

**WRITTEN EVIDENCE TO THE JOINT COMMITTEE ON HUMAN RIGHTS IN RESPONSE
TO ENQUIRY INTO THE IMPLICATIONS FOR ACCESS TO JUSTICE OF THE
GOVERNMENT'S PROPOSED LEGAL AID REFORMS SUBMITTED BY THE PUBLIC
LAW PROJECT**

Introduction

1. The Public Law Project (PLP) is an independent legal charity that was set up in 1990 with the aims of increasing the accountability of public decision-makers; enhancing the quality of public decision-making; and improving access to justice for disadvantaged groups and individuals. It carries out its aims through training, research, casework and policy work.
2. PLP welcomes the opportunity to provide written evidence on the implications for access to justice of the proposed legal aid reforms. As indicated in our letter to the Committee dated 19 August 2013, PLP's submission will be restricted to the issue of exceptional funding under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012), and the extent to which it provides a safety net for access to justice. This issue is of central importance to any analysis of the proposed legal aid reforms because exceptional funding is the mechanism by which the UK's legal aid system purports to comply with its human rights obligations.

Background

3. As is well canvassed, LASPO 2012 takes many areas of law out of scope for legal aid. During the passage of the LASPO Bill it was recognised that in order to comply with the UK's international obligations (such as the right to a fair hearing under Article 6 of the European Convention on Human Rights), there needed to be a way of ensuring that impecunious litigants with meritorious cases who could not represent themselves would have access to public funding so as to ensure they had access to justice. To this end, the Minister for Legal Aid, Jonathan Djanogly, said in the House of Commons on 8 September 2011, "It is right to have an exceptional funding scheme to provide an essential safeguard for the protection of an individual's fundamental right to access to justice".
4. The Government consultation on the proposed legal aid reforms relies on exceptional funding to justify imposing a residence test for eligibility for civil legal aid,¹ in spite of the concerns about the adequacy of the scheme raised by respondents to the consultation.²
5. Since 1 April 2013 PLP has been running a project dedicated to assisting individuals, lawyers, caseworkers, charities and non-governmental organisations with making applications for exceptional funding LASPO 2012. This project is grant funded and we do not charge for the work that we do. The aim of the project is to promote access to exceptional funding for those individuals who have meritorious cases that are no longer in scope for legal aid and who would find it practically impossible to represent themselves.

¹ See paragraph 3.54 of *Transforming Legal Aid* and paragraph 116 of *Transforming Legal Aid: Next Steps*.

² See paragraph 96 of *Transforming Legal Aid: Next Steps*. PLP's response to the consultation is available here:

http://www.publiclawproject.org.uk/documents/PLP_legal_aid_consultation_response_4_June_2013.pdf

6. PLP has worked on over fifty applications for exceptional funding and has significant experience of all stages of the exceptional funding process. PLP is the only organisation that we are aware of that is providing this service.
7. It is our experience that the exceptional funding scheme is inaccessible for applicants, particularly for those that need it most. In our view the exceptional funding regime does not provide a safeguard for access to justice and nor does it ensure that LASPO 2012 complies with the UK's human rights and European Union law obligations.

How exceptional funding works

8. Exceptional funding is available for cases that are out of scope for legal aid under LASPO 2012.
9. Providers of legal services do not have delegated powers to grant exceptional funding. Instead, regulation 67(2)(a) of the Civil Legal Aid (Procedure) Regulations 2012 provides that an application must be made in writing to the Director of Legal Aid Casework (the Director) at the Legal Aid Agency (LAA) for an 'exceptional case determination'. Section 10(3) LASPO 2012 states 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 –
 - 1) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
 - 2) any rights of the individual to the provision of legal services that are enforceable EU rights,³ 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.⁴
10. The Director must provide written reasons for his/her determination and a notice of any right of review. Applications for a review of a determination must be submitted within 14 days of receipt of the determination. A refusal to grant exceptional funding that is upheld on an internal review is amenable to challenge only by way of judicial review.
11. Guidance for exceptional funding has been produced by the Lord Chancellor pursuant to section 4(3) of LASPO 2012. It is entitled *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)* and is available online. The Director must have regard to the Lord Chancellor's guidance when making exceptional funding determinations.
12. Applications for exceptional funding made by applicants who have a legal representative are made on form ECF1 and must be accompanied by the relevant means and merits forms, depending on the area of law and the level of legal service that is required.
13. The process of applying for exceptional funding is set out in more detail in the *Exceptional Cases Funding – Provider Pack*. In particular, the *Provider Pack* sets out the procedure for applicants who do not have a legal representative. Applicants applying for

³ 'Enforceable EU right' is defined in section 2(1) of the European Communities Act 1972, which states: "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."

⁴ Section 10 also makes provision for exceptional funding to be granted in certain inquests. The provisions relating to inquests are not considered further here.

exceptional funding without a legal representative can do so in any form (see para.10 of the *Provider Pack*) and do not need to submit the relevant means and merits forms. This is because individual applicants cannot complete the means and merits forms themselves, nor can public funding attach to them as individuals – it must attach to a legal provider.

14. If an applicant in person applies for exceptional funding they will be given a 'preliminary view' by the LAA. The preliminary view will set out whether or not the LAA considers that the applicant is eligible for exceptional funding without necessarily determining whether an applicant has satisfied the applicable tests regarding their financial means and the merits of the case. A preliminary view is not binding on the LAA and nor does it come with a right of internal review. If an applicant who has received a preliminary view manages to find a legal provider to take on their case, the legal provider will have to submit a full application for exceptional funding, including the ECF1 and the relevant means and merits forms.
15. Applications for exceptional funding should, according to the *Provider Pack*, be determined within 20 working days. Applications for internal reviews of funding refusals should be determined within 10 working days. There is no procedure for urgent cases and the LAA states in the *Provider Pack*, "We cannot guarantee that the application will be determined before a hearing day or before specified urgent work is needed." (para.6).
16. The application for exceptional funding is done at risk: if the application is unsuccessful, the lawyer will not be paid for their work on the application or for any urgent work done on the substantive case while awaiting the outcome of the application. If an application is successful, legal aid will be backdated.

How exceptional funding is working so far

17. At a meeting on 26 February 2013 the Ministry of Justice told stakeholders (including the Public Law Project) that they anticipated that there would be between 5000-7000 applications for exceptional funding in the first year of LASPO 2012.
18. On 1 July 2013 the LAA published statistics detailing how many applications there had been in the first four months of the scheme, the breakdown of those applications according to the area of law and the number of grants of exceptional funding that had been made.⁵ In total, the LAA had received 213 applications for non-inquest cases. Of those, 146 were in family law and 63 in immigration. There had been only two grants of funding: one in an immigration case concerning EU law and one in a family case. In the immigration case, funding was only granted after a pre-action protocol letter was sent.
19. On 1 July 2013 there had been only 16 applications from applicants in person, of which none had been given a positive preliminary view of their eligibility for exceptional funding.
20. These figures are striking for two reasons: first, they demonstrate that the scheme is not being accessed by as many applicants as the Ministry of Justice thought it would be. Second, they demonstrate that the threshold for exceptional funding is being set very high, and the success rate in non-inquest cases is less than one per cent.
21. It is PLP's experience that the scheme is inaccessible for applicants in person and for solicitors. The latter are routinely refusing to make exceptional funding applications because they are done at risk, they are onerous and the chances of success are so

⁵ Statistics will be published by the LAA on a quarterly basis. The next publication will therefore be on or around 1 October 2013.

poor. For applicants in person the process is almost impossible to navigate, largely because the kinds of applicants who may be eligible for exceptional funding under human rights or EU law will be the kinds of people who find it impossible to fill out lengthy forms, grapple with legal concepts, put forward arguments or understand legal procedures. These concerns are particularly acute for vulnerable applicants, including children and young people and people who lack capacity to litigate.

22. Between 1 April and 21 August 2013, PLP has worked on 57 exceptional funding cases, of which 40 have been in immigration and 17 have been in private family law. PLP's exceptional funding referrals come from a range of sources including, solicitors in private practice, charities, law centres, citizens' advice bureaux, NGOs (including the British Red Cross) and individuals and their families.
23. PLP's exceptional funding project has not had any success in getting exceptional funding for its clients (or the clients of the solicitors that have made referrals to us) to date, although some of the applications have not had a final refusal and others are currently being considered for progression to the judicial review stage.

The process of applying for exceptional funding

24. The process of applying for exceptional funding is an onerous one. It involves, *inter alia*:
 - a. Considering whether an applicant can make an arguable case for exceptional funding. This involves looking at the human rights and European Union case-law on when legal aid must be provided, as well as considering the Lord Chancellor's guidance.
 - b. Meeting with the applicant to take detailed instructions on the factors relevant to the exceptional funding application, including mental and physical health, financial circumstances and language and literacy ability.
 - c. Sourcing evidence in support of the exceptional funding application. It is our experience that all assertions in the exceptional funding application must be evidenced, in spite of the fact that the ECF1 contains a declaration of truth signed by the applicant. The following comment from an LAA refusal letter is typical:

“You also argue that your client has mental health problems and you state that your client was “*referred for treatment to X Hospital where she subsequently received counselling*” (paragraph 19 of grounds). However, there is no supporting evidence provided which outlines your client's diagnosis and treatment.”

Sourcing evidence may involve obtaining a letter from a doctor or social worker. Many doctors charge fees for writing such reports.
 - d. Obtaining relevant papers from previous legal representatives, where relevant. In many cases it will be necessary to obtain the papers relevant to the underlying case so as to ensure that it is meritorious. Many solicitors charge a fee for retrieving a client's files from storage.
 - e. Enlisting the services of an interpreter for applicants who are not proficient in English. Interpreters charge approximately £25 per hour (excluding VAT).
 - f. Drafting grounds in support of the exceptional funding application. This involves addressing the legal test that must be met for exceptional funding to be granted. Given the range of different issues that need to be addressed, PLP's grounds often exceed ten pages, where this is necessary to do justice to the case.

- g. Attempting to find a solicitors firm with expertise in the relevant area of law to complete the means and merits forms so that a full application (as opposed to an application for a preliminary view) can be submitted. This is a difficult task. For example, on 14 August 2013, PLP put out a call for assistance on the Refugee Legal Group Google group, which has approximately 800 members. Only one solicitors firm indicated that they might be able to offer some assistance with making future applications.

25. This whole process is onerous, expensive and time consuming. The LAA have stated that they consider 45 minutes for doing the application to be reasonable, but in our view this is a massive underestimate (in most cases by a factor of 10 or more). If it was not for the grant funding that PLP has secured, we would not be able to undertake these applications.

The systemic flaws of the exceptional funding scheme

Applications for exceptional funding are made at risk

26. Applications for exceptional funding are made at risk. Payment is only made if an application is successful. This arrangement was the subject of concern during the passage of the LASPO Bill. For example, when the Bill was at Committee stage, Kate Green MP stated (8 September 2011, Hansard report, page 403):

“An applicant for such funding already faces a high hurdle if it is to be secured. He or she must demonstrate to the satisfaction of the director of casework that it would be a breach of their human rights not to provide funding for representation. That will, of necessity, involve a detailed explanation of the substance of the legal case to show why the applicant needs representation, plus evidence of any characteristics that contribute to the need for representation, and legal argument around the test being applied. It is not plausible for a client who meets the test and needs the exceptional funding criteria to demonstrate, without assistance, that they meet the test. It is a classic Catch-22 situation, and not the first in the Bill.

If we are not to fall foul of our convention obligations, it is essential that legal aid funding is available to assist prospective clients to make an application under the test, and the amendment provides for such assistance to be made available. I hope that the Minister will accept it”.

During the course of the debate, the Minister responded by stating (8 September 2011, Hansard report, page 403):

“Amendment 227 would ensure that civil legal services were provided for the purposes of making an exceptional funding application. I assure the Committee that the Government will implement appropriate procedures to ensure that those who require exceptional funding will, in practice, be able to access the scheme. To that end, we will of course engage with all interested parties, including key stakeholders, to discuss relevant procedural issues such as contracting and remuneration and the important practical questions surrounding applications to which her amendment alludes. On that basis, I hope that hon. Members will withdraw their amendments”.

27. Contrary to the Minister’s assurance, no payment for the making of an exceptional funding application is available, unless the application is successful.

28. In PLP's experience this has had the effect of deterring many solicitors from undertaking the onerous task of making an exceptional funding application, regardless of the strength of the case or the vulnerability of the applicant. The deterrent effect is made all the more acute by (a) the extremely low rate of exceptional funding grants, which means that the chance of the solicitor being paid for their work is vanishingly small; and (b) The Lord Chancellor's published guidance which states that even if exceptional funding is eventually granted, it is liable to be paid at a lower rate than cases that remain in scope (the minimum necessary to avoid a breach of the ECHR or EU law⁶).

There is no procedure for urgent cases

29. Regulation 66(3)(c) of the Civil Legal Aid (Procedure) Regulations 2012 states that the general LASPO provisions on emergency representation do not apply to exceptional funding cases.

30. Paragraph 6 of the *Provider Pack* states:

"If you wish the application to be treated as urgent you should complete page 13 of the CIV ECF1 to provide us with details as to the urgency of the case, for example an imminent date for a hearing or the imminent expiry of a limitation date or reasons why delay would cause risk of harm or prejudice to the client's case. We will consider the information that you have provided and if we agree, then we will deal with your case ahead of non-urgent applications. We aim to determine all cases within 20 working days from the date of receipt of the fully completed application.

However we cannot guarantee that the application will be determined before a hearing day or before specified urgent work is needed. We can provide information if you call our ECF telephone enquiry line about the likely timeframe for completion of a pending application."

31. As this demonstrates, there is no procedure for urgent exceptional funding applications, regardless of whether or not they are meritorious. This is of grave concern. PLP has had applicants whose applications for exceptional funding have been rendered academic because, in spite of giving reasons as to why delay would cause harm or prejudice to the applicant, they have not been determined in time for the hearing in question or in time for a challenge to removal directions to be brought. For example, PLP had an applicant who was seeking legal help for her appeal hearing before the First-Tier Tribunal (Immigration and Asylum Chamber), which included consideration of *inter alia* Article 8 ECHR, the Immigration Rules, section 55 of the UK Borders, Citizenship and Immigration Act. The applicant had two young children, both of whom were British citizens. The client did not speak English proficiently and she had no formal qualifications. The applicant's hearing date was set for 17 July 2013. An application for exceptional funding was submitted by PLP on 27 June 2013 (as soon as possible after the client was referred to PLP) and page 13 of the ECF1 was completed to explain the need for a decision in advance of the hearing date. PLP was told on two separate occasions that a funding decision would be made the week before the applicant's hearing date, so as to enable lawyers to be instructed if funding was granted. In the event, no decision was forthcoming until the day before the applicant's hearing, 20 days after we applied for exceptional funding. As a result, the applicant was forced to represent herself. The decision from the LAA was negative, but in PLP's view the grounds for refusal were flawed and should have been

⁶ See the Lord Chancellor's Guidance, p.3, para.10.

challenged by way of the internal review process. In another case that PLP considered to be urgent, the LAA took 37 days to respond.

32. The absence of an urgent procedure means that for many applicants exceptional funding is not a realistic or reliable way for them to guarantee their right of access to the courts. The decision-time for an application is 20 working days, not including the time it takes the provider to prepare the application or the likelihood that the application will be refused and renewed on an internal review. The internal review process adds another ten working days, not including the time it takes the provider to prepare the review grounds. What this means is that for an applicant who has a hearing date, visa expiry date or removal date that is in less than seven weeks, there can be no guarantee that a final exceptional funding decision will be made in that time and therefore no guarantee that their human rights and EU law rights will be safeguarded.
33. It is therefore PLP's view that, despite the best endeavours that the LAA might make to determine cases within relevant time frames, the absence of an emergency procedure is a major systemic flaw.

There are no exemptions for children or people who lack capacity

34. In spite of their vulnerability and inability to conduct litigation on their own, there is no exemption from the need to apply for exceptional funding or from the rule that unsuccessful exceptional funding applications will not be paid, for children or people who have been assessed as lacking the capacity. In PLP's experience this means that some of the most vulnerable people are unable to get the help that they need to apply for exceptional funding, even if they have a meritorious case. For example, PLP has an applicant who is registered blind and has a cognitive impairment that means he functions at the level of dementia sufferer. The applicant cannot access the community care that he needs unless he has an outstanding immigration application. The Official Solicitor is acting for the applicant in his community care proceedings but cannot act in the immigration proceedings because the Official Solicitor does not have jurisdiction to do so. The Official Solicitor, through the applicant's community care solicitor, approached five reputable immigration firms to see if the case could be taken on and exceptional funding applied for. All of those immigration firms refused to take the case on. PLP completed an application for exceptional funding so as to seek a preliminary view of the applicant's eligibility for legal aid, which could then be used to persuade a solicitor to take on the case. Without a solicitor to help him, the applicant would be completely barred from exercising his right to make an immigration application, because he does not have capacity to do the application on his own. Furthermore, the applicant cannot be advised by anyone who is not an immigration solicitor because it is a criminal offence for someone to provide immigration advice who is not qualified or regulated to do so.
35. The application for a preliminary view was refused, and the refusal was upheld on the internal review. As instructed by the Official Solicitor, PLP has now sent a pre-action letter to challenge this refusal.
36. The fact that this application for a preliminary view was unsuccessful demonstrates how high the threshold is set by the LAA and how, in practice, it is impossible for vulnerable individuals to access exceptional funding.
37. Furthermore, it is PLP's experience that the LAA routinely fail to engage with the fact that an applicant is either a child or an incapacitated adult. In one refusal letter for exceptional funding, the LAA made no mention of the fact that the applicant was a child, in spite of the fact that this was emphasised in the grounds. In another, the LAA made no mention of the fact that the applicant had been assessed as lacking capacity to litigate

and had no litigation friend, even though this had been the primary basis on which exceptional funding had been sought.

Conclusion

38. In light of the above, it is PLP's strong view that the exceptional funding scheme does not live up to the claims that were made for it by Ministers during the passage of the LASPO Bill. The scheme is flawed (both systemically and in the manner in which it is operated), inaccessible to those whom it is designed to safeguard, and applied too restrictively. PLP's view, based on our experience as summarised above, is that the scheme is not fit for purpose, and it cannot be relied upon to safeguard access to justice nor to make LASPO 2012 compliant with the European Convention on Human Rights or with European Union law.
39. Furthermore, the exceptional funding scheme is new and un-tested: it cannot be relied upon to justify the introduction of further cuts to legal aid and it is PLP's strong view that it is incapable of ensuring that the proposed residence test will comply with the UK's human rights and EU law obligations.
40. In drafting its written evidence PLP has had regard to the need to be concise, as set out in the House of Commons guide. However, PLP is able to provide anonymised case studies of the exceptional funding cases that it has dealt with if requested and would be pleased to provide oral evidence on this issue if it would be of value to the Committee.

**The Public Law Project
26 September 2013**