



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: ADR77580

Our Ref: AP/DR

Date: 15 March 2021

Dear Lord Chancellor

Exceptional Case Funding and the Legal Action Plan

1. I am writing to follow up on our previous correspondence, including my colleague Alison Pickup's letter to you dated 16 April 2020 and the response from Alex Chalk MP of 10 May 2020, for which we are grateful. In his letter, Mr Chalk, notes our concerns on the impact of the Covid-19 pandemic on Exceptional Case Funding and invites empirical evidence concerning 'specific problems that are not being addressed by the steps already taken'.
2. I am writing to draw your attention to [research](#) (also attached) undertaken by PLP in order to respond to that invitation, to request clarification as to the extent and timetable for any further changes to the ECF scheme, and make recommendations for the same in light of our research.
3. The evidence gathered by PLP highlights some of the challenges currently being faced by providers both in relation to the ongoing effects of the pandemic and the longer-term operation of the scheme. In light of that evidence we consider that urgent reform is still needed and consider there are several areas where improvements still need to be made to the ECF scheme if it is to function efficiently and provide an effective safeguard of human rights.

Request for clarification as to planned changes and timetable

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4. The MoJ's action plan published following the LASPO PIR included a commitment to 'simplify the ECF scheme to ensure it works effectively as possible'. We note the contents of Alex Chalk MP's letter of 10 May 2020, as well as an email from Deepika Patel of the MoJ dated 1 September 2020 setting out recommended improvements following a roundtable discussion PLP attended in September 2019. We understand that those improvements are to be made by September 2021.
5. We should be grateful for confirmation as to whether the Ministry of Justice continues its consultative work on the Exceptional Case Funding scheme (or whether this has now concluded) and whether any further changes are still planned, beyond those set out in Alex Chalk MP's letter of 10 May 2020 and Ms Deepika's email of 1 September 2019 (attached for reference).
6. We note that the pace of changes being introduced as a result of government consultation remains slow. It is now more than 18 months since the Ministry of Justice published its Action Plan and committed to reform of specific areas. It has taken 12 months from a stakeholder meeting to formulate recommendations and a further 12 months to implement them appears unambitious. In addition, further improvements are needed, as set out below.
7. Where reforms have still not been made or sufficiently introduced to match the promises of the Action Plan, individuals are facing practical barriers to legal aid on a day-to-basis. As the ECF scheme is intended to act as a safety net to protect individuals from serious breaches of their human rights, it is essential that it functions effectively at all times.

PLP's empirical research

8. Over summer 2020 we worked to collect further evidence of the impact of the COVID-19 pandemic on the Exceptional Case Funding Scheme. PLP surveyed the 80 legal aid providers that responded to our earlier [survey](#). There were 15 responses to the updated research, which indicate some of the challenges that providers were facing by the end of June when the survey was carried out. The main findings of the research were:
 - a. 60% of respondents said that the pandemic had directly impacted their capacity or ability to make ECF applications;
 - b. 80% said that they were unaware of the steps that the Legal Aid Agency had taken to ensure the accessibility of the ECF scheme in the pandemic; and,
 - c. Nearly three quarters (73%) thought more should be done to improve the accessibility of the scheme.
9. The responses demonstrate that existing difficulties with the ECF scheme have been exacerbated by the pandemic at a time when legal aid providers have less capacity. These findings are also supported by the

government's own data, which shows a 23% drop in the number of ECF applications as compared with the same quarter of the previous year.

10. Some of the problematic areas highlighted by the research include: difficulties for providers in contacting the ECF team, particularly in relation to urgent cases; low levels of awareness where positive changes had been introduced by the Ministry of Justice to mitigate the impact of the pandemic on legal aid providers; ongoing issues with slow decision-making in some cases and for particular types of funding, such as disbursement extensions; and, inconsistent decision-making or other technical issues with the operation of the scheme that are off-putting to legal aid providers.

Recommendations for further reform

11. Below we recommend some areas in which the ECF scheme could be improved, which are based on the findings of our research and the work of our casework team. We hope trust that these will be taken into account as part of any consultative work that the Ministry of Justice continues to do:

- 1) Urgently address the lack of an effective procedure for considering urgent applications. The evidence from our research demonstrates that the ECF application process must be simpler and quicker for legal aid providers to access for their clients. The pandemic exacerbated barriers to the ECF scheme where providers had less capacity, but our research shows that legal aid providers find the application process off-putting because it is time-consuming, risky and financially unviable in many cases as the lack of an urgent procedure often compels providers to work at risk where they do take on cases.
- 2) Reinstate a direct helpline to contact the ECF team. The findings of our research indicate that there were low levels of awareness about whether the changes introduced by the Legal Aid Agency in relation to the pandemic were applicable to ECF. A direct helpline would ensure that information about the ECF scheme and its application in specific cases would be easily accessible at all times, including any future disruption due to pandemic or other unprecedented circumstances. It would also help to ensure that anyone making an urgent application could contact the ECF team directly.
- 3) Introduce a presumption that LAA caseworkers will grant applications for specific common categories of case that are highly likely to be granted, for example Art. 8 immigration cases (where the grant rate in 2019/20 was 80%¹) and EU Settled Status applications which are also highly likely to succeed. Ultimately introducing presumptions that funding will be granted in these

¹ <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2020>

areas will increase efficiency, reduce ECF processing costs and ensure access to justice.

- 4) Regularly update the ECF guidance whenever new areas of need emerge. This is important in ensuring that LAA caseworkers are aware of areas of law in which there is often a need for ECF to prevent a breach of convention rights and alive to common indicators that ECF should be granted.

12. In respect of the last recommendation above, we note that advisors also rely upon that guidance and inaccuracies may result in them not identifying that ECF may be available. In our research published in January 2020, one respondent to our survey (a legal aid provider) specified that they had been advised that ECF is not available for Welfare Benefits, which is incorrect. We attach a supplementary document that outlines where the Lord Chancellor's guidance is out of date and recommends how it might be amended to bring it up to date.

We await hearing from you and would be happy to discuss these requests further.

Yours sincerely



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

Enclosures:

1. Our letter of 9 April 2020.
2. Reply from Alex Chalk MP of 10 May 2020.
3. Email and attachment from Ms Deepika Patel of 1 September 2020.
4. PLP Research Briefing, Improving Exceptional Case Funding: Responding to COVID-19.
5. Recommended updates for the Lord Chancellor's guidance regarding Welfare Benefits.