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Agency

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Director of Legal Aid Casework

Annual Report 2019-20



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

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Foreword

I am pleased to present the Annual Report of the Director of Legal Aid Casework for 2019-20.

My role as Director of Legal Aid Casework was created under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act). 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 8 July 2019, which is when I took over the roles of both Director of Legal Aid Casework and Chief Executive of the Legal Aid Agency on an interim basis.

This report summarises the work carried out on behalf of the Director. It 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 focus of this report is on the regulatory changes and amendments to the Lord Chancellor's guidance made during the year. However, it would be remiss of me not to briefly mention the impact of the coronavirus (COVID-19) crisis. This has particularly affected our case-working teams and the legal aid provider base they work with. We have worked collaboratively with practitioners and partner agencies and made huge adjustments to deal with the pressure of this crisis. These include the relaxation of some of our case management time limits among other contingency measures, which we will keep under review as the emergency unfolds.

Among the amendments to pre-existing guidance I would like to highlight are changes concerning Gateway Work. This was normally exclusively a telephone service. However, it became possible for certain "exempted individuals" to receive face to face legal advice as well.

Among other items featured in the report are regulatory changes concerning proceedings relating to stalking protection orders and interim stalking protection orders. These

proceedings now fall under the criminal legal aid regime for the purposes of the LASPO Act.

Amendments have been made relating to payments made under, or in connection with, the Windrush Compensation Scheme. These must be disregarded when making legal aid assessments concerning an individual's income and capital resources.

The report looks at amendments which mean civil legal aid provision is now available for separated migrant children in a variety of areas. Examples include the grant of entry clearance, and leave to enter or remain in the UK.

I would like to express my thanks to Deep Sagar, Calum Mercer and Professor Suzanne Rab for their work since joining the LAA Board as Non-Executive Board members (NEBMs).

The board has an important governance role for the LAA and meets 10 times a year. NEBMs contribute by providing expert and independent advice to help the Agency fulfil its funding duties. Important elements in this oversight are helping to maintain the independence of the Director by ensuring the robustness of the legal aid decision-making process.

Jane Harbottle

Interim 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.
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 to 07 July 2019 both roles were held by Shaun McNally. From 08 July 2019 both roles have been held by Jane Harbottle.
6. This report explains how the Director has carried out the functions specifically entrusted to the Director 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 her 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 not published any new guidance documents in 2019-2020.
10. The Lord Chancellor has made amendments to one pre-existing guidance document. Amendments were made to the Lord Chancellor's Guidance under Section 4 of the LASPO Act effective from 01 September 2019 in relation to applications for legal aid made through the Gateway. In accordance with Part 2 of the Civil Legal Aid (Procedure) Regulations 2012 (Procedure Regulations), any individual intending to apply for legal help in certain categories of law (defined as "Gateway Work" in the Procedure Regulations) was, in most circumstances, required to do so through the Gateway, which is exclusively a telephone service. The amendments to the guidance allowed for certain "exempted" individuals to receive face to face legal advice, rather than simply receiving advice over the telephone through the Gateway.
11. The regulatory and legislative framework has also undergone the following changes in 2019-2020:
 - I. The Criminal Legal Aid (General) (Amendment) Regulations 2020 made amendments to the Criminal Legal Aid (General) Regulations 2013 and came into force on 20 January 2020. The amendments prescribed as criminal proceedings, for the purposes of LASPO, proceedings under sections 1, 4, 5 and 7 of the Stalking Protection Act

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

2019 in relation to stalking protection orders and interim stalking protection orders. This means that any such proceedings would fall under the criminal legal aid regime, rather than civil legal aid. Proceedings under section 1 concern the application for stalking protection orders by a chief officer of police. Proceedings under section 4 concern applications by the defendant or a relevant chief officer of police to vary, renew or discharge a stalking protection order. Proceedings under section 5 concern interim stalking protection orders; and proceedings under section 7 concern appeals against making or refusal to make an order under the Stalking Protection Act 2019.

- II. The Legal Aid (Financial Resources and Contribution Orders) (Amendment) Regulations 2019 made amendments to the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013; the Criminal Legal Aid (Financial Resources) Regulations 2013; and the Criminal Legal Aid (Contribution Orders) Regulations 2013. They came into force on 1 May 2019. The above regulations deal with an individual's financial eligibility for criminal and civil legal aid and the liability of an individual to pay a contribution towards the costs of services received. The amendments provide that in the assessment of an individual's income and capital resources, payments made under, or in connection with, the Windrush Compensation Scheme must be disregarded.
- III. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019 made amendments to Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and also made consequential amendments to secondary legislation. It came into force on 25 October 2019. It makes provision for separated children to be eligible for legal aid for civil legal services in relation to the grant of entry clearance, leave to enter or remain in the UK (whether under or outside of the immigration rules), applications made by separated children outside of the immigration rules for the grant of leave to remain in the UK and the applications for registration as a British citizen, as a British Overseas Territories Citizen, as a British Overseas Citizen or as a British Subject.
- IV. The Civil Legal Aid (Amendment) (EU Exit) Regulations 2019 ("the EU Exit Regulations") made amendments to the Access to Justice (Northern Ireland) Order 2003; the Legal Aid Sentencing and Punishment of Offenders Act 2012; the Civil Legal

Aid (Procedure) Regulations 2012; the Civil Legal Aid (Merits Criteria) Regulations 2013; the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013; and the Civil Legal Aid (Financial) Regulations (Northern Ireland) 2015. The EU Exit Regulations were made in exercise of the powers in section 8(1) of the European Union (Withdrawal) Act 2018, in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU. They made amendments in relation to the provision of civil legal aid in England and Wales and in Northern Ireland. These regulations will come into force on “implementation period completion date”, as defined in the European Union (Withdrawal Agreement) Act 2020.

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 discussion of any themes that have emerged relating to the Director’s role, the legal aid scheme and lessons learned. This year the meeting is scheduled to take place in June 2020. It is proposed to discuss the topics referred to in this report.

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 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, Exceptional Case Funding Team and National Immigration and Asylum Team.

14. Civil Case Management includes Legal Merits, Family High Cost Cases, Means, Civil Finance, Records Management and Central Business Support teams as well as dedicated Contact Centre Teams. Work has continued during the year to streamline processes; reducing double-handling and speeding up processing where possible. Close links with the Process Efficiency Team and the Civil Contracts Consultative Group (both of which include stakeholders from representative bodies) have ensured close collaboration as to priority areas to work on. This has included improvements to the civil amendment process, a reduction in rejects and ongoing improvements to end to end processing times. We have continued our focus on reducing failure demand, providing a mix of training to providers regarding the Client and Cost Management System (CCMS) and offering visits to LAA offices to discuss specific issues. The pilot of our Apply Service, aimed at streamlining the civil application process, is under way with positive feedback from providers involved in testing. The impact of the COVID-19 pandemic has necessitated a focus on supporting staff to work from home, assisting our providers with process adjustments and devoting resource to Key Performance Indicator (KPI) processing.

15. Crime Case Management includes the Criminal Cases Unit which deals with high cost criminal cases, special preparation, the assessment of Proceeds of Crime Act claims and claims out of Central Funds. This team has prioritised payments to our suppliers in light of the COVID-19 emergency.

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. Many applications received by the Director and referred to the ECCT continue to have a high profile. ECCT case managers are located around the country but the majority are based in London and Brighton.
17. Exceptional Case Funding (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
18. 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.
19. 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.
20. 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.
21. 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

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), a solicitor or barrister or Fellow of the Chartered Institute of Legal Executives 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 2020 to be published on 25 June 2020.
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 in their roles as Independent Costs Assessors (ICAs) consider appeals against the provisional assessment of costs by the Agency's staff.
24. Appeals are allocated according to the specialist areas of law declared by each panel member.
25. There is a sub panel, the Special Controls Review Panel (SCRP) 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 14 SCRП members.
26. Aside from SCRП, most appeals are considered by a single panel member.
27. In the spring of 2019 the LAA ran a competitive recruitment exercise for 5-year terms on the panel commencing on 1 July 2019. This was the first recruitment covered by the Governance Code of the Commissioner for Public Appointments which contains a strong presumption that no individual can serve more than two terms nor serve in any one post for more than 10 years. This meant that a significant number of existing Panel members were unable to re-apply because they had already served two terms.

28. As there was a shortfall after the recruitment exercise the Agency was permitted by the Cabinet Office and Ministry of Justice to offer 18-month extensions to some existing members despite them having already served two terms.
29. As at 31 March 2020 the Review Panel comprised 73 members, of whom 34 are serving five-year terms through to June 2024. The remainder were the subject of 18-month extensions running until December 2020.
30. The LAA is running another recruitment campaign for the Review Panel in 2020.
31. If a client is dissatisfied with the final determination following a review and/or appeal then the only recourse left is litigation.

Litigation

32. The Director's decision-making can be challenged by a claim for judicial review. Of note this year was *R (Liberty) v Director of Legal Aid Casework* [2019] EWHC 1532, which was a challenge to a decision refusing to grant civil legal aid to an individual to enable her to pursue a statutory application to quash prohibitions contained in a public spaces protection order (the PSPO) made by the Borough of Poole (the Borough) under section 59 of the Anti-Social Behaviour, Crime and Policing Act 2014 (the 2014 Act). The applicant was seeking to challenge the validity of the PSPO under section 66 of the 2014 Act (the Section 66 Challenge) on the basis that the PSPO unlawfully targeted rough sleepers and therefore the Borough did not have the power to make it. The applicant was represented in the Section 66 Challenge by Liberty. The Director had refused the application for legal aid on the basis that legal services to support the Section 66 Challenge were not "civil legal services" described in Part 1 of Schedule 1 of the LASPO Act (in other words that they were not within the scope of civil legal aid). Specifically, the Director concluded that the Section 66 Challenge was not a "judicial review" within the meaning of paragraph 19(10) of Part 1 of Schedule 1 and that the Section 66 Challenge did not have the potential to produce a benefit for the applicant and was therefore excluded from the scope of civil legal aid by paragraph 19(3) of Part 1 of Schedule 1.
33. The Court concluded on the facts of this case, that what the applicant was seeking to do was to bring a representative action. Her status as a resident of the Borough gave

her the standing to bring a Section 66 challenge against the PSPO. But civil legal aid for a representative action is excluded by paragraph 19(3) of Part 1 of Schedule 1. Accordingly, in refusing funding the Director was not wrong to the extent that she relied on the ground that the Section 66 Challenge did not have the potential to produce a benefit for the applicant or a member of her family in the sense required by paragraph 19(3), and therefore that ground of the claim did not succeed.

34. Given its conclusions on the question of “benefit” to the applicant of the Section 66 Challenge, it was not necessary for the Court to decide whether the Section 66 Challenge fell within the definition of “judicial review”. A subsequent application by the Claimant seeking leave to appeal to the Court of Appeal was refused.
35. A related case, *R (FF) v Director of Legal Aid Casework* [2020] EWHC 95 (Admin), which also dealt with the question of “benefit” to an applicant, was heard within the same period and applied the principles outlined in *Liberty*. The court considered that case as being exceptional on its facts, and concluded that there was a benefit to the applicant.
36. As noted in last year’s report, the Court of Appeal in *R (Faulkner) v Director of Legal Aid Casework* [2018] EWCA Civ 1656 said that the Director had no power to waive the statutory charge where no decision had been made that the case had significant wider public interest and was not selected for funding as a test case. The Supreme Court has now refused to grant permission to appeal.
37. In relation to criminal legal aid, the LAA was invited to attend court by Mr Justice Chamberlain. This was to assist on the question of who is the correct determining authority to grant criminal legal aid regarding committal proceedings for contempt of court arising out of a breach of a civil order in the High Court. Clarification was provided via court attendance on behalf of the Director and this resulted in the judgment in *The All England Lawn Tennis Club (Championships) Limited v. Luke McKay* [2019] EWHC 3065 (QB) (the McKay case). This confirms that the correct determining authority is the Director, rather than the High Court, and gave an overview of the position since 2013.

Accountability

38. 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

39. 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.

40. In 2019-20 the LAA received 13 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 and individual case funding.

41. 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

42. 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.

43. 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.

Statistics

44. 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 2020 will be published online on 25 June 2020.².

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

Equality and Diversity

45. The LAA is subject to the public-sector equality duty under section 149 (1) of the Equality Act 2010 and contributes to the delivery of the Ministry of Justice Equality and Diversity strategy.
46. During 2019-20 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 Diversity and Inclusion, Unconscious Bias and Disability Confidence.
47. 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.
48. The Director has reviewed the equal opportunity information that recipients of legal aid provided during 2018-19 to monitor the extent to which the LAA continues to cater for the diverse population of England and Wales. The LAA will publish statistics relating to the diversity of legal aid clients over the period 2019-20 as part of the Legal Aid Statistics bulletin published on 25 June 2020, and the Director will continue to review this information over the coming year.

Conclusion

49. The important role of the Director of Legal Aid Casework remains 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 her duties.
50. As indicated in my foreword, the LAA has also responded with great speed and flexibility to the unprecedented demands places on it as a business by the coronavirus (COVID-19) crisis. There has been huge pressure both on legal aid practitioners and LAA casework teams. It has taken the resources and energy of staff throughout the agency to keep the business on track.
51. Processes have been adapted in consultation with provider representative bodies and relevant partnership agencies. I am confident the LAA will continue making every effort to be responsive as we work our way together through this crisis.
52. Our overarching efforts to streamline digital processes and speed up processing times have been continuing. The pilot of our new civil application Apply Service is just one example of our commitment to working collaboratively with providers. This partnership includes working through our Process Efficiency Team and the Civil Contracts Consultative Group. We are also enhancing communications with the provider base with a strong emphasis on customer service.
53. The Director must always be ready to work through and meet challenges in the exercise of her functions.
54. For example, assisting the courts whenever we can make a helpful contribution – as in the judgment mentioned above in the McKay case.
55. Investing in the LAA's workforce remains a priority for the organisation as we continue to make improvements and look for new and more efficient ways of moving forwards. The capabilities of our people are our biggest strength and this investment will continue as we look to the future.

56. 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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