

Improving Exceptional Case Funding: Responding to COVID-19

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Introduction

The purpose of this briefing paper is to provide an update to Public Law Project's earlier report, *Improving Exceptional Case Funding: Providers' Perspectives*,¹ which was published in January 2020 just before the COVID-19 pandemic. The research found that many legal aid providers have low confidence in the Exceptional Case Funding (ECF) scheme and find the application process off-putting.

The pandemic has had a significant impact on the operation of the justice system, including access to legal aid as well as the operation of the courts and tribunals system. Given the changing landscape of legal advice and how professionals are able to provide assistance to their clients under the continuing effects of the pandemic, Public Law Project carried out a survey to update its previous findings.

The survey was sent to the 80 legal aid providers that responded to the initial research. The survey was initially sent on 15 June 2020 and remained open to responses until 3 July 2020. Public Law Project received 15 responses, across a range of jurisdictions, including immigration, housing, family, welfare benefits, public law and debt.

Main findings

- **60% of legal aid providers state that the pandemic has had a direct impact on their capacity or ability to make ECF applications.** The reasons for this are high workload, issues for both clients and staff in accessing the IT facilities needed to make applications, and difficulties collecting the documents needed to evidence ECF applications;
- **80% of legal aid providers were unaware of the steps that the Legal Aid Agency implemented to ensure the accessibility of the ECF scheme** in response to the pandemic;
- **Nearly three quarters of legal aid providers (73%) thought that more should be done to improve the accessibility of the ECF scheme** during the pandemic.

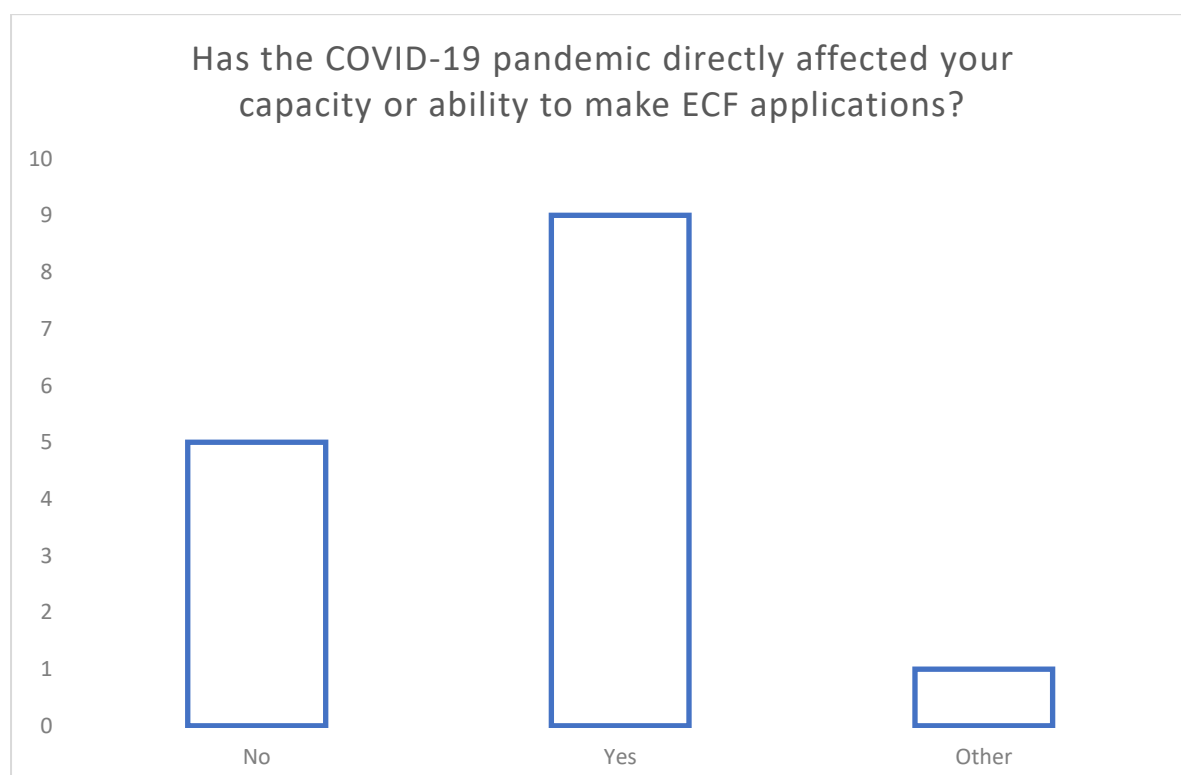
¹ Tomlinson, J. and Marshall, E., *Improving Exceptional Case Funding: Providers' Perspectives* (January 2020). <https://publiclawproject.org.uk/wp-content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>. Page 3.

Impact of COVID-19 on access to ECF

Statistics published by the Ministry of Justice demonstrate that at the beginning of the COVID-19 pandemic the number of ECF applications reduced considerably. The number of ECF applications dropped by just under a quarter (23%) when compared to the same period for the previous year, and nearly a third (30%) when compared to the figures published for the first three months of the year 2020.²

In the first quarter of the year (January to March 2020) there were 983 ECF applications, and in the second quarter (April to June 2020) there were 691 ECF applications. As the number of ECF applications has been rising each year since 2014/15 it is likely that the significant drop in applications can be wholly attributed to the impact of the pandemic.

The pandemic also had an impact on the types of ECF applications submitted. The number of individuals applying directly to the ECF scheme decreased by nearly half (45%) compared to the figures for the same quarter in the previous year. In April to June 2020, the number of applications for inquests decreased by more than half (54%), applications for family law decreased by more than a third (35%), and applications for immigration matters decreased by 13%. The grant rate across all areas of law increased from 67% in the same quarter of the previous year to 76% in April to June 2020.³



² Ministry of Justice, *Legal Aid Statistics Quarterly: April to June 2020* (September 2020). <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2020>

³ The overall grant rate for the whole of the financial year 2019/2020 was slightly higher, at 69%.

“There are no internet cafe's or libraries open, therefore, clients who are not very IT literate and do not have access to scanners etc, struggle to get the evidence to us. We do accept pictures taken on the phone, but that also requires some skill to even fit the whole pages into the frame as well as the fact that due to the large volume of documents required, at times this can be overwhelming for clients.”

A majority of those who responded to the survey said that the pandemic has directly affected their capacity or ability to make ECF applications. Those who stated that the pandemic had affected their capacity or ability to make ECF applications cited reasons such as high workload and less capacity, clients being unable to access the necessary technology, no staff access to printing or other resources making the process more difficult and time consuming, and difficulties collecting evidence.

Two respondents said that they had experienced difficulties gathering documents from clients without places being open to access the Internet. Four legal aid providers said they had less capacity as a result of the pandemic. Two legal aid providers indicated that they had no access to the necessary resources to make ECF applications due to the switch to remote working. One legal aid provider explained:

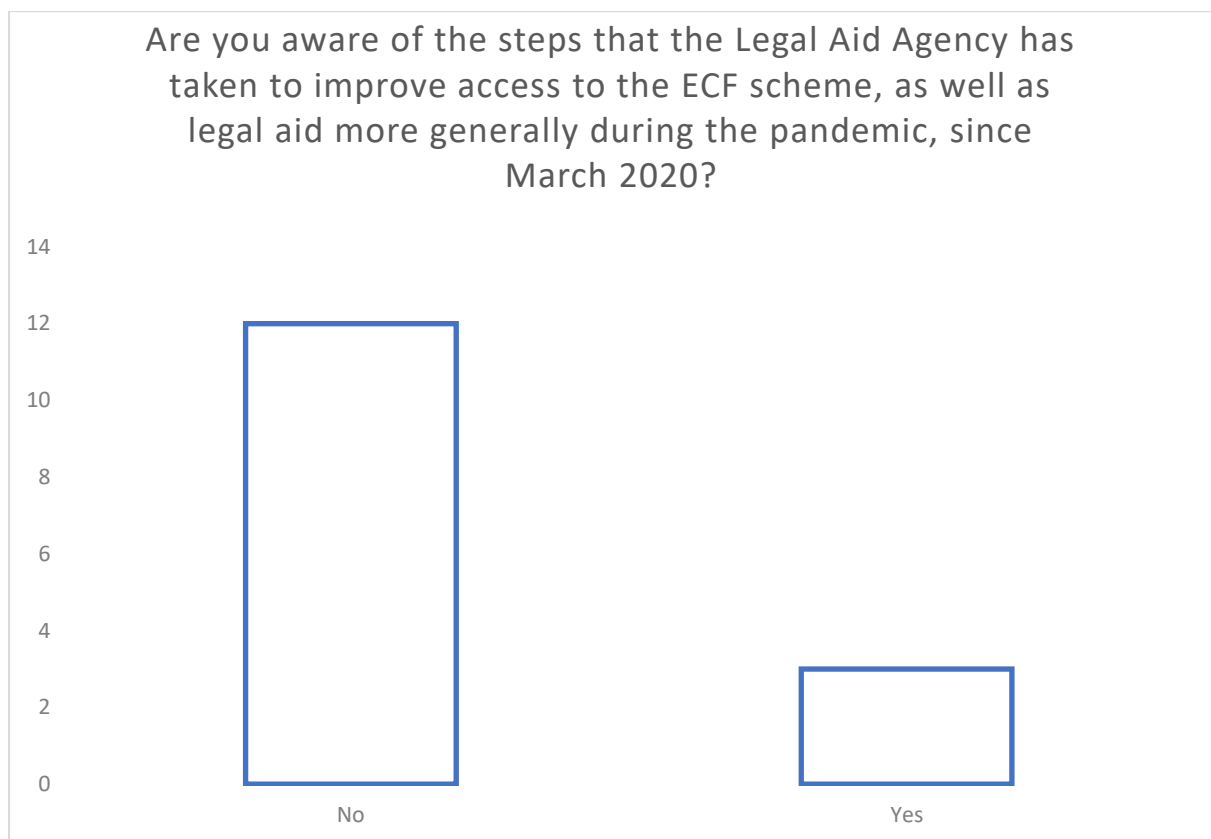
“My paralegal would usually deal with making the applications to the LAA but she is furloughed. I am not able to make any new ECF applications at this time. I also need to focus on bringing in private work to keep paying staff. The ECF cases are high workload but low fee and I always make a loss on them.”

Of those who said that the pandemic had not had an impact on whether they were making ECF applications, most said it was because they had not been making ECF applications prior to the pandemic either. One legal aid provider highlighted that they were unable to say whether the pandemic had affected their use of the ECF scheme, writing that “the scheme is so unworkable that we do not use it.”

The survey also highlights some ongoing issues with the ECF scheme, not only related to the pandemic, for example, operational issues with the application process and access to assistance from the Legal Aid Agency. Responses highlighted technical issues with the electronic ECF application form as well as the Legal Aid Agency email address, which one respondent noted “at times rejects submissions or only accepts parts of emails and not others.”

The Government's response to COVID-19 for ECF — is it sufficient?

An overwhelming majority of those who responded to the survey indicated that they were unaware of any measures introduced by the Legal Aid Agency during the pandemic to improve the accessibility of the ECF scheme, or legal aid more generally.



One legal aid provider cited the information sent out in updates from the Legal Aid Practitioners Group as the reason that they were aware of the changes made by the Legal Aid Agency in response to the pandemic.

Public Law Project wrote to the Lord Chancellor on 16 April 2020, to request changes to the ECF scheme during the pandemic.⁴ Public Law Project received a response on 10 May 2020 from Alex Chalk MP, Parliamentary Under-Secretary of State for Justice and the Minister responsible for legal aid, which set out the measures introduced by the Ministry of Justice:

⁴ Public Law Project, *Letter to the Lord Chancellor dated 16 April 2020*.
<https://publiclawproject.org.uk/latest/plps-letter-to-the-lord-chancellor-on-ecf-changes-during-covid/>

Summary of measures introduced by the Legal Aid Agency in response to the pandemic

- Regular meetings with key stakeholders, including legal aid practitioners and representative bodies, to assist in the rapid identification and resolution of issues.
- Protecting legal aid practitioners and the public by transitioning to remote audio and video hearings wherever possible, and working with HMCTS to ensure that vulnerable individuals are not disadvantaged by this change.
- Ensuring that providers can claim the same amount of money for online hearings as they can for face-to-face hearings.
- Relaxing evidence requirements, including evidence of means, the use of electronic signatures and submission of evidence by email.
- Halting the pursuit of outstanding debts owed to the Legal Aid Agency.
- Suspending sanctions in relation to missed deadlines for delegated function applications, substantive amendments and appeals against LAA decisions.
- Issuing updated Exceptional Case Funding guidance and forms for challenges to restrictions under the Coronavirus Act.⁵

Public Law Project also welcomes the changes recently made to the Provider Pack,⁶ which mean that successful direct ECF applicants no longer require a further ECF application to be made on their behalf by a provider.⁷ It is also necessary to note here that the Government website was updated on 7 April 2020, to clarify the guidance on how direct applicants should apply for ECF without the assistance of a legal aid provider.⁸

⁵ Ministry of Justice, *Exceptional Case Funding and the COVID-19 Pandemic* (letter from Alex Chalk MP to Public Law Project, 10 May 2020). <https://publiclawproject.org.uk/latest/plps-letter-to-the-lord-chancellor-on-ecf-changes-during-covid/>

⁶ Legal Aid Agency, *Exceptional Cases Funding — Provider Pack* (published 1 April 2013, last reviewed 1 April 2020). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879071/ECF_Provider_Pack_March_2020_Amendments_002_.pdf

⁷ Watts, K., *COVID-19 and the limitations of exceptional case funding* (June 2020). <https://www.lag.org.uk/article/208442/covid-19-and-the-limitations-of-exceptional-case-funding>

⁸ Legal Aid Agency, *Legal aid: apply for exceptional case funding* (published 1 June 2014, last updated 21 April 2020). <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>

Of the three legal aid providers who indicated in their survey responses that they were aware of improvements to the ECF scheme, one cited awareness that the Legal Aid Agency was accepting forms without signatures, an apparently lower burden of evidence for the means test, and a better version of the electronic ECF form (CIVECF1). Another observed that the Legal Aid Agency had been more lenient in accepting the ECF form and means and merits form, and applications had been granted well within the 25-day target time, including “just over a week in some cases”, which they welcomed. However, they also emphasised that these improvements were “not nearly sufficient to address the problems with ECF”, due to ongoing problems with the ECF form itself (which cannot be edited on a computer, and must be printed) as well as ECF remaining “a highly restrictive and risky process for many firms [which] leads many firms to avoid ECF altogether.”

The responses indicate the general, ongoing difficulties that people face in getting support with ECF applications, which have been exacerbated by the pandemic where legal aid providers have less capacity. For example, there is no dedicated telephone contact for the ECF casework team, only the general legal aid contact number.

“More could have been done to support the scheme, such as, a dedicated help line as the general line is usually not even able to provide basic advice and tend to signpost to the email enquiry address which takes more than 48 hours to get a response”.

Public Law Project has previously raised this as a concern because the helpline that was available at the time of the *I.S.* judgment was a direct line to the ECF team, but in February 2017 this was merged with the main Legal Aid Agency customer service number, and the email address was merged into one email for exceptional and complex cases.⁹ This is concerning given that in the judgment in the case of *I.S.* the scheme was found to be lawful in part on the basis of the help available to access the scheme, including the website and helpline, which were found to be “of significant material assistance to potential applicants.”¹⁰

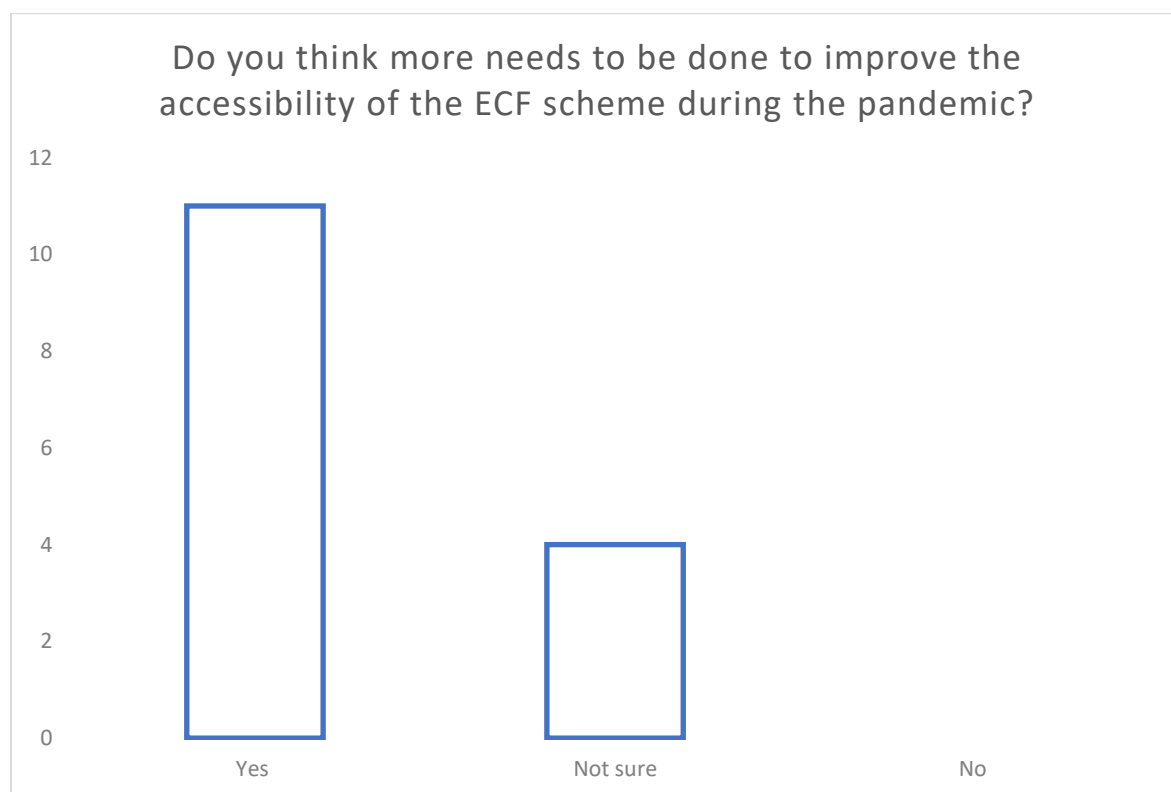
The consequences of the inadequacy of the ECF process remain a significant concern, as highlighted by one respondent who wrote that it “leaves clients with a genuine eligibility for Legal Aid and genuine Human Rights claims unable to assert their rights without paying legal fees that they cannot afford.”

⁹ Watts, K., *Exceptional Case Funding* (May 2018). <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>.

¹⁰ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464 [55].

Are further improvements to the ECF scheme needed?

A majority of those who responded thought that more should be done to improve the accessibility of the ECF scheme during the pandemic, and just over a quarter of respondents (27%) were unsure about whether improvements were needed. No respondents perceived that the ECF scheme requires no further improvements.



The findings of the research highlight the need for the Legal Aid Agency to provide clear information about any changes to procedures affecting ECF applications, and in particular, the need for explicit guidance on whether changes to the requirements for legal aid applications generally in the pandemic also apply to ECF applications.

One respondent wrote "I am not aware of any improvements so more should be done to highlight these changes i.e. changes to ECF specifically". Another requested a move to electronic signatures, suggesting a lack of awareness or clarity around the measures introduced by the Ministry of Justice, which were outlined in the letter to Public Law Project from Alex Chalk MP on 10 May 2020.

The survey responses highlight a range of measures that should be continued for the foreseeable future to ensure the accessibility of the ECF scheme during the pandemic, including easing evidence requirements and allowing the use of electronic signatures. It is acknowledged that at the time of writing the restrictions imposed by the Government in response to the pandemic have been eased in most places, but as 'local lockdowns' continue and further restricted measures are introduced for the winter it will be important

for the Legal Aid Agency to continue to ensure flexibility around the necessary documentation to support ECF applications.

The survey responses indicate that there is still a need for the speed of the overall process to be improved. Responses included the following suggestions:

- The need for a fast track process for some cases (for example, where an applicant is in receipt of a passported benefitted and applying for further leave to remain);
- Some areas of work should be brought into scope, for example, immigration applications based on Article 8 rights and European Union (EU) Settled Status applications;
- Quicker initial decisions and decisions on disbursement extensions.

One respondent emphasised the need for Legal Aid Agency caseworkers to receive training to ensure consistent decision-making, suggesting that often applications are not considered thoroughly leading to requests for evidence that has already been provided.

Conclusion

Although the Ministry of Justice has implemented some measures in response to the pandemic, particularly in terms of the operation of Legal Aid Agency procedures and their impact on legal aid providers, further changes are urgently needed to improve the accessibility of the ECF scheme. At the timing of writing, it is anticipated that the pandemic will have continuing effects on society with restrictive measures needed to reduce the spread of the virus. The potential for further disruption as a result of the pandemic means that it is essential to now reflect on what was learnt from the first wave of the outbreak and how access to ECF has been affected.

The survey responses from legal aid providers highlight that the COVID-19 outbreak has squeezed already limited resources, resulting in less capacity for providers to make ECF applications, which are already seen as overly onerous and time intensive. Further complications due to the pandemic, such as clients being unable to gather documents and send them electronically to their legal representative, or legal aid providers themselves working remotely without being able to scan or print documents, make it more difficult to submit ECF applications.

It is acknowledged that some steps have been introduced in response to the pandemic, such as the Legal Aid Agency accepting electronic signatures, that mitigate the difficulties faced by providers. However, the research found low levels of awareness of such steps, and the Government must take action to ensure that these measures are better communicated with all stakeholders.

The work of non-governmental organisations such as the Legal Aid Practitioners Group has been invaluable in doing this work, but the research suggests that it is not adequate for the Government to rely on professional membership organisations to share updates about the

changes implemented by government departments, as the overall level of awareness among providers is low.

The research highlights ongoing issues with the ECF scheme, which the Government has not yet addressed, despite assurances that elements of the ECF application process would be reviewed following the Post-Implementation Review of LASPO. Public Law Project's previous report, *Improving Exceptional Case Funding: Providers' Perspectives*, which was published in January 2020 argued that it would be essential for the Government to take meaningful steps to make processes simpler and quicker, and to communicate those changes to stakeholders.

The findings of this updated research indicate that the changes implemented in general have not been sufficient to ensure the broad accessibility to the ECF scheme, and the situation as a result of the COVID-19 pandemic has brought new challenges. Where effective changes have been implemented, these have not been communicated sufficiently with legal aid providers. In the current climate of uncertainty for legal aid providers and increasing concerns about the sustainability of the sector, it is essential that the ECF scheme functions effectively to ensure legal aid is available to individuals whose human rights would otherwise be breached.