chamber of the Upper Tribunal in relation to an appeal or review from the Immigration and Asylum Chamber of the First-Tier Tribunal from the definition of Controlled Work, resulting in it being re-categorised as Licensed Work. Regulation 3 amended the Civil Legal Aid (Remuneration) Regulations 2013 to enable remuneration to be paid to persons who provide civil legal services under the 2018 Standard Civil Contract and the 2018 CLA Contract.

Regulation 4 made minor amendments to the Civil Legal Aid (Statutory Charge) Regulations 2013 to the definition of “legal aid only costs”. In particular, to ensure that legal aid only costs as described under the 2018 Standard Civil Contract are excepted from the charge on costs payable to a legally aided party and do not form part of the charge on costs recovered from another party to the proceedings.

- iii. The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018, whilst made in February 2018, did not come into force until 1 April 2018. They made amendments to the Criminal Legal Aid (Remuneration) Regulations 2013. They amended the legal aid fees that are payable to advocates in criminal proceedings under the advocates’ graduated fee scheme (AGFS), as set out in Schedule 1 to the 2013 Regulations. The regulations also made provision for advocates’ fees to be determined according to a new ‘banding structure’ for criminal offences.
- iv. The Criminal Legal Aid (Amendment) Regulations 2018 amended the Criminal Legal Aid (General) Regulations 2013 and the Criminal Legal Aid (Financial Resources) Regulations 2013. The amendments

made by these regulations expand the scope of criminal legal aid to include advice and assistance regarding reviews of an individual’s classification as a Restricted Status Inmate (RSI) or Restricted Status Prisoner (RSP). A RSI is a person who is required to be detained in a young offender institution and whose escape would present a serious risk to the public and a RSP is a prisoner whose escape would present a serious risk to the public. They also expand the scope of criminal legal aid to include advice and assistance for reviews of an inmate’s classification as a Category A Inmate (meaning an inmate of a young offender institution whose escape would be highly dangerous to the public, the police or national security, and for whom the aim is to make escape impossible).

- v. The Criminal Legal Aid (Remuneration) (Amendment) (No.2) Regulations 2018 made amendments to the Criminal Legal Aid (Remuneration) Regulations 2013. These regulations which, came into force on 31 December 2018 further amended the legal aid fees that are payable to advocates in criminal proceedings under the AGFS, as set out in Schedule 1 of the 2013 Regulations.

Decision-Making Process and Structure

13. 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 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 13 May 2019. The topics referred to in this report were discussed.
14. Decisions on cases and the functions of the Director are delegated to the LAA. Specifically, these determinations are made by Case Management, a team of around 891 staff. This team is divided into two groups, each managed by a Deputy Director:
 - Civil and Crime Case Management
 - Exceptional and Complex Cases Team (ECCT). This group combines the former High Cost Civil Team, ECF Team and National Immigration and Asylum Team.
15. 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. Work continues on an ongoing basis to review processes and improve and streamline where possible. Close links with the Process Efficiency Team and the Civil Contracts Consultative Group (both of which include stakeholders outside the LAA from representative bodies) ensure collaboration on the key areas to focus on. This has included improvements to civil billing and means assessment to improve end to end processing. A strong focus on reducing failure demand and improving provider Client and Cost Management System skill sets has continued throughout the year.
16. Crime Case Management includes the Criminal Cases Unit which deal with high cost criminal cases, special preparation, the

assessment of Proceeds of Crime Act claims and claims out of Central Funds. The Criminal Cases Unit has continued its programme of replacing paper claims with digital claim forms, resulting in faster and more efficient payment for providers. In addition, following a Judicial Review brought against the Lord Chancellor in the summer of 2018 [*R (On the Application of Ames) v The Lord Chancellor* [2018] EWHC 2250 (Admin)], guidance has been published on how fees for advocates in very high cost criminal cases are calculated.

17. 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. Many applications received by the Director and referred to the ECCT continue to have a high profile.
18. ECF 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 (HRA)]; or

- b) any rights of the individual to the provision of legal services relating to enforceable EU rights

19. ECF applications must be considered on an individual basis, in light of the facts and 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.
20. To ensure that legal aid legislation and guidance issued 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.
21. 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. The team act solely for the LAA when exercising the functions of the Director or the operational legal aid functions of the Lord Chancellor.
22. Decisions on individual applications are delegated to caseworkers with the opportunity for escalation as necessary. This includes a referral mechanism to the Central Legal Team 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

23. 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), a solicitor or barrister from private practice. IFAs are members of the Funding and Costs Appeals Review Panel (FCARP). 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 2019 published on 27 June 2019.
24. 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 in their roles as Independent Costs Assessors (ICAs) consider appeals against the provisional assessment of costs by the Agency's staff.
25. As at 31 March 2019 the Review Panel comprised 93 members who consider the majority of appeals alone. Appeals are allocated according to the specialist areas of law declared by each panel member
26. There is a sub panel, the Special Controls Review Panel (SCRCP) which 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 18 SCRCP members.
27. The LAA has launched a competitive recruitment exercise for panel membership commencing from 1 July 2019. Those appointed will serve a term of five years. The LAA extended the recruitment exercise to allow applications to be made by Fellows of the Chartered Institute of Legal Executives.
28. If a client is dissatisfied with the final determination following a review and/or appeal then the only recourse left is litigation.

Litigation

29. The Director's decision-making can be challenged by a claim for judicial review. Of note this year was a challenge to the regulations concerning the refusal to backdate civil legal aid. In *Duncan Lewis Solicitors v Director of Legal Aid Casework & Lord Chancellor* ("the Duncan Lewis case") the Claimant, a firm of solicitors, challenged a decision made by the LAA to refuse to pay for work done *prior* to a grant of funding for emergency legal representation

where at the time, there was no power to do so in the Civil Legal Aid (Procedure) Regulations 2012 in respect of in-scope work. The Lord Chancellor, who was also a defendant in those proceedings, agreed to amend the Civil Legal Aid (Procedure) Regulations 2012 to give the Director the discretion to backdate the effect of certain legal aid determinations. Alongside these changes, the 'out of hours' service, which provided for urgent determinations on applications for emergency representation was closed and could no longer be used after 19 February 2019. The changes came into effect on 20 February 2019 and apply to applications for determinations including amendments made on or after that date.

30. There has also been litigation in respect of the scope of the LASPO Act as it concerns legal aid available to victims of trafficking (VoT), and in particular, what constitutes an "application ... for leave to enter, or to remain in, the United Kingdom" for the purposes of paragraph 32 of Part 1 of Schedule 1 to the LASPO Act (*LL v Lord Chancellor*). The LAA accepted that the VoT process can (where relevant) be considered to involve an application for discretionary leave to remain, and not solely one for recognition of VoT status.

31. As noted in last year's report, the case of *R (Faulkner) v Director of Legal Aid Casework* [2018] EWCA Civ 1656 resulted in a Court of Appeal judgment which confirmed that the Director had no power to waive the statutory charge where a decision had not been made that a case had significant wider public interest, and where that case had not been selected for funding as a test case. That decision is currently on appeal to the Supreme Court which, at the time of writing, is considering whether to grant permission.

32. A continued source of enquiry has been the potential application of the statutory charge to awards of damages under the 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. This issue was largely resolved in 2017. A further judgment was handed down on 5 June 2018 in the case of *Northamptonshire County Council & A.W. v Lord Chancellor (via the Legal Aid Agency)* [2018] EWHC 1628 (Fam) which addressed the circumstances in which damages recovered, pursuant to the HRA in respect of breaches of duty by a Local Authority following care proceeding (or other public law children proceedings), are subject to the statutory charge in respect of the costs of those care proceedings. Published and appended to the judgment was a position statement from the LAA to be read in the context of HRA claims where similar cost issues arise.

Accountability

33. In relation to criminal legal aid, there were four High Court cases in which former legally aided clients have sought unsuccessfully to challenge their Capital Contribution Orders (CCOs). CCOs are issued to defendants who are convicted in the Crown Court so that they contribute towards the cost of their legal representation in their criminal proceedings from capital and equity above the threshold of £30,000. Each challenge was on a different basis. One case of note was *R (Flannigan) v Director of Legal Aid Casework* [2018] EWHC 1927 (Admin) which concerned whether the Director was entitled to make a CCO several years after the Crown Court proceedings concluded and whether the Director was entitled to take into account assets which had been restrained at the beginning of the Crown Court case, but which were unrestrained after the Claimant paid his confiscation order. The High Court held that the delay did not cause any prejudice and that the Director would have had to have reviewed the Claimant's case once his restraint order had been repaid because that was a change in financial circumstances which affected the Claimant's liability to make payment.
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 can also submit requests for information held by the LAA under the Freedom of Information Act 2000.
36. In 2018-19 the LAA received 14 requests for information under the Freedom of Information Act and 11 parliamentary questions relating to the Director of Legal Aid Casework specifically. The majority related to ECF and individual case funding.
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 2019 were published online on 27 June 2019.²

² See <https://www.gov.uk/government/collections/legal-aid-statistics>

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 2018-19 the LAA continued to improve the knowledge and awareness of LAA staff about equality and diversity issues. As a minimum all staff are required to complete Civil Service Learning courses on Equality and Diversity Essentials, Unconscious Bias and Disability Confidence.
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 2017-18 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 2018-19 as part of the Legal Aid Statistics bulletin published on 27 June 2019, and the Director will continue to review this information over the coming year.

Conclusion

45. The important role of the Director of Legal Aid Casework is fundamental to the legal aid system. As in previous years, the LAA has continued to be highly responsive to legislative and regulatory changes while providing the Director all the support needed to perform his duties.
46. Our commitment to improving digital processes remains an important area of work for the LAA. We are continuing to work collaboratively with providers in this area to ensure that delegated decision-making in the case management directorate is managed as efficiently as possible.
47. The Director must always be ready to work through and meet challenges in the exercise of his functions.
48. For example, the Duncan Lewis case is one instance of a challenge which resulted in a change to regulations. Once a change is made our approach is to ensure that new approaches to funding are clearly understood on all sides. This helps all parties work together as effectively as possible going forwards. In this case, the change means arrangements are now in place to enable payment for work carried out before a determination to grant funding for emergency legal representation has been made.

49. The LAA has a commitment to growing the capabilities and skill-set of its workforce. As this report demonstrates, this capability is one that has been much relied upon by the Director in meeting the demands of the role in 2018-19. I am confident it is a capability that will continue to strengthen in the years ahead.

50. 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.

CCS0619468214

978-1-5286-1441-2