



Ministry of  
**JUSTICE**

**Name:**

**Address:**

**Tel:**

**Email:**

To: See list at end

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## **LEGAL AID REFORM: PROCESS FOR OBTAINING EXCLUDED CASES FUNDING**

If enacted the Legal Aid, Sentencing and Punishment of Offenders Bill, which is currently before Parliament, will radically alter the scope of civil legal aid. Only those matters set out in Schedule 1 to the Bill will be within the scope of the civil legal aid scheme. Clause 9 of the Bill sets out a power to allow the Director of Legal Aid Casework to fund cases excluded from the Schedule.

We are writing to you now to outline our intentions about how applications for excluded funding will work. The present exercise does not cover contracting or remuneration. It is not a consultation within the meaning of the Government Code of Practice on Consultation. The purpose of writing to you is to help us improve our understanding of the potential impact of our proposals on groups sharing a protected characteristic under the Equality Act 2010, in accordance with our public sector equality duty, before final decisions are taken on how applications will work.

We recognise that as a result of the reduction in scope there is likely to be an increase in the number of applications for exceptional funding. A process is needed that will handle the



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anticipated volume of cases effectively. The attached note sets out how we intend the executive agency of the Ministry of Justice that will replace the Legal Services Commission handles applications for excluded cases funding. Before doing so, and for background, it outlines briefly the current arrangements for in-scope civil legal aid cases and for exceptional funding cases under the Access to Justice Act 1999.

The note does not cover the criteria which the Director will use to decide whether or not to grant funding under clause 9 in an individual case. Those criteria will be a statement of the Government's view of its legal obligations to provide legal aid. It is intended that the criteria will be published as guidance provided by the Lord Chancellor under clause 4 of the Bill. The criteria will continue to ensure the protection of an individual's rights to legal aid under the European Convention on Human Rights as well as those rights to legal aid that are directly enforceable under European Union law. In considering whether legal aid should be provided in an individual case engaging Article 6, the Director would need to take into account, for example, the importance of the issues to the individual concerned and the nature of the rights at stake; the complexity of the case; the capacity of the individual to represent themselves effectively; and alternative means of securing access to justice. Any application will also need to satisfy the relevant means and merits tests, as now.

We are interested in your views on how the proposals described in the note are likely to impact either adversely or positively on the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The enclosed Equality Impact Assessment sets out our analysis as to the likely impact. We would particularly welcome your views on its conclusions, as well as any additional evidence of equalities impact, both qualitative and quantitative, and any suggestions regarding mitigation.

Please reply to [legalaidreformmoj@justice.gsi.gov.uk](mailto:legalaidreformmoj@justice.gsi.gov.uk) by no later than 1 April.

Thank you for your consideration.

**Legal Aid Reform Team**  
**Ministry of Justice**

Sent to:

Law Society  
Bar Council  
Legal Aid Practitioners' Group  
Resolution

Action Against Medical Accidents  
Immigration Law Practitioners Association  
Housing Law Practitioners Association  
Advice Services Alliance  
Citizens Advice  
INQUEST  
Equality and Human Rights Commission  
British Institute of Human Rights  
Disability Advisory Service  
Disability Charities Consortium  
Disability Law Service  
Disability Alliance  
MIND  
Rethink  
Mental Health Lawyers Association  
Coalition for Racial Justice  
Race on the Agenda  
Voice UK  
Stonewall  
Women's Resource Centre  
Age Concern  
Young Minds  
Children's Rights Alliance for England  
Liberty  
Justice

## **LEGAL AID REFORM: PROCESS FOR OBTAINING EXCLUDED CASES FUNDING (ECF)**

### **NOTE OF PROPOSALS BY THE MINISTRY OF JUSTICE AND THE LEGAL SERVICES COMMISSION**

#### **Current Arrangements for In-scope Certificated Work**

1. An application must be submitted to the Legal Services Commission (LSC) and will be approved where the relevant merits test and means test are met. A certificate will be issued following approval where no financial contribution is payable, or where a contribution is payable when the first payment is received. In certain circumstances an authorised provider may self-grant emergency funding, whereupon emergency work can begin at once. Funding will usually be limited in terms of scope and by a financial limit. Arrangements are in place to make payments towards profit costs and for any disbursements incurred, and for any funding limitations to be reviewed and where justified removed or updated. At the end of the case a claim is submitted to the LSC where an assessment of work is undertaken and payment is made.

#### **Current Arrangements for In-scope Legal Help**

2. A contracted provider is authorised to self-grant funding for a certain maximum number of matters. A provider may use their devolved powers to self-grant funding where the sufficient benefit and means tests are met. The provider may then begin work at once. Most Legal Help cases are remunerated through fixed fees. A claim for a fixed fee is submitted to the LSC and payment is made automatically. Retrospective audit and assessment activity may take place and money may be recouped from the provider where Legal Help has been incorrectly granted and monies claimed.

#### **Current Arrangements for Exceptional Funding**

3. An application relating to services in Schedule 2 of the Access to Justice Act 1999 that are excluded from scope and so may only be provided for by way of exceptional funding under section 6 of that Act must be made first to the LSC. The LSC cannot authorise exceptional funding itself unless it is authorised to do so by the Lord Chancellor (as is the case for advocacy at inquests into deaths in custody). Otherwise the LSC is only able to request that the Lord Chancellor authorises funding. The Lord Chancellor can authorise any level of service under the Funding Code. Exceptional funding applications currently come

within the level of service 'Other Grant or Contract Work' (level 6)<sup>1</sup>. Under that level of service the Lord Chancellor will usually authorise a one-off grant rather than a funding certificate.

4. All applications are dealt with by the LSC's Special Cases Unit (SCU) in the first instance. Applications must be accompanied by a completed CLSAPP1 form together with the relevant means forms as if applying for a certificate for Legal Representation. LSC means assessors carry out means assessment calculations based on information provided by the applicant (and any further information the SCU caseworker has requested). SCU case workers consider applications against the merits test and then consider whether the exceptional funding tests are met. Case workers may at any stage refer applications to the Special Controls Review Panel for consideration. The referral criteria for the Panel are set out in the Funding Code Procedures.

5. Initially the SCU case manager can make a decision to grant funding (in an authorised case), refuse funding or request funding from the Lord Chancellor. If the case manager refuses funding, the applicant can appeal to the LSC's legal team. The legal team look at the application afresh and take the decision again. If the SCU or legal team request funding the case is passed to Ministry of Justice officials for the Lord Chancellor to make a final decision. He will either endorse the LSC request to authorise funding or disagree and refuse funding. If the Lord Chancellor refuses funding the applicant can seek a judicial review.

6. Where the Lord Chancellor approves funding the case will be returned to the SCU who will deal with assessment of the bill and payment. Generally, funding will take effect from the date of the LSC decision to request funding from the Lord Chancellor. However, in appropriate cases it may be backdated to the date the initial application to the LSC was received.

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<sup>1</sup> The Funding Code presently states: "**1.1 Levels of Service Available**

The Commission will fund only the following levels of service as part of the Community Legal Service, subject to the provisions of the Act, orders, regulations and directions made under the Act, these criteria and the Funding Code Procedures:

1. Legal Help.
2. Help at Court.
3. Family Help – this can be either Family Help (Lower) or Family Help (Higher).
4. Legal Representation – this can be either Investigative Help or Full Representation.
5. Family Mediation.
6. Such other services as are authorised by specific orders or directions from the Lord Chancellor."

## **Current Arrangements for Legal Help relating to Exceptional Funding**

7. In the overwhelming majority of cases in-scope Legal Help can be self-granted by providers in the normal way to cover the preparatory work associated with making an exceptional funding application. That is usually a fixed fee. If the amount of preparatory work involved is exceptionally high an application can be made for the work to be paid at hourly rates. In a minority of cases where all levels of service, including Legal Help, are out of scope (for example, business cases) the cost of making an exceptional funding application can be claimed as part of the exceptional funding grant if the application is successful.

## **Provision introduced by the Legal Aid, Sentencing and Punishment of Offenders Bill**

8. Clause 9(3) of the Bill sets out that an exceptional case determination is a determination –

(a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of –

(i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or

(ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

In addition, there is provision for excluded cases funding (ECF) under clause 9(4) for advocacy in inquest proceedings into the death of a member of the individual's family where the Director has determined that in the particular circumstances of the case there is a significant wider public interest in the provision of advocacy.

9. To ensure the appropriate degree of independence and transparency, the Government has decided that funding decisions in individual in-scope and excluded cases should be made by the Director of Legal Aid Casework, subject to general criteria which will be published in the form of guidance or directions issued by the Lord Chancellor. Ministers will be prevented by statute from giving the Director guidance or directions about funding in an individual case.

10. The guidance issued and published by the Lord Chancellor will set out the factors that the domestic courts and the European Court of Human Rights have identified as weighing in favour of the provision of publicly funded legal assistance, for example, under Article 6 of the

European Convention on Human Rights. In considering whether legal aid should be provided in such cases, the Director would need to take into account, for example, the importance of the issues to the individual concerned and the nature of the rights at stake; the complexity of the case; the capacity of the individual to represent themselves effectively; and alternative means of securing access to justice. Any application will also need to satisfy the relevant means and merits tests, as now.

### **Proposed Arrangements for ECF**

11. At present about 200 applications for exceptional funding are made each year. There is uncertainty regarding the number of people who will apply for ECF, stemming from uncertainty surrounding how the changes to the scope of the civil legal aid might affect the behaviour of people applying for legal aid, and how legal services providers might adjust to changing demand. To give an idea of the order of magnitude of the potential increase, our initial estimate is that approximately 6,500 additional applications for Legal Representation a year are likely.

12. A process is needed that will handle the anticipated volume of cases effectively. To assist providers we have aimed as far as possible to use existing processes for the sake of familiarity.

### **Proposed Arrangements for Certificated Work under ECF**

13. We are proposing that the application process for certificated work will be broadly similar to the existing process for in-scope cases, with the additional factor that providers must set out how the case satisfies the ECF criteria. Where the application is complete the Director will determine the application in the same way as in-scope applications with the addition of the consideration of the test set out in clause 9 and the ECF criteria set out in the Lord Chancellor's published guidance or Directions. Awards will in principle be effective from the date of grant (or where a contribution is required from the date the certificate is issued). However, the Director will have a power to backdate to the date of receipt of the application, which we expect will be exercised in line with present practice.

14. Where a grant is subject to a contribution from the applicant, a funding certificate will not be issued until the first payment is made. Following the issue of a certificate the process will be the same as that for in-scope cases now. Service level definitions will be as for in-scope cases.

## **Proposed Arrangements for Legal Help under ECF**

15. We consider that most applications for ECF will be for Legal Representation. However in some circumstances the Director may respond to an application by authorising only Legal Help. For example, where the applicant seeks both Legal Representation and Legal Help, the Director could conclude that the Government's legal obligations to provide legal aid will be discharged if just Legal Help is authorised.

16. In the rare circumstances where an applicant wishes to apply for ECF for Legal Help only, there will be no devolved powers to grant Legal Help (see "Devolved Powers under ECF" and "ECF Applications" below). Providers would carry out the sufficient benefit and means tests, and would also be required to provide evidence that the case satisfied the ECF criteria. They would commence work following receipt of notification of the Director's agreement of their assessment as to satisfaction of the sufficient benefit test and the Director's determination that the ECF criteria were satisfied. The Director might limit the scope and financial value approved. Awards will in principle be effective from the date of grant. However, the Director will have a power to backdate to the date of receipt of the application, which we expect will be exercised in line with present practice.

## **Inquest Cases under ECF**

17. The arrangements described above will also apply to inquest cases and cases in other venues before which advocacy is out of scope. Our present expectation is that the service level definition will be level 6 (see "Current Arrangements for Exceptional Funding" above).

## **Devolved Powers under ECF**

18. It is proposed that providers will not be given devolved powers for any level of service in relation to ECF. Providers will not be able to self-grant Legal Help on an ECF basis, so unless it is a case which has remained in scope for Legal Help, any work carried out in advance of determination of an application will be done at the provider's risk or the client's own expense.

## **ECF Applications**

19. Applications for legal aid are currently made in writing by a legal representative adviser. The merits test and the need to provide the relevant facts from a legal perspective, including meeting the clause 9 test and any criteria published by the Lord Chancellor, presupposes legal input to the application process before ECF for Legal Representation could be authorised. We expect that all ECF applications will continue as now to be made through a solicitor or other legal advisor. In the event that a potential applicant visits a face-to-face provider who recognises that the case will not be within scope for legal aid but may be eligible for ECF, the ECF application can be made straightaway.

20. We are proposing that payment for the cost of making the application may be made only if the application is successful. When applying for ECF providers will have to accept the risk of non-payment for any work done as part of the application. That is in line with the position for existing wholly out-of-scope exceptional funding cases (eg business cases where *all* levels of service are excluded). Paying for all ECF applications whether successful or not would encourage applications as a matter of routine, incurring costs which would ultimately be of no benefit to clients.

### **Urgent ECF Applications**

21. There may be occasions when ECF applications for Legal Representation will need to be dealt with urgently, for example in family proceedings. There will not be any 'conditional' grant for urgent applications. The procedures will remain the same as for other ECF cases but will be prioritised within the agency. A contribution where due will still be required before the certificate is issued.

### **Review of ECF Determinations**

22. If an application is refused at the determination stage a notice of refusal with reasons will be issued. The provider will be able to request a review by a different person within the agency to the person who took the original decision. That mirrors the existing arrangements for internal review of applications refused by the LSC. The reviewer will look at the decision in its entirety and reconsider the determination. The current exceptional cases process applies to relatively few applications which are often technically complex. We expect ECF applications to be more numerous but with a lower proportion of complex cases. Consequently the same high level of checks for ECF determinations would be impractical and might lead to delays in grant and uncertainty for individuals and providers. More complex

cases may necessitate more detailed scrutiny. The same review process will apply to amendments and decisions to withdraw funding.

### **Monitoring Arrangements and Data Collection**

23. We expect on ECF cases to record broadly the same data that is currently collected on in-scope civil cases. That includes details about the client including gender, ethnic origin and disability (there are also a number of additional details depending on the type of work completed, for example marital status). We also require information on the type of case and the outcome of the case that is being funded. There is also likely to be additional information collected for the purposes of tracking ECF cases through the agency's IT systems.

### **Telephone Helpline**

24. When a caller does not qualify for legal aid the telephone helpline will, as now, signpost them to other potential sources of assistance. In particular, where a caller's case is out of scope the operator will advise them of the existence of ECF and that if they want advice about whether ECF might be of help in their case they should contact a legal adviser. Operators are not legally trained and it will therefore not be possible for them to take an appropriate view of whether or not a particular caller might be able to apply successfully for ECF.

### **Equality Issues**

25. Under the Equality Act 2010 section 149, when exercising its functions, the Ministry of Justice is under a legal duty to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
- Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
- Foster good relations between different groups.

The relevant protected characteristics for these purposes are: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

26. Consistent with these duties, and with the statutory objectives of section 149 of the Equality Act 2010 in mind, the accompanying Equality Impact Assessment sets out in full our view as to the likely impact of these proposals on those sharing protected characteristics. In summary:

*Elimination of unlawful discrimination*

The proposals will not result in direct discrimination, because they will apply equally to those clients or providers who share a protected characteristic and those who do not. However, clients sharing certain protected characteristics may be more likely than the general population to use the ECF process. On that basis we have identified the potential for differential impacts on clients sharing the protected characteristics of age, disability, race and sex and on providers in relation to disability, race and sex. In particular, there is a risk in making clients bear the expense of unsuccessful applications in that disabled clients or those with mental health issues, learning difficulties or need of translators might require more work at the application stage and thus incur a bigger unrecovered expense (albeit that many such clients could be expected to be assisted by an advocate/litigation friend). We believe that is justifiable because non-payment for unsuccessful applications is in line with the position for the minority of existing exceptional funding cases where all levels of service are out of scope. Paying for all ECF applications whether successful or not would encourage applications as a matter of routine, incurring costs which would ultimately be of no benefit to clients.

*Advancement of equality of opportunity between different groups*

Providers will be expected as part of their contractual obligations to make reasonable adjustments for their clients, as well as complying with the freestanding legal duties that they themselves have as a service provider under section 29 of the Equality Act 2010.

*Fostering good relations between different groups.*

We have given careful consideration to this objective and do not believe that the proposals should make its attainment more difficult. As part of the overall package of legal aid reform the Government has specifically protected discrimination claims in all areas of civil legal aid, demonstrating its commitment to the principles of equality and to the combating of societal prejudices.