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Agency

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# Director of Legal Aid Casework

## Annual Report 2021-22



**Legal Aid Agency**

# **Director of Legal Aid Casework**

## **Annual Report 2021-22**

Presented to 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 2021-22.

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 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. I was permanently appointed to both roles on 5 March 2021.

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.

A handwritten signature in black ink, reading 'Jane Harbottle', with a large, elegant flourish at the end.

**Jane Harbottle**  
**Director of Legal Aid Casework**

# Introduction

1. The Director of Legal Aid Casework (the Director) is designated 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 other Ministers. 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 LAA staff under section 5(4) the LASPO Act. The LAA came into existence on 1 April 2013 and is an Executive Agency of the Ministry of Justice (MoJ).
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 8 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 has separately published 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 (including Exceptional Case Funding) and criminal legal aid as set out in Part 1 of the [LASPO Act](#).
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. Guidance issued by the Lord Chancellor regarding the functions of the Director include:
  - [The Lord Chancellor's Guidance Under Section 4 of the LASPO Act 2012](#)
  - [The Lord Chancellor's Guide to determining financial eligibility for certificated work](#)
  - [Lord Chancellor's guidance on determining financial eligibility for Controlled Work and Family Mediation](#)
  - [The Lord Chancellor's Guidance – Exceptional Case Funding \(Inquests\)](#)
  - [The Lord Chancellor's Guidance – Exceptional Case Funding \(Non-Inquests\)](#)
10. The Lord Chancellor has not published any new guidance documents in 2021-22. However, he has made amendments and additions to the following, pre-existing guidance documents:
  - I. The Lord Chancellor's Guidance under Section 4 of LASPO Act was amended in August to reflect the removal of the requirement to provide evidence of attempts to secure a conditional fee arrangement (CFA) in modern slavery compensation cases. The amendment can be found by reading a new paragraph, 7.19, in the

guidance.

- II. The Lord Chancellor's guidance on determining financial eligibility for certificated work was amended in January to reflect that applications for Exceptional Case Funding (ECF) for inquest cases no longer need to include means assessments of individuals, following an amendment to the regulations on 12 January 2022. The amendment can be found at paragraph 2.6.3.

11. The regulatory and legislative framework has also undergone changes in 2021-22:

- I. The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 were amended by the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2021. The amendments, which came into force on 12 January 2022, remove the means test for other advocacy granted under the ECF scheme for inquests, and for legal help where advocacy is being provided as a result of a grant of advocacy under the ECF scheme. The amendments affected regulations 5, 10 and 44.
- II. The Criminal Legal Aid (Remuneration) Regulations 2013 were amended by the Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2021, which came into force on 7 June 2021. These amendments introduced new criminal legal aid payments for pre-charge engagement undertaken by defence practitioners in line with the Attorney General's Guidelines on Disclosure. The new rates are set out under paragraph 3A of Schedule 4.



## Decision-making process and structure

12. Determinations on individual applications and the functions of the Director are in practice delegated to LAA staff.<sup>1</sup> Specifically, individual case determinations are made by Case Management, a team of around 805 staff. This team is divided into two groups, each managed by a Deputy Director (DD):
- Civil and Crime Case Management – DD Alistair Adan
  - Exceptional and Complex Cases Team (ECCT) – DD Dr Samantha Milton
13. 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.
14. The LAA continues to work closely with stakeholders via the Process Efficiency Team (PET) and the Civil Contracts Consultative Group. Increased engagement with legal aid providers (providers) through these groups has enabled the LAA to make positive improvements to processes. The PET meets with representative bodies and providers monthly to identify operational issues and business improvements. In particular, the LAA has worked in close partnership with providers via this forum to address issues around decision-making, for example by increasing case ownership and communications and streamlining of the decision-making process where submissions are raised regarding exercise of discretion around trapped capital. The LAA has also worked hard to provide training to providers through a series of ‘help us say yes’ seminars to ensure it receives full and complete applications to minimise unnecessary delay and rejections. These all help the LAA’s commitment to ensuring that legal aid is accessible to all those who eligible. Following successes across civil legal aid, the first crime-focussed PET was held on 25 May and an internal working group was set up to take forward the actions raised at the meeting.

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<sup>1</sup> For some forms of service individual determinations are delegated to legal aid providers. Civil: Legal Help, Help at Court, Family Help (Lower), Family Mediation and Controlled Legal Representation. Crime: Advice and Assistance, including Advocacy Assistance, under sections 13 and 15 of the LASPO Act.

15. This work has been underpinned by the [LAA Strategy](#), published in July, which sets out four key guiding principles for the Agency: being user-centred; getting things right first time, being open and transparent; and becoming a responsive, diverse, learning organisation. All of which will enable the LAA to deliver faster, better outcomes that work for legal aid clients, providers, taxpayers and LAA staff. This is further supported by the [LAA's Customer Service Strategy](#) which focuses on putting its users at the heart of services.
16. The LAA has continued to develop the Apply service following the launch of the pilot last year. Over 50 providers are now using it to submit applications in domestic abuse cases, and over 10,000 applications have successfully come through the new service so far. New functionality has been introduced which means the service can now handle multiple proceedings. Working closely with HMRC, the LAA has implemented a mechanism to verify applicants' income levels directly using HMRC data. This will reduce the administrative burden on applicants and providers by mitigating the need for applicants to submit evidence manually.
17. Crime Case Management includes the National Criminal Applications Team, Crime Billing Team, Criminal Finance Team, a Contact Centre Team, and the Criminal Cases Unit.
18. The LAA continued to work closely with HMCTS to support the rollout of the Common Platform in criminal courts, ensuring it can process applications and bills for cases which come through the platform. The platform is now live in 112 courts across England and Wales, and it has processed around 48,000 applications, paying more than 15,000 bills so far.
19. 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.
20. 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. ECF can cover all forms of service including legal help and controlled legal representation. 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 retained enforceable EU rights.

21. 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.

22. 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.

23. 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 is headed by the Principal Legal Adviser and acts solely for the LAA when exercising the functions of the Director or the operational legal aid functions of the Lord Chancellor. There are clear protocols restricting what information members of that team may share outside of the LAA.

24. 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 in appropriate cases. This process of escalation and referral provides the Director with the requisite assurance that any decisions made are lawful. In such cases the Central Legal Team advises on the law relating to funding applications – the decision as to whether to grant or refuse an application remains that of the Director.

## **Appeals and reviews**

25. 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). IFAs can be 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.

26. 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 based on a client's behaviour.

27. Other issues are referred 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 LAA staff.

28. Appeals are allocated according to the specialist areas of law declared by each panel member.

29. 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 5 SCRPs members but more are being recruited.

30. Aside from SCRPs, most appeals are considered by a single panel member.

31. As mentioned in last year's report the LAA began a competitive recruitment exercise for five-year terms on the panel on 13 October 2020. The LAA successfully appointed 35 new members to the Review Panel, including appointing a new chair, bringing the total to 71 panel members. An induction package and online training was provided to all new panel members.

32. If a client is dissatisfied with the final determination following a review and/or appeal, then the only recourse left is litigation.

## **Litigation**

33. The Director's decision-making in individual cases is susceptible to challenge by way of judicial review. Further, the Director is affected by any wider challenges brought to the

operation of the legal aid scheme, for example, the case of [R Detention Action v Lord Chancellor](#), which was a judicial review challenge to the operation of the Detained Duty Advice Scheme (DDAS) in Immigration Removal Centres (IRCs).

34. The Claimant argued that the Lord Chancellor was failing to ensure access to justice for detainees where the scheme (which is operated by the LAA) was alleged to be operating with systemic deficiencies that were not being addressed by powers available to the Lord Chancellor under his contract with DDAS providers, and that by extension, a decision by the Lord Chancellor in January 2021 to extend the contracts of all DDAS providers for a year was unlawful. The Administrative Court concluded, on the evidence, that it could not be said the LAA's operation and monitoring of the scheme on behalf of the Lord Chancellor was unlawful, where it did not create any impediment to detainees obtaining access to justice; on the contrary, the LAA was doing its best to facilitate access to justice. That being so, it was also not unlawful for the Lord Chancellor to have decided to extend DDAS contracts for a further year.
35. Further to the case of *R (Director of Legal Aid Casework) v. Southwark Crown Court*, interested party Professor Swingland [2021] EWHC 397 (Admin) (Swingland), mentioned in last year's report, the Director successfully defended an application made by an individual to apply for judicial apportionment two years late. Had the order for judicial apportionment been made this would have had the effect of considerably reducing the amount of legal aid expenditure the Director was entitled to recover from the Defendant under a Capital Contribution Order.
36. The Divisional Court held, in *Swingland*, that the Crown Court Judge retained a discretion to extend time to make a judicial apportionment order if there were "cogent and compelling reasons". In *Swingland*, the solicitors misunderstood the law, which the Court held, very firmly, was not a good reason for extending time.

# Accountability

37. 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 Act requests

38. Members of both Houses of Parliament can table parliamentary questions asking about the work carried out by the Director in respect of cases or individuals. All questions and answers are published on [Parliament.UK](https://www.parliament.uk). Similarly, the public can also submit requests for information held by the LAA under the Freedom of Information Act 2000 and Data Protection Act 2018.

39. In 2021-22 the LAA received 208 requests for information under the Freedom of Information Act. Of these, 23 related to the functions of the Director of Legal Aid Casework specifically. The majority related to grants of legal aid under ECF, applications in the Immigration and Asylum category of law and the means assessment process.

40. In the same period there were 58 legal aid related parliamentary questions. Of these, 16 related to the Director of Legal Aid Casework specifically. Of note were five parliamentary questions specifically relating to the exercise of discretion by the Director when valuing capital assets following the judgment in *R(GR) v DLAC* [2020] EWHC 3140 (Admin) (see the Director's Annual Report for 2020-21).<sup>2</sup>

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 UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018.

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<sup>2</sup> [PQ 113255](#) [PQ 113256](#) [PQ 113257](#) [PQ 113258](#) [PQ 117067](#)

## 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 escalated response, they have the right to refer their complaint to the Parliamentary and Health Service Ombudsman via their local MP.
43. Complainants may also request financial redress from the LAA where there has been maladministration. As with complaints, if the complainant is dissatisfied with the LAA's response they have the right to refer their complaint to the Parliamentary and Health Service Ombudsman via their local MP.
44. The LAA does not separately record complaints or compensation claims which relate specifically to the remit of the Director. However, a significant proportion of complaints are from individuals who are unhappy with decisions not to grant or extend legal aid funding.

## Statistics

45. 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 2022 were published on [30 June 2022](#).
46. The number of applications for legal aid in the magistrates' court decreased by 8% in 2021-22 compared to 2020-21. Overall, 159,279 applications were received, of which, 96% were granted. 81,141 applications for legal aid in the Crown Court were received in the same period, down 12% from the previous financial year. The proportion of Crown Court applications granted remains at almost 100%.
47. 114,687 applications for civil representation were received between April 2021 and March 2022.
48. 11,776 applications for civil representation supported by evidence of domestic violence or child abuse were received between April 2021 and March 2022, down 1% from the previous year. 10,044 certificates for civil representation were granted in the same period via the domestic violence and child abuse gateway.
49. 3,722 Exceptional Case Funding applications were received between April 2021 and March 2022. This is a 12% increase compared to the previous financial year.



## Equality and Diversity

50. 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, Diversity and Inclusion strategy.
51. The LAA requests that applicants for legal aid provide 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.
52. The Director has reviewed the equal opportunity information that recipients of legal aid provided during 2020-21 to monitor the extent to which the LAA continues to cater for the diverse population of England and Wales.
53. The LAA published statistics relating to the diversity of legal aid clients over the period 2021-22 as part of the Legal Aid Statistics bulletin published on 30 June 2022, and the Director will continue to review this information over the coming year.

## Conclusion

54. The role of the Director is an important one and the LAA continues to demonstrate its capabilities in responding to legislative and regulatory changes and in providing the support that the Director needs to perform her duties.

55. 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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