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PLP RESEARCH PAPER

# Improving Exceptional Case Funding: Providers' Perspectives

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## Public Law Project

The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

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# Introduction

When the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into effect, a new Exceptional Case Funding (ECF) scheme was introduced. ECF was intended to offer a 'safety net' to ensure that legal aid would still be available where the European Convention or European Union law rights of individuals would otherwise be breached. The need for such a safety net was acute in the context of the broad cuts to legal aid introduced under LASPO, as the Act removed many types of case from the scope of legal aid. Today, there remain major questions about the effectiveness of ECF, access to advice, and whether the safety net has holes.

Accessible legal advice is an essential part of access to justice, and access to justice is a fundamental component of the Rule of Law and democratic systems of governance. The changes introduced under LASPO mean that significantly fewer people are eligible for legal aid now than prior to LASPO, and those who do not fall under the usual scope of legal aid must apply for ECF in order to ensure that their rights are not breached.

Since 2013, the accessibility of the ECF scheme has been criticised by a range of actors, including professional bodies,<sup>1</sup> legal professionals and the advice sector,<sup>2</sup> academics,<sup>3</sup> and human rights organisations.<sup>4</sup> There have been a number of reports published highlighting issues with the ECF scheme, as well broader concerns about the impact of LASPO on the availability of legal advice and the practical implications for access to justice.

In 2018/19, the ECF scheme received 3018 applications across all areas of civil law, the highest level of applications since the introduction of LASPO. However, the number of applications received by the Legal Aid Agency (LAA) each year continues to fall short of the 5000 to 7000 applications that the Government initially anticipated the scheme would receive annually.

Over time, the Government has come to recognise some of the problems in the ECF system. After its initial introduction, there were some improvements to the ECF scheme, primarily as a response to litigation.<sup>5</sup> Following the case of *Gudanaviciene*, the Lord Chancellor's Guidance was amended<sup>6</sup> and the Government amended the prospects of success test following the case of *IS*.<sup>7</sup>

Recently, in February 2019, The Post-Implementation Review (PIR) of LASPO was published alongside a document titled *Legal Support: The Way Ahead*, which set out plans by the Ministry of Justice to improve some aspects of legal aid, including the ECF scheme.

The PIR found that the rising grant rates for ECF indicated the growing success of the scheme.<sup>8</sup> However, it also acknowledged the concerns raised by stakeholders about the accessibility of the scheme and, in response to those concerns, outlined plans for improvement, including simplifying the application process, improving the timeliness of decision-making, and considering the introduction of a procedure for urgent applications.

The findings of the PIR indicate a need for further evidence on access to legal aid through the ECF scheme. An effective system relies on legal aid providers being able to access ECF for clients whose rights would otherwise be breached. But, as suggested in the PIR, there are indications that legal aid providers are deterred from making ECF applications or are otherwise reluctant. In the absence of providers willing to make applications, individuals may have to apply directly to the Legal Aid Agency, but they may face additional barriers in navigating the complex application process. Whilst the Ministry of Justice has committed to making some improvements, it is important to ensure that the changes go far enough to ensure the equitable accessibility of the ECF scheme.

With this context in mind, and with the aim of informing the planned improvements, Public Law Project has sought to develop an evidence base—through survey research—to address key gaps in understanding about the experience of legal aid providers using the ECF scheme, and the barriers that they face.

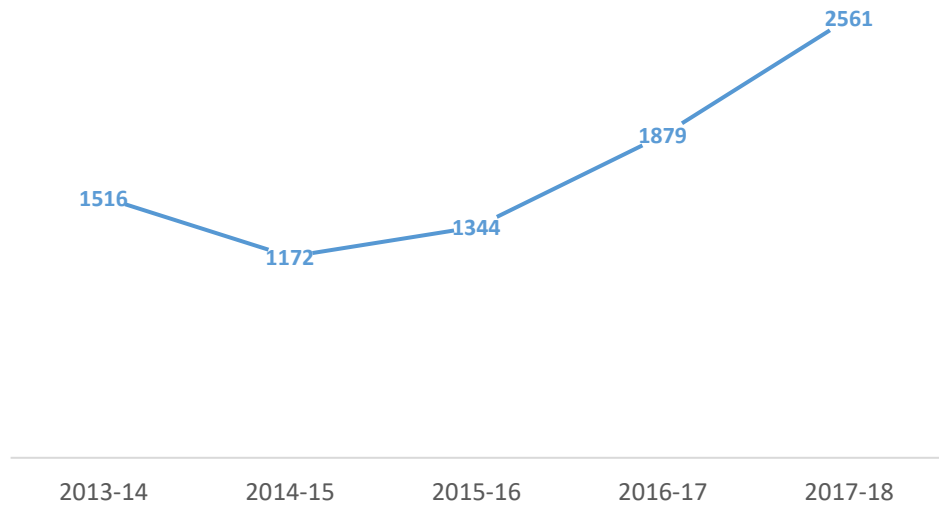
# Existing evidence

Legal Aid Agency statistics provide a vital insight into how the ECF system is working. Many of the reports published in response to LASPO highlight that ECF has not operated as the safety net that it was intended to be, identifying where it fails to ensure that legal aid is available to those who need it. The literature highlights how the scheme presents barriers for individuals who need to access ECF, due to issues such as the time-consuming application process and delays in decision-making. Individuals may also face problems finding a provider to make an application on their behalf. There is some, albeit limited, research on the experience of providers using the ECF scheme.

Existing evidence can be drawn from LAA administrative data (some of which is published quarterly and some of which we received as a result of Freedom of Information Act 2000 requests). Presently available annual LAA data runs from 2013-2019. This data provides quantitative statistics on the general throughput of the system. The LAA data also now includes limited demographic data relating to applications for ECF, but there are only two years of data in this respect.

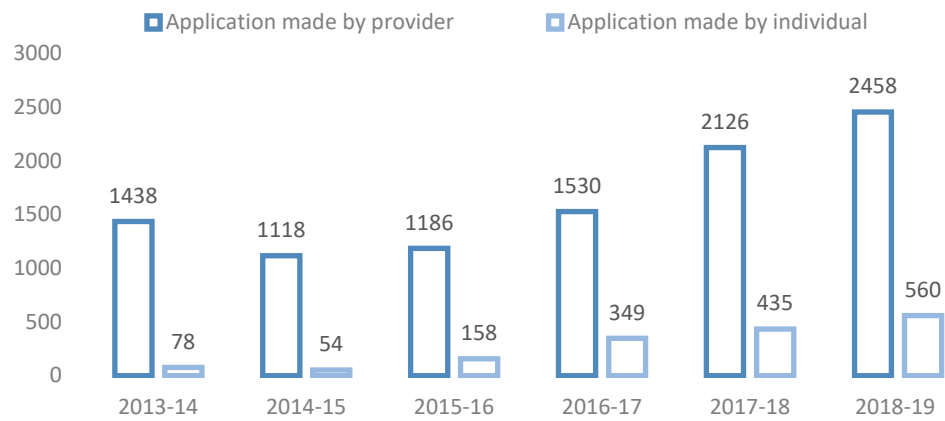
In terms of the volume of applications, the Government expected 5000-7000 applications per year when it set up the Scheme.<sup>9</sup> Things did not start as expected and they are still not matching the original projections by some distance. In the first year, only 1516 applications were received. This figure went down further over the next two years. In 2018/19, it peaked at 3018 applications. This shows some growth in application rates but the rate still remains substantially lower than expected.

## Volume of applications for ECF



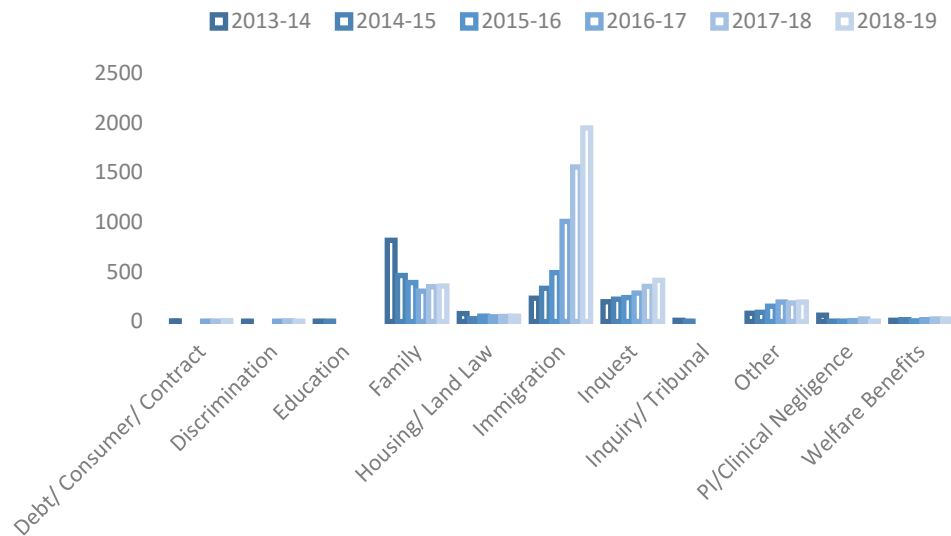
The primary source of applications for ECF are legal aid providers (not individuals), with relatively few applications coming directly from individuals. In 2014/15, there were only 54 individual applications. The peak number of individual applications was 560, in 2018/19.

## Source of applications



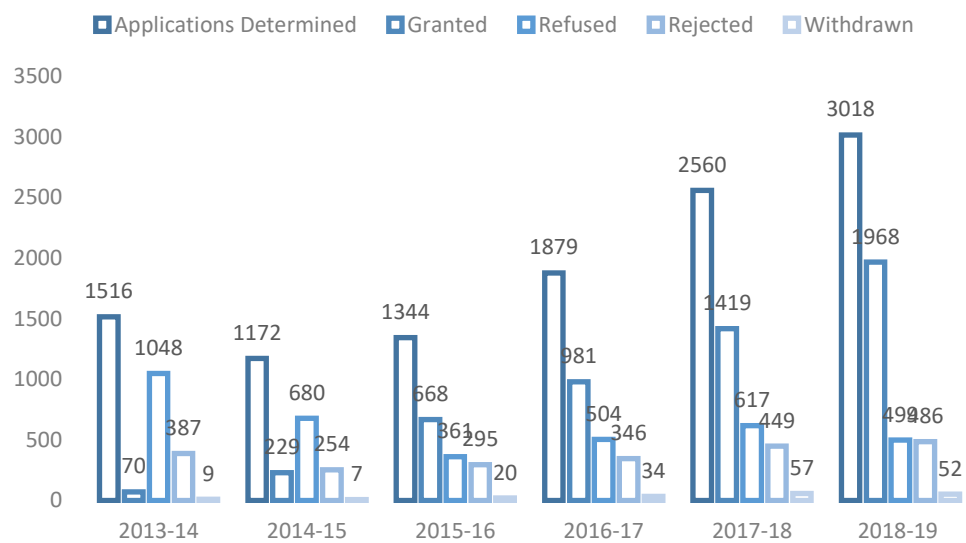
In terms of areas of law, there are some areas of high activity, such as immigration and family, but other areas, such as discrimination, see little to no applications.

## Applications by area of law



In terms of the outcomes of applications, the grant rate has maintained consistency as the volume of applications has increased.

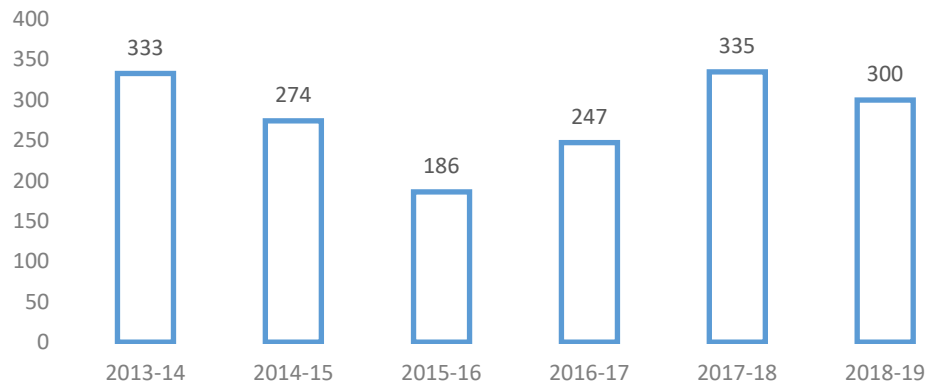
## Application outcomes



Individual decisions concerning ECF can be challenged through an internal review process at the LAA—a common feature of discretionary schemes. There was a peak of 335 internal review applications in 2017/18.

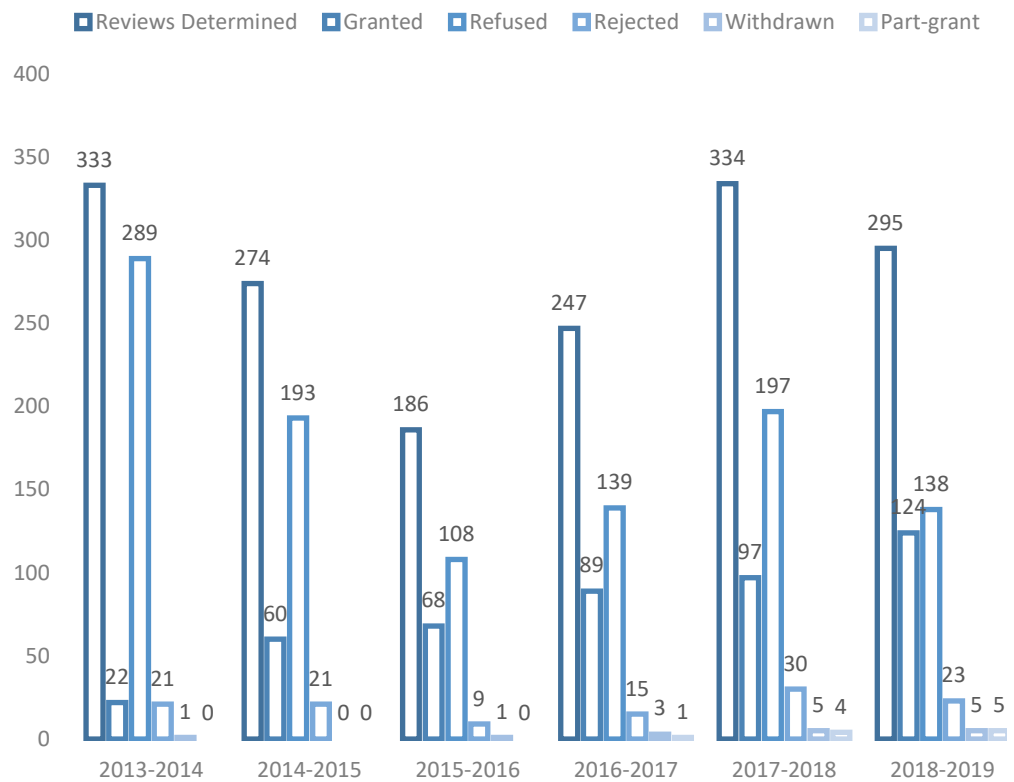


### Internal review of ECF decisions – number of applications



The grant rates seen for internal reviews have increased but remain low compared to rejection rates.

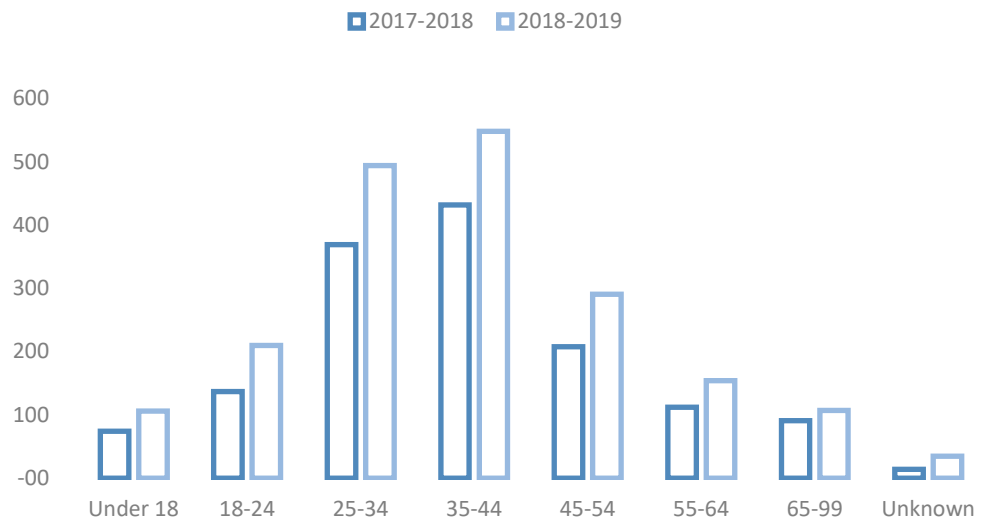
### Internal review outcomes



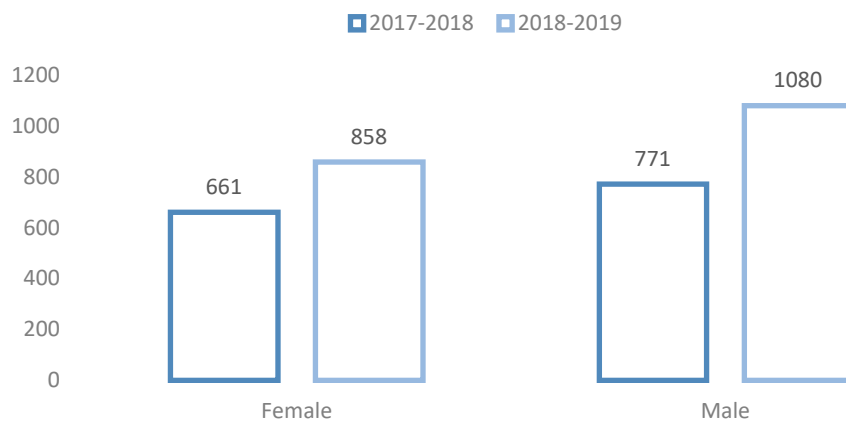
The demographic data on ECF collected by the LAA is only available for a two-year period but it reveals some interesting trends, which it will be worth monitoring over a longer period.

In respect of age, the Scheme is mostly applied to by those aged 25-45. Men make more applications than women, but only by a small amount.

### Applications by age

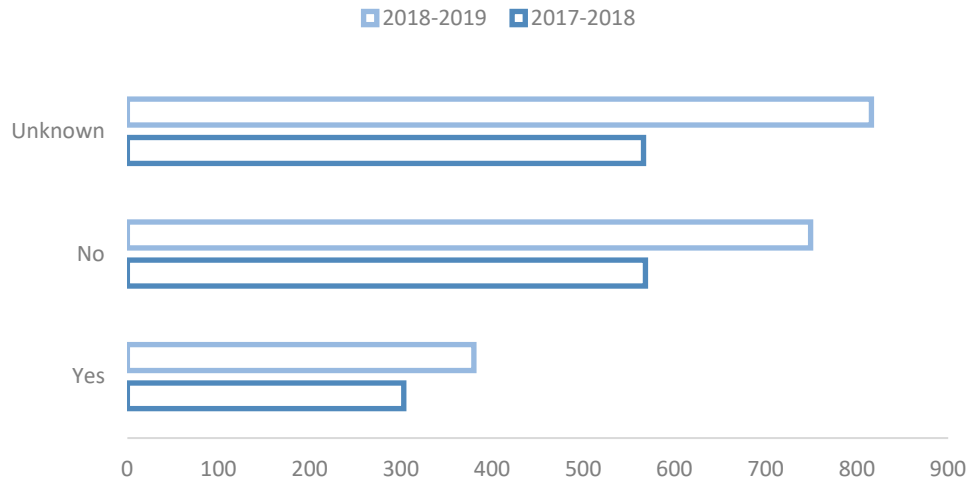


### Applications by sex



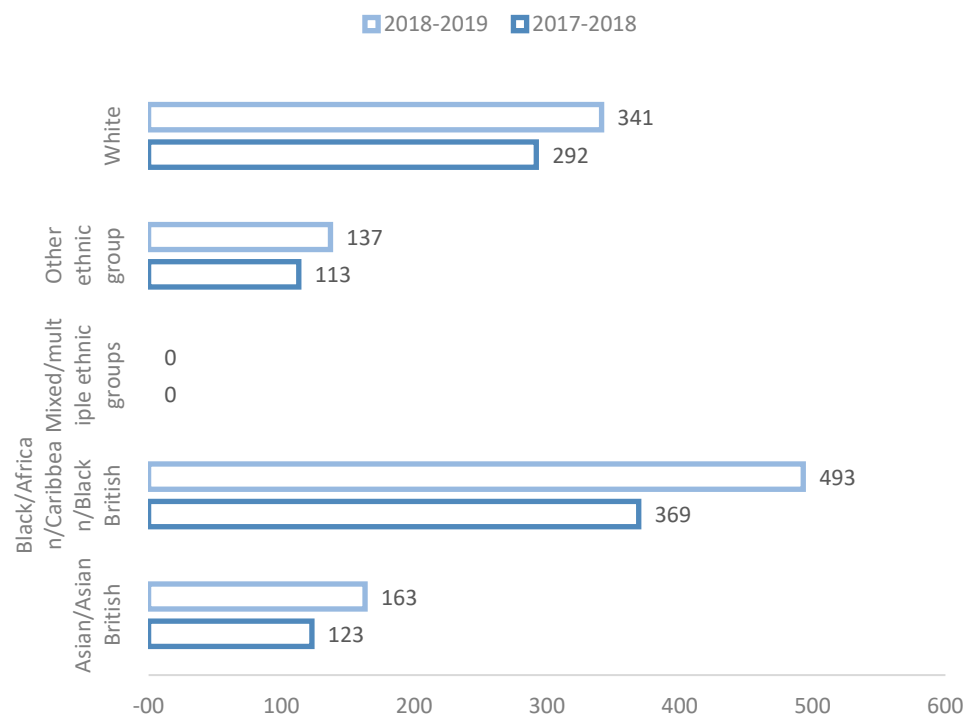
Many applicants do not disclose if they are disabled or not. Of those who do disclose this information, those who identify as disabled represent a sizeable share of applicants.

### Applications by disability



Ethnic minority applicants outnumber those from white British applicants. The largest ethnic group of applicants identify as Black/African/Caribbean/Black British.

### Applications by ethnicity



Alongside the LAA’s own data, ECF has also been monitored and investigated by a range of organisations and experts, resulting in helpful reports which flesh out details of the human experience that the LAA’s quantitative data does not fully capture.

### **The Children's Society**

Research by the Children's Society emphasises that legal aid providers showed limited engagement with the ECF scheme. The initial research, published in 2015, reported that:

*One of the most striking findings of this research is the lack of engagement by solicitors with the exceptional funding scheme. Not one participant across the participant groups spoke about knowing children that had been assisted through this. When exceptional funding was raised during the interviews, it was highlighted as an elusive opportunity rather than the safety net that it was designed to be. It was noted by some participants that lawyers did not see the point in submitting an exceptional funding application given the poor quality decision making of the process in conjunction with the long and complex process of putting an application together. It was not considered a good use of time and practitioners considered it more time efficient to secure pro-bono work.<sup>10</sup>*

The Children's Society published a follow-up report two years later, which acknowledged that usage of the ECF scheme had improved since the cases of *Gudanaviciene*<sup>11</sup> and *IS*.<sup>12</sup> However, it reported that despite the increase, many of the providers they spoke to had still not made an ECF applications, due to 'a preconception that they will not succeed; a decision not to use unpaid time on an application for which they may not receive payment, and a lack of knowledge about ECF generally'.<sup>13</sup>

### **Bar Council**

A report for the Bar Council on immigration detention and the perspectives of legal professionals found that ECF is 'the subject of controversy, with participants suggesting that it is an under-used channel for immigration detainees.'<sup>14</sup> The report highlights a lack of data on how many ECF applications are granted for people held in detention, but notes that 'many interviewees were concerned that legal aid advisers are not always alerting clients that they are eligible for ECF.'<sup>15</sup> There were a range of views about the reasons for this, including poor awareness among lawyers that ECF provision had improved, and some lawyers being deterred by the separate application process. There were reports of detainees with cases that may be eligible for ECF being told that they would need to pay privately.<sup>16</sup> Whilst these findings are concerning, they only represent a small snapshot of one discrete part of the civil justice system. Further evidence is required to identify whether such concerns are reflected across other areas of law.

### **Rights of Women**

Research conducted by Rights of Women, a national charity that aims to help women through law, provides a detailed account of barriers that individuals face in accessing the scheme.<sup>17</sup> The report is based on research conducted between April 2017 and September 2018, during which time data was collected whilst the organisation provided support to 23 women experiencing or at risk of domestic or sexual violence in making ECF applications for immigration and family cases. The research found that there were significant barriers arising from the length of time that it takes to compile an ECF application, the complexity of the application process and information required to make an application, and problems with the system for urgent applications. On average, caseworkers spent 9 hours preparing ECF applications, the average length of a cover letter for an ECF application was 11.5 pages for immigration and 10 for family cases, and of the 8 urgent applications submitted, only 1 was determined within 5 days (which was the LAA's target for processing urgent applications at the time of the research, although it has recently been increased to 10 working days).

The research by Rights of Women also raises concerns about the general timeliness of decisions on non-urgent ECF applications, as from the 15 non-urgent applications submitted during the research, none were determined within the LAA's 20 working day timeframe (which since the research has increased to 25 working days). Overall, the research identified barriers for individuals attempting to access the scheme without the assistance of a lawyer, and difficulties finding legal aid lawyers to take onward referrals once ECF was granted, as well as a general lack of knowledge about the scope and availability of legal aid. Whilst the project saw high levels of successful applications, with all 18 immigration applications granted and 4 out of the 5 family applications granted, overall grant rates for ECF applications are much lower.

In the context of this existing evidence and research, the aim of our research was to address the gaps in evidence about the experience of legal aid providers using the scheme, and the barriers that they face in accessing ECF for their clients.

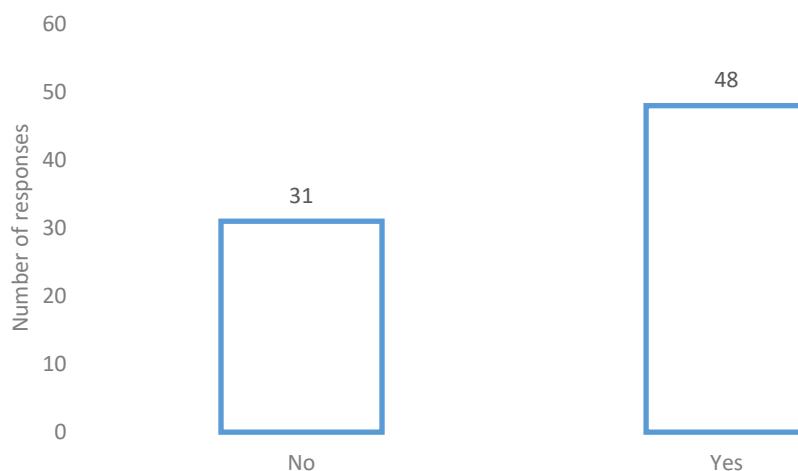
# Providers' experiences

To build a better understanding of how the ECF system is experienced by providers, we surveyed legal aid providers. Our findings provide important context for how the Ministry of Justice should approach their review of ECF.

Details of our method are in the appendix of this report. Given the short timeframe set out in *The Way Ahead*, we fell just short of a statistically significant sample, but the sample does allow us to generate strong indications of provider experience. It therefore provides a detailed framing of key issues for the work of the *The Way Ahead* team.

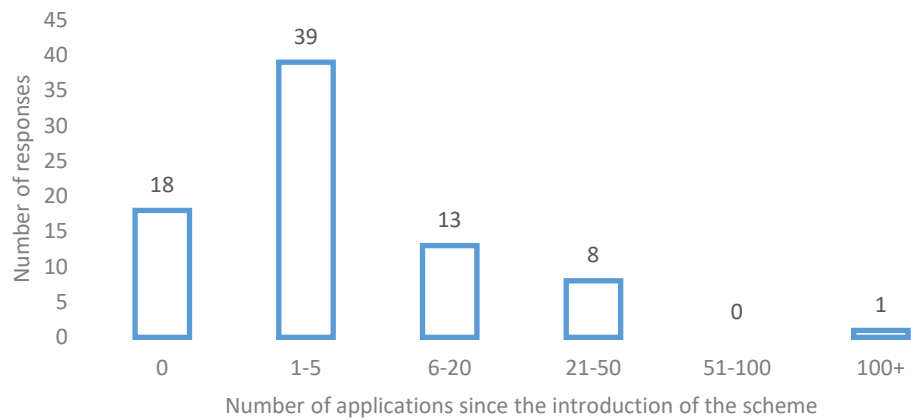
Of those who responded, 48 legal aid providers reported that they do make ECF applications on behalf of their clients, and 31 (38.75%) reported that they do not make ECF applications.

## Do you make ECF applications on behalf of your clients?



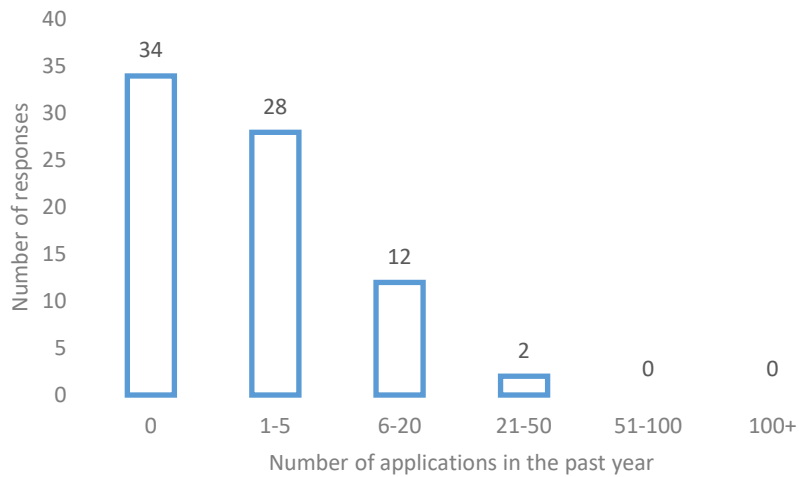
18 providers (22.5%) reported that they have never made an application to the ECF scheme, and a just under 50% reported that they had made a small number of applications (between one and five) since the scheme was introduced.

**Approximately how many times have you applied for ECF since the scheme was introduced?**



Just under half of providers (42.5%) reported that they had not made any ECF applications in the past year, with a smaller number (35.44%) reporting that they had made between one and five applications in the past year. Only one provider reported making in excess of 100 applications since the scheme was introduced, and only two providers reported making between 21 and 50 applications in the past year.

**Approximately how many times have you applied for ECF in the past year?**



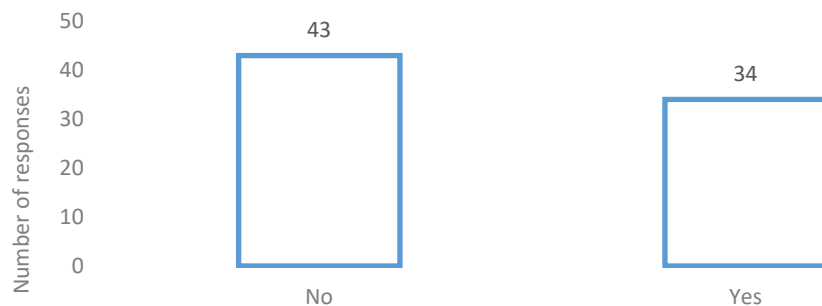
These results indicate that many providers make a low frequency of ECF applications, and that previous experience of using the scheme does not necessarily lead to continued use of ECF.

Providers reported a range of reasons for not using the scheme. These included:

- the risk of not being paid, particularly where resources are stretched and the applications are not cost effective;
- previous applications being refused; and
- the application process being off-putting, particularly due to it being time consuming.

Over half of providers (53.75%) reported that they do not take on clients who have applied for ECF directly from the Legal Aid Agency and who have had their eligibility for ECF confirmed.

**Do you take on clients where the individual has directly applied to the Legal Aid Agency and their eligibility for ECF has been confirmed?**

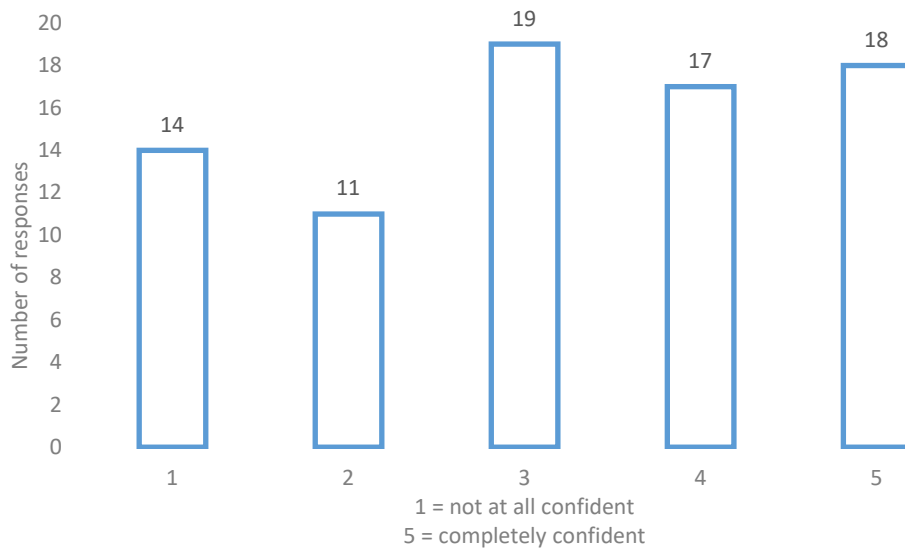


The reasons provided were predominantly that providers had not been approached by anyone under these circumstances. Some respondents expressed a preference for doing the applications themselves, and one respondent specified that they prioritise in scope cases due to capacity issues.

The survey also asked a series of questions to find out more about provider attitudes towards the ECF scheme, and any factors that might prevent providers from making applications. Across all categories of law, providers indicated a tendency to have a high level of confidence in identifying cases that may be eligible for ECF. Confidence among immigration providers appears higher than for providers specialising in family, housing, and welfare benefits.



**How confident do you feel about identifying cases that may be eligible for ECF?**

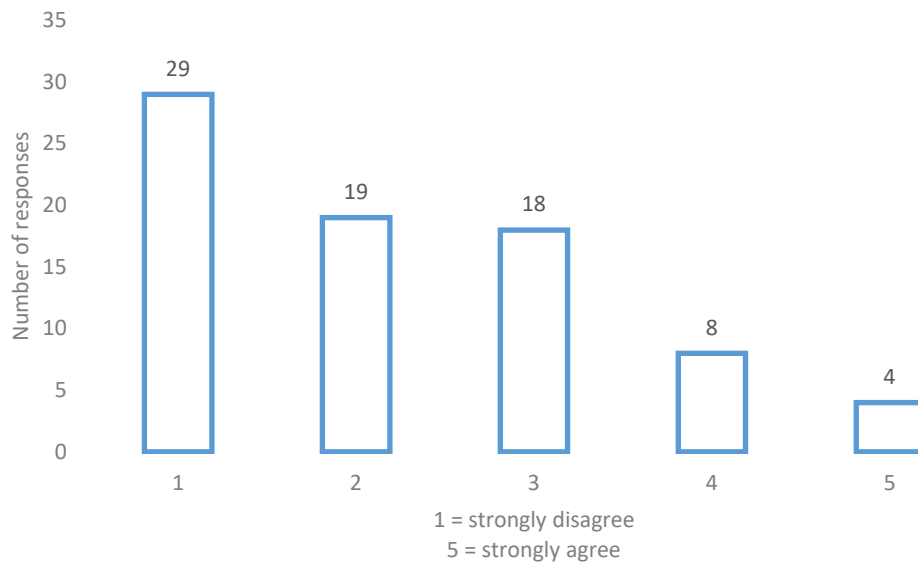


Providers were asked to rate their level of agreement with the following statements:

- The Legal Aid Agency provides clear information about the eligibility criteria for ECF;
- The Legal Aid Agency provides clear information about how to apply for ECF; and
- The ECF scheme currently operates effectively to ensure that clients are able to access legal aid when they need.

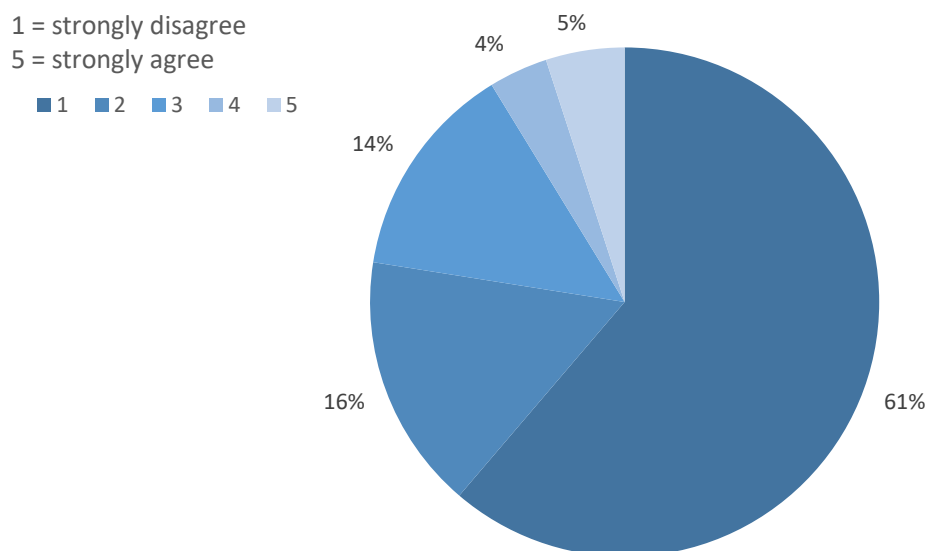
The survey found that providers displayed a strong tendency to disagree with the statement that the LAA provides clear information about the eligibility criteria for ECF. Providers also displayed a strong tendency to disagree with the statement that the Legal Aid Agency provides clear information about how to apply for ECF.

### The Legal Aid Agency provides clear information about the eligibility criteria for ECF



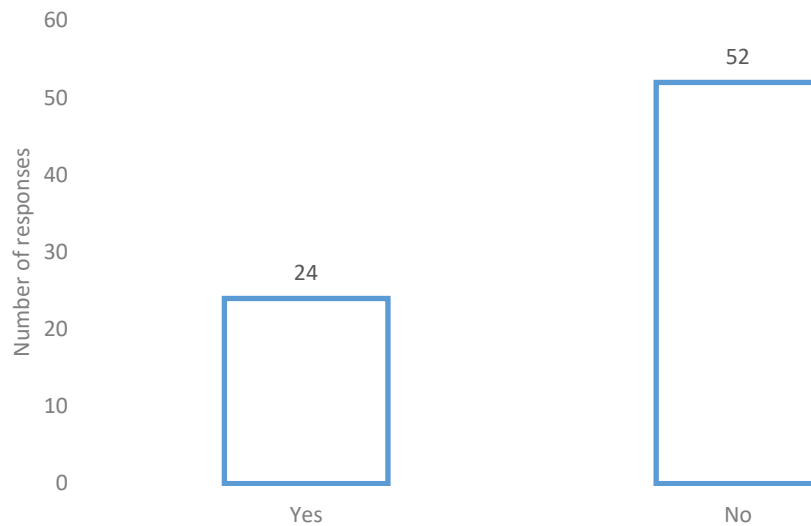
A majority of providers (61%) who responded to the survey strongly disagreed with the statement that the ECF scheme currently operates effectively to ensure that clients are able to access legal aid when they need it. Only 5% of respondents strongly agreed that the scheme operates effectively.

### The ECF scheme currently operates effectively to ensure that clients are able to access legal aid when they need it



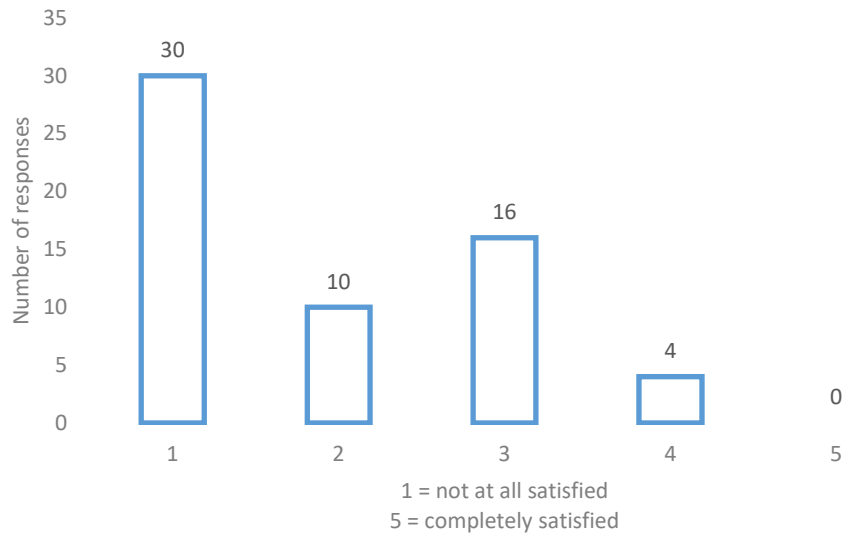
Just under a third of respondents (30%) indicated use of alternative strategies to avoid making ECF applications. Such strategies included pro bono work and work completed under grant funding or other funding streams, as well as some providers indicating that they limit the number of cases taken on at any one time or advise clients to try self-help alternatives.

**Do you adopt alternative strategies to avoid making ECF applications?**

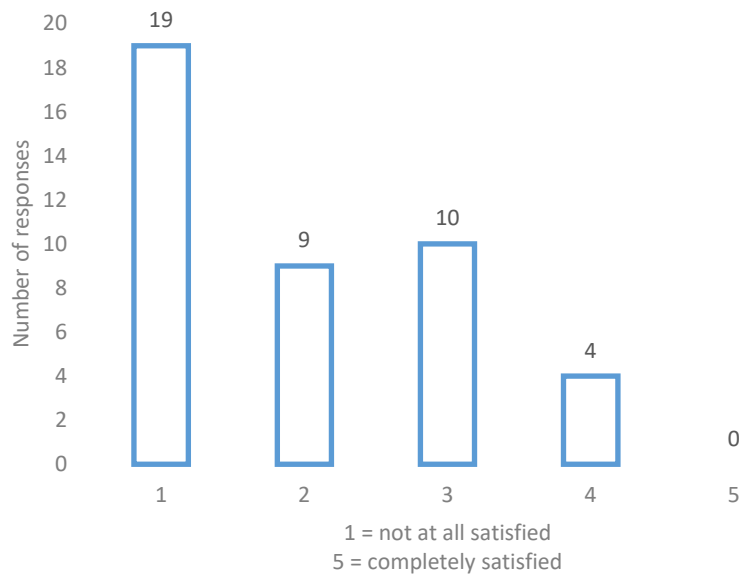


The survey asked providers to report their experiences of using the scheme, including the timeliness of decision-making. A total of 61 providers (76.25% of those who responded) reported that they had made at least one application since the scheme was introduced, and of these, 49.18% reported that they were not at all satisfied with the timeliness of decision-making for non-urgent applications (based on the previous processing target time of 20 days and the updated target time of 25 days as of 28 August 2019). A total of 42 providers (just over 50% of those who responded) reported that they had made an application within the past year, with 45.24% of these reporting that they were not at all satisfied with the timeliness of decision-making for non-urgent applications. An overwhelming majority of responses highlighted continuing problems and the need for further improvements. No providers that had made an application in the past year or since the introduction of the scheme indicated that they were completely satisfied with the timeliness of decision-making.

**Provider satisfaction with the timeliness of decisions from the Legal Aid Agency for non-urgent applications since the introduction of the scheme**

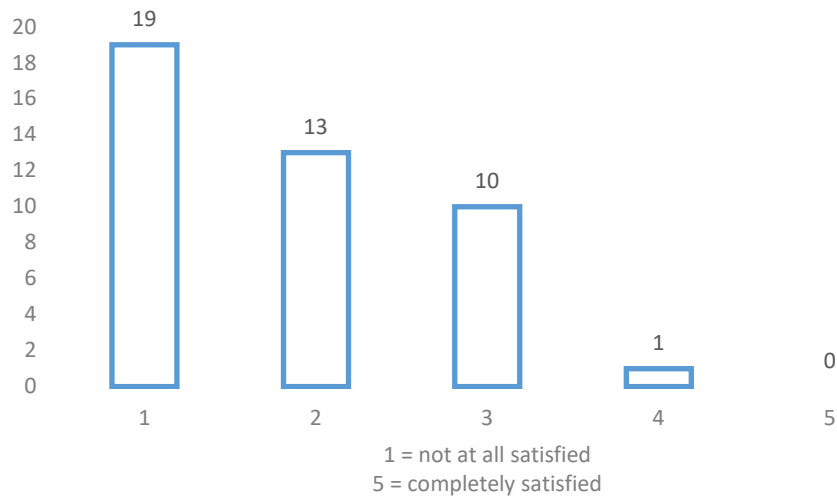


**Provider satisfaction with the timeliness of decisions from the Legal Aid Agency for non-urgent applications in the past year**

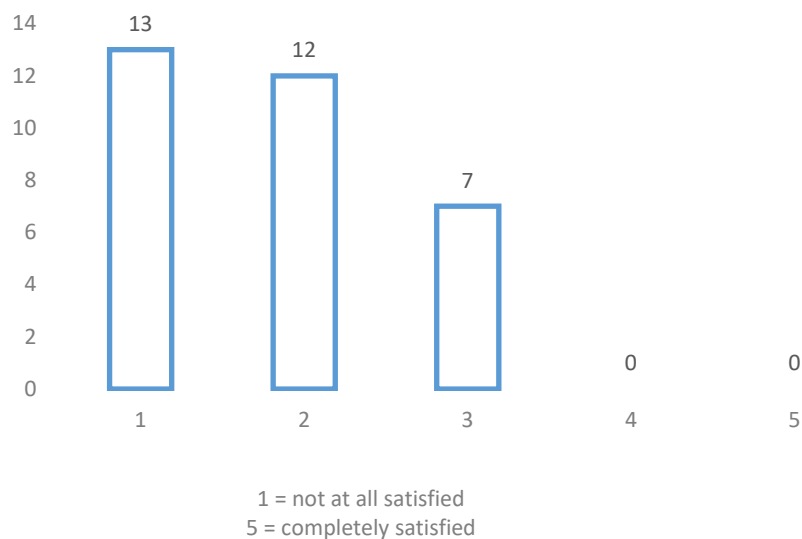


Of the 43 providers that had made at least one application to the scheme since its introduction, including an urgent application, 44.19% reported that they were not at all satisfied with the timeliness of decision-making for urgent applications. 40.63% of those who had made an application in the past year reported that they were not at all satisfied with the timeliness of decision-making for urgent applications. Overall, higher levels of dissatisfaction were expressed in relation to the timeliness of decision-making on urgent applications than with the timeliness of decision-making for non-urgent applications.

**Provider satisfaction with the timeliness of decision-making for urgent applications since the scheme was introduced**

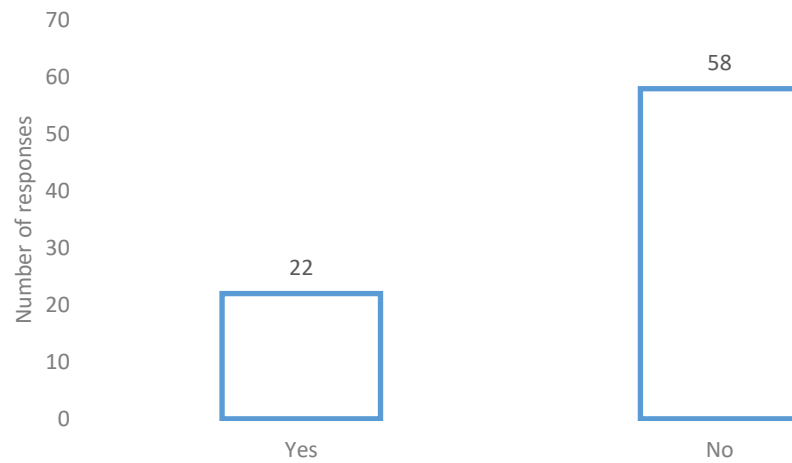


**Provider satisfaction with the timeliness of decision-making for urgent applications in the past year**



Just over a quarter (27.5%) of providers reported that they were aware of the availability of applying for ECF to investigate the possibility of applying for ECF (or 'ECF for ECF'). Only two providers reported that they had actually applied for 'ECF for ECF.' The reasons that providers gave for not using this process included that it would be too time consuming to make two applications and concerns about the possibility of it causing undue delays. Some providers reported that they were not aware it was available, including one response by a provider who reported that they had carried out investigatory work without being paid because they did not know about the 'ECF for ECF' process, and there was also one request for training from another provider.

**Are you aware that applications can be submitted through the ECF scheme to investigate the possibility of applying for ECF**

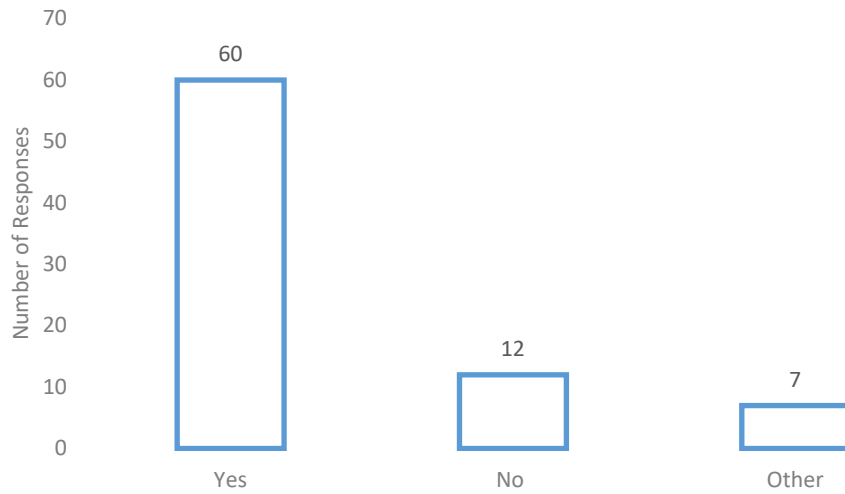


Providers were asked to provide feedback on whether they would be more likely to make ECF applications if the Government implemented specific improvements as a result of the following commitments set out in *Legal Support: The Way Ahead*:

- To work with legal practitioners to consider whether the process for applying for Exceptional Case Funding can be simplified, and ensure that the forms and guidance are as accessible as possible;
- To work to improve timeliness of the Exceptional Case Funding process, to ensure that people can access funding when they need it; and
- To consider whether it is necessary to introduce a new emergency procedure for urgent matters to access Exceptional Case Funding.

Three quarters of providers (75%) responded that they would be more likely to make applications if these changes were implemented effectively.

***Would you be more likely to make applications to the ECF scheme if the suggested *The Way Ahead* improvements were implemented?***



Additional comments given by providers, which suggested improvements to the ECF scheme, included:

- ensuring the process is more accessible to direct applicants;
- bringing areas back into scope, including Article 8 immigration cases;
- simplifying the evidence required to support ECF applications;
- assigning caseworkers that could be contacted;
- making the scheme financially viable for providers; and
- giving providers increased powers to determine eligible cases.

There were also a range of comments that echoed the improvements suggested in *Legal Support: The Way Ahead*, including improvements to the application forms and decision-making process, and improvements to the process for urgent applications.

# Next steps

The evidence set out in this report suggests that ECF processes need rethinking urgently but so does the role of ECF in the wider legal aid system.

As regards ECF processes, it is clear—as *The Way Ahead* appears to acknowledge—that the current process design is deterring providers from making applications. Taking meaningful steps to make processes simpler and quicker—and to communicate those changes—is essential. The Ministry of Justice has access to a far wider range of relevant data sources concerning ECF than external researchers and they should seek to draw upon all of this evidence to inform improvements. Providers responding to our survey indicated support for the planned improvements and also provided some concrete proposals which should be considered.

The evidence also suggests that wider reflection on the role of ECF in the legal aid system is necessary, including how it fits into the economic environment that legal aid providers find themselves operating within. For instance, the evidence we have reviewed prompts serious questions about whether Article 8 immigration cases ought to be brought back into scope for legal aid, given the volume of successful applications in the immigration context. There are also questions around whether giving further powers to legal aid providers to grant ECF for controlled work would improve the operation of the scheme, particularly in areas where there is a high demand for ECF and the evidence indicates providers have a good understanding of the criteria for granting ECF. Such reforms present an opportunity to remove the evident disincentives for applications and lower the LAA's administrative burden, which is also a source of problems. Reducing the number of immigration applications which have to be processed by the ECF team (whether by bringing such cases back into scope or granting delegated powers) would free up resources to consider urgent or more complex applications, thus potentially reducing decision times. This kind of wider systems thinking is necessary to optimise the ECF system.

The key risk of *The Way Ahead* plan for ECF is that it results in superficial changes that make little difference to people who are in need of legal advice to effectively enforce their fundamental rights. The opportunity is for a range of systemic improvements that substantially improve access to essential legal advice. The evidence in this report provides guidance on how the latter outcome could be achieved.



# Appendix: method

This report is based on the findings of a survey of legal aid providers carried out by Public Law Project to gather further data on usage of the Exceptional Case Funding (ECF) Scheme. Our analysis excluded inquest-related cases as there are distinct questions in that area.

The survey was open to responses between 10<sup>th</sup> October 2019 and 15<sup>th</sup> November 2019, and there were 89 responses, of which 80 respondents were legal aid providers, and 9 responses were submitted by other organisations that provide legal advice and support.

Given that we worked within the short timeframe set out in *The Way Ahead*, we fell just short of a statistically significant sample, but the sample does allow us to infer strong indications of provider experience. It therefore still provides a detailed framing of key issues for the work of the *The Way Ahead* team.

The aim of the survey was to engage legal aid providers working in the areas of immigration law, family law, housing law and welfare benefits law to share their experiences of using the ECF scheme, as well as to identify factors that prevent some providers from using the scheme.

We identified 1276 organisations with a legal aid contract working across these four areas, and emailed the survey to 1223 legal aid providers with a contact email address listed on the Law Society website. An email was sent to one email address for each organisation, *i.e.* where an organisation operates from more than one location an email was not sent to each location. Across the areas of immigration, family, housing and welfare benefits the response rate was 5.81%. The survey was sent to people who had attended Public Law Project training on ECF over the past two years, and was also promoted through organisations whose members include legal aid providers, and media outlets to target legal professionals, including promotion via social media.

Participants were able to respond to the survey by completing an online form, which had a total of 35 questions. To encourage a good response rate, participants were invited to only fill out the questions relevant to them, and for the same reason, the survey was designed to take around ten minutes to complete. The questions included a range of subjects relating to questions arising from other research findings and the PIR, including provider perspectives on the complexity of ECF applications, the timeliness of decision-making and experiences of making urgent applications.

To help refine the plan for the research and the areas addressed within the survey questions, Public Law Project consulted with two academics with considerable knowledge and experience of legal aid and the ECF process. We would like to express our gratitude to Dr Jane Krishnadas, Director of CLOCK and Legal Outreach at Keele University, and Dr Michelle Waite, Lecturer in Law (Practice) and Solicitor at the University of Salford, for their helpful input in developing the questions. We also extend our thanks to Ariana Devine who assisted with the administration of the survey.

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