

## IMPROVING ACCESS TO JUSTICE THROUGH LEGAL AID: EXPLORING THE POSSIBILITIES OF 'EXCEPTIONAL CASE FUNDING' CLINICS IN UNIVERSITY LAW SCHOOLS

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### **Abstract**

This article focuses on the role of universities in establishing law clinics to assist individuals to make Exceptional Case Funding (ECF) applications. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed many categories of civil matters from the scope of legal aid, reducing the number of people entitled to state-funded legal advice and assistance. To replace provision for the categories removed from scope, LASPO introduced ECF to provide a 'safety net' for cases where human rights would be breached if legal assistance was not available. To obtain legal aid through the ECF scheme, legal aid providers or individuals must apply to the Legal Aid Agency, the department of government within the Ministry of Justice that deals with the administration of legal aid. The article considers how analysis of ECF clinics can contribute to knowledge about the work of universities in facilitating access to justice through clinical legal education, particularly in the context of cuts to legal aid expenditure. It argues that ECF clinics present an opportunity to involve students

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while engaging — rather than replacing — the responsibility of the British state to provide legal aid.

Keywords: LASPO, legal aid, exceptional case funding, university law clinics, access to justice.

## **Introduction**

When the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into effect in 2013, it had a significant impact on the availability of free legal advice and representation in England and Wales. The LASPO Act was introduced to implement a fundamental reform of the legal aid system (Ministry of Justice 2011), which formed part of the austerity measures intended to reduce public spending. One of the immediate effects of LASPO was the significant reduction in the number of people receiving legal aid, and statistics released by the Ministry of Justice exposed the extent of the cuts: in 2012 legal aid was granted for 925,000 cases, which reduced to 497,000 cases the following year, a drop of 46 per cent (Ministry of Justice 2014). Government spending on legal aid dropped from £2.51 billion in 2010/11, to £1.55 billion by 2016 (Ministry of Justice 2017a, p. 51).

LASPO can be viewed as part of a longer trajectory of changes that have reduced the public funding of the British legal aid system over the past two decades

(Sommerlad and Sanderson 2013), but when the legislation came into effect in 2013, LASPO had a particularly significant impact in reducing the availability of legal aid. In this respect, it is noteworthy that legal aid was first introduced as part of the welfare state by the Legal Aid and Advice Act 1949, to ensure that those who could not afford to pay for a legal representative would not be excluded from the justice system (Sommerlad 2004). Prior to LASPO, legal aid was available for most civil proceedings with a few exceptions. The introduction of the Act effectively reversed this, taking many categories of civil law out of scope, and reducing the availability of legal aid for significant areas of family, housing, debt, welfare benefits, discrimination, community care and immigration law.

Where categories of law were removed from the scope of legal aid, LASPO extended an Exceptional Case Funding (ECF) scheme, intended to provide a 'safety net' for cases where human rights would be breached if legal assistance was not available (House of Lords Debate 5 March 2012). Under the ECF scheme, legal aid lawyers or individuals (as 'direct applicants') can apply to the Legal Aid Agency – the government department within the Ministry of Justice that deals with the administration of legal aid – setting out the reasons that they require legal aid. However, the accessibility of the ECF scheme, and the impact of LASPO more generally, has been subject to heavy criticism by human rights organisations (Amnesty International 2016), legal practitioners (The Law Society 2017, Legal Aid Practitioners Group 2017) and academics (Cobb 2013; York 2013; see also Journal of Social Welfare

and Family Law 2017). The number of ECF applications has been consistently much lower than predicted by the government prior to the introduction of LASPO, with low grant rates, particularly in the initial years of the scheme (The Law Society 2017, p.21), leaving many people who arguably should be eligible for legal aid unable to access it.

This article examines one way in which university law clinics can engage directly with the practical challenges of the legal aid system under LASPO by setting up clinics to support individuals to make ECF applications. The research presented here examines a collaborative project between Public Law Project (PLP), a national legal charity that promotes access to justice for marginalised and disadvantaged groups, and the Community Law Clinic at the University of Exeter, which established an ECF clinic to support individuals to access legal aid. Using data collected during the process of setting up the clinic, the article reflects on the findings of the project, and suggests that ECF clinics offer an important opportunity to engage students with access to justice in practice, whilst also improving access to legal aid by increasing the availability of support for people who need to access ECF.

### ***1.1 University law clinics and access to justice***

University law clinics have been primarily established in the UK to provide students with important opportunities for practical 'hands-on' experiences of law as part of the learning process (Grimes 2000; Marson *et al.* 2005; Turner *et al.* 2018), although most also offer services that provide access to justice for the community (Drummond and

McKeever 2015). In the context of legal aid cuts, the increasing demand for free legal services is one of many tensions that must be managed in the day-to-day running of university law clinics. The backdrop of significant increases to student tuition fees in recent years, and the associated expectations of students as consumers, places student experience as an important motivation for the work of university law clinics (Bleasdale-Hill and Wragg 2013). Some of the advantages of university law clinics for student learning are that students are able to apply the law in practice, gaining knowledge of how the law works, as well as the legal skills used by practitioners, such as interviewing and client care.

Previous academic research has sought to understand how cuts to the public funding of legal services have had an impact on the operation of university law clinics in the United Kingdom, and the practical implications for access to justice in the context of the reduction of services previously funded by the state. A study of university law clinics by Orla Drummond and Grainne McKeever (2015) highlights the tensions that exist within university law clinics as a result of competing concerns for student education and access to justice. Drummond and McKeever's research demonstrates the range of perspectives and motivations that exist for conducting clinical legal education, and describes how some law school staff take the view that access to justice should be the business of the state rather than universities, whilst others wish to fulfil the critical role of supporting access to justice for their local communities (Drummond and McKeever 2015, p.32). The research found that 69% of

clinics thought that universities should provide access to justice services, whilst 90% of respondents were actually involved in the delivery of such services. Although many university law clinics seek to balance an interest in providing learning opportunities for students while also providing an important service to the community, there are limitations on the assistance that can be provided by law schools. Drummond and McKeever recommend that universities would require external support from government to support the development of the access to justice potential of law clinics.

Despite some of the challenges for university law clinics engaging in access to justice work, this article takes inspiration from research that celebrates the potential of academic and community partnerships for the protection of basic rights (Boylan *et al.* 2016). In this article it is argued that the changes to legal aid brought into effect by LASPO, although controversial, may also be seen to open up and enable opportunities for law schools to engage in clinical work that reinforces, rather than removing or redirecting, the notion of state responsibility for access to justice. The evidence presented below demonstrates how the politics of responsibility for advice provision plays out through university settings, by considering the ways in which clinics engage with the problems of facilitating access to justice through the ECF scheme, as well as the opportunities that ECF clinics offer for improving access to legal aid and some of the challenges of the work.

### ***1.2 Exceptional Case Funding and legal aid for immigration matters***

The idea of setting up a legal aid clinic within the Law School at the University of Exeter began to form in December 2016. A small group of academics, practitioners and community representatives started discussions about how to support a local refugee charity, Refugee Support Devon, which was finding it difficult to secure free immigration advice for its service users. Immigration is a broad category of law, which includes asylum, but most immigration work was removed from the scope of legal aid by LASPO with only specific types of case remaining in scope. According to Schedule 1 of LASPO, matters that remain eligible for legal aid include asylum applications, asylum support applications, applications for victims of trafficking, assistance for those held in immigration detention and some judicial review cases. Legal aid for other categories of immigration must be applied for via the ECF scheme.

The accessibility of the ECF scheme has been problematic, with much lower rates of applications and grants through the scheme than initially predicted by the government. Prior to the introduction of LASPO, the government estimated that the scheme would receive 5,000-7,000 applications a year, of which 53-74% would be granted, a target that it has failed to meet (The Law Society 2017). The number of ECF applications made by legal aid providers and individual members of the public remains relatively low compared to the predicted figures, and the overall rates of success for ECF applications have only slowly started to increase over the last few

years. In the first year after LASPO there were 1,516 applications for non-inquest<sup>2</sup> cases, with 16 applications granted (Ministry of Justice 2017b). The following year the total number of applications fell to 1,172 applications, although there were 119 applications granted, which was higher than the first year of the scheme.

Since the introduction of the ECF scheme the overall number of applications and successful applications has increased and immigration matters now have the highest rate of applications and grants across all areas of civil law. In 2019/20, there were 3,747 applications for ECF, of which 2,525 were for immigration matters (67.39%). Of the applications made for immigration matters, there were 2,035 grants of ECF, establishing a success rate of over 80% (Ministry of Justice 2020). In comparison, in the same financial year there were just 439 applications for family law and much lower application rates across other categories of law (*ibid.*). The average grant rate across all other categories, excluding inquest cases, was just 32.95% (*ibid.*).

The restrictions on legal aid funding have contributed to the growth of immigration 'advice deserts' across England and Wales,<sup>3</sup> as well as compounding the issues in areas where there was already a shortage of immigration advice (Burrige and Gill 2017). Academic work has described how the changes to legal aid contracts under LASPO created a crisis of capacity within the immigration advice sector, with

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<sup>2</sup> Non-inquest ECF is the focus here as a form of ECF was already available for inquest cases prior to LASPO. All figures provided relate to non-inquest cases.

<sup>3</sup> The analysis here is limited to the legal aid scheme in England and Wales, as Scotland and Northern Ireland operate as separate jurisdictions.

legal aid providers are often unable to meet demand for immigration legal aid (Wilding 2019). The South West of England is one area of the country in which the availability of legal aid for immigration matters is very limited, which is a situation that has been worsened by LASPO. Prior to LASPO there had been a small number of legal aid providers with immigration and asylum contracts in Devon, but most of these contracts ended when general immigration work was removed from the scope of legal aid. There is currently only one organisation with a legal aid contract for the category of immigration and asylum in Devon, whilst Devon's neighbouring counties of Cornwall, Somerset and Dorset have no legal aid contracts for immigration and asylum work (*ibid.*).

Applying for ECF does not directly increase the availability nor capacity of legal aid providers, but where individuals successfully make direct applications to the Legal Aid Agency it can help to secure the assistance of a legal aid provider that may otherwise be unable to take on the case. Research conducted by the charity Rights of Women found that there is very little help available for people who need to make an ECF application, with very few legal aid providers who undertake ECF applications (2019, p.10). The low grant rates for ECF across many areas of civil law mean that there is little incentive for legal aid providers, who already work within the context of a system under strain, to make ECF applications. Funding is only retrospectively provided for the time spent on an application if ECF is granted, and the applications themselves are complex and time-consuming. In light of this, setting up projects to

improve the number of applications and grants of ECF is a significant gap that university law clinics and other pro bono projects can help to address.

## **1. Methodology**

The interest in establishing an ECF clinic at the University of Exeter was motivated by concerns about the availability of legal aid for immigration advice in the local area. In discussing the potential of the project, it was felt that law students would have much to offer in assisting individuals with ECF applications. The organisations involved in the project had observed that often individuals are unaware that they can apply for funding, or would be unable to make an application themselves, unless they can find an adviser to assist, which can be difficult even once ECF is secured. The project also offered a valuable opportunity for law students to put their developing legal skills into practice.

### ***2.1 Setting up the research***

When seeking information about the ECF scheme for Refugee Support Devon and its service users, it became apparent that the information provided on the government website, intended to assist individuals to make ECF applications, was limited. The steering group for the clinic approached PLP, a national legal charity with a particular interest in promoting access to justice, which has done considerable work to improve access to ECF since the introduction of LASPO. Between 2013 and 2017, PLP's Legal

Aid Support Project assisted individuals to make applications for ECF, resulting in litigation setting out the systemic issues of the scheme in the cases of *Gudanaviciene & others v the Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 and *I.S. v the Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464. PLP also has a website with resources offering practical information to help legal aid providers and members of the public who wish to apply for ECF, and it provides training to organisations. PLP maintains that the ECF scheme 'remains inaccessible in practice for many people, particularly those who are trying to apply without the assistance of a legal aid provider' (Public Law Project 2018a, p.2), based on its considerable experience of advocacy in this area. For this reason, PLP was keen to support the development of an ECF clinic at the University of Exeter.

PLP was particularly interested in the feasibility of developing a model that could be adopted by university law schools in setting up their own ECF clinics. As a charity, PLP had previously conducted a piece of research with university law clinics to look at how they support access to justice in public law matters (Public Law Project 2018b). With PLP's input in setting up the ECF clinic, the research was designed to collect data on the process of establishing the clinic, which included recording a detailed field diary of the process of, as well as speaking to other university law clinics in England and Wales with experience of making ECF applications or an interest in doing so.

The discussions that initially took place between the University of Exeter and PLP highlighted some of the potential practical problems that could arise from the project. For example, cases need to be triaged to ensure that ECF is appropriate and that cases ineligible for ECF can be referred to other services. Such examples might include when a matter falls within the usual scope of legal aid or where an applicant falls outside general eligibility requirements for legal aid, such as the means test. In addition, immigration advice is strictly regulated, and it is a criminal offence for anyone who does not have appropriate accreditation to provide immigration advice. ECF applications are exempt from this regulation (Office of the Immigration Services Commissioner 2016), but it remains necessary to ensure that immigration advice is not inadvertently provided in the course of assisting an individual to make an application for ECF.

## ***2.2 Conducting the research***

The research on ECF clinics was conducted on behalf of PLP between September 2017 and February 2018, although field notes from the months prior to September helped to contextualise the findings of the research, as the clinic constituted part of a larger research project about access to immigration advice in the South West. A formal agreement between PLP and the University of Exeter was put in place, which helped to make a distinction between the work of the two organisations and how each was involved in the project. The process of setting up the clinic was documented, with detailed notes recorded about the discussions and processes involved. Field notes

were collected from the early discussions in November 2016 onwards, and in February 2018 the observations were written up to include minutes from planning meetings and discussions among member of the steering group, to provide reflection on how the ideas had progressed. In total the observations collected were saved in a document of just under 11,000 words. Analysis of these observations enabled detailed reflection on the process of establishing the clinic.

The data that was collected included observations from the process of setting up the clinic at Exeter, feedback from volunteers and Refugee Support Devon, the partner organisation for the project, as well interviews with other university law clinics. Clients of the ECF clinic were not asked to participate in the research due to the short timescale for the research and the focus on the organisational aspects of supporting ECF applications. An online survey was sent to 53 university law school pro bono projects in England and Wales by PLP in December 2017. The list was compiled from the LawWorks website (LawWorks 2015), which has a database of law clinics. The questionnaire requested feedback from law schools either running, setting up or considering ECF projects. Participants were encouraged to respond in other formats if they felt that would be more appropriate, for example by email or telephone contact. Despite the best efforts of the researcher to make the survey easy to respond to, very few replies were received. There was a total of six responses, with three of those from law clinics willing to participate in the research. Two of the universities that agreed to participate were already assisting individuals with ECF applications

(The Immigration Human Rights Project at City University, and Swansea University) and the other was interested in setting up a project (University of Huddersfield). It is not possible to definitively provide a reason for the low number of responses, although the negative responses that were received indicated that ECF was not relevant to the services provided by the clinics.

Alongside the observations, feedback from the students and staff involved in the Exeter ECF clinic was gathered at the end of the research period. A questionnaire was sent to the eight students involved in the project and responses were collected anonymously. From this, three responses were received, and the other professionals on the steering group for the project were provided with the opportunity to give feedback through an online web form. The original intention was to hold a focus group at the end of the project, but the busy timetables of everyone involved meant this was not possible. The opinions and input of the other members of the steering group were present in the observations that were compiled, and one additional response was received from Refugee Support Devon, the local charity that was a partner organisation for the clinic.

The findings of the research were compiled in a report published by PLP, which was made available on its website. In the sections that follow, the significance of these findings is explained, particularly in relation to why ECF clinics have an important function providing support to individuals who do not have a legal adviser to make a

legal aid application on their behalf, and how ECF clinics have grappled with the challenges of the post-LASPO legal aid system.

### **3. Findings: The work of ECF clinics**

The limited availability of legal aid providers in England and Wales, particularly those that make ECF applications on behalf of their clients, means that the support that university law clinics offer individuals in making applications for ECF can be of considerable benefit to the community and improve the accessibility of legal aid. The government's website encourages individuals to make their own applications for ECF (Legal Aid Agency 2014), but at the time of the research the number of applications from direct applicants was lower than the number of applications made by providers, and direct applicants also had lower grant rates than provider applications. For example, in the financial year 2016/17 prior to the research, there were 1,243 non-inquest applications to the LAA that were made by providers, with a 57% grant rate.<sup>4</sup> In the same year there were just 348 non-inquest applications by individuals, with a 34% grant rate. The Legal Aid Agency does not publish data on the support that direct applicants receive from charities or pro bono projects, so it is not possible to compare

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<sup>4</sup> Based on data provided by email by the Ministry of Justice, 22 March 2018. Statistics also published by the Ministry of Justice, see Ministry of Justice, 2018. *Legal aid statistics: October to December 2017. Legal aid statistics England and Wales more detailed data October to December 2017*. Available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-october-to-december-2017>.

the number of successful applicants who have received this type of assistance for an ECF application to those who have not received any help.

Although individuals or legal aid providers can apply for ECF, direct applicants who do not have the assistance of a legal adviser may be subject to particular barriers in making a successful application. The application form for ECF is complex to fill out and requires technical knowledge of the relevant areas of law and legal processes, including the eligibility criteria for ECF (see also, Public Law Project 2018c). One barrier is the technical nature of ECF applications, and the legal framing that they require, particularly in terms of the need to set out how an individual's rights would be breached in the absence of legal aid. Some groups face other specific barriers, such as those with low levels of literacy in English, and people with learning disabilities or health conditions that may impair their ability to complete an application. It is often people who could not make an ECF application themselves that are most in need of legal assistance, but these groups also likely to be excluded by the system if they are unable to find a legal aid provider to assist with an ECF application. Although the Legal Aid Agency suggests that individuals can apply themselves, in practice this may not always be possible, or may be more likely to result in an unsuccessful application for legal aid where individuals are unable to provide all of the information required without assistance.

### ***3.1 The location and scale of ECF clinics***

The potential scale of any project is closely related to the existing advice infrastructure of an area. Consequently, the number of advice agencies and legal aid providers available to make and receive referrals in a local area can be an important consideration for the operation of ECF clinics. In Exeter, there was a slow start to the project, and although from the outset the steering group recognised that the project was likely to deal with relatively small numbers of enquiries, in the initial months it became clear that considerable work would need to go into generating referrals by raising the profile of the project. Initiating conversations with local charities and legal aid providers was an important part of the process. In comparison, the Immigration and Human Rights Project in London, a collaboration between City University and No 5 Chambers, was able to secure a number of referral agencies that work with the service by identifying individuals that need to make an ECF application and helping them to secure a legal aid provider once ECF is granted. As Jennifer Blair, an Immigration Barrister at No 5 Chambers involved in the running of the project, explained:

We don't arrange [a legal aid provider] before making an application, but we know that referral agencies sometimes would. We (student volunteers) do not have the contacts to do this. There are vast disparities in the quality of legal advice out there and the student volunteer will not know how complex the case is compared with other

cases in the field. In general, once ECF is granted we signpost the client back to the referral agency for help finding a solicitor. In a few cases, volunteers have been keen to help and I have provided a list of solicitors to try. Cases are then placed. (Jennifer Blair, Immigration Barrister).

The project in London completed 28 ECF applications in two years, with a 91% grant rate. They reported that they had three partner organisations, and virtually all of their referrals came from London.

In contrast to London, there were difficulties for the project in Exeter due to the limited number of legal aid providers in the region that could take on immigration cases. This was identified as a key risk for the project by the staff at Refugee Support Devon:

[There is a] risk of giving wrong expectations to clients, and not being able to find a solicitor that could take a case on. There is a big lack of legal advice in this area. (Nelida Montes de Oca, Casework Coordinator).

Swansea Law Clinic described a similar difficulty around securing legal aid providers in the region of South Wales. Swansea Law Clinic also identified ECF as a way to improve access to advice by working with and complementing existing services (Richard Owen, Director of Swansea Law Clinic). The University of Huddersfield does

not currently run an ECF service, but recognised the potential value of establishing a service within their existing pro bono scheme in order to assist firms that were unable to make ECF applications, or only able to make a small number on a selective basis (i.e. only making the applications most likely to be granted). The Director of the Legal Advice Clinic at the University of Huddersfield noted that any work on ECF applications through the law clinic may still be selective, but would not have the same financial constraints as law firms that only get paid for successful applications (Phil Drake, Director of the University of Huddersfield Legal Advice Clinic). Thus, in areas where there is limited legal aid capacity, ECF clinics can potentially complement existing services that may otherwise be unable to take referrals for cases that require ECF.

The location of any project in relation to existing advice infrastructure is not the only factor likely to influence the size and capacity of a clinic, but as demand and resources will also determine the viability of a clinic the potential to create referral pathways, or to generate a caseload and to make onward referrals, is an important consideration for setting up ECF clinics. The research identified two distinct advantages for setting up clinics in the context of advice deserts where there is limited advice provision. First, universities as research institutions are well placed to monitor and report on the situation where access to advice is limited. In locations from which low numbers of ECF applications are made, ECF clinics can increase these numbers or provide commentary on why the number of applications is low. Second, setting up ECF clinics

can open up conversations about ECF in locations where services are lacking, raising awareness of the ECF scheme among those who may otherwise not be able to access it. As the project in Exeter also generated referrals, it helped to make the local need for ECF more visible by establishing conversations around the issue.

### ***3.2 Training and supervision***

The level of supervision and input of specialist lawyers varies between clinics, but there are clear benefits to having legal expertise built into the process for making ECF applications. For example, at the Immigration and Human Rights Project at City University and No 5 Chambers, students are given training and support from lawyers, but largely take responsibility for the operation of the clinic, as explained by the barrister involved in the project:

The students take on an ECF application. They are trained, and it is for them to meet the client, explain the forms, provide an advice letter and then — once the information is collected — provide a covering letter. Their work (the attendance notes and letters they write) are saved on the drop box, which is moderated by student directors. It is predominantly a student led project with support from the university, chambers and partnership with referral agencies. If there are questions about the content of letters they can ask the student directors, but often these are passed onto me. We are in the

process of establishing a monthly drop-in surgery to develop more in depth (and one-stop) feedback from a lawyer. Thus far it's been by email. (Jennifer Blair, Immigration Barrister at No 5 Chambers).

This evaluation of the process demonstrates how the input of lawyers can help to direct students in developing ECF applications, allowing them to offer their developing legal skills for the benefit of the community at the same time as the process being an important learning opportunity for students.

At the University of Exeter, law students were supervised in every session spent with a client. A qualified lawyer would not be present in every client meeting, but the input from the practitioners involved in the project was important for developing the training materials and setting up the model for taking instruction from a client, drafting the documents and checking the content where necessary. At Swansea University, the Clinic Director interviews clients initially, and then students carry out a follow up interview, particularly as the clinic was in the process of becoming established:

As we are in a pilot stage the Clinic Director interviews the client initially and then students do a follow up interview. The students draft applications, which are

supervised by the Clinic Director. The students work in pairs. (Richard Owen, Director of Swansea Law Clinic).

For the clinics in both Exeter and Swansea, the training delivered benefitted from being based on the ECF training provided by PLP as a charity with a great deal of knowledge about the ECF process. The training in Exeter provides general guidance about the operation of the clinic and how to work with clients, as well as specific information about the ECF process. The ECF training at the University of Exeter covers the history of LASPO and the introduction of ECF, including the main changes to the legislation and guidance on how to make ECF applications. For example, specific details about the timeframe for decision-making by the Legal Aid Agency, the evidence required to support applications, and how to include relevant case law. It also gives participants the chance to discuss anonymised case studies to practise applying the eligibility criteria.

All three established clinics that participated in the research did not only have specialist knowledge of specific areas of law, they also had specific knowledge of the ECF scheme itself (the project at City University is supervised by an immigration barrister, who has significant experience of ECF). The combination of general points of law and legal practice, and very specific information about the ECF scheme, would not necessarily be available to direct applicants without the support of an organisation or legal aid provider. And although there is the potential to provide individuals with

such knowledge, for example, PLP have produced a guide for direct applicants, law students have the benefit of already having an understanding of legal processes. As one participant commented, 'quite often with applications there's a certain technique — it's not necessarily what you say, and it's how you say it' (Phil Drake, Director of the University of Huddersfield Legal Advice Clinic). Law students are already in the process of learning the technique of putting forward legal arguments, which is of great benefit for making ECF applications.

The regulation of immigration advice means that opportunities to engage in its provision without being a qualified adviser are limited. As ECF applications for immigration cases are not regulated by the Office of the Immigration Services Commissioner, making applications on behalf of individuals is an area of immigration work that law schools can engage in without having to put substantial regulatory frameworks in place. The fact that ECF applications are not included within the definition of regulated immigration advice was a factor in setting up the projects in Exeter and Swansea, although the risk of student volunteers providing immigration advice must still be mitigated. Students can assist individuals to complete the ECF form and compile the evidence, but putting in place additional practical arrangements, such as recording an attendance note, is important to demonstrate that any assistance provided is limited to the ECF application process and not the provision of immigration advice. Since it is a criminal offence to provide immigration advice without the appropriate regulation, safeguarding students — who are likely to

pursue a career in law — from inadvertently providing unregulated advice is essential.

The operational ECF clinics that participated in the research all focused on immigration, in part due to the recognition of the need for legal services in this area, but also because it can be easier to focus on one specialist area of law due to the practicalities of triaging referrals and ensuring their suitability for ECF. For example, the project in London reported why their work was usually limited to immigration:

We are the City University and No5 Chambers Immigration Human Rights Project, so we are focused on migrants' rights. We have done one or two family law cases, but I understand it is harder to get ECF in those areas. The family ECF applications have been in relation to migrants. We are not limited to immigration ECFs if there were good reasons for one in another area, but it is harder to ensure the clients have good legal advice first (for example, in a family case I had to ask one of my colleagues to provide a pro bono advice, which we could do on occasion but obviously not in every case). (Jennifer Blair, Immigration Barrister at No 5 Chambers).

The specific focus on one area of law also makes the training and supervision of students easier. Although law students can bring general legal skills to the process of making an ECF application, focusing on one area of law can make projects more

manageable from a supervisory perspective. The different types of specific knowledge required to make an ECF application may vary depending on the area of law. For example, understanding what is likely to be a successful immigration application does not necessarily equate to being able to write a successful family application. Building expertise in a particular area of law can allow students to be more effective in identifying the relevant facts of a case and translating them into an ECF application. Having said this, towards the end of the research, the Exeter ECF clinic identified a need to assist with ECF applications in other areas of law, particularly family law where ECF applications and grant rates are much lower than immigration. In either case, being able to identify law school staff or partner organisations with the expert knowledge to train and supervise students is likely to be a significant consideration for any ECF clinic.

Finally, the sensitive nature of the types of cases presented to ECF clinics means that the safeguarding of students and clients is a key consideration in the day-to-day running of the clinics. The Director of Swansea Law Clinic noted that some of the cases referred to the clinic had been 'harrowing' (Richard Owen, Director of Swansea Law Clinic). At Exeter, this was also an important consideration, and sessions often ended with an opportunity to debrief the students, which gave the students a chance to talk about anything they had found particularly challenging, problematic or upsetting.

### ***3.3 Student learning and benefits to the wider community***

From a student learning perspective, ECF clinics provide an important opportunity for students to apply their legal training to real-life scenarios, and to develop knowledge of the legal aid system and legal practice. The focus on access to justice within ECF clinics reflects the view expressed by Frank Dignan, that a clinic providing access to justice to all members of society can provide ‘an opportunity for students to think about the practical aspects of the provision of legal services to those who cannot pay for them’, which also has the potential to enhance academic understanding of these issues through the practical knowledge gained by students (2011, p.81). For example, the ECF process provides insight into how the civil legal aid system works, because submitting an ECF application requires students to compile relevant documents in a similar way to how legal aid lawyers compile and present legal aid applications for their clients. The value of ECF clinics is not, however, limited to the practical legal skills acquired by students. All of the clinics that participated in the research had an interest in access to justice, and an important part of setting up the ECF clinic at the University of Exeter was to provide students with sufficient training and supervision in order to enable them to compile applications on behalf of individuals, to allow the legal skills and expertise developed in the university setting to be shared with the community.

Previous literature demonstrates that law clinics can be a valuable format for teaching students about the ethical demands of being a lawyer if consideration is

given to how students will be trained and provided with opportunities to explore ethical obligations through clinic activities (Kerrigan 2007; Bleasdale-Hill and Wragg 2013). The work of ECF clinics allows students to learn about access to justice in practice by witnessing how individuals encounter the justice system and the challenges of the legal aid system. The work of the clinic at Exeter was often emotionally demanding due to the accounts given by clients of their personal situations and this was further intensified by the hours spent labouring over the technical details of the ECF applications compiled, and, in some cases, the to-and-fro in correspondence with the Legal Aid Agency in order to get ECF granted. Most of the cases seen in the Exeter clinic involved people in urgent situations, whether due to destitution or the threat of removal from the UK. The delays in getting responses from the Legal Aid Agency — which in some cases were refusals that then needed to be challenged — contributed to the practical challenges of running the clinic. However, feedback from one volunteer highlighted how experiencing some of these issues in practice was an important motivation for furthering their interest in the legal aid system:

I have found the client interaction extremely valuable. Gaining knowledge of the practical application of different areas of law, like the human rights act, has also been hugely valuable. It has given me real experience of interacting with clients, enhanced

my knowledge of different areas of law and made me more passionate about the problems surrounding legal aid. (Student Volunteer, University of Exeter ECF Clinic).

The students that chose to volunteer in the project at Exeter already had some interest in immigration law, but some became very engaged in the project not only to assist individuals, but to help raise awareness of ECF by contacting local firms and community support organisations, encouraging referrals to the clinic. Setting up ECF clinics may, therefore, be motivated by a desire to provide students with practical experience to develop professional skills, which can be a significant factor for universities establishing law clinics (Marson *et al.* 2005; Turner *et al.* 2018), but ECF clinics are also a way of engaging students in the practical and ethical demands of access to justice as a social issue.

The value of the work done by ECF clinics may then not be viewed as limited to the immediate benefit to individuals who are granted ECF, but also comes from engaging law students in the politics of legal aid and the struggle to ensure that the legal needs of those without money to pay for legal services are met. The value of the work of the clinics for general community benefit need not be considered entirely separately from the benefits of the student learning experience, as ECF clinics provide students with an opportunity to learn about access to justice *by doing* access to justice work.

### ***3.4 Challenges for ECF clinics***

As well as the benefits of ECF clinics for members of the public and student learning, the research also highlighted three particular challenges. First, the management of resources available within the institution and the capacity of staff and volunteers. Second, managing external partnerships with other, usually very busy, local advice agencies and legal aid providers. And finally, dealing with problems arising from the administration of the ECF scheme itself, including delays to applications, in the context of other internal and external resource constraints and the pressing needs of the clients being assisted. The relationship between these three challenges will now be further explained.

Managing the capacity of ECF clinics can be challenging where universities are relying on already busy staff and students to carry out and supervise the work. Recruiting new students each year, as well as managing a caseload (and client expectations) can be particularly demanding. The project in London, which was the most established service that took part in the research, explained how student recruitment needed to be carefully negotiated:

We increased from the pilot to 30 trainees in the second stage. In the third intake we have decided to reduce the number of trainees — we are currently training 18 but there are usually some immediate drop outs after training, so we really want around 12 committed people — and the smaller group will allow us to assign cases on a rota

and monitor them more closely. (Jennifer Blair, Immigration Barrister at No 5 Chambers).

In Exeter, having only a small number of referrals brought additional challenges (the clinic dealt with five cases in its first year), as eight students received training but there were not enough referrals to the clinic were made to engage all of the student volunteers in the first few months of the project. When cases did come up, they were often at short notice, and finding a time for everyone to meet with the client (two volunteers and a supervisor), was sometimes not possible.

At the Exeter clinic the need to ensure good quality applications (as well as the safeguarding of students and clients) resulted in time-intensive supervision. Students were supported during meetings with clients, as well as in the drafting stage of an application. If a client meeting takes an hour to an hour and a half, and cases may require two or three meetings, the time of two students plus a supervisor could amount to a considerable number of cumulative hours just spent with the client. The students would then spend additional time drafting the documents, which would need to be checked. Combined with the length of time it took to receive Legal Aid Agency decisions, and requests for further information that could extend the period between submitting an application and receiving a decision, this meant that the resources needed to support one case could be considerable (for example, around 6-8

hours supervision time),<sup>5</sup> and it could also make it difficult to predict the size of caseload that the clinic would be able to facilitate at any given time.

The most appropriate way of dealing with the challenge of an unpredictable number of referrals is to initiate an ECF clinic on a small scale and build it up over time. Richard Owen, Director of Swansea Law Clinic, explained that because their referrals for ECF applications come from a partner organisation, it is hard to identify the exact demand in the region. Here he explains how the project was started on a small scale in addition to other pro bono work recently established through the Law Clinic:

The Clinic was only established in January 2017. It began with a miscarriage of justice project and prison law clinic. Since October 2017, we have had face-to-face client interviews mainly in housing, employment, relationship breakdown and equality issues, following which clients get an initial advice and assistance letter. There are currently four students involved with the work on ECF applications. It is less than other clinical work which has thirty-six students, but we have just started. (Richard Owen, Director of Swansea Law Clinic).

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<sup>5</sup> Accurate time recording was not carried out at the time of the research, so this figure is based on an estimate including work subsequently done by the clinic. Rights of Women (2019) reported that their caseworkers spent 9 hours on average preparing an ECF application.

Building a project over time means that the immediate potential benefits of ECF for clients may be limited by the reality of the potential caseload, and there are related considerations of how this is likely to be restricted by the capacity constraints of local advice infrastructure (i.e. the organisations able to provide or take referrals), as well as university resources, including the amount of staff supervision time available.

### **Discussion: The value of ECF clinics from an access to justice perspective**

NGOs have a growing interest in how university law clinics can support access to justice (LawWorks 2017), with funders such as the Legal Education Foundation supporting significant work in this area, including PLP's report on Public Law in Clinical Legal Environments (Public Law Project 2018b). Identifying the opportunities that ECF clinics offer as part of clinical legal education programmes is an important contribution to discussions about the role of university law clinics in access to justice work and the benefits that they can offer to the wider community. The expansion of university law clinics to assist members of the public with legal issues is important at a time where the decline of legal aid has left many people facing significant barriers to accessing the justice system without legal representation. However, university law clinics are under increasing pressure to provide access to justice in the absence of state funding, and clinics would require significant additional resources to meet this demand (Drummond and McKeever 2015). Where other pro bono advice services may aim to at least in part replace services previously funded by legal aid, ECF clinics offer

a route to directly challenge the effects of legal aid by increasing the number of people able to access ECF for areas of law that are now outside the usual scope of legal aid.

ECF clinics are beneficial from a student learning perspective not only for allowing students to apply their developing legal skills to support access to justice, but also by engaging them in the challenges of the legal aid system and providing the opportunity to learn about how access to justice issues impact the communities that they live in. Raising awareness of the challenges of the civil justice system, as well as the developing creative ways to address such challenges, is an important part of the work done by ECF clinics. Engaging students with the ECF scheme and conversations about the operation of the legal aid system also provides an important point of learning. Teaching students about civil legal aid, by providing students with a chance to encounter the legal aid system, can be an important part of longer-term strategies to develop future lawyers who care about access to justice and the accessibility of legal services.

Despite the advantages of ECF clinics, the research also found that engaging with the ECF scheme demonstrates the ways in which the scheme itself often limits the possibilities of fair and effective access to justice by preventing individuals from being able to access legal aid. The experience of running the clinic in Exeter was that the ECF scheme is problematic from an access to justice perspective in terms of its administration by the Legal Aid Agency, including the time and technical expertise required to make an application, and the delays faced by applicants. The issues

encountered when assisting individuals to make applications often made the project more difficult to manage in terms of the resources and capacity of university volunteers. These challenges presented a tension between the aim of promoting access to the ECF scheme to ensure that those in need of advice can secure it and enabling a deeply flawed system to function.

Despite the challenges of the ECF system, attempting to improve access to the scheme remains important because if people do not apply for ECF when they need it, the statistics will continue to show a low level of take up for the scheme, which is then assumed to indicate a low level of demand rather than demonstrating the reality of the need for a more accessible and sustainable legal aid system. The research summarised above focuses primarily on immigration law, as that was the main focus of the clinics that participated in the research. Immigration is also the area of law in which most ECF applications are currently made and granted. However, since the research was conducted, the University of Exeter ECF clinic has assisted individuals with ECF applications for family law and welfare benefits. Given the lower application and grant rates in these areas, as well as the other categories of civil law where ECF was introduced and because the overall number of ECF applications continues to fall short of the government's original predictions for the scheme each year, there is considerable scope to expand the work of ECF clinics to support access to justice.

## **Conclusion**

ECF clinics can be viewed as one strategy for increasing access to legal aid, rather than establishing alternative services in response to the gaps left by the LASPO cuts. Where legal aid providers are unable to make ECF applications, university law clinics (and potentially other pro bono projects, although that is not the scope of the research presented here) can provide an important service to the public by assisting individuals to apply for ECF directly to the Legal Aid Agency. The potential to support direct applicants with the process of applying for ECF comes with the caveat that the individuals still need to find a legal aid provider to take their case on, which is not always easy given the context of advice deserts. In cases where providers are unable to make ECF applications themselves, ECF clinics can help to connect individuals with their entitlement to legal aid, which may otherwise be unrealised. Law students are able to put their developing legal skills into practice before they are qualified, and first-hand experience of access to justice issues may prove to be important for the future development of a generation of legal aid lawyers who are committed to access to justice. In response to the funding cuts introduced by LASPO, ECF clinics are one way of improving access to justice, but at the same time refusing to accept the burden of responsibility for advice provision in the context of the reductions of state funding for legal aid.

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