



# Public Law Project

The Rt Hon Robert Buckland  
Lord Chancellor and Secretary of State for Justice  
Ministry of Justice  
102 Petty France  
Westminster  
London SW1H 9AJ

Your Ref:

Our Ref: AP

Date: 16 April 2020

Dear Lord Chancellor

## **Exceptional Case Funding and the COVID 19 pandemic**

1. The Public Law Project (PLP) is a national legal charity founded in 1990 which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage. Since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') in April 2013, a major focus of PLP's work has been the civil legal aid reforms introduced by LASPO and subsequently, including as a result of the 'Transforming Legal Aid' consultation launched in April 2013.
2. We are writing to ask you to take urgent action in relation to Exceptional Case Funding (ECF), to ensure that during the COVID-19 pandemic it remains a safety net for those most in need of legal aid, and whose rights would otherwise be breached. A copy of this letter goes to the Director of Legal Aid Casework and colleagues at the Legal Aid Agency.
3. We are seriously concerned about the additional barriers to accessing ECF that disadvantaged and vulnerable groups are likely to face during the COVID-19 pandemic, including difficulties collecting and submitting the supporting evidence required for ECF applications and potentially increased delays to ECF decision-making.

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4. We are also concerned about the difficulties facing legal aid providers at a time of unprecedented uncertainty, a view shared by other legal practitioners.<sup>1</sup> The onerous application process for ECF, which our research shows is already off-putting to many,<sup>2</sup> is likely to exacerbate the other challenges that will be faced by legal aid providers, particularly as services must increasingly operate remotely and clients cannot be seen face-to-face.
5. Direct applicants to the ECF scheme can often find it difficult to find a provider to take on their case, even once they have been granted ECF, and this is likely to be exacerbated by the current crisis. The Legal Aid Practitioners Group has provided guidance to legal aid providers on how to continue to meet their contractual obligations, and have understandably advised legal aid providers that in order to protect existing clients they should prioritise existing clients over taking on new clients.<sup>3</sup> The current pressure on legal aid providers means that some will have limited capacity to take on new clients, particularly those who have been granted ECF. Once direct applicants have been granted ECF, providers are still required to make an ECF application to the Legal Aid Agency, which means that an element of work must still be carried out at risk. This is one of the factors that makes the scheme off-putting to providers, and means that where any capacity to take on clients exists, it is likely this will be prioritised for cases that are in scope for legal aid. In the current circumstances, people who are granted ECF as direct applicants are highly unlikely to find a provider able to take on their case, therefore it is very important that changes are urgently made to the operation of the ECF scheme.
6. ECF is intended to act as a safety net for those most in need of legal aid. The Ministry of Justice acknowledged in the Post-Implementation Review that improvements were needed to make the application process for ECF more accessible and ensure timeliness of decision-making.<sup>4</sup> Any changes to be made by the Ministry of Justice should be implemented under normal circumstances, and we understand that resources may have to be diverted in the current circumstances to the response to the pandemic. In the interim, however, urgent and substantial changes are required to ensure that legal aid remains accessible for cases usually out of the scope of legal aid.<sup>5</sup>
7. **We are requesting that, as a matter of urgency, usual ECF procedures are suspended. Legal aid providers should be given delegated powers to make grants of legal aid funding for out of scope cases without having to**

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<sup>1</sup> Legal Action Group, *As the impact of COVID-19 deepens, the MoJ and the LAA need to step up to the plate* (March 2020) <https://www.lag.org.uk/?id=07725>; LAPG, *COVID-19 — Issues facing legal aid providers and the action we need from the LAA* (March 2020) <https://www.lapg.co.uk/covid-19-issues-facing-legal-aid-providers-and-the-action-we-need-from-the-laa/>.

<sup>2</sup> Public Law Project, *Improving Exceptional Case Funding: Providers' Perspectives* (20 January 2020) <https://publiclawproject.org.uk/wp-content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>.

<sup>3</sup> Legal Aid Practitioners Group, *Understanding the Legal Aid Contract and LAA COVID-19 Guidance* (March 2020) <https://www.lapg.co.uk/wp-content/uploads/LAPG-LAA-Contract-and-Covid19-Guidance-27-March-2020-V2.pdf>.

<sup>4</sup> Ministry of Justice, *Legal Support: The Way Ahead* (CP 40, February 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf).

<sup>5</sup> 'Out of scope' means any matter not listed in Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1.

**go through a separate process of approval from the Legal Aid Agency via the ECF scheme.**

8. **We further request that the Lord Chancellor's Guidance on ECF is amended, or further guidance issued, to recognise the particular barriers to effective participation in proceedings at this time which mean that ECF may be necessary in more cases to protect the right to a fair hearing and effective access to justice.**
9. Further detail about the basis for these requests is set out below.

#### Barriers to ECF for vulnerable groups

10. At the last Civil Contracts Consultative Group (CCCG) meeting the Legal Aid Agency reported that 86% of ECF applications are being processed within the target of 25 working days.<sup>6</sup> This means that 14% of cases are not decided within the target timeframe under normal circumstances, which the Legal Aid Agency explains is mainly due to a small number of cases taking longer to resolve, for example 'direct applicants or cases where additional time had been allowed for information to be supplied'.<sup>7</sup>
11. Based on these Legal Aid Agency figures, approximately one in seven applications for ECF already faces delays due to the evidence requirements of the ECF process. It is reasonable to assume that the COVID-19 pandemic will exacerbate the difficulties faced by direct applicants as well as other cases where additional information is required to substantiate the application. There may also be additional delays to decision-making processes as the workforce is stretched in capacity due to the health of workers, childcare arrangements and other unpredictable and unprecedented circumstances. It is currently unknown what the full impact of COVID-19 will be on the workforce of the UK.
12. Many people in the UK lack digital literacy, and are unable to access advice or engage with the justice system through online platforms. According to guidance published by the Government in 2019, 11.3 million people in the UK lack full basic digital skills, 4.3 million people have no basic digital skills at all, and 28% of those aged over 60 are offline.<sup>8</sup>
13. Those who lack digital literacy often rely on assistance from others to access digital services, not only from friends and family, but also from advice services such as Citizens Advice.<sup>9</sup> Therefore it is likely that people in these groups will face additional barriers to accessing legal aid services due to social distancing requirements and advice services operating remotely themselves. This may particularly impact on those who are extremely vulnerable to the virus due to

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<sup>6</sup> UK Government, *Civil Contracts Consultative Group minutes: 15 January 2020* (Legal Aid Agency and The Law Society, 15 January 2020) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/873008/1\\_January2020\\_CivilCCG\\_Minutes\\_002\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873008/1_January2020_CivilCCG_Minutes_002_.pdf).

<sup>7</sup> Ibid. Page 5.

<sup>8</sup> UK Government, *Essential digital skills framework* (Department for Education, 23 April 2019) <https://www.gov.uk/government/publications/essential-digital-skills-framework/essential-digital-skills-framework>.

<sup>9</sup> Buck A and Smith M, "The Importance of Family and Friends in Advice-Seeking for Rights Problems" (2015) 14 *Social Policy and Society* 175.

pre-existing health conditions, who are being strongly advised to ‘stay at home at all times and avoid any face-to-face contact for a period of at least 12 weeks’.<sup>10</sup>

14. Those who are unable to leave the house and lack the necessary digital literacy skills, or who lack the technology at home to send electronic documents, will face significant barriers accessing legal aid where services are provided remotely. They should not be required to negotiate the additional obstacles that exist for accessing ECF, which are already significantly greater than barriers to legal aid for cases within the scope of LASPO.<sup>11</sup>

#### Changing the Lord Chancellor’s Guidance to reflect the impact of coronavirus on court and tribunal proceedings

15. As you are aware, the Court of Appeal gave guidance in the case of *Gudanaviciene* on the factors that the LAA must take into account when considering an application for ECF. One of those factors is to consider the ability of the applicant to effectively represent themselves.
16. You will also be aware that the courts and tribunals system has adapted to the coronavirus crisis by moving many cases to remote hearings, conducted either over the telephone or by video link technology such as Skype. It follows that unrepresented applicants who do not have access to the necessary technology to participate in remote hearings, or who lack the digital literacy skills to use the required technology, will not be able to represent themselves effectively at those hearings or meaningfully take part in proceedings.
17. Applicants who lack digital literacy skills, or who do not have access to the necessary technology in their homes, will face considerable difficulty in taking part in remote hearings, due to the closure of many public services such as libraries and Support Through Court,<sup>12</sup> which may otherwise have provided a workaround option.
18. These applicants are therefore more likely to require legal representation in order to effectively participate in hearings. Although this is challenging for all, legal aid providers are more likely than unrepresented individuals to be able to put in place remote working systems, therefore enabling more effective participation.
19. **Accordingly, we urge you to consider amending the Lord Chancellor’s Guidance on ECF to make clear that obstacles to participating in remote hearings, such as using and accessing technology, that would affect an applicant’s ability to effectively represent themselves, should be given particular weight in deciding whether ECF is necessary at this time.**

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<sup>10</sup> UK Government, *Guidance on shielding and protecting people defined on medical grounds as extremely vulnerable from COVID-19* (Public Health England, 21 March 2020) <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>.

<sup>11</sup> Public Law Project, *Exceptional Case Funding Briefing* (22 May 2018)

<https://publiclawproject.org.uk/resources/exceptional-case-funding-briefing/>.

<sup>12</sup> Formerly the Personal Support Unit. It is now only offering a telephone helpline following the closure of its offices and all face-to-face support.

## Challenges for legal aid providers

20. Legal aid providers have expressed serious concerns about how COVID-19 will affect their operational capacity over the coming weeks and months.<sup>13</sup>
21. Relaxing the rules on ECF to allow legal aid providers to grant ECF to eligible clients could help to soften the impact of the potential loss of other income.
22. The Legal Aid Agency has already shown some flexibility in the management of legal aid contracts in response to the crisis,<sup>14</sup> and it is likely that, as further restrictions are introduced to control the virus, legal aid providers will have to adapt services to make them accessible remotely. At a time when providing services may present significant challenges, it is unlikely that legal aid providers will be able to put resources into ECF applications as the procedure is currently configured.

## Urgent action required

23. We are concerned that without making substantial changes to the usual ECF process, legal aid providers will be less likely to be able to make ECF applications, leaving those people most in need without the legal advice and representation that they require. Direct applicants to the ECF scheme are also less likely to be able to access the assistance of pro bono projects that usually provide essential support.
24. The changes that we are recommending would ease the capacity of legal aid providers, as well as the resources of government departments, and would ensure that those at risk of further disadvantage due to the current situation do not face additional and unnecessary barriers to justice.
25. If you have any queries about this letter or the requests in it, please do not hesitate to contact Alison Pickup, Legal Director, at [a.pickup@publiclawproject.org.uk](mailto:a.pickup@publiclawproject.org.uk) or on 020 7239 9031.

Yours sincerely,



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Cc: Director of Legal Aid Casework; Jane Harbottle, LAA; Malcolm Bryant, Exceptional and Complex Cases Team, LAA.

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<sup>13</sup> LAPG, *COVID-19 — Issues facing legal aid providers and the action we need from the LAA* (March 2020) <https://www.lapg.co.uk/covid-19-issues-facing-legal-aid-providers-and-the-action-we-need-from-the-laa/>.

<sup>14</sup> UK Government, *Coronavirus (COVID-19): Legal Aid Agency contingency response. Last updated 24 March 2020* (18 March 2020) [https://www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response?utm\\_source=5cf2de16-10f4-4a25-ada6-44a9e0e53076&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response?utm_source=5cf2de16-10f4-4a25-ada6-44a9e0e53076&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate).