

Position of the Legal Aid Agency as to the Application of the Statutory Charge in Relation to Care Costs and Human Rights Act Applications

1. This Position Statement is made by the Legal Aid Agency ('LAA') as part of its operational legal aid functions on behalf of the Lord Chancellor to clarify the circumstances in which the costs of care and 'other family law proceedings'¹ will constitute a first charge on Human Rights Act ('HRA') damages by operation of statute ('the statutory charge').
2. In summary, the application of the statutory charge in respect of the legally aided costs of care or other family law proceedings to HRA damages can be avoided by ensuring damages are not awarded within the care and other family proceedings and by keeping the costs of pursuing the damages claim separate. For the avoidance of doubt, where the HRA claim is completed outside of the care or other family law proceedings the costs of the HRA claim itself, if sought to be claimed from the LAA, will constitute a statutory charge.
3. The statutory charge arises as a matter of law by section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') which provides:
 - (1) *Where civil legal services are made available to an individual under this Part, the amounts described in subsection (2) are to constitute a first charge on –*
 - a) *any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided (whether the property is recovered or preserved for the individual or another person); and*
 - b) *any costs payable to the individual by another person in connection with such proceedings or such a dispute.*
 - (2) *Those amounts are –*
 - a) *amounts expended by the Lord Chancellor in securing the provision of the services (except to the extent that they are recovered by other means); and*
 - b) *other amounts payable by the individual in connection with the services under section 23 or 24.*
4. The statutory charge operates to recover legal aid expenditure where property or money is recovered or preserved by a legally aided individual, but a claim for legally aided costs is maintained in relation to the proceedings or dispute. Such a claim will arise where the individual has not fully recovered costs from another party to the proceedings or dispute. Particular difficulties have arisen where claims for HRA damages have been made within care or other family law proceedings as to whether all of the care costs should be included in the statutory charge. The costs of care or other family law proceedings will generally not be recovered in full

¹ 'Other family law proceedings' in this context means proceedings under Part IV of the Children Act 1989 and Chapter 3 of the Adoption and Children Act 2002.

from the local authority and they are likely to be so high in comparison with the HRA damages that a statutory charge would absorb most or all of those damages.

5. Judicial Guidance has been provided by the Honourable Mr Justice Keehan in the case of *H v NCC and LAA* [2017] EWHC 282 as to the procedure to be followed where a HRA claim for damages arises during the course of care proceedings (see paragraphs 115- 117). As part of that guidance, Keehan J advised practitioners to issue separate proceedings and to seek the issue of a separate legal aid certificate. His Lordship further advised practitioners to invite the LAA well in advance of the final hearing of the HRA claim to decide on whether it asserts that the statutory charge will apply to any such award. Further relevant guidance to which parties should have regard has been provided by the Honourable Mr Justice Cobb in *Re W (Children) (Convention Rights Claim: Procedure): Practice Note* [2017] 1 WLR 3451, in particular at paragraph 3 where Cobb J confirmed that applications for substantive relief under the HRA (including damages claims) should be brought as civil proceedings by way of Part 8 claim. (It should be noted that the guidance in these cases represents a modification of the guidance given by Munby J in *Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665 (Fam), [2003] 2 FLR 160.)
6. The application of section 25(1) LASPO contains two components: identification of the proceedings or dispute in which the damages are recovered and establishing the legal aid expenditure provided in connection with those proceedings or dispute.
 - a) Where damages are recovered within the care or other family law proceedings themselves, the full legally aided costs of the care or other family law proceedings will form a statutory charge on the damages awarded. Costs may of course be sought against the local authority in these circumstances in order to reduce or eliminate the effect of the statutory charge.
 - b) By way of contrast, if the judicial guidance referred to above is followed, and HRA damages are obtained outside of the care or other family law proceedings (e.g. within separate civil proceedings, or by means of a settlement outside of the care or other family law proceedings), only the legal aid expenditure incurred in respect of pursuing an HRA claim will be treated by the LAA as provided in connection with it. If the LAA is asked to give an early indication as to whether the statutory charge will apply to any HRA damages in these circumstances, it will request undertakings from the provider and counsel in the care proceedings that they will not make a claim for costs in respect of any HRA work carried out as part of the care or other family law proceedings. Once the undertakings have been received, the LAA will be able to confirm that the statutory charge will not extend to the legally aided care costs. Note that, unless a certificate or amendment to a certificate specifically authorising an HRA claim has been granted, there could be no valid claim for such costs in any event.
7. For the avoidance of doubt, legal aid expenditure in relation to the HRA claim will form a statutory charge in respect of any damages or costs recovered in the settlement of that claim, to the extent that a claim is made for costs from the LAA.