



The Legal Aid, Sentencing and Punishment of Offenders Bill
Briefing for the House of Lords, Committee Stage, January 2012

VIOLENCE AGAINST WOMEN IN THE UK

The Legal Aid, Sentencing and Punishment of Offenders Bill (LAPSO) in its current form will remove meaningful access to justice from women who have experienced and are at risk of gender-based violence and abuse including domestic and sexual violence, trafficking, sexual exploitation and forced labour.

“Violence against women is one of the most heinous, systematic and prevalent human rights abuses in the world...[L]et us take this issue with the deadly seriousness that it deserves.” Ban Ki moon, United Nations Secretary General

In its Call to End Violence against Women and Girls published in November 2010, the Government stressed its commitment to end violence against women and girls and ensure victims have the support they need to rebuild their lives. We urge Peers to hold Government to this commitment and scrutinise the impact that the removal from scope of entire areas of law will have on access to justice and safety for women who have experienced gender-based violence.

Violence against Women is a pressing issue in the UK. There has been a concerted effort and real commitment under the current and preceding governments to prevent and respond to it. Yet the removal of civil legal aid will undermine progress made and effectively bar women’s access to their rights and the legal remedies available to them, increasing the risks to their (and their children’s) safety from violence and abuse.

- **Domestic violence:** In 2009/10 there were more than one million female victims of domestic violence in England and Wales - nearly two women each minute. Every week two of those women lose their lives at the hands of a current or former partner.
- **Trafficking:** Between 1 April 2009 and 31 March 2011 there were 1481 referrals to the National Referral Mechanism, the national framework for the identification of victims of human trafficking in the UK. The overwhelming majority (72%) were women. The numbers of individuals trafficked into and within the UK is likely to be much higher than this figure (SOCA).¹
- **Migrant domestic workers:** this group of workers are overwhelmingly represented by women and are extremely vulnerable to exploitation and abuse. Around 15,000 migrant domestic workers were issued visas to work in the UK in 2010 (UKBA);² between January 2003 and August 2010, 41% of migrant domestic worker cited abuse or exploitation as their reason for changing employer to the Home Office.³

¹ SOCA, Statistical Data, available online: <http://www.soca.gov.uk/about-soca/about-the-ukhct/statistical-data>.

² UKBA, Employment-related settlement, tier 5 and overseas domestic workers, A Consultation, June 2011, online: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/employment-related-settlement/employment-related-consultation?view=Binary>.

³ Kalayaan, Ending the Abuse, Policies that work to protect migrant domestic workers, May 2011.

About this briefing

It is critical that the rules governing eligibility for legal aid take into account the needs of women who have experienced gender-based violence and abuse, for whom effective self-representation in complex legal proceedings is unrealistic and dangerous, both in terms of the process and outcomes.

This briefing highlights key issues with the Legal Aid, Sentencing and Punishment of Offenders Bill (LAPSO) related to legal aid for victims of gender-based violence, focussing on provisions related to family and immigration law.⁴ It has been endorsed by and draws on the expertise of the following specialist violence against women organisations:

- CAADA (www.caada.org.uk)
- Domestic Violence Intervention Project (www.dvip.org)
- Eaves Housing for Women (www.eaves4women.org.uk)
- Kalayaan (www.kalayaan.org.uk)
- Refuge (www.refuge.org.uk)
- Respect (www.respect.uk.net)
- Rights of Women (www.rightsofwomen.org.uk)
- Southall Black Sisters (www.southallblacksisters.org.uk)
- Welsh Women's Aid (www.welshwomensaid.org.uk)
- Women's Aid Federation of England (www.womensaid.org.uk)

PRIVATE FAMILY LAW

Legal advice and representation is vital to enabling domestic violence survivors to protect themselves and their children from further violence and resolve issues relating to their children and joint property.

LAPSO removes almost all legal aid for private family law cases.⁵ The Government has announced that legal aid will be retained for private family law matters where domestic violence is an issue, in recognition of the need to ensure that victims of domestic violence are protected. However, this will simply not be the case owing to the restrictive definition of domestic violence used in the Bill and the unrealistic evidence of violence that victims will be required to produce.⁶

Definition of domestic violence

The definition of domestic violence currently used in LAPSO is inconsistent with the cross-government definition of domestic violence which guides statutory agency practice and governs

⁴ For more information contact: Emma Scott, Director (emma@row.org.uk) or Katherine Perks, Policy and Public Affairs Officer (Katherine@row.org.uk) on 0207 2516575 www.rightsofwomen.org.uk

⁵ By private family law cases we mean cases that involve private children law, divorce financial relief and relationship breakdown (cohabitation disputes and applications under Schedule 1 of the Children Act 1989). The Government proposes to withdraw legal aid for all private family law matters, except mediation and applications for domestic violence protection orders (occupation orders, non-molestation orders and forced marriage protection orders) or for other cases where there is "objective evidence of domestic violence".

⁶ Whilst legal aid will be retained for all applicants for domestic violence injunctions (non-molestation and occupation orders) and forced marriage protection orders, applicants in private family law cases will have to provide "objective evidence" of the violence they have experienced.

access to Government services. Importantly, the definition used in the Bill fails to explicitly refer to financial abuse and sexual violence, particularly insidious forms of domestic violence. It is not clear why a different definition of domestic violence is used in the Bill, unless the purpose is to restrict the number of cases that will be deemed eligible for legal aid.

As the 2010 Supreme Court case of *Yemshaw v London Borough of Hounslow* demonstrated, there are already common misconceptions about what constitutes domestic violence amongst decision makers despite the existence of a cross-government definition. Ms. Yemshaw was refused housing assistance as a victim of domestic violence by her Local Authority because whilst she had experienced emotional, psychological and financial abuse, she did not claim physical abuse. Allowing the appeal, Lady Hale (with whom Lord Hope and Lord Walker agreed) cited the cross-government definition of domestic violence which refers to “[a]ny incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”⁷ The adoption of a different definition in this Bill will serve only to compound confusion about the different types of domestic violence and undermine progress in this area.

It has been suggested in Parliamentary debates that adopting the cross-government definition of domestic violence would allow cases that are somehow not “genuine” to qualify for legal aid. Yet the cross-government definition has been used for some time by statutory agencies to identify victims and grant access to services. For example, it is used by the UK Border Agency (UKBA) to decide immigration applications related to domestic violence and criminal justice agencies to ensure enhanced service to victims. Therefore, under the current proposals, many who are already known to be victims of domestic violence by other Government departments will not obtain the legal support they need.

We urge Peers to support **Amendment 45** (Baroness Scotland, Baroness Butler-Sloss, Lord Bishop of Leicester, Lord Blair).

This amendment incorporates the cross-government definition of domestic violence used by the Home Office, Ministry of Justice, UK Border Agency⁸, Crown Prosecution Service and the Association of Chief Police Officers (ACPO).

Domestic violence gateway criteria

Under the proposals, victims of domestic violence will be expected to provide “objective evidence” of that violence in order to qualify for legal aid. Research indicates that at least 46% of domestic violence victims will be ineligible for legal aid because the evidence that they will be required to present is dangerously restrictive.⁹

The evidence of domestic violence which the government proposes to accept relies on victims taking civil and criminal proceedings against perpetrators. Yet we know that a large proportion of victims do not take these routes. 79% of professionals who work on violence against women issues surveyed by Rights of Women in 2011 said that the women they work with do not routinely report to the police. Although the government has suggested that the inclusion of survivors who have been referred to Multi-Agency Risk Assessment Conferences (MARAC) will capture those who do not

⁷ The Government is currently consulting on whether to widen this definition to incorporate the concept of “coercive control” and/or to extend it to apply to 16-17 year olds, or all those under 18.

⁸ The Home Office defines domestic violence as “any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”

⁹ Evidencing domestic violence: the facts, Rights of Women and Welsh Women’s Aid, January 2011 (www.rightsofwomen.org.uk/policy.php)

report to statutory agencies, this is insufficient since only very high risk cases are considered at MARAC. For example, Women's Aid Federation of England's Annual Survey in 2010 found that just 19% of women in refuge had been referred to a MARAC.¹⁰

To ensure that all women affected by domestic violence are protected, it is essential that the evidential criteria used reflect the experiences of women and the reality of domestic violence. This must include evidence from specialist domestic violence organisations, health services and social services.

The Government has also proposed to apply a twelve month time limit to each of the evidential criteria. It would mean that a woman who has had a domestic violence injunction in place could not use the injunction as evidence of violence if it expired more than 12 months ago. This simply does not reflect the reality of domestic violence, in particular the ongoing risk that perpetrators pose to women, and their use of private family law proceedings to get back in contact with a woman who has been safe for some time. Rights of Women's family law advice line often receives calls from women who have been separated and safe from an abusing ex-partner for some time, only to be placed at risk once more when he initiates child contact proceedings.¹¹

The range of evidence that the Government proposes to accept is not set out on the face of the Bill but is expected to be introduced later through secondary legislation and/or regulations. Because of the importance of this issue, it is essential that the evidence that will be accepted or the domestic violence "gateway criteria" is debated and subject to full parliamentary scrutiny.

We urge Peers to support **Amendment 46** (Baroness Scotland, Baroness Butler-Sloss, Lord Bishop of Leicester, Lord Blair) that would ensure that the evidence that domestic violence victims are required to produce reflects the reality of domestic violence and the types and range of evidence victims are likely to have. It builds on the Government's initial proposals by adding those forms of evidence already used by the UK Border Agency to decide immigration applications related to domestic violence.

We further urge Peers to support **Amendment 48** (Baroness Butler-Sloss, Lord Bishop of Leicester, Lord Blair) that would ensure that supporting evidence of domestic violence is not subject to unrealistic time limits.

Legal aid for alleged perpetrators in domestic violence cases

Legal aid will not be retained under LAPSO for alleged perpetrators in private family law proceedings. We are concerned that the anticipated surge in litigants in person as a result of the proposals will result in an increase in the number of women being cross-examined by a perpetrator in detail about the physical or sexual violence she has experienced.

We urge Peers to support **Amendment 42 (Baroness Butler Sloss)** that would make legal aid

¹⁰ (sample of 601 women in a one-day snapshot),

¹¹ Many callers to Rights of Women's advice lines often express fear at the potential for a perpetrator to locate where they live by instituting civil proceedings and/or that a perpetrator is issuing court proceedings as a means by which to continue violence. This very real concern was acknowledged by the court in the leading case of *Re L* (see: *Re L*; *Re V*; *Re M*; *Re H*, *Contact: Domestic Violence*, [2000] 2 FLR 334). A survey conducted by Women's Aid in 2001 found 60 refuge projects in England (47% of the sample) said they knew of cases in their area where a perpetrator had been able to use contact proceedings to track down his former partner since 19 June 2000, the previous year (see: Women's Aid, *Making Contact Worse*, Bristol: Women's Aid, 2001. The survey was sent to all refuge projects in England and 127 refuge projects took part).

available for the other party in private family law cases for the purposes of a court hearing where the victim of domestic violence would otherwise be cross-examined by them in person in order to protect victims and vulnerable witnesses in proceedings.

Domestic child abduction

Legal aid has been retained under LAPSO for international child abduction, due to the serious and potentially damaging impact of this form of abuse. However, if a child has been removed, or a threat has been made to remove a child from the parent with care to another part of the UK, legal aid will not be available to make applications for residence and prohibited steps orders (under the Children Act 1989) to have the child returned or to protect against abduction, unless the parent with care satisfies the domestic violence gateway criteria. The police will not return a child to the parent with care unless she has a residence order and /or prohibited steps order in place. Under LAPSO in its current form, legal aid will also not be available for orders under the Family Law Act 1986 to disclose the child's whereabouts, recover the child or for the surrender of the child's passports. Domestic child abductions are far more common than international child abductions, raise similar child welfare concerns, and highly traumatic for all involved. Without legal aid, many parents will face this trauma alone.

We urge peers to support **Amendments 39-41** that will ensure that legal aid is available to obtain an emergency order to prevent the removal of a child from their usual place of residence or to take steps further to such a removal in order to deal with abduction of children within the United Kingdom as well as international abductions.

Legal aid in cases deemed unsuitable for mediation

Whilst legal aid will be retained for mediation under LAPSO, there has been no provision made for those cases where mediation is unsuitable or unsuccessful. This is alarming as it means that a case which fails to meet the domestic violence gateway criteria yet is deemed unsuitable for mediation, for example because of domestic violence or imbalance of power between the parties, will not be funded at all. Women facing this situation will under the current proposals be forced to represent themselves or take no part in legal proceedings at all, placing them and their children at risk of harm.

We urge Peers to support **Amendment 51 (Baroness Butler-Sloss)** that would make legal aid available for one or both eligible parties in defined circumstances where mediation is unsuitable or unsuccessful, including so that an individual at risk is not refused both publicly funded mediation and legal aid.

IMMIGRATION LAW

The Legal Aid, Sentencing and Punishment of Offenders Bill (LAPSO) in its current form will remove legal aid from most immigration cases including from women who have experienced gender-based violence whose immigration status places them at greater risk of harm (it will remain available for asylum and domestic violence rule applications but not for other types of gender-based violence cases).

Women with an insecure immigration status are particularly vulnerable to violence and abuse because their immigration status and uncertainties about it often restricts them from seeking help and accessing support services and is used as a tool of control by their abusers.¹² For many women, including victims of domestic violence, trafficking and migrant domestic workers exploited in private households, their insecure immigration status is both a direct result of the violence they have experienced and a vehicle for its continuance. The availability of legal advice and representation to resolve their immigration status is vital for these women whose safety and well-being depends on it.

Domestic violence applications

Early on in the life of the Bill the Government made an important decision to bring back into scope legal aid for victims of domestic violence applying for indefinite leave to remain in the UK under the domestic violence rule (Rule 189A of the Immigration Rules). This rule covers a specific group of domestic violence victims who entered the UK on a spousal visa, whose relationship with their spouse broke down because of domestic violence within a two year probationary period.

Under the current version of LAPS0, legal aid is now retained for applicants under the domestic violence rule. This covers victims of domestic abuse whose leave to enter or remain is dependent on their relationship as the partner of a British citizen or person with indefinite leave to remain. However, legal aid would not be available for other victims of domestic violence whose immigration status is dependent on their abusive partner, for example someone whose immigration status is dependent on a partner who is exercising European free movement rights (for example where the partner is an EEA citizen)¹³ or dependent on a partner who has limited leave to enter or remain (for example where the partner is a refugee). The vulnerability issues remain the same in these cases.

We urge Peers to support **amendments 62-67 (Baroness Gould)** which together would extend the provision of legal aid to all victims of domestic violence whose immigration status is dependent on their abuser.¹⁴

Vulnerable applicants: trafficking victims, migrant domestic workers, other victims of domestic violence

Announcing his decision to retain legal aid for domestic violence rule cases the Minister for Legal Aid, Jonathon Djanogly said:

“such cases are unusual. There is a real risk that, without legal aid, people will stay trapped in abusive relationships out of fear of jeopardising their immigration status. The type of trauma that they might have suffered will often make it difficult to cope with such applications. We also appreciate that people apply under great pressure of time, and access to a properly designated immigration adviser is a factor. We intend to table a Government amendment to bring such cases into scope at a later stage.”

The concerns raised by the Minister apply equally to other vulnerable applicants in immigration cases who have experienced or are at risk of violence and abuse, who simply cannot be expected

¹² See Rights of Women, Silenced Voices Speak, December 2011.

¹³ Individuals seeking to remain in the UK under Regulation 10 of the EEA Regs 2006 because of domestic violence will not be eligible for legal aid, although the Government has made a concession in respect of non-EEA nationals who are seeking to remain in the UK under the Domestic Violence rule, within the immigration rules.

¹⁴ For a full briefing on this group of amendments, see ILPA Briefing, House of Lords – Committee, December 2011, Immigration and Domestic Violence, online: <http://www.ilpa.org.uk/data/resources/14002/11.12.16-ILPA-LASPO-briefing-schedule-1-immigration-domestic-violence.pdf>.

to represent themselves in applications effectively because of the trauma they have experienced including:

- Trafficking victims
- Migrant domestic workers exploited in domestic households
- Other victims of domestic violence whose immigration status may or may not be dependent on maintaining an abusive relationship with their spouse, yet their insecure immigration status is still used by the perpetrator as a tool of control.

All of these cases raise complex issues and affect particularly vulnerable women whose fundamental human rights, including the right to be free from inhuman and degrading treatment, are at risk. As the Minister has indicated, what sets these cases apart from other areas of law is that there are no alternative advice providers because it is a criminal offence for anyone to give immigration advice or services unless they are qualified to do so. Removal of legal aid for these cases will place women at greater risk of violence and prevent those with valid legal reasons for remaining in the UK from being able to access and benefit from their legal rights.

Migrant domestic workers are extremely vulnerable to exploitation and abuse because of the invisible nature of their work which takes place in private households and because they are dependent on their employers for their work, accommodation and immigration status. This dependency invests incredible control in the hands of the employer and thus migrant domestic workers who are exploited by their employers find them in a very similar position to victims of domestic violence. Research has shown that 41% of migrant domestic workers cite types of abuse or exploitation as their reason for changing employer. Under LAPSO legal aid will not be available for migrant domestic workers to seek advice on how to regularise their immigration status and/or change employer. Migrant domestic workers may also be victims of trafficking.

Trafficking victims who have been trafficked into the United Kingdom for the purposes of sexual and other exploitation will not be eligible for legal aid under LAPSO for advice on the implications of being referred into the National Referral Mechanism (and will therefore their informed consent for referral will be questionable); whether they are entitled to apply for leave to remain other than as an asylum seeker in the United Kingdom (such as applications for discretionary leave); or to challenge Home Office decisions concerning whether or not they are a victim of trafficking.

Victims of domestic violence whose immigration status may not be dependent on maintaining an abusive relationship with their spouse may also be vulnerable to remaining in a violent relationship if they cannot access legal advice to regularise their immigration status. Rights of Women receives many calls to our immigration and asylum law advice line from women whose leave is not dependant on their spouse, yet their insecure immigration status is still used by the perpetrator as a tool of control.

We urge Peers to support **Amendments 69A and 70A (Baroness Gould)** which together would ensure that those who have experienced forms of gender-based violence are able to access legal aid for immigration advice and representation. These amendments would retain legal aid for immigration matters in relation to children, victims of domestic violence and trafficking as well as other groups who are at risk of gender-based exploitation, such as migrant domestic workers. Legal aid would also be retained legal aid for others whose ability to represent themselves in an immigration law issue is impaired because of their age, illness or disability.

We also urge Peers to support **Amendments 61A and 90A (Baroness Butler-Sloss)** which together would provide civil legal aid to victims of trafficking in relation to immigration, and other proceedings relating to their experience of trafficking: criminal injuries compensation claims, employment claims (including appeals before the Employment Appeal Tribunal) and damages claims.