



**Written evidence submitted by Rights of Women to the Joint Committee on Human Rights: the implications for access to justice of the Government's proposed legal aid reforms.**

**Summary**

1. Legal aid is a vital tool for the protection of women from violence.<sup>1</sup> It enables a woman who is experiencing violence to protect herself and any children that she has by making applications for protective orders, securing safe accommodation, ending a violent relationship and if necessary, regularising her immigration status. Rights of Women rejects the unsupported claim made in the Ministry of Justice's consultation *Transforming Legal Aid* (henceforth referred to as 'the proposals') that the legal aid system has lost credibility with the public. Rights of Women's research indicates that users of civil legal aid view it as a life-saving resource that secures access to justice and safety from violence.<sup>2</sup>
2. Rights of Women believes that the proposals made to 'reform' legal aid would, if implemented, fail the Government's own commitment to end violence against women and girls.
3. Rights of Women is concerned that the Ministry of Justice has not paid due regard to its obligations under section 6 of the Human Rights Act 1998 (HRA). It is our contention that these legal aid proposals, when considered with the reforms implemented in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) infringe Convention rights protected under the HRA, particularly the rights of women who are vulnerable, marginalised or experiencing disadvantage.
4. Rights of Women would also like to draw the Committee's attention to obligations that the UK has under other relevant international law to protect women from violence and secure their access to justice, particularly under the Convention on the Elimination of all Forms of Discrimination against Women as elucidated, with specific regard to legal aid and violence against women, in the *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*.<sup>3</sup>

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<sup>1</sup> *Womens' Access to Justice: A research report*, Rights of Women, 2011.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland* Adopted by the Convention on the Elimination of All Forms of Discrimination against Women Committee at its fifty-fifth session (8-26 July 2013) CEDAW/C/GBR/CO/7.

5. Rights of Women submits that the residence test, if implemented, would fundamentally undermine the rule of law in England and Wales. Rights of Women is particularly concerned about the effects that the imposition of a residence test would have on victims of gender-based violence in the UK.

### **About Rights of Women**

6. Rights of Women<sup>4</sup> works to secure justice, equality and respect for all women. Our mission is to advise, educate and empower women by:
  - ❖ Providing women with free, confidential legal advice by specialist women solicitors and barristers.
  - ❖ Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
  - ❖ Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.
7. Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe choices about their own and their families' lives.

### **Rights of Women's evidence to the Joint Committee on Human Rights**

8. Rights of Women is responding to this call for evidence because the proposals, if implemented, would have significant consequences for the women that we support. Specifically, we believe that women and children will be put at greater risk of experiencing violence as they will be unable to access and benefit from their legal rights. From a broader perspective, we are deeply troubled by the proposed introduction of a residence test as we believe that this will not only result in the UK failing in its international and domestic obligations to protect *all* women from violence, but will also fundamentally undermine the rule of law.
9. This evidence highlights some of the consequences that two of the proposed changes to legal aid will have on women experiencing violence: the residence test and changes to the funding of judicial reviews. Rights of Women's research on legal aid *Womens' Access to Justice*<sup>5</sup> as well as our responses to the two most

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<sup>4</sup> Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

<sup>5</sup> *Womens' Access to Justice: A research report*, Rights of Women, 2011.

recent legal aid consultations<sup>6</sup> are available on our website. This evidence should be considered alongside these documents.

### **The Government's Commitment to Ending Violence Against Women and Girls**

10. In its *Call to End Violence Against Women and Girls* and its associated *Action Plan* the Government set out its absolute commitment to work towards the elimination of violence against women and girls. Central to both documents is prevention, as the Home Secretary states in her forward to the Call: "However, at the heart of our approach will be prevention. We will work across the whole of government on preventative measures to stop violence from happening in the first place."<sup>7</sup>
11. There is no legal definition of what conduct or forms of harm constitute violence against women within UK law. However, the UN Declaration on the Elimination of Violence against Women (1993)<sup>8</sup> defines violence against women in Article 1 as: "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life". It is upon this that the Government's definition of violence against women, as set out in the *Call*, is based.
12. It is submitted that these proposals completely undermine the Home Secretary's stated commitment to preventing violence against women. The consultation document failed to consider the impact of the proposals on women who are experiencing violence. This is all the more surprising when the residence test proposal directly impacts on migrant women experiencing violence (see further below) and the *Call* and its *Action Plan* recognise the particular vulnerability of asylum seeking women and women on spouse / partner visas.
13. In addition to the failure to formulate proposals that are in line with the Government's *Call to End Violence Against Women and Girls* (and its associated documents and commitments) it is also a cause for concern that no understanding is demonstrated of the UK's domestic and international legal commitments to respond to violence against women.

### **The residence test**

14. The introduction of any residence test is a threat to the rule of law and the principle of equality before the law. It is unacceptable to deny, *de facto*, any group of people access to the courts and therefore to justice. Rights of Women is confident that the Committee is seized of the importance of individuals being able to resolve "without prohibitive cost or inordinate delay, bona fide disputes

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<sup>6</sup> *Rights of Women's response to the Ministry of Justice's consultation, Transforming legal aid* and *Rights of Women's response to the Ministry of Justice's legal aid proposals 2011*

<sup>7</sup> *Ibid*

<sup>8</sup> A/RES/48/104

which the parties are unable themselves to resolve”<sup>9</sup> as the “denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law”.<sup>10</sup>

15. Rights of Women has argued that in formulating its current legal aid proposals, particularly when these are considered alongside changes already made in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the Ministry of Justice has not paid due regard to its obligations under section 6 of the Human Rights Act 1998 (HRA). Our consultation response to the Ministry of Justice sets out our specific concerns in relation to women’s right to receive a fair trial (Article 6, EHRC) and note how this relates to the protection and possible infringement of other rights, such as the right not to be subject to inhuman and degrading treatment (Article 3, EHRC) and to respect for private and family life (Article 8, ECHR). The focus of our attention is on the right to a fair trial in civil law issues and draws on an analysis of Airey v Ireland [1979]<sup>11</sup> and Steel and Morris v UK [2005]<sup>12</sup>.
16. Rights of Women believes that it is clear from the European Court of Human Rights’ interpretation of Article 6 that the right to a fair trial in civil cases, requires legal aid be provided in complex cases that engage Convention rights. Whilst the Court makes clear that the ability of an individual to represent themselves (i.e. without access to legal advice/representation) in simple and straightforward proceedings is sufficient to prevent a breach of their Article 6 rights, it is also clear that legal aid must be provided in cases that are complex, where legal aid is necessary to enable effective access to a court. In determining complexity, consideration has to be given not just to the relevant law and procedure, but also to the capacity of the individual concerned (e.g. whether she/he has a mental health problem or a learning difficulty which would inhibit her/his ability to represent themselves).
17. Rights of Women is aware, from the women who we advise and support on our legal advice lines, that those who are prevented from benefitting from legal aid because of the proposed residence test will be unfamiliar with UK laws and procedures, have limited access to support networks, and may be in the hands of, or dependent on, either the state or a perpetrator of violence. As noted above, women in these situations may also have additional vulnerabilities, such as experiences of poverty, domestic and sexual violence. Women in these situations will not be able to take part in legal proceedings by representing themselves. We submit that the European Court of Human Rights’ conclusion that a State's failure to protect women against violence is unlawful

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<sup>9</sup> *The Rule of Law*, Tom Bingham, Allen Lane (2010) page 85.

<sup>10</sup> *Ibid* page 88.

<sup>11</sup> *Airey v Ireland [1979]* ECHR 3

<sup>12</sup> *Steel and Morris v UK [2005]* ECHR 103

discrimination because it breaches their right to equal protection of the law in the case of Opuz v Turkey [2009] is relevant here.<sup>13</sup>

18. Rights of Women would also like to draw Committee member's attention to UK's obligations under the Convention on the Elimination of all Forms of Discrimination against Women and the International Covenant on Civil and Political Rights.
19. The CEDAW Committee has consistently affirmed the importance of legal aid to ensure women's access to justice<sup>14</sup> and has highlighted concerns about the availability of legal aid in its concluding observations to a number of State party reports. In February 2010 the CEDAW Committee issued concluding observations to The Netherlands on legal aid. It expressed concern that while perpetrators of domestic violence in the Netherlands had access to free legal aid, victims of domestic violence had access to legal aid only in exceptional circumstances. It called on The Netherlands "to ensure without any further delay that free legal aid is provided to all victims of domestic violence".<sup>15</sup>
20. The UK Government has removed the immigration reservation to CEDAW and so is legally required to ensure that migrant women receive equal protection from violence to that available to UK women. The CEDAW Committee has recently considered the impact of LASPO and the proposed residence test on women, particularly women at risk of or experiencing violence. In their *Concluding Observations* to the UK Government the Committee stated:

**"Legal aid and access to justice**

22. The Committee is concerned that the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 unduly restricts women's access to legal aid, as it removes access to legal aid for litigation concerning, inter alia, divorce, property disputes, housing and immigration matters. While noting that legal aid is still available for some private family law issues, the Committee is concerned that the Act conditions legal aid upon proof of, inter alia, abuse for victims of violence, and that a proposed residency test is under consultation. It is also concerned at the introduction of court fees under the Employment Appeal Tribunal Fees Order 2013. The Committee notes with concern reports that these limitations may push women, particularly ethnic minority women, into informal community arbitration systems, including faith-based tribunals, which are often not in conformity with the Convention.

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<sup>13</sup> Opuz v Turkey [2009] (Application no. 33401/02) para 191

<sup>14</sup> See for example, CEDAW General Recommendation No. 28, para 34.

<sup>15</sup> Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands, UN DOC CEDAW/C/NLD/CO/5, 5 February 2010.

**23. The Committee urges the State party to:**

- (a) Ensure effective access by women to courts and tribunals, in particular women victims of violence;**
- (b) Continuously assess the impact of the reforms to legal aid on the protection of women's rights; and**
- (c) Protect women from informal community arbitration systems, particularly those which violate their rights under the Convention.”<sup>16</sup>**

21. Furthermore, the Human Rights Committee has highlighted how: “[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way... States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it”.<sup>17</sup>

22. Introducing a residence test which would prevent those who do not meet it (or could not demonstrate that they do meet it) from being able to access civil legal aid will result in women being exposed to violence and abuse and being unable to secure safety and justice for themselves and their children. This will violate their fundamental human rights as protected by domestic and international human rights law (see above) as well as the common law of England and Wales. Rights of Women has provided examples of cases where this would happen to the Ministry of Justice and could also provide them to Committee members.

23. Specific groups of women who would be affected by the introduction of a residence test include:

- i. victims of domestic violence (including British women living in England and Wales and women eligible for settlement under the domestic violence rule);
- ii. victims of forced marriage who have been brought to the UK;
- iii. parents of children who are abducted from the UK;
- iv. parents of children who are involved in care proceedings;
- v. women who are in the UK lawfully (including migrant domestic workers, European citizens and their family members);
- vi. British women who have fled abusive relationships in other countries and who are returning to the UK to seek safety;

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<sup>16</sup> *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland* Adopted by the Convention on the Elimination of All Forms of Discrimination against Women Committee at its fifty-fifth session (8-26 July 2013) CEDAW/C/GBR/CO/7.

<sup>17</sup> Human Rights Committee, General Comment No. 28, para 18.

- vii. stranded spouses (women who are married to men who are British or settled here who are coerced or deceived into leaving the UK and who are prevented from returning);
  - viii. women who have been trafficked for sexual and other forms of exploitation; and,
  - ix. women who have British children.
24. Women who are unable to access legal aid will be unable to secure and benefit from protective orders (such as non-molestation orders and occupation orders), may remain in abusive relationships and lose rights to make a claim or lodge an appeal due to limitation periods and / or deadlines. The introduction of a residence test recreates the situation that the domestic violence rule and accompanying destitute domestic violence concession were created to resolve<sup>18</sup>, namely that women should not be forced to remain in violent and abusive relationships because of their immigration status. Such a situation is in opposition to the Government's stated position on violence against women. Indeed, the importance of legal aid for trafficked women and women with applications under the domestic violence rule was recognised by the Ministry of Justice when it drafted and amended LASPO to ensure that immigration legal aid remained available in these cases.
25. Denying legal aid to a victim of trafficking who does not meet the residence test and does not have an asylum claim risks violating Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 47 of the EU Charter of Fundamental Rights (because of the Directive on Trafficking in Human Beings (Directive 2011/36/EU)). We will not repeat the legal arguments made on this point in our consultation response, however, we would reiterate the fact that the vulnerability of victims of trafficking was recognised in the exemption they received from the residence test that now applies to all applicants for criminal injuries compensation.<sup>19</sup> The Ministry of Justice's position in relation to victims of trafficking who do not meet the proposed residence test is therefore at odds with the position taken previously in relation to both LASPO and the Criminal Injuries Compensation Scheme 2012. No evidence or information has been provided to explain this change in policy.
26. In relation to asylum, Rights of Women is concerned that whilst the Ministry of Justice states that asylum-seekers will be exempted from the residence test they have not explained how it will operate in relation to those who are granted refugee status or humanitarian protection. Refugees or those with other forms of leave to remain in the UK may need civil legal aid but appear not to be able to access it because they are no longer asylum-seekers (and therefore able to

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<sup>18</sup> For further information see Rights of Women's Domestic violence, immigration law and no recourse to public funds [www.rightsofwomen.org.uk/legal.php#domestic\\_sexual\\_violence](http://www.rightsofwomen.org.uk/legal.php#domestic_sexual_violence).

<sup>19</sup> See further pages 11 and 12 of 'A Guide to the Criminal Injuries Compensation Scheme 2012' published by the CICA in March 2013.

benefit from the exemption) but may not have accrued one years' lawful residence in the UK.

27. The residence test will also operate to prevent refused asylum-seekers from being able to challenge a decision not to accept a fresh claim for asylum. This will have a disproportionate impact on women asylum seekers because there are a range of factors that can make it harder for women to disclose their experiences of violence (for example, experiencing sexual violence) at the time of their asylum claim and at appeal. Further information about barriers faced by women asylum-seekers in this regard can be found in our consultation response. However, we would emphasise that the evidence suggests that women are more likely to have to make a fresh claim than men and the factual and legal complexity of their cases makes it more likely that it will not be recognised as such.
28. The exceptional cases scheme would not remedy any of the issues identified as it is only available for applications for legal aid in areas of law that are no longer in scope (such as general immigration law, see Section 10, LASPO). It cannot assist an applicant with a legal problem with an area of law that is within scope (such as a domestic violence rule application) but for an applicant who did not meet the residence test.
29. In addition to these arguments Rights of Women wishes to make the general point that the proposed residence test is both unworkable and disproportionate. Ascertaining whether or not someone has a right to reside and how it can be evidenced is a complex process which may itself require legal advice and assistance. Indeed, this may be the issue under dispute. Women who are homeless or who have or are experiencing domestic violence may be unable to provide or access supporting documentation (because they are in a refuge, because of their experience of financial control etc). This latter point links to our concerns about proportionality. The imposition of a residence test will have a disproportionate and adverse impact on the majority of legal aid applicants who do have a strong connection to the UK (and who are likely to be vulnerable and experiencing economic and other disadvantage). It is perverse and wholly disproportionate to impose such considerable burdens on providers and the majority of legal aid applicants.

#### **Paying for permission work in judicial review cases**

30. The importance of judicial review proceedings as a check to the unlawful exercise of power and to protect women from discrimination and violence cannot be overstated. Judicial review proceedings can enable women to ensure that local authorities meet their legal obligations to provide them with housing and homelessness assistance; meet their community care needs; compel the acceptance of a fresh claim for asylum; prevent an unlawful removal from the UK and ensure that victims of trafficking are correctly recognised as such.



31. Many public law issues can be resolved without judicial review proceeding being issued, for the benefit of the client. This includes situations where the decision is so clearly unlawful that the decision-maker withdraws or changes it as soon as the decision and possibility of legal action being taken is drawn to their attention. It also includes cases where successful applications for interim relief effectively end the need for bringing substantive proceedings. If judicial review cases are only funded in cases where permission is granted then the majority of work undertaken by public lawyers will be unfunded. Rights of Women believes that this will have a catastrophic impact on the provision of advice and representation in public law proceedings. We cannot envisage how such a loss of capacity could be militated against by the work of voluntary organisations such as ourselves.

### **Recommendations**

32. Rights of Women would like to recommend that the Committee:

- i. Examines the impact of the proposed residence test on women, particularly women at risk of, or experiencing, violence. The intersection between gender and other characteristics, such as race or ethnic origin should also be considered (particularly in relation to specific forms of violence that disproportionately affect BME women, such as forced marriage).
- ii. Considers the proposed residence test in the light of both the Government's stated objectives to eliminate violence against women and girls and the UK's domestic and international obligations to protect women from violence.
- iii. Calls on the Government to accept the recommendations of the CEDAW Committee in relation to legal aid as set out in paragraph 23 of their *Concluding Observations*.<sup>20</sup>
- iv. Analyses the impact on vulnerable groups of a loss of provision of advice and representation for judicial review proceedings.

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<sup>20</sup> Adopted by the Convention on the Elimination of All Forms of Discrimination against Women Committee at its fifty-fifth session (8-26 July 2013) CEDAW/C/GBR/CO/7.