

Exceptional funding: a fig leaf, not a safeguard

During the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the Government justified the swingeing cuts to legal aid by reference to an exceptional funding scheme that would act as a safety net for those cases which were not eligible for legal aid but which nevertheless needed to be publicly funded so as to ensure access to justice. Jonathan Djanogly, the Under-Secretary of State for Justice, put it like this: “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”.

The exceptional funding scheme is established by [section 10](#) of LASPO, with accompanying [guidance from the Lord Chancellor](#) and a [provider pack](#) for lawyers. Under section 10, a person will be given exceptional funding if without it they would suffer a breach, or be at risk of a breach, of their human rights or European Union law rights. In most cases this means that a person must be given legal aid if without it their case would be practically impossible to bring or there would be an obvious unfairness in the proceedings. This is a very high threshold that is hard to meet.

In the [latest set of proposals](#) to cut legal aid further still, exceptional funding is once again held out as the safeguard that justifies taking whole swathes of vulnerable people out of scope for legal aid (see, for example, paragraph 3.54 of *Transforming Legal Aid*, in relation to the proposed residence test).

Since the coming into force of LASPO on 1 April 2013, the Public Law Project (PLP) has been running a project dedicated to helping people to apply for exceptional funding. Our experience is that the process of applying for exceptional funding is extremely onerous and that for litigants in person it is completely impenetrable: it requires the submission of a fourteen page form, complete with a detailed explanation of the client’s circumstances, and a valid means and merits form. For providers, this work is done at risk, with payment only being made if exceptional funding is granted. There is no mechanism for deciding cases on an emergency basis and there is no exemption for people who lack capacity to litigate. It is our experience that providers are routinely refusing to make exceptional funding applications because it is too time consuming and, as will be seen below, too risky. It is also our experience that the quality of decision-making by the Legal Aid Agency in these cases is very poor.

In a meeting at the Legal Aid Agency (LAA) on 1 July 2013, the Exceptional Funding Team produced up-to-date statistics about the operation of the exceptional funding regime. Those statistics demonstrate beyond doubt that the system is not fit for purpose. The figures must be read in the context of the Ministry of Justice’s estimate that there would be 5000-7000 applications for exceptional funding in the first year of LASPO. This estimate was based on the kinds of cases that were being taken out of scope for legal aid and an approximation of the number of litigants who had characteristics (such as profound learning disabilities) which meant they were unable to represent themselves.

Instead, the LAA has received only 233 applications for exceptional funding in the first three months of LASPO. 83 of those applications were rejected by the LAA because they were incomplete or the area of law was in fact in scope and therefore eligible for legal aid in the normal way. If the figures remain constant, that will mean fewer than 1000 applications in

the first year of LASPO. The LAA has only made two grants of exceptional funding in non-inquest cases: one in a family case where the applicant had very serious mental health problems and one in an immigration case where the law was particularly complex. For the latter, funding was only granted after the solicitor sent a pre-action protocol letter to the LAA threatening to judicially review their initial refusal of funding.

The majority of applications for exceptional funding have been in family law (146), with immigration coming in second (63). There have been 18 applications in housing cases and 5 in welfare benefits cases. There have been no applications in education, debt, personal injury or clinical negligence cases. There have been 20 applications for exceptional funding for inquests, of which four have been granted. On average the LAA takes 4.58 days to determine an exceptional funding application.

The main reason for refusing exceptional funding is that the application does not meet the merits criteria for exceptional funding nor the merits criteria for the underlying case (93 applications have been refused on this basis).

A particularly concerning trend is that out of all of the refusals, only 37 applicants have sought an internal review of the LAA's decision. This is the first stage of challenging the LAA's refusal of funding. This may demonstrate that applicants are in practice not able to challenge refusals, either because the process is too onerous or because the chances of succeeding are so low. Given the poor quality of decision-making that we have seen, this is of real concern.

These figures demonstrate that the exceptional funding regime does not in fact safeguard access to justice because it is beset with operational failings that are bar to vulnerable people with strong cases accessing legal aid. The low numbers demonstrate that the needy are simply not getting through - they cannot penetrate the system because the threshold is so hard to meet, because it is practically impossible to even try to meet it without the assistance of a lawyer, and because lawyers cannot afford to take these cases on. **Any attempts to justify further cuts to legal aid on the basis that exceptional funding protects access to justice should be dismissed: this is a new scheme that is not, and may never be, fit for purpose.**

The Public Law Project's briefing to MPs on exceptional funding is available [here](#).

More information about the Public Law Project's exceptional funding project is available [here](#).

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