



Rights of Women's response to the consultation 'Proposals for the Reform of Legal Aid in England and Wales'

About Rights of Women

Celebrating our 35th anniversary this year, we work 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.

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. We received the Mayor of London's Award for Distinction for outstanding and innovative work in relation to domestic violence (November 2007) and the Lilith Project's Best Voluntary Sector Violence against Women Campaign (November 2005).

Rights of Women is an Industrial and Provident Society and an exempt charity. Our Rules set out our charitable purposes. Pursuant to the Charity Act 2006 we are in the process of registering as a charity. Rights of Women does not have and never has had a contract with the Legal Services Commission. Consequently, our response to this consultation is not based on financial concerns about the consequences of the reforms on our own organisation, but out of concern for the women and families that we support.

Summary

We know from our experience providing legal advice to women across England and Wales that legal aid is a vital, lifesaving resource. Legal aid enables women (and men) who cannot afford to pay for legal advice and

representation to get protection from domestic violence from the civil courts; end a violent or abusive relationship; access welfare benefits and housing support that they are entitled to; protect their children from violence or abuse; and, resolve any immigration law problems that they have.

Rights of Women opposes the proposed changes because:

- they are discriminatory and will entrench inequality because women and other vulnerable groups such as the disabled, poor and marginalised will be disproportionately affected;
- they will put women at greater risk of violence by making it harder for them to leave their relationships and resolve issues relating to their children;
- they will remove an important check to abuses of power and incompetence (legal aid is necessary to ensure equality of arms and to enable individuals to challenge decisions taken by those in positions of power); and,
- they breach the Human Rights Act 1998 (HRA) because:
 - o the ability to access legal advice and representation is a vital part of the right to a fair trial, which is fundamental to the rule of law and protected under the HRA 1998 in Article 6 of the European Convention on Human Rights (ECHR); and,
 - o a lack of access to legal advice and representation may lead to violations of other fundamental rights protected under the HRA, such as the right not to be subject to inhuman and degrading treatment (Article 3, ECHR) and the right to respect for a private and family life (Article 8, ECHR).

Rights of Women is also concerned that the Ministry of Justice has not paid due regard to its obligations under section 6 HRA. Section 6 HRA imposes a clear duty on all public bodies, including the Ministry of Justice, not to infringe any of the rights it guarantees. This duty clearly applies to the formulation of policy to ensure that policies are not developed which, if implemented, would breach the rights protected in the HRA. The ability to access legal advice and representation is a vital part of the right to a fair trial under Article 6(1) ECHR. The ability to access a court is also central to the right to an effective remedy under Article 13 of the ECHR. The inability to access legal advice and representation may also lead to violations of other fundamental rights protected under the HRA, such as the right not to be subject to inhuman and degrading treatment (Article 3, ECHR) and the right to respect for a private and family life (Article 8, ECHR). Given the engagement of these fundamental human rights it is vital that the Ministry of Justice ensures that it is fully complying with its section 6 HRA duties to ensure that any changes made to legal aid do not breach these rights.

An evidence based approach

In order to ensure that Rights of Women's response to this consultation was evidence-based and that our conclusions represented the views of the individual women and the professionals we work with, we decided to carry out research into both the current operation of civil legal aid and the reform proposals. To do this we created three surveys on legal aid and access to

justice which were available to complete on our website between 17th December 2010 and 31st January 2011. We developed specific surveys to capture the experiences of:

- individual women;
- professionals who respond to violence against women issues; and,
- legal professionals.

We publicised the surveys using our website, Facebook and Twitter, as well as through our advice line, training and events. The questions asked of respondents were open and neutral and, in most cases, came with the opportunity to clarify or explain an answer. Just under one thousand people responded to our surveys. Their answers make for uncomfortable and inspiring reading, explaining as they do, the barriers women face leaving violent and abusive relationships and how receiving legal advice and representation can make the difference between acting to resolve a legal issue or not, as one of the individual women who responded said:

“...Legal aid is not only a necessary tool for victim of domestic violence, it is also a life saving tool both for women and children.”

Throughout this response we will draw on evidence obtained from our surveys to support our arguments. Our full research report *Women's Access to Justice* is attached to this response at appendix 1. Appendix 2 sets out the responses of all those who took the opportunity to give us an example of how legal aid had helped them or someone they supported.

Scope

Question 1: Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme?

We **agree** that all the types of case identified should remain in scope.

The consultation states that some issues and areas of law, like asylum and domestic violence, will remain in scope. However, we have considerable concerns about how the consultation proposes to achieve this.

Asylum

The consultation states that asylum cases will remain within the scope of legal aid. A claim for asylum includes:

- a claim for protection under the 1951 UN Convention and 1967 Protocol relating to the Status of Refugees;
- where there is serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict;¹ and,
- a claim for protection under Article 3 of the European Convention on Human Rights (ECHR).

¹ Article 15(c) of the EU Qualification Directive

Those who make a successful claim for protection and are given either Refugee Leave or Humanitarian Protection may apply for their family members, who may be living in situations of considerable danger in the country the applicant fled, to join them in the UK. Whilst these cases relate to the rights of refugees, they are currently classed as immigration cases and it is therefore proposed that legal aid will no longer be available to enable family reunion in these cases to take place.

We believe that it is vital that family reunion cases are classed as asylum cases and that legal aid remains available to:

- enable families separated by human rights violations to be reunited; and,
- ensure the safety of family members who may remain in considerable danger in the refugee's country of origin.

Family reunion is particularly important for women who may be:

- particularly vulnerable to persecution and violence if they are left in their country of origin alone following the flight of their husband. Women in this situation may be persecuted because of their association with someone who has applied for asylum in the UK or may be stigmatised because they are a separated spouse. In many countries and cultures it is not acceptable for women to live alone and women in this situation may be harassed or singled out for ill-treatment.
- Alternatively, women who have claimed protection in the UK may have had to leave children in order to escape persecution or other serious harm. It is vital for the physical and mental health and wellbeing of the woman and her children that they are reunited as soon as possible.

The importance of family reunion was recognised in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, to which the UK is a signatory. The Final Act forms part of the basis of the international law that protects people who have had to flee persecution in their own country and seek safety elsewhere. The Final Act unanimously adopted the following recommendation:

The Conference,
considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
noting with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family,
recommends Governments to take the necessary measures for the protection of the refugee's family especially with a view to:
(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

Enabling family reunion has considerable benefits for the UK as it promotes integration. The Council of Europe has recognised that family reunion and the residence rights that go with it are important elements which assist the integration of new migrants² while the preamble to the EU family reunification directive makes a similar point:

“Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.”³

Family law

Family law: The definition of domestic violence

The consultation document and accompanying press releases state that domestic violence will remain in scope under the proposed changes to the scope of legal aid. This is simply not the case. Paragraphs 4.64-4.68 of the consultation show that the focus of the reforms is on protecting victims from “physical harm” only. Physical harm is just one form that domestic violence may take. The current Home Office and Association of Chief Police Officers (ACPO) definition of domestic violence recognises this and in line with international standards, 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.”

This definition is also used by the Crown Prosecution Service, the Ministry of Justice and the UK Border Agency.⁴

Whilst the consultation document proposes that legal aid will remain available for women to obtain domestic violence injunctions (non-molestation and occupation orders), it proposes that legal aid for related domestic violence issues, such as financial relief (separating finances following divorce) and private child law (to resolve issues like child contact and residence) will only be available “where there is an ongoing risk of physical harm”. This means that not all victims of domestic violence will be able to protect themselves and their families from all forms of violence contrary to what the consultation suggests.

² Recommendation (2002) 4 of the Committee of Ministers to member states on the legal status of persons admitted for family reunification (Adopted by the Committee of Ministers on 26 March 2002 at the 790th meeting of the Ministers’ Deputies).

³ EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, October 3, 2003, p.12-18, Preamble no. 4.

⁴ See the CPS’ *Policy for Prosecuting Cases of Domestic Violence* (2010), the Ministry of Justice’s *A Guide to Civil Remedies and Criminal Sanctions* (February 2003, updated March 2007); and the UKBA’s *Victims of Domestic Violence: Requirements for Settlement Applications* and the IDI *Chapter 8, Section 4, Victims of Domestic Violence*.

The consultation document proposes that legal aid to resolve family law matters (other than to obtain domestic violence injunctions) will only be available in domestic violence cases where the victim meets one of the following requirements:

- where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant (e.g. an application for an injunction) or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship;
- where there are ongoing privately-funded (or self-represented) domestic violence (or forced marriage) proceedings (e.g. an application for a protection order), or where there have been such proceedings in the last 12 months and an order was made, arising from the same relationship;
- where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced marriage, against any other person);
- where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).

We are very concerned about these proposals because we believe that:

- legal aid should be available to women who experience any form of domestic violence, not just physical violence;
- the eligibility requirements are much too restrictive and do not capture the experiences of women and the reality of domestic violence, whether physical or otherwise.

First, we consider that legal aid must be available to women who experience any form of domestic violence, not just physical violence. Legal aid not only enables a woman to protect herself from violence through the use of injunctions, it also enables her to leave a violent relationship and protect her children from abuse. Psychological, financial and emotional abuse are all serious forms of domestic violence that can have devastating and long-term consequences for those who experience it. As Lord Brown recognised in Yemshaw [2011]⁵ (discussed further below):

“It has long been known that psychological abuse within a domestic context can cause at least as much long-term harm to the victim (most commonly the woman) as physical abuse.”

The harm caused by non-physical forms of violence and domestic violence have long been recognised by the criminal law. Section 8 of the Public Order Act 1986 makes clear that a range of behaviours falling short of physical contact with a person can be considered violence. Putting someone in fear of violence⁶, harassment⁷ and making a threat to kill⁸ are all serious criminal

⁵ Yemshaw (Appellant) v London Borough of Hounslow (Respondent) [2011] UKSC 3, paragraph 48.

⁶ Section 4 of the Protection from Harassment Act 1997

⁷ Section 2 of the Protection from Harassment Act 1997

⁸ Section 16 of the Offences Against the Person Act 1861

offences notwithstanding the fact that they do not involve a perpetrator using actual physical violence against a victim. The devastating consequences of non-physical violence have also been recognised in case law, as the case of *R. v Ireland; R v Burstow* [1997]⁹ showed. In that case, which concerned the harassment of a woman by telephone calls, the House of Lords ruled that if a woman suffered a psychiatric illness because of the telephone calls she had received, she would have suffered “bodily harm”. Finally, the validity of differentiating between physical violence and other forms of domestic violence was conclusively rejected by the Supreme Court in the recent case of *Yemshaw* [2011]¹⁰. This case concerned a woman who experienced verbal, emotional and financial abuse from her husband and sought assistance from her local authority to obtain housing as someone who was unintentionally homeless as a result of domestic violence under sections 175 and 177 of the Housing Act 1996. Baroness Hale, who gave the lead judgement in the case rejected the idea that protection from domestic violence should only apply in cases of physical violence. Quoting with approval the definition of domestic violence set out above, she asserted at paragraph 27 that:

““Violence” is a word very similar to the word “family”. It is not a term of art. It is capable of bearing several meanings and applying to many different types of behaviour. These can change and develop over time.... The essential question, as it was in Fitzpatrick, is whether an updated meaning is consistent with the statutory purpose- in that case providing a secure home for those who share their lives together. In this case the purpose is to ensure that the victim of domestic violence has a real choice between remaining in her home and seeking protection from the criminal or civil law and leaving to begin a new life elsewhere.”

The essential question for the Ministry of Justice now, like that in *Yemshaw* [2011], is whether the purpose of legal aid will remain to ensure that a victim of domestic violence has a real choice between remaining in an abusive relationship and seeking the protection of the law and beginning a new life in safety.

Second, we believe that the proposed eligibility requirements are much too restrictive and will:

- leave many women experiencing violence having to represent themselves in proceedings involving the perpetrator of abuse;
- deter women from leaving violent / abusive relationships;
- place more women and children at risk of violence and domestic homicide. The 2008 ACPO guidance on investigating domestic abuse identifies psychological and emotional abuse and child contact disputes as risk factors for both physical violence and domestic homicide.¹¹

Even if it were accepted that the focus should be on protecting women from physical violence only (which we do not accept for the reasons given above),

⁹ *R v Ireland; R v Burstow* [1997] 4 All E.R. 225

¹⁰ *Yemshaw (Appellant) v London Borough of Hounslow (Respondent)* [2011] UKSC 3.

¹¹ *Guidance on investigating domestic abuse 2008*, ACPO / NPIA, page 35 onwards www.acpo.police.uk/asp/policies/Data/Domestic_Abuse_2008.pdf.

women would not be able to get legal aid for related family law proceedings when the perpetrator of the physical violence:

- had been given a caution for an offence relating to domestic violence (and therefore has accepted criminal responsibility for his behaviour);
- had been given a harassment warning;
- was being investigated or prosecuted for a criminal offence.

It is nonsensical to create a system where the victim would be entitled to legal aid for related family law proceedings if the perpetrator of domestic violence had been convicted of assault occasioning actual bodily harm, but would be denied legal aid and have to represent herself if the perpetrator had been cautioned for the same offence (because he accepted responsibility for his behaviour and did not have a criminal record).

The requirements are also problematic for a number of other reasons. Many women experiencing violence, even physical violence, do not report that violence to the police or seek an injunction from the family courts. This is for a variety of reasons. Many women do not have faith in the criminal or civil justice system or fear that if they did report the violence or apply for an injunction, the violence they were experiencing would escalate. Women with an insecure immigration status may not know their rights in the UK or be told by the perpetrator of violence that they are not entitled to support. Women may instead feel that it is safer to go into a women's refuge or relocate to another part of the country. Women who choose not to use the criminal or civil justice systems to get protection from violence should not be disadvantaged for doing so.

These observations are supported by the findings of our research. We asked the individual women who answered our questions whether or not they had experienced violence (58% of the 336 respondents identified as having experienced a form of gender-based violence); and, if they had, we asked whether or not they had reported that violence to the police or applied to the family courts for a protective order. 53% said that they had not reported the violence they experienced to the police or applied for a domestic violence protection order. Respondents gave a variety of reasons for this including:

"I did not realise help was available and did not believe the treatment I was suffering warranted help- I blamed myself"

"Reported to the police. Harassment notice given but police do not act upon it after if further reports are made. When claims of domestic abuse are made to the police if the abuse is not physical the police are not interested."

"My partner was emotionally, physically and sexually abusive. He would tell me that the police would not take me seriously and it would be his word against mine. He made much of the fact that husbands are never convicted of rape of their wives in this country."

"I'm a 46-yr old mum of 3; I've always felt that probably no-one would believe me ("why are you still with him?" etc, etc)."

79% of professionals who responded to violence against women said that the women they supported did not routinely report that violence to the police or seek the protection of the family courts. Respondents made the following observations:

“Many of the women using our services have found safety by leaving the area so their (mainly male) partner cannot find them. They fear that to proceed with police action or to go through the courts would antagonise him or potentially alert him to their whereabouts during this high risk time. They will normally wait for him to use the courts to find them and to request child contact. At this point they will engage with the courts to resolve this difficult and potentially dangerous situation but will need professional legal support to do so safely.”

“Asking for 'proof' of gendered-based violence will always cause problems. While some women will report to the police, many others will not. Narrowing 'proof' down to the existence of either an injunction or a criminal conviction is not helpful, too restrictive and doesn't take into account all the ways in which women will seek to make themselves safe. Many women will not apply for an injunction on the basis that they don't feel it is right for them, and many perpetrators will not be convicted even if an incident is reported to the police. Asking for proof in this way colludes with & reinforces the idea that a) if there's no physical violence then it's not actually abusive and b) that a large number of women who allege abuse are lying. Non-molestation orders can be difficult to obtain without recent violence - what is someone experiencing emotional/psychological abuse supposed to do to provide the 'proof' required?”

“Women from some minority ethnic groups also face the problem of having to go against the prevailing views of their community to involve legal authorities. The idea of having to have had legal involvement in the prior 12 months will just make things harder for these women and could prevent them from accessing the support that they need.”

Perhaps the problems with the proposed evidential requirements are best summed up by this case which was shared with us by a legal professional:

“One recent example was a young mother of two who had been borough through marriage from Pakistan to the UK. She was subject to frequent and extreme abuse from all members of the father's family and the father, including verbal degradation, being hit, made to stay up all night as a punishment and burnt with hot oil. Her children were removed from her care by the family if she displeased them . Eventually she was made to live with the father's sister, who orchestrated a gang rape of her. She eventually fled to a refuge. The family issued residence and contact applications. Ultimately the court accepted all of her allegations. There had been, however, no preceding injunction or criminal convictions.”

If evidential requirements are to be used to determine who should receive legal aid for related family law proceedings, other forms of evidence of domestic violence should be accepted. We asked respondents to our surveys what evidence of domestic violence they thought applicants should have to provide, if evidential requirements are to be introduced. What was interesting was that the individual women, violence against women professionals and legal professionals who responded to this question all gave similar examples of evidence that they thought should be accepted. Examples included:

- evidence that a case had been referred to a MARAC (Multi-Agency Risk Assessment Conference);
- evidence from a specialist domestic violence organisation (such as Women's Aid or Refuge);
- evidence that the police have been involved in a case (this would include cautions, harassment warnings and evidence of call-outs to the family home);
- undertakings given to the court (as many applications for injunctions are resolved in this way);
- evidence from health professionals such as GPs, counsellors, midwives and health visitors; and,
- evidence of involvement with social services because of domestic violence.

As one survivor of domestic violence noted:

"I guess evidence, but I didn't report anything to police so there was no evidence from them. However I did report to my GP and a charity org, so this should be sufficient. They also need to ensure that a woman has the means to represent herself (i.e. language, no physical or mental health problems), but I believe anyone experiencing any form of violence would find it difficult to represent themselves. As it stands there is a financial means test, this should still be the case."

Child abuse

An additional complication relates to child abuse and eligibility for legal aid. If a child discloses to their parent that they have experienced violence or abuse it may be reported to the police. However, criminal prosecutions are less likely in child abuse cases than for other offences because of the challenges of using children, particularly young children, as witnesses. Whilst some women may use domestic violence injunctions to protect a child from physical or sexual abuse or neglect it is much more likely that a woman will contact social services for support. If a child is suffering from physical or sexual abuse at home, social services often advise the non-abusive parent to seek a residence order and prohibited steps order to protect their child. If a parent does not take these steps to protect her child (because she is no longer able to get free legal advice and representation) the local authority may have a legal obligation to initiate child protection proceedings. The requirements set out above do not address this situation at all.

The inability of women to obtain legal aid to take private law proceedings to protect their children from violence, neglect or abuse will result in:

- children being placed at risk of further abuse;
- an increase in the number of child protection proceedings and all the costs associated with them;
- an increase in the number of children who are separately represented in private child law proceedings.

The following case study, provided by one of the legal professionals who responded to our survey, graphically illustrates the ability of legally aided private child law proceedings to protect children from serious abuse:

“A child of 4years, a boy, having weekend contact with his father, despite the Mother fearing for her own wellbeing, she genuinely wanted the child to have a relationship with his Father. After a weekend away the child returned and sat on his Mother's lap and kissed her- (with his tongue in her mouth), saying that's how Daddy kisses me! Despite her own fear (which was palpable) she gave clear and concise evidence to the Judge, the Father who had been on the weekend break with his mother, also gave evidence, as did the Paternal Grandmother. After a day of evidence, what became clear from a simple contact hearing, the father AND the Paternal Grandmother were in league to prepare this child for sexual abuse. The child's Mother would simply have been unable to think straight let alone conduct the hearing, she bravely gave evidence, but only after 1 hour of preparation to think of the child first. The court heard the Father give his evidence, and the Grandmother - both had prepared a convincing explanation, but had become unseated by a simple point- which made it very clear to everyone listening they had lied about the whole day, and the abuse perpetrated. My concern about the changes to Legal funding is:- this little boy would now be having generous contact with a man who sexually abused him, with court sanction. As, the court only saw the deception of the Father during his cross examination, a task the Mother alone could not have done. Now this little boy has no contact with the abusive Dad, thankfully. Legal Aid saved a family and the generations to follow. This cannot be calculated by 'bottom line' mathematics. The cost of future generations saved from a life of abuse, is simply priceless. And this is only one case- I deal with one every day of the week.”

Family law: Re-victimisation at court

Legal aid does not appear to be available in domestic violence cases for those against whom a protection order is sought (i.e. the alleged perpetrator). Removing legal aid from perpetrators in these cases will increase the number of women who are faced with questioning in court from the perpetrator of abuse (rather than their solicitor). This could involve a perpetrator cross-examining a woman in detail on her account of the physical or sexual violence she has experienced. We believe that legal aid should be available for those against whom a domestic violence injunction is sought, at least for court hearings, to ensure that women are not re-victimised in this way. One individual woman who answered our legal aid survey had this to say about facing her abuser in court: “I was absolutely terrified in court - my soon to be ex husband was present and I would have found it very difficult if not

impossible to speak. I imagine this must be the case for many women” another said that “Even with my barrister and his assistant present, he was intimidating.”

Family law: The position of cohabittees

Under the proposals, applications under section 14 of the Trustees of Land and Appointment of Trustees Act 1996 (TOLATA) will not be funded by legal aid even when someone meets the above criteria in relation to domestic violence. Section 14 TOLATA enables someone who has an interest in a property (for example, a cohabitee who has made financial contributions to it) to apply to the court for an order setting out the nature and extent of their interest. This is important for cohabittees who need to deal with their property following relationship breakdown. By not making legal aid available to cohabittees experiencing violence to enable them to resolve issues in relation to their property, the consultation is proposing to discriminate against those who choose not to marry or enter into a civil partnership.

The Committee on the Elimination of Discrimination against Women has already expressed its concerns about the “lack of specific regulations safeguarding the property rights of women in de facto unions” and the economic consequences of separation on cohabiting women and has requested that the Government includes the results of research into this issue in its next report to the Committee.¹² We believe that discriminating against cohabittees in the way proposed is unacceptable and that cohabittees who are experiencing domestic violence and seek to end their relationship should get as much assistance to do so as is given to married couples or those in a civil partnership.

Family law: mediation in all private family matters

One of the reasons given in the consultation for removing family law from the scope of legal aid is that more couples should reach their own agreements about property and children if their relationship breaks down. We believe that legal aid for legal advice and representation is necessary if mediation is to be a meaningful option for couples following relationship breakdown. For example, in relation to financial arrangements following relationship breakdown, individuals who want to resolve their dispute through mediation need legal advice on their entitlement, assistance getting disclosure and advice on any settlement proposals made. Legal aid is also necessary to turn any agreement reached in mediation into a binding legal agreement that can be enforced. While mediation is a valuable tool for couples whose relationship breaks down, it is not a substitute for the adequate provision of legal advice and representation.

The consultation states that mediation will be retained to encourage out of court solutions and that “This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is

¹² See paragraphs 290 and 291 of the Concluding observations of UK’s fifth and sixth period reports of the Committee on the Elimination of Discrimination against Women CEDAW/C/UK/CO/6.

present, we intend to offer support through family mediation, as some couples may still be able to obtain value from the mediation process.”¹³

We believe that mediation is not appropriate in any case involving domestic violence because:

- it will place the victim at further risk of violence or abuse;
- it gives the perpetrator the opportunity to continue to have contact with the victim;
- it causes re-victimisation;
- victims may feel unable to take part fully in mediation because they still fear the perpetrator; and,
- victims may be put under pressure by the perpetrator to agree to an arrangement or settlement that is not in their best interests.

Respondents to our surveys were also very concerned about mediation in domestic violence cases. 66% of individual women thought that mediation was not appropriate in domestic violence cases, in comparison with 70% of legal professionals and 80% of professionals who work on violence against women issues. These figures suggest that the more that a person knows about violence against women, the less likely they are to believe that mediation is appropriate in domestic violence cases. All respondents raised concerns about safety and the re-victimisation of the women concerned, as one survivor of domestic violence explained “no, my own experience [of mediation] ended up with me being abused further”. One legal professional shared a case that exemplifies many of the problems of using mediation in cases involving domestic violence:

“The Mother who had felt bullied in mediation and agreed to contact with her violent ex partner and daughter. With legal aid she was able to fight the case, prove the violence and obtain a domestic violence report and a CAFCASS report which showed that the ex partner posed a significant risk of physical and emotional harm to her and that indirect contact was appropriate. Without legal aid she would still be at risk of physical harm. She would now be sent to mediation and that would not be appropriate. She was a victim of domestic abuse and she was not able to discuss the abuse for some time.”

Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party?

We **do not agree** with the proposal to give courts the powers to make interim lump sum orders against a party who has the means to fund the costs of representation for the benefit of the other party if it is introduced as a substitute for legally aided advice and representation.

The making of such a lump sum order at the time that assets are divided would deplete the assets available to both parties on separation. Unlike the

¹³ See para 4.70 of the consultation.

statutory charge (where money to repay legal costs is taken from a property at a time in the future when it is sold) a lump sum order will remove assets at the time that they are divided reducing the amount available for families to re-house when the finances of both parties are likely to be under considerable pressure. Given the limited assets of many separating couples, it may simply be impossible for any money to be released to pay for legal advice and representation; hence the individuals concerned being eligible for legal aid in the first place. The ability of one party to make an application for such a lump sum order against the other is also likely to increase acrimony, reducing the chances of couples reaching an agreement. Adding a further complication to the law in this area will also increase the time proceedings take to resolve. It is also difficult to see how an applicant representing herself in financial relief proceedings (because legal aid is no longer available to her) will know that she can apply for a lump sum or be able to apply for it.

Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme?

We **do not agree** with the proposals to exclude the following types of case and proceedings from the scope of legal aid:

- Asylum support
- Clinical negligence
- Compensation from the Criminal Injuries Compensation Authority
- Debt
- Education
- Employment
- Family law (financial relief and private child law)
- Proceedings before the Higher Courts
- Housing
- Immigration
- Welfare benefits

Our full reasons for not agreeing with the proposals are set out below; however, we also wish to make the following general points as these apply to all of the areas of law discussed.

Women's economic inequality (see below for evidence on women's pay and women's poverty) means that women are less likely to be able to pay privately for advice and representation. As violence against women is both a cause and a consequence of women's inequality, the ability to access free or low cost legal advice is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay privately for legal advice. Figures from the Community Legal Service confirm this analysis by showing that more women than men apply for civil legal aid (see further below in our answers to the questions on financial eligibility). Women will therefore be disproportionately affected by these proposals, a position which is discriminatory and unacceptable. Women who experience multiple forms of discrimination, such as disabled women, will be particularly disadvantaged. Any changes that are made to the legal aid scheme should

not compound the disadvantage already faced by the poorest and most vulnerable in society.

The women's voluntary and community sector works with some of the most marginalised, economically disadvantaged and vulnerable women in society. These women frequently have a range of needs, including legal problems. Women's organisations provide specialist services in relation to a number of issues, including domestic and sexual violence, immigration and asylum, welfare benefits and employment and training. The sector has a breadth of experience and knowledge, is resourceful and skilled and provides high quality and appropriate services. However, the loss of legal aid for the women that these organisations serve will have a devastating impact on their lives (for reasons set out below). This in turn will increase the burden on the women's organisations that support them. The women's sector is already underfunded and financially vulnerable.¹⁴ The current financial climate has exacerbated this vulnerability and many women's organisations are currently in a funding crisis. For example, Devon County Council recently announced a cut of 100% of the region's domestic and sexual violence services. This loss can only compound the loss of the award winning Devon Law Centre.¹⁵ In this context, women's organisations will simply not be in a position to 'step into the breach' and provide services which mitigate the impact of any loss of legal aid. Indeed, as the Devon example shows, women currently risk losing specialist services from women's organisations and legal advice and representation from legal aid providers.

The consultation seems to suggest that some of the increasing cost of legal aid is caused by individuals going to court too readily and being less inclined to resolve disputes themselves. A similar argument in the consultation seems to be that people should take responsibility for their situation and that this does not involve bringing legal proceedings. The evidence, however, contradicts this analysis. Figures from the Public Legal Education Network indicate that people are already reluctant to bring proceedings because of the complexity of the law and a lack of reliable information about the law and their legal rights.¹⁶ Research from 2007¹⁷ shows that in the vast majority of child contact cases, contact is agreed informally between parents. This shows that applying to the court is a last resort in cases where agreement is not possible because, for example, there has been domestic violence, child abuse or neglect. In such a situation, being a responsible parent will involve making an application to the court. Similarly the fact that in 2008 73% of ancillary relief orders made were by consent¹⁸ shows that people are taking responsibility for their financial affairs. It is, therefore, simply not the case that public funds are

¹⁴ *Why Women Only?*, Women's Resource Centre, 2007,

www.wrc.org.uk/resources/wrcs_research_and_reports/why_women_only.aspx.

¹⁵ www.devonlawcentre.org.uk

¹⁶ *Knowledge, capability and the experience of rights problems*, Nigel Balmer et al, Public Legal Education Network, March 2010 www.plenet.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf.

¹⁷ *Omnibus Survey Report No. 38: Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey*, produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D) (2008) (Office for National Statistics).

¹⁸ See page 59 of the consultation.

being wasted in unnecessary proceedings. Removing legal aid will make it harder, not easier, for people to resolve their problems or take responsibility for their situation because it will remove the sources of advice and support that facilitate and enable agreement.

Finally, expecting litigants to represent themselves before courts and tribunals in complex areas of law raises profound human rights concerns. This issue will be explored further below in our answer to question 4.

Asylum support under section 4 and section 95 of the *Immigration and Asylum Act 1999*

We **strongly disagree** with removing this area of law from the scope of legal aid.

The consultation document accepts that asylum-seekers cannot be expected to represent themselves in their asylum cases because of the complexity of the legal issues involved and their vulnerability. If asylum-seekers are unable to represent themselves in their asylum appeals, why are they able to do so in relation to asylum support? Asylum support law is complex as is shown by the fact that the UKBA has 30 different documents on the interpretation of its asylum support regulations. It is not feasible to expect vulnerable asylum-seekers to be able to navigate an area of law of this complexity. Legal advice and representation makes a considerable difference to the chances of an applicant being successful at their asylum-support appeal. In their Evidence Briefing *Supporting Justice: The case for publicly-funded legal representation before the Asylum Support Tribunal*, the Citizen's Advice Bureau analysed cases where representation was provided by the Asylum Support Appeals Project and found that legal representation before the Tribunal increased the chances of success from 39%, to between 61 and 71% – a 'representation premium' of 22-32%¹⁹.

An applicant appealing against a refusal of asylum-support has to complete a notice of appeal form (see appendix 3). This is a complex legal document that has to be completed in writing and in English and requires the appellant to set out their grounds of appeal in detail). Once the notice of appeal is lodged, a hearing date before a Tribunal will be set at which the asylum-seeker will have to explain why the decision to refuse support was wrong. It is unrealistic to expect an asylum-seeker who may not have been in the UK for very long; who may not speak English; and who may be suffering from trauma or other physical or mental health problems; to complete the notice of appeal (in writing and in English) or make legal arguments before the Tribunal. Applicants with disabilities (particularly learning disabilities) and applicants who are physically or mentally ill will be particularly disadvantaged. While the tribunals were designed to be accessible to the public, research for the Department for Constitutional Affairs (now the Ministry of Justice) in 2006 found that this was not the case:

¹⁹ *Supporting justice The case for publicly-funded legal representation before the Asylum Support Tribunal*, Citizens' Advice Bureau evidence briefing, June 2009.
www.citizensadvice.org.uk/index/er_immigrationassylum/supporting_justice

“...there are limits to the ability of tribunals to compensate for users’ difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and the tribunal, but may be crucial to procedural and substantive fairness”.²⁰

The lack of availability of legal aid for Tribunal hearings in asylum support cases has already been commented on with concern by the Asylum Support Adjudicators at the then Asylum Support Tribunal²¹ and the Joint Committee on Human Rights.²² Rights of Women is concerned that reducing the availability of legal aid further will considerably worsen an already desperate situation. There is already an insufficient number of providers doing asylum-support law, which results in destitution and considerable hardship for individuals who are eligible for, but cannot obtain, asylum support owing to a lack of legal help and representation. While there are some organisations supporting asylum-seekers with their applications for asylum-support and appeals, these organisations are already unable to meet the demand for their services and are set to face further cuts. Organisations like the Refugee Council, for example, are facing significant cuts.

Destitution has a devastating effect on individuals and can cause an individual to suffer inhuman and degrading treatment contrary to Article 3 ECHR.²³ The right to be free from inhuman and degrading treatment, which Article 3 protects, is an absolute right which cannot be limited or restricted for any reason, including the maintenance of immigration control or for resource allocation reasons. Women who are destitute are particularly vulnerable to sexual exploitation and internal trafficking, these are issues which also engage Article 3 ECHR and Article 4 ECHR, the prohibition on slavery. Article 4 is also an absolute right. Rights of Women believes that for the UK to be in compliance with its domestic and international legal obligations, legal aid for advice and representation has to be made available to asylum-seekers with asylum-support law problems.

Compensation from the Criminal Injuries Compensation Authority

We **strongly disagree** with removing this area of law from the scope of legal aid.

Applicants for criminal injuries compensation are by definition vulnerable as a result of being victims of crime. Survivors of domestic and / or sexual violence are particularly vulnerable as they may experience trauma which is exacerbated by the application process. While the application process is fairly straightforward, no specific support is available for those with mental or physical health problems or disabilities which may prevent them from completing the application forms. The tribunal is not accessible, particularly to

²⁰ *Tribunals for diverse users*, H Genn, B Lever, and L Gray, January 2006, DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice).

²¹ See, for example, the Asylum Support Adjudicators annual reports for 2000-01 and 2004-05. The AST has now been replaced by the First-Tier Tribunal (Asylum Support).

²² *Treatment of Asylum Seekers*, Joint Committee on Human Rights, Tenth Report of Session 2006-07, HL 81-1, HC 60-1

²³ See for example *R v. SSHD ex parte Adam, Limbuela and Tesema* [2005] UKHL 66

those with special needs who are disproportionately likely to experience violent crime.²⁴ There is no capacity in the women's voluntary sector to provide additional support to applicants; the current economic situation has led to a decline in the availability of public and private funding available to the sector, and the sustainability of the sector is in doubt.

Rights of Women is also concerned that removing criminal injuries compensation from the scope of legal aid will have consequences for trafficked women contrary to the UK's obligations under Articles 12 and 15 of the Council of Europe Convention on Action against Trafficking in Human Beings²⁵ which require states to provide legal advice and information to victims and free legal aid to enable them to seek redress, including compensation, for the harm they have experienced.

Debt and proceedings under the Insolvency Act 1986

We **strongly disagree** with removing this area of law from the scope of legal aid.

Removing debt from the scope of legal aid will further entrench women's economic inequality. The evidence is that women are more likely than men to experience poverty and are therefore more likely to have problems with debt, housing and welfare benefits law. Women earn less than men and are more likely to experience poverty than men following relationship breakdown (see further below). In 2006 it was reported that the gender pay gap in the UK was one of the highest in Europe: women who work full-time earned 17% less per hour than men. Women working part-time earned 39% less per hour than men working full-time.²⁶ Evidence suggests that women's pay continues to be lower than their male counterparts. In 2007, median weekly earnings of full-time employees for women of £394 were 21% less than those for men (£498).²⁷

Women who experience multiple forms of discrimination, such as disabled women or Black, Minority Ethnic and Refugee women (BMER women) are also more likely to experience poverty. Between 1996/7 and 2004/5, disabled women's earnings reduced from 87% to 84% of non-disabled women's earnings.²⁸ Research in 2007 revealed that ethnic minority women had low levels of savings and high levels of debt, making them particularly vulnerable to financial exclusion. Three quarters of Black women had less than £1,500 in savings, compared to half of all White women. Moreover, 24% of Black

²⁴ See *Tribunals for diverse users*, H Genn, B Lever, and L Gray, January 2006, DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice).

²⁵ *Council of Europe Treaty Series - No. 197* see <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>.

²⁶ Fawcett Society (2006), <http://www.fawcettsociety.org.uk/index.asp?PageID=256> as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

²⁷ Office of National Statistics website <http://www.statistics.gov.uk/cci/nugget.asp?id=1893> as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

²⁸ *Equality group inequalities in education, employment and earnings: A research review and analysis of trends over time*, Yaojun Li et al. University of Manchester, University of Oxford, Equality and Human Rights Commission, Autumn 2008 as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

women were in arrears, compared to 9% of Asian and White women.²⁹ Similarly, research in 2009 found that ethnic minority women were disproportionately likely to be working in temporary jobs, leading to patchy and insecure income.³⁰ As women are more likely than men to experience poverty, removing debt from the scope of legal aid will disproportionately affect women and other vulnerable and marginalised groups, such as those with disabilities.

A lack of education and social exclusion contribute to poverty; this means that individuals experiencing poverty often have complex needs and require support to resolve their financial problems. The importance of this issue to those affected is very high, because it concerns the ability of individuals and families to financially support themselves. Characterising these issues as purely financial is a failure to understand the problems and barriers experienced by those who are economically marginalised and the effects of poverty and destitution. As one of the individual women who answered our survey explained:

“My ex partner significantly helped me to get into in £4,000 of debt which I am still struggling to get out of and has threatened to take me to court for custody of our 10 month old son. Without legal aid I would end up in even more debt which impacts greatly on my child’s standard of living and what I can provide for him as well as having a significant affect on my health through stress.”

Rights of Women also believes that the removal of legal aid for debt so that it is only available when a person’s home is at risk will result in a ‘snowballing effect’ where debt problems that could have been resolved early will become more serious and complex because the individuals concerned can only get advice when their home is at risk. It is much more cost effective to deal with debt problems before they become this serious.

Finally, this proposal has significant consequences for not-for-profit advice services and the communities that they support. 20% of Citizen’s Advice Bureaux (CABx) and 55% of Law Centres have legal aid contracts to advise the public on issues including debt and welfare benefits. The proposed changes will lead to a loss of these vital sources of community advice as other sources of funding for these providers, including from local government, are also being cut. In Birmingham for example, CABx are having to reduce their services as they are faced with losing 100% of the funding they get from Birmingham City Council. The loss of these vital community services will have a devastating impact on the vulnerable and disadvantaged.

Employment

We strongly disagree with removing this area of law from the scope of legal aid.

²⁹ *Women’s financial assets and debts*, The Fawcett Society, November 2007 as cited in *Statistics about women in the UK*, Women’s Resource Centre, October 2010.

³⁰ *Poverty pathways: ethnic minority women’s livelihoods*, Z Moosa and J Woodroffe, Oxfam and the Fawcett Society, June 2009 as cited in *Statistics about women in the UK*, Women’s Resource Centre, October 2010.

Women experience systematic discrimination in the work place. In addition to being discriminated against in relation to remuneration (see above for evidence on women's pay) women also face discrimination in relation to pregnancy and child care. In relation to pregnancy and work for example, in 2005 the Equal Opportunities Commission (EOC) estimated that 30,000 women lose their jobs each year as a result of being pregnant³¹ while research conducted by the EOC in 2003 found that 25% of employers asked could not refer to a single statutory entitlement for pregnant women.³² The same study found that nearly 25% of women who made an employment tribunal claim had been dismissed within hours of telling their employer they were pregnant while one in five women returning from maternity leave were given lower grade jobs. While we welcome the fact that legal help is being retained in discrimination cases, we are concerned that removing legal aid for other employment cases will result in a decrease in the number of advice providers and employees being unable to find information and advice on their rights. Pregnancy and maternity rights are a complex area of law and will often involve issues of general employment law as well as discrimination. For example, a woman who is dismissed because of pregnancy will often have a claim for unfair dismissal and discrimination on the grounds of pregnancy.

Rights of Women does not agree with the consultation that there are other providers of employment law advice that can 'fill the gap' left if this area of law is removed from the scope of legal aid. Women's economic disadvantage (see above) means that women are less likely than men to be able to pay privately for employment law advice. Similarly, as women are more likely to work in sectors which are not unionised they are less likely to be able to get legal advice and representation on employment law issues from unions.

Removing employment law from the scope of legal aid will prevent those who are in domestic servitude, including victims of trafficking, from challenging their working conditions or recovering wages. Such a position is contrary to the UK's obligations under Articles 12 and 15 of the Council of Europe Convention on Action against Trafficking in Human Beings³³ which requires states to provide legal advice and information to victims and free legal aid to enable them to seek redress for the harm they have experienced. A respondent to our legal aid survey who provided support to women in this situation gave us the following example of how legal aid had assisted her service user:

“Vicky’ is a domestic worker from India. She came to the UK one and a half years ago, accompanying the sister of her previous employer as a nanny and cleaner. It had been a difficult decision to leave India and her two young children but she had been assured that she would be

³¹ *Greater Expectations: Final Report of EOC investigation into discrimination against new and expectant mothers in the workplace*, Equal Opportunities Commission, June 2005, as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

³² *Pregnancy Discrimination at Work: A Review* Equal Opportunities Commission (2004), Equal Opportunities Commission, Manchester, as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

³³ *Council of Europe Treaty Series - No. 197* see

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>.

paid £450 a month, more than double her Indian earnings and by sending this money home she hoped that her children would be able to complete their education and not have to make the same difficult decisions as her.

When Vicky first arrived in the UK she was only paid £200/month for the first six months. She didn't question this as she was slightly confused about the exchange rates and she didn't want to show too much disrespect to her employers. However when a close family member needed an urgent operation and asked to borrow money for this Vicky asked for her salary and was told by her employers that their outgoings in the UK were too high for them to pay her any more. Vicky was unhappy but felt unable to challenge them. After 8 months they stopped paying her altogether. Vicky protested the first time her salary was unpaid but was told that she was 'illegal' in this country and her employers were spending a lot of money trying to sort out her status so she should not complain. By the time Vicky ran away in desperation she had not been paid at all for 10 months. During this time she had no regular day off, worked 13 hour + days and shared a room with the children. She was frantic with worry about her family whom she had been unable to send any money to at all during this time.

When Vicky came to Kalayaan and told us her story we thought it likely that she might need immigration and employment advice on legal aid. If her employer had let her visa expire without her knowledge as they told her they had done, Vicky would have needed a solicitor to represent her to the Home Office. Fortunately, in Vicky's case, the employers were lying to her and her visa had been renewed. Vicky did however want to try and get some of her unpaid wages from her employers and we referred her to a legal aid employment solicitor. In the end Vicky and her employers 'settled' and she secured a lump sum to send to her children in India. Without legal representation it is very unlikely that the employers would have agreed to pay Vicky any of her unpaid wages."

Finally, Rights of Women would like to draw the Ministry of Justice's attention to the fact that sexual harassment is a form of violence against women that requires positive state action. We believe that this involves providing representation as well as advice on sexual harassment and employment law issues.

Family law: financial relief

We **strongly disagree** with removing this area of law from the scope of legal aid.

41% of the women who answered our legal survey who had had legal aid to respond to a legal problem had had a problem with divorce / civil partnership dissolution and financial relief proceedings. Women are more likely than men to access legal aid for divorce and financial relief so this cut will have a disproportionately negative impact on women. Women are also more likely to be the financially weaker party in a divorce and, if these proposals are introduced, there is an increased chance that women may agree to financial settlements which they would not have agreed to had they had the benefit of

legal advice. Women's position will be further disadvantaged by the fact that men are more likely to be in the financially stronger position and, are therefore, more likely to be able to pay for legal advice privately.

The long-term financial impact of separation on women now is substantial. Separated / divorced women have a poverty rate of 27%, almost three times that of their former husbands.³⁴ Without advice and representation on financial entitlement on separation this gap will increase. The Committee on the Elimination of Discrimination against Women has already expressed its concerns about the economic consequences of divorce and has requested that the Government includes the results of research into this issue in its next report to the Committee.³⁵

Rights of Women does not believe that couples are going to court too readily to deal with these issues. The fact that in 2008 73% of ancillary relief orders made were by consent³⁶ shows that people are taking responsibility for their financial affairs. Removing legal aid will make it harder for them to do so. Whilst mediation is an option for many couples, as explained above, mediation goes alongside legal proceedings. Individuals still need advice on settlement and to turn an agreement reached in mediation into a legally binding settlement. Legal aid may also be required to force disclosure to enable mediation to take place. Legal aid for advice and representation is necessary to facilitate mediation and assist couples reach agreement.

Financial relief is an extremely complex area of law. It is not reasonable to expect people to represent themselves in cases that may involve resulting and constructive trusts, maintenance pending suit, proprietary estoppel and bankruptcy. Increasing the numbers of litigants in person will prolong cases and increase costs (see further below). Self-representation is not appropriate in domestic violence cases. The requirements that have to be met by a victim of domestic violence in order to be able to get legal aid for related financial relief proceedings are much too restrictive (see above in our answer to question 1). Women often don't identify behaviour they are experiencing as abusive until they get legal advice on a related issue, such as divorce and financial relief. In this case study on legal aid that was provided by a legal professional who responded to our survey, it is interesting to note that the woman needed support with her divorce / financial relief proceedings before her violent husband was convicted of a serious criminal offence:

"I represented a Sikh woman who was nearly bludgeoned to death by her husband. She had been subjected to horrific sexual and physical abuse since giving birth to their only child who was a girl and not the son he desired. Legal aid helped this lady secure a house for herself and the child as part of divorce/financial proceedings together with an

³⁴ 'Marital splits and income changes over the longer term' Stephen P. Jenkins, Institute for Social and Economic Research University of Essex, Feb 2008. The report can be read here www.iser.essex.ac.uk/publications/working-papers/iser/2008-07.pdf.

³⁵ See paragraphs 290 and 291 of the Concluding observations of UK's fifth and sixth period reports of the Committee on the Elimination of Discrimination against Women CEDAW/C/UK/CO/6.

³⁶ See page 59 of the consultation.

injunction once husband was released from prison and a No Contact Order in Children Act Proceedings. Without the benefit of legal aid none of this would have been possible. The lady and her daughter would probably have been forced to flee the area with very little money or return to her home country. The lady suffered from severe PTSD and required therapy which it was possible to secure funding of from the husband as part of the financial case. As a result she was able to continue caring for her daughter and start a new life. This man was such a risk that he has since gone on to allegedly murder another woman.”

It is also not possible for all couples to reach agreement when their relationship breaks down and a party who is reasonable should not be disadvantaged by the behaviour of the person from whom they are separating. We consider that legal aid is necessary in cases where agreement is not possible because of the unreasonable, controlling or abusive behaviour of one party. For example, we are concerned that financial relief proceedings may be used to maintain financial control by a perpetrator of violence. The following case example from a legal professional shows the complexity of financial relief proceedings, the unreasonableness of some litigants and the value of legal aid to enable women secure financial independence following relationship breakdown:

“Mrs K was married to a clever and devious man who had buried his assets in offshore trust funds and foreign bank accounts, in an effort originally to defeat the tax authorities and later the family Court. Over the course of two years, Mrs K’s solicitors and I chased this money around the world, running up a six figure legal aid costs bill in the process. However, our search was successful and resulted in a large sum being repatriated to the UK and an Order of the High Court breaking open an offshore trust fund which in reality he controlled. Mrs K was awarded enough money to buy a flat over a florist’s shop which she could run, thus taking her off the social security budget and we recovered all her costs from the husband. The net cost to the taxpayer was nil and justice was done.”

Family law: private children matters

We **strongly disagree** with removing this area of law from the scope of legal aid.

Women’s economic inequality (see above for evidence on women’s pay and women’s poverty) means they are less likely to be able to pay privately for advice and representation. No other sources of free or low cost legal advice and representation for these proceedings are available. 46% of the women who answered our legal survey who had had legal aid to respond to a legal problem had had a problem with private child law issues.

Private children law is a complex and sensitive area of law which engages Article 8 ECHR and involves the best interests of children. Schedule 1 of the Children Act 1989 applications for women who are not married but need

financial provision for children are also extremely complex. Research from 2007³⁷ shows that in the vast majority of cases contact is agreed informally between parents. This shows that applying to the court is a last resort in cases where agreement is not possible, because for example, there has been domestic violence, child abuse or neglect. Whilst mediation is a valuable option (other than in domestic violence cases), it is important to note that mediation goes alongside legal proceedings. Individuals still need advice on the types of contact available, parental responsibility and issues like shared parenting in order to reach an agreement. Mediation will also not resolve all types of problems, cases involving domestic violence are one example but other types of cases also may require court intervention, as one legal professional who responded to our survey explained:

“....I have been a firm advocate of mediation my entire career as have most family law solicitors I know. We had pioneering mediation services in the field of children mediation locally and are heavy referrers but as mediation has become universal the quality of that mediation appears to be more hit and miss. The reality is that we refer those cases to mediation that can mediate, settle via legal advice many of those that can't and take only a small proportion of those most difficult cases or urgent cases to Court mostly where there are complicating risk and welfare issues for the child such as social work involvement, parental drug and alcohol issues, mistreatment of child and / or partner, sexual abuse or other abuse or major irreconcilable conflict in relation to upbringing eg move abroad or not.”

Rights of Women also believes that the family court system will not be best served by an increase in the numbers of litigants in person. Private children law cases are already taking too long to resolve (in part because of delays caused by CAFCASS). An increase in litigants in person on both sides will delay proceedings further, increase court costs, increase acrimony between the parties and result in prolonged uncertainty for children (see further below). Self-representation is also not appropriate in domestic violence cases. The requirements that have to be met by a victim of domestic violence in order to be able to get legal aid for related private child law proceedings are much too restrictive (see above, in our answer to question 1). Without proper legal advice and representation, women may feel forced to accept contact and / or residence solutions which are unsafe. Evidence suggests that this is already happening.³⁸ It will only increase if the proposals are implemented.

³⁷ *Omnibus Survey Report No. 38: Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey*, produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D) (2008) (Office for National Statistics).

³⁸ See Women's Aid report '*Twenty-nine Child Homicides: Lessons still to be learnt on domestic violence and child protection*' (Jan 2004) and Lord Justice Wall's report to the President of the Family Division on the outcome of his review of five cases where children had been murdered by their fathers in contact where there had been judicial involvement (Feb 2006). Both of these reports highlighted cases where mothers who had experienced domestic violence had agreed to contact. A number of reasons were put forward for this including the 'routinisation' of violence and effect of pressure to reach an agreement.

Similarly, the proposals, if implemented, would facilitate the re-victimisation of victims of domestic violence. Even if the victim is legally aided the perpetrator will not be. This will increase the number of cases where the perpetrator cross-examines the victim personally, something that will be particularly distressing in finding of fact hearings (which are designed to determine whether violence occurred) and which often involve the exploration of allegations of physical and sexual violence.

It is not possible for all couples to reach agreement and a party who is reasonable should not be disadvantaged by the behaviour of the person from whom they are separating. Perpetrators of violence often issue private child law proceedings as a way of maintaining contact with their former partner and continuing the violence or abuse. Legal aid is necessary in cases where agreement is not possible because of the unreasonable, controlling or abusive behaviour of one party. As one survivor of domestic violence explained:

“I left a controlling and abusive ex-husband who it then transpired was a child abuser something for which he was later prosecuted and sentenced to 10 years imprisonment. I had 2 young children at the time, I then had to spend about 6 years fighting his various applications for contact with our children, despite the severity of the charges he was convicted for. Without the support of legal aid I would have found it impossible to fund my legal bills. This would have placed my two young daughters at a very real risk of future abuse.”

This case is particularly telling in the light of the Ministry of Justice’s proposed “gateways” for domestic violence and relating family law proceedings as the respondent had no evidence of the risk that the perpetrator posed to her and her children until after she had separated from him. Cases like these show the complexity of some of the legal and practical issues involved in domestic violence cases and the importance of individuals being able to access legally aided advice and representation.

Cases like the above also shows that private children law proceedings are often used to protect children from abuse. This may happen because social services advise a parent to seek a residence order or Prohibited Steps Order because of safeguarding issues. The ability of non-abusive parents to protect their children from harm will be reduced by these proposals resulting in increased child protection proceedings.

Rights of Women is also concerned that two aspects of private children law have been overlooked by the proposals: domestic child abduction and cases where a parent is in prison. While legal aid will remain available in international child abduction cases, it will not for child abduction in the UK so women will be unable to protect their children from abduction (e.g. by applying for an emergency residence order or Prohibited Steps Order), find abducted children or have them returned to them. This will have considerable cost implications for both the police and local authorities. Women who are in prison will also be unable to take part in private law proceedings that relate to their children. Women in this situation may arrange for children to be cared for by a family member or want to take part in private child law proceedings that

concern their children. By making no provision for parents who are in prison (and who therefore cannot, by definition, represent themselves or pay privately for advice) the Ministry of Justice is again failing in its obligations under Article 8 ECHR.

Higher courts: Court of Appeal, Supreme Court and references to the European Court of Justice

We **strongly disagree** with removing this area of law from the scope of legal aid.

Private children law, financial relief, housing, employment and immigration cases that go to the Court of Appeal all involve extremely complex legal issues. To access the Court of Appeal or higher courts applicants have to go through permission proceedings and meet specific legal tests. It is therefore difficult to envisage a case that went to this level that did not involve a complex legal issue that requires specialist legal advice and representation. It is only possible to go to the Court of Appeal on a child law issue, for example, where the appeal raises an important point of principle or law, or there is some other compelling reason for it to be heard. Rights of Women believes that it is simply not feasible to expect people to represent themselves at this level of hearing even if the applicant is not vulnerable in some way.

Rights of Women also believes that Article 6(1) ECHR requires that civil legal aid be made available for cases which reach the higher courts as hearings at this level were specifically referred to by the European Court of Human Rights in the case of *Airey* (see further below) as examples of cases where applicants could not be expected to represent themselves.

Rights of Women also believes that removing proceedings at this level from the scope of legal aid will increase costs to other areas of the Ministry of Justice's budget as increased numbers of applications and cases involving litigants in person will result in increased financial burdens on the higher courts.

Housing

We **strongly disagree** with removing this area of law from the scope of legal aid. 19% of individual women who responded to our survey who had had a legal problem had had it with housing law.

The consultation is silent on the position of women who are seeking a transfer because of domestic violence or harassment, or are threatened with homelessness because of domestic violence or harassment. If this area of law is removed from scope, in addition to there being an exception for cases where a person's home is at risk, we believe that there should be an exception in cases where a person's ability to remain in their home safely is at risk because of domestic violence.

The demographics of local authority and social housing mean that those affected by this change are more likely to be disabled or socially excluded in

another way. As with the other changes, it is the most vulnerable who will be unable to access advice and assistance. Pressure on other advice providers during the current economic situation and following the implementation of changes to housing benefit mean that alternative sources of advice and support will not be available to this vulnerable group. Rights of Women is also concerned that removing this area of law from scope will result in a 'snowballing' of problems, because by not dealing with the issue when it arises the case is more likely to end up resulting in possession proceedings (for which legal aid is available) or in an application to the local authority. This is costly and inefficient.

Immigration

We **strongly disagree** with removing this area of law from the scope of legal aid. Immigration cases are often extremely complex and involve fundamental human rights issues. We are therefore very concerned about proposals for individuals to represent themselves in such proceedings.

In relation to cases involving Article 8 ECHR (the right to private and family life) we consider the high number of cases that have reached the House of Lords³⁹ evidence of the complexity of the legal issues involved and the inability of applicants to represent themselves in such proceedings. Similarly, we are concerned about the potential for individuals to represent themselves in immigration cases when UK Border Agency (UKBA) policies and regulations often don't reflect the correct legal position.⁴⁰ The complexity of immigration law and the impossibility of individuals navigating it without legal advice and representation was recognised by Lord Justice Longmore in AA (Nigeria) [2010]:

"I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done".⁴¹

Rights of Women believes that all victims of domestic violence should be able to get legal aid to secure protection in the UK:

- Cases under the domestic violence rule (para 289 of the Immigration Rules), regulation 10 of the 2006 EEA regulations⁴², or that raise domestic violence or gender-based violence issues raise all the same issues as

³⁹ See for example *Huang and Kashmiri v SSHD* [2007] UKHL 11, *E B Kosovo (FC) (Appellant) v SSHD* [2008] UKHL 41; *Chikwamba v SSSH D* [2008] UKHL 4; *Beoku Betts v SSHD* [2008] UKHL 39; *AL Serbia v SSHD*; and *R (Rudi) v SSHD* [2008] UKHL 42.

⁴⁰ For example, the relevant UKBA regulations have still not been changed following the European Court of Justice's decision in *Metock* which was decided in June 2008.

⁴¹ *AA (Nigeria) v SSHD* [2010] EWCA Civ 773 at para 87.

⁴² The Immigration (European Economic Area) Regulations 2006

- asylum cases (e.g. risk of physical harm, vulnerability, trauma, inability to self represent or pay privately etc).
- Domestic violence cases are also complex. Attached as appendix 4 is the SET(DV) application form which must be used by victims of domestic violence under the domestic violence rule. The form is 18 pages and must be accompanied by a number of different forms of evidence and a letter from the applicant. It is simply not feasible to expect applicants, who will be vulnerable because of the violence they have experienced to represent themselves in these applications.
 - Whilst some immigration law issues that a person might experience may be a result of choices they have made, for example, the choice to study in the UK rather than in a person's own country, no one chooses to experience domestic violence. Women in this situation need legal aid because of circumstances beyond their control, because of the violent actions of someone else (their partner or members of their extended family members).
 - The removal of legal aid for domestic violence rule cases will have considerable implications for the operation of the Sojourner Project and the Government's commitment to implementing a long term solution to the problems faced by women experiencing domestic violence who have no recourse to public funds.

The vulnerability of women experiencing domestic violence and their inability to represent themselves was summed up by one legal professional who gave this example of a women who had been helped by legal aid:

"I recently represented a Iranian woman who was in the UK on a spouse visa. She was a victim of domestic violence and her marriage broke down. As a result she suffered PTSD, depression and anxiety. She was completely alone in the UK, save for her abusive husband. She called the police following an attack by her husband and was referred to CAB for advice. CAB then referred her to a solicitor for assistance with her divorce proceedings. She was granted legal aid and they helped her gain access to her home and financial support whilst her divorce was going through. The same solicitors also dealt with her immigration appeal through legal aid when her husband informed the Home Office that the marriage had broken down and curtailed her leave. She was severely depressed and found it difficult to assist her lawyers prepare the appeal. She regularly broke down in tears and found the whole process extremely tiring and hopeless. If she was dealing with the matter herself, I am sure she would have given up."

The complex interaction between the immigration process for victims of domestic violence and the Home Office's Sojourner Project as well as the importance of legal aid are shown in this case study from a professional who responds to violence against women:

"Peruvian woman married to a British citizen, four months old baby, has a 2 years spouse visa NRPF, suffers domestic violence from her husband, reports abuse to the police, ends up staying with a girl friend

and apart from being afraid and destitute has nowhere to turn or does not know where to go. Comes to LAWRS, (has been told by friend that she cannot have her staying much longer after client's husband turned at friend's address and threatened her, police were called, husband told to leave) client is advised about her rights, about legal aid, about the Sojourner, about injunctions. Eventually, after too many weeks looking for a refuge, she was taken into a women's refuge, most women's refuges reluctant to take women with NRPF, even though our client had secured the 8 weeks financial support through the Sojourner pilot project. Client applies for ILR under the home office DV concession rule and is successful with her application. The case of this woman speaks for itself, if she had not been able to apply for legal aid she would have probably been forced to stay with her abusive husband or else give up and return to her home country, abuse, humiliated and destitute.”

Removing immigration law from scope will have consequences for trafficked women contrary to the UK's obligations under Articles 12 and 15 of the Council of Europe Convention on Action against Trafficking in Human Beings⁴³ which requires states to provide legal advice and information to victims and free legal aid to enable them to seek redress for the harm they have experienced. It will also lead to a considerable increase in the number of asylum applications as people have no other option to seek advice and protection in the UK.

Given the costs concerns of the Ministry of Justice, Rights of Women would like to draw attention to the fact that costs in legal aid for immigration cases will have increased over recent years because of an avalanche of legislation in this area. In immigration there have been Acts of Parliament in 1993, 1996, 1999, 2002, 2005, 2006, 2007, 2008 and 2009. Significant changes have also been made in the form of regulations and changes to the Immigration Rules, many of which have been introduced hastily, are poorly reasoned and have been successfully challenged in the courts.⁴⁴ Instead of penalising litigants, we recommend that the Ministry of Justice should assess what savings could be made by the UKBA by, for example, improving quality of policy formation.

Richard Thomas, Chair of the Administrative Justice and Tribunals Council, suggests that the success rate on appeal in immigration cases was 48%.⁴⁵ Research carried out by Asylum Aid in 2010 also found that 50% of refusals of women's asylum claims were overturned when subjected to independent scrutiny at Tribunal level.⁴⁶ In order to ascertain the quality of decision making in relation to domestic violence rule cases Rights of Women made a freedom of information request to find out how many of these cases were successful on appeal. This was the UKBA's response:

⁴³ *Council of Europe Treaty Series - No. 197* see

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>.

⁴⁴ See for example the case of *Diego Andres Aguilar Quila v SSHD* [2010] EWCA Civ 1482 following the raising of the marriage age to 21.

⁴⁵ November 2010, as quoted in the initial consultation response of the Immigration Lawyers Practitioners Association available at www.ilpa.org.uk.

⁴⁶ *Unsustainable: the quality of initial decision-making in women's asylum claims*, Asylum Aid, January 2011 www.asylumaid.org.uk/pages/.html.

Date	Percentage of appeals under the domestic violence rule that are successful*
Jan-March 2009	55%
April -June 2009	64%
July-September 2009	61%
October-December 2009	63%
Jan-March 2010	69%
April - June 2010	63%
July-September 2010	64%

*Figures relate to the final appeal outcome of those cases that have exhausted all rights of appeal.

*We have included all cases that have been allowed at the final outcome regardless of whether they were first tier or upper tier tribunal appeals.

Whilst some of this can be explained by evidence being available on appeal that was not at the time the initial application was made, the very high rates of success on appeal (as compared to other immigration applications) indicates significant issues with the quality of decision making. We consider that improvements to the quality of decision making would reduce the number of appeals and make considerable savings for both for the UKBA and the Ministry of Justice. In this context, however, removing legal aid from applicants is unacceptable, particularly as it is only on appeal that many applicants get a properly reasoned decision.

Legal aid costs are also increased by the failure of the UKBA to follow the law. For example, following the case of ZO (Somalia) [2009]⁴⁷ (which concerned

⁴⁷ ZO (Somalia) [2009] EWCA Civ 442

permission to work for certain asylum-seekers) the failure of the UK to implement the judgement resulted in applicants having to issue judicial review proceedings in order to enforce it. It is estimated that between 200 and 300 judicial review claims were issued that would have been unnecessary had the UKBA implemented the judgement properly and in a timely fashion.

Whilst we welcome the Ministry of Justice's recognition that legal aid is necessary for those in immigration detention, we are concerned that it does not make sense to retain legal aid for someone who needs assistance challenging their detention but not to deal with the underlying immigration law problem that may have resulted in their detention. Furthermore, whilst we welcome the Ministry of Justice's recognition that legal aid should remain available for judicial review proceedings, it is unclear who will be in a position to do this work if there are no legal aid contracts for immigration work and / or there is a significant reduction in the number of immigration law legal aid providers.

Women experiencing violence and other vulnerable migrants who are unable to get legally aided advice may be exploited by unscrupulous advisors. It was recognition of problems with some immigration advisors that resulted in the creation of the current regulatory framework. Legal aid providers who do immigration law are, rightly, highly regulated to ensure the quality of advice and representation given. To give immigration advice in the course of a business "whether or not for profit", an advisor must be a solicitor, barrister, or regulated by the Office of the Immigration Services Commissioner.⁴⁸ To give legal aided immigration advice, advisors must be accredited by the Law Society's Immigration and Asylum Accreditation Scheme. If legal aid is no longer available for immigration cases it is unclear where people who are unable to pay privately for advice will go and how the quality of advice will be ensured. The consultation document does not identify any other sources of immigration advice for those who are unable to pay for it privately. Not-for-profit organisations are unlikely to be able to step in as they will not be able to meet the regulatory requirements or secure the necessary funding. MPs surgeries will be the only place remaining where individuals may be able to go for immigration advice.

Finally, immigration cases raise equality of arms issues that are not present in the other areas of law discussed elsewhere in this response. An individual involved in immigration proceedings is pitted against the UKBA (rather than another unrepresented individual). The disparity in resources between an unrepresented litigant (who may not speak English or have a support network) and a government department are considerable and could lead to substantive inequality. Similarly, what will happen when an appellant with an immigration law issue succeeds before the First-Tier Tribunal but the Home Office appeals against the decision? It is unfair to expect individuals to privately pay for representation or represent themselves when it is the UKBA who is appealing a decision.

Welfare benefits

⁴⁸ Section 84 of the Immigration and Asylum Act 1999

We **strongly disagree** with removing this area of law from the scope of legal aid.

As disability benefit is one of the benefits for which legal aid will no longer be available individuals in need of welfare benefits are more likely to have physical or mental health problems or learning difficulties than the rest of the population. It is not reasonable to expect those with mental health problems or learning difficulties to complete the necessary appeal forms and represent themselves. The Tribunal is particularly inaccessible for those with learning difficulties. There are no easy read guides or audio guides available for those who cannot read for example.

Applicants should not be affected by poor quality decision making. Richard Thomas, Chair of the Administrative Justice and Tribunals Council found that the success rate on appeal in social security appeals was 41%.⁴⁹ This means that in 41% of cases the decision maker got it wrong. If savings are to be found in this area it could be done by improving the quality of decision making.

As with debt cases, removing welfare benefits law from the scope of legal aid will lead to increased costs in other areas and a loss of vital advice providers such as CABx and Law Centres. A failure to resolve welfare benefits problems when they arise will lead to a 'snowballing' of issues that will lead to increased costs elsewhere (e.g. because people approach their local authority or become eligible for advice because their home is at risk).

Welfare benefits law can be very complex. For example, determining whether or not someone has the right to reside under EEA law and therefore passes the Habitual Residence Test was compared to a "labyrinth" by the Court of Appeal in the case of *Kaczmarek* [2008]⁵⁰:

"I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and,

⁴⁹ November 2010, as quoted in the initial consultation response of the Immigration Lawyers Practitioners Association available at www.ilpa.org.uk.

⁵⁰ *Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310: "I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in *Abdirahman*"

although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in Abdirahman”

This was exemplified by the following case study that was provided by a legal professional:

“Client was here as a dependant of an EU Worker. She herself was a non-EU national. She had dependent children. At the time of death her husband was receiving Jobseeker's Allowance. He died abroad. She applied for Income Support and was refused due to the Right to Reside test. The decision was appealed and successful at the First Tier Tribunal. The DWP did not accept the decision and appealed the matter to the Upper Tribunal. Representations were made and the Upper Tribunal found in her favour. She has now received arrears but was without any payment for nearly three years.”

Question 4: Do you agree with the Government’s proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases?

We **do not agree** with the Government’s proposals to introduce a new scheme for ‘excluded cases’. We would also like to emphasise that the UK’s obligations under the ECHR are domestic legal obligations which create duties for all public authorities, including the Ministry of Justice. We agree that legal aid has to be provided in certain types of cases if the UK is to meet its domestic obligations under the HRA and its international obligations under the ECHR and the Council of Europe Convention on Action against Trafficking in Human Beings. We also agree that there may be other public interest reasons why legal representation for some types of cases, for example, at Inquests, should be available. However, we believe that these cases should not be considered ‘exceptional’ and should instead be dealt with within the normal scope of legal aid.

The right to a fair trial is fundamental to the rule of law and has a long tradition in this country's constitutional history. This right is set out in Article 6 of the

ECHR (set out below). Whilst the ECHR is an international legal agreement, it is important to remember that most of the rights set out in the ECHR, including Article 6, have been made enforceable in UK law through the Human Rights Act 1998 (HRA).

Importantly, under section 6 of the HRA all public authorities (including central government departments) are under a duty not to infringe people's Convention rights. This duty extends to everything that public authorities do, including decisions about policy development and implementation, such as “reforms” to the legal aid system. This section 6 HRA duty is important because it focuses on the need for the state to ensure prevention rather than cure. This means making decisions, policies and laws which consider peoples’ rights from the start, rather than only providing a remedy once those rights have been engaged. This is particularly important in the context of legal aid because the impact of the proposals will be to significantly reduce the number of people able to access legal advice and representation which would enable them to seek legal remedies for the infringement of their rights.

It is our contention that the legal aid proposals fail to adequately consider the government's obligations under the HRA and that the proposals risk infringing the ECHR rights protected under the HRA, particularly the rights of women who are vulnerable, marginalised or experiencing disadvantage. Below, we set out our specific concerns in relation to the right to a fair trial (Article 6, ECHR) 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 ECHR,) and to respect for private and family life (Article 8 ECHR).

The right to a fair trial under the HRA (Article 6(1) ECHR) states that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Often discussions about Article 6 and legal aid focus on the criminal law; however, the right to a fair trial and legal aid also apply to civil law issues, including areas such as family law. The European Court of Human Rights has determined that the ability to access legal aid is central to this right.

In the case of *Airey v Ireland* [1979]⁵¹ the European Court of Human Rights held that a failure to provide legal aid to enable a victim of domestic violence to get a judicial separation from her husband violated Article 6(1) ECHR.

51 *Airey v. Ireland* [1979] ECHR 3

Importantly, in this case the European Court of Human Rights articulated the important principle that ECHR is not about “theoretical or illusory” rights, but rather these rights must be “practical and effective”. In relation to Article 6 the Court said this principle “is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial”.

The Court recognised that while Article 6 does not require blanket access to legal aid for all civil cases, legal aid may nonetheless be required in certain circumstances to ensure the fairness of proceedings:

“Article 6 para. 1... may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”

The Ministry of Justice consultation paper notes that whilst legal aid will no longer be available in many cases, individuals will still be able to represent themselves. However, the Court in *Airey* rejected self-representation as a sufficient guarantee of Mrs Airey's human rights:

“The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer. The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective... It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.”

The Court went on to examine the proceedings and their complexity and concluded that it was “most improbable” that someone in Mrs Airey's position could effectively present her own case. Therefore in this case it was held that access to legal aid was required to ensure that Mrs Airey's right to a fair trial was not infringed.

In *Steel and Morris v UK [2005]*⁵² the Court acknowledged that restrictions can be placed on the right of access to the courts, provided that these are pursuing a legitimate aim and are proportionate. It therefore, *may* “be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings”. However, the Court also noted that legal aid was not required “as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary” (emphasis added). The Court set out

⁵² *Steel and Morris v. UK [2005] ECHR 103*

several factors for determining whether a civil case requires legal aid in order to meet the standard of a fair trial set out in Article 6:

“The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity represent him or herself effectively”

The Court went on to examine the complexity of the relevant proceedings before concluding that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively and contributed to an unacceptable inequality of arms which violated Article 6 ECHR.

We believe, it is clear from the Court's 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 herself).

We believe that the Ministry of Justice proposals restricting access to legal aid deal with complex areas of law and risk breaching the right to a fair trial in relation to rights protected under the HRA/ECHR. This includes the right to respect for private and family life (Article 8, ECHR) which protect people's physical and mental well-being, set minimum standards of treatment by the state and which recognise when people are vulnerable, disadvantaged and/or are dependent on the state. In family law issues Article 8 rights are engaged by domestic violence cases (including the availability of laws and procedures which provide adequate protection to those who have experienced physical abuse (*X and Y v Netherlands* (1986)⁵³)) and cases involving the best interests of the child, such as contact and care proceedings. As noted in the consultation paper, immigration cases often engage Article 8. These cases involve complex areas of law such as family reunification, whether people threatened with removal can stay in the UK where they have significant family ties, and if people subjected to domestic servitude or trafficking are able to stay in the UK. The people involved in such cases will be unfamiliar with UK laws and procedures, have limited access to support networks, and are likely to be in the hands of, or dependent, on the state. As noted above, women in these situations may also have additional vulnerabilities, such as experiences of poverty and domestic and sexual violence. Further, in addition to engaging people's human rights, these cases are often about challenging the decisions of state officials, providing a vital check and balance on state power, which we

⁵³ (*Application no. 8978/80*)

note is in line with current government agendas focusing on the accountability of the state.

Rights of Women would also like to draw the Ministry of Justice's attention to the obligations that the UK has under the Convention on the Elimination of all Forms of Discrimination against Women and the International Covenant on Civil and Political Rights. The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), monitoring State obligations under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has asserted that:

“States parties must ... ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary”.⁵⁴

The CEDAW Committee has reiterated its concern about the availability of legal aid to ensure women's access to justice 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”.⁵⁵

Furthermore, the Human Rights Committee, the treaty body that monitors the International Covenant on Civil and Political Rights (the ICCPR) to which the UK is a State party, 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”.⁵⁶

It is our submission that a number of the areas of law that the Ministry of Justice proposes to remove from the scope of legal aid engage Convention rights and these areas are so complex that legal aid must be provided in order for the UK to meet its obligations under the HRA and the ECHR and other relevant international law such as CEDAW and the ICCPR. Further, noting the duty on the government under section 6 HRA to respect people's Convention rights in decisions, policies and laws, we believe that the government should practice prevention rather than cure and bring these areas of law back into the scope of the legal aid scheme rather than seeking to adopt a case-by-case approach which focuses on exceptions. At a practical level, opting for an “exceptions” approach will be time consuming, costly and open to legal challenge. At a principled level, it is important to bring these areas of law back

⁵⁴ CEDAW General Recommendation No. 28, para 34.

⁵⁵ Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands, UN DOC CEDAW/C/NLD/CO/5, 5 February 2010.

⁵⁶ Human Rights Committee, General Comment No. 28, para 18.

within the scope of legal aid because the reforms in question will limit the ability of people to access the legal advice and representation which would enable them to challenge infringements of their rights in the courts. The implementation of an “exceptional” cases scheme in the manner suggested is therefore bankrupt in theory and in practice.

Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.

We are extremely concerned that the consultation misrepresents research carried out for the Department of Constitutional Affairs by Professor Richard Moorhead and Mark Sefton⁵⁷ to conclude that there was not a significant difference between cases carried out by someone representing themselves and cases where clients were represented⁵⁸. The research actually found that:

- Unrepresented parties in cases were common under the current legal aid system but that obsessive/difficult litigants were only a very small minority of those involved. Many parties were unrepresented because they were ineligible for legal aid and unable to afford legal representation.
- Although some litigants in person were able to access some advice and assistance this was only on an *ad hoc* basis.
- Some unrepresented litigants were vulnerable (e.g. because of a mental health problem or disability).
- The legal issues at stake were significant for litigants concerned.
- The level of participation of unrepresented litigants was at a lower intensity than participation by represented parties.
- Unrepresented litigants participated less in proceedings but made more mistakes, struggling with law and procedure. The research found other evidence of prejudice to their interests.
- There was some evidence to suggest that cases involving unrepresented litigants took longer and were less likely to be settled.

An increased number of litigants in person will also have time and cost implications for the court system as the late Mr Justice Hodge, when giving evidence to the Constitutional Affairs Committee explained:

“The AIT and its judges, whenever they have been asked, have always said that we value representation and we want as many people to be legally represented as possible, and whenever we discuss these matters with the Legal Services Commission, which we do periodically, that is entirely what we say....—the change in representation has been very much driven by the Legal Services Commission's worries about the total cost of their budget rather than anything to do with us.”

Mr Justice Collins, giving evidence in the same proceedings also commented on the problems faced by judges in dealing properly with litigants in person stating:

⁵⁷ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Professor R Moorhead and M Sefton, Department for Constitutional Affairs (2005), <http://www.familieslink.co.uk/download/july07/DCA%20view%20of%20LIPs.pdf>.

⁵⁸ See paragraphs 4.266 onwards of the consultation.

“it makes it more difficult to give proper consideration when you do not have the evidence out before you in the form that it ought to be put.”⁵⁹

The legal professionals we surveyed were also concerned that increased numbers of litigants in person would have negative consequences for the court system. 98% of legal professionals thought that increasing numbers of litigants in person in the justice system would result in cases taking more time to resolve while 97% of legal professionals thought that increasing numbers of litigants in person would increase court costs. As one legal professional explained:

“I struggle to recall any litigant in person who has been able to do any one of these [understand proceedings, give evidence or make submission in legal proceedings] with even passing competence. It is always extremely difficult for professionals and judges in family law cases where emotions run so high to be faced with litigants in person.”

Litigants in person also reported very negative experiences of the process:

“Affecting my health and mental well being. Only at the start of the proceedings so haven't dealt with it fully yet. It has left me feeling scared and emotionally not well having to deal with this myself.

One professional who responded to violence against women issue gave this account of a woman who was unable to function when she saw the perpetrator of violence in court. This example is particularly interesting as it illustrates how court process can be used to facilitate further abuse:

“A woman was (and still is) being persecuted by her husband, he is representing himself and continually takes her to court and fires questions at her, the case has been going on for 2 years, she is an ethnic minority, living in vulnerable housing (until the case is settled) with a 5 year old daughter. She is highly intelligent and generally able to represent herself well, but in front of the perpetrator she becomes a wreck and is unable to string two coherent words together. I don't believe under any circumstances she could represent herself and could certainly not afford to pay for representation.”

Most tellingly was the response of the individual women who said that, after not receiving legal aid:

“I gave up and did not pursue the matter”.

A professional who responded to violence against women also noted that:

“Many of our clients have hugely benefitted from legal aid, not just by the provision of domestic violence orders, but also in relation to child contact as this further protects not just the children but also the victim

⁵⁹ Oral evidence taken by Constitutional Affairs Committee on 21 March 2006, www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm.

from further abuse through the children. I feel that the eligibility criteria should be INCREASED nor decreased. Clients I have supported who are not entitled to legal aid either do not pursue court protection at all, or are forced to quit work/reduce hours in order to receive it, which leaves them further in poverty.”

Whilst the consultation is rightly concerned with the impact of increased numbers of litigants in person on the court system, it does not adequately consider the impact of the changes on individuals who decide that if they cannot get legally advice and representation they will do nothing at all about the legal problem that they have.

We therefore believe that the evidence actually shows that being unrepresented has significant negative consequences for the individuals involved and that settlement and efficiency in legal proceedings is best promoted by giving individuals access to legal advice and representation.

The Community Legal Advice Telephone Helpline

- **Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?**
- **Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel?**
- **Question 9: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?**
- **Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?**
- **Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?**

We **do not agree** that:

- the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice;
- that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel; or that,
- the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline.

Whilst we welcome the introduction of such a helpline in addition to the ability of an individual to seek face-to-face advice, we strongly oppose its establishment as a single gateway to civil legal advice. We believe that face-to-face advice should be available to anyone who wants it, in line with Government reforms to other areas of the public sector which aim to increase choice and diversity. Strikingly, 91% of the individual women we surveyed

thought that being able to access face-to-face advice from a solicitor was extremely important, particularly for women experiencing violence.

The use of a helpline to determine access to legal advice and representation raises a number of issues, not least how someone who is not legally trained can identify whether or not a client needs specialist legal advice. While telephone services are useful in reaching some client groups, a generic service of this nature will fail to meet the needs of those who are vulnerable. What provision will be made for those without access to a telephone? How are asylum-seekers or those with an insecure immigration status supposed to access advice and representation? How are children, for example, separated children seeking asylum in the UK, supposed to use the helpline? How likely is it that a woman experiencing domestic or sexual violence will be able to disclose this to a (male?) operator? The same issues apply to other vulnerable or marginalised groups who experience discrimination, for example, asylum-seekers who are gay or HIV-positive. For all of these reasons, it is vital that individuals can still seek advice and support directly from a specialist provider.

We are particularly concerned about the effects of the helpline on women experiencing violence. What training will operators have in violence against women issues? How will operators identify cases where abuse is happening? The woman herself may not identify her experience as abusive or violent. What safeguards would be put in place to ensure that emergency advice is available? What about those who are unable to make a call in private? If a woman did contact the helpline and disclose that she was experiencing violence it is not clear how she would be referred to a specialist advice service. Will referrals be made to specialist solicitors (e.g. in relation to issues like domestic violence, forced marriage or international child abduction)? How will these services be procured? What are the costs of a procurement round of this kind?

Finally, we reject the idea that there is evidence that people want a helpline rather than the ability to contact an advisor directly. In our experience, those seeking publicly funded legal advice and representation want choice in how they access it. Reducing choice in this area is contrary to Government reforms to other areas of the public sector, such as education and healthcare. These observations are supported by the findings of our research. 68% of individuals said that they would not feel confident speaking to an operator on a helpline about their legal problem; 93% said they would prefer to speak to a solicitor or advisor in person. 77% of professionals who respond to violence against women and 93% of legal professionals thought that an operator on a helpline would not be able to identify and respond to violence against women. 79% of professionals who respond to violence against women thought that the women they supported would not be able to fully understand and act on advice they received by telephone. 91% of legal professionals thought that it was extremely important that vulnerable clients (such as those experiencing violence or those with disabilities) are able to get face-to-face, specialist, legal advice. 94% professionals who respond to violence against women thought that it was extremely important that women experiencing violence are able to get face-to-face, specialist, legal advice. The individual women who

responded to our surveys expressed a number of concerns about the helpline proposals:

“I wouldn't be confident that I'd taken everything in. It seems okay when you are talking to someone but once the phone is put down you're back on your own. It's not a time when you feel confident about doing anything, let alone something as complex and important (if your children are at stake). Advice is one thing, taking the action is another.”

“A lot would depend on my mental well being. The trauma of fleeing my home and living in a woman's refuge with my children, etc on top of the mental and physical scars of DV would weigh heavily on how I would respond to legal advice over the phone.”

The ability of applicants to exercise choice was also emphasised by many of the individual women who responded including one who said:

“depends on various things - the nature of the problem and the ability of the adviser. It should be up to the person needing the advice, not the government!”

Legal professionals raised similar concerns:

“This excludes women who don't speak English. It excludes women with mental health problems and with disabilities such as learning disabilities who can't articulate their exact problem. This is a particularly silly solution, because it ensures that only those who have already been able to identify their legal problem and articulate it will be able to access a lawyer. Those who need one most won't even get past the telephone stage!”

Financial Eligibility

- **Questions 12-23 which propose changes to reduce the number of people who are financially eligible for legal aid, including for those who are in receipt of welfare benefits.**

We **do not agree** with any proposals that make it more difficult for those on a low income to qualify for legal aid.

Women's ability to obtain and benefit from their legal rights and remedies is dependent upon their ability to access legal information, advice and representation. Women experiencing violence may need advice on how they can protect themselves from violence by seeking non-molestation or occupation orders; how to divide joint assets and joint debts following relationship breakdown; deal with the family home; make arrangements for child contact and residence and organise and maintain child maintenance. Women at risk of specific forms of violence against women that disproportionately affect BME women (such as forced marriage, dowry-related violence and female genital mutilation) may need specialist legal advice on these issues in addition to the issues outlined above. As violence

against women is both a cause and a consequence of women's inequality, the ability to access free or low cost legal advice is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay privately for legal advice (see above for statistics on women's unequal pay and women's poverty). Figures from the Community Legal Service confirm this analysis by showing that more women than men apply for civil legal aid. For example, in 2005/2006 62.2% of 154,153 applications for civil representation in family matters were made by women (and 37.8% by men).⁶⁰ Any further reductions in the number of people who are eligible for legal aid will disproportionately affect women, and in particular women on low incomes and women who share more than one protected characteristic, contrary to government commitments and policy on gender equality (see further our answer to questions 49-51).

Individual women who completed our legal aid surveys were asked whether or not, if they had received legal aid, they had had to pay a financial contribution to it. Respondents were then asked what the effect of paying a contribution had and the majority of them reported it having either a negative or a significantly negative impact on their financial security. As one respondent explained:

"I received partial legal aid when going through a court case regarding domestic violence, and family issues, child contact etc. I paid a substantial contribution towards it, and being a single parent, who had experienced domestic violence, I thought the fact I had to pay disgusting. I was after all, a victim of abuse. He on the other hand, was represented by a charity, and paid nothing. The amount I paid reduced my monthly income substantially, in fact, I paid more in contributions than my ex partner paid in child support. It was a farce, and put myself and my son in serious financial hardship."

Finally, Rights of Women is particularly concerned that the changes will result in women being exploited as one professional who responded to violence against women explains in one of her answers to our survey:

"One particular example involved a woman who did not know she was entitled to legal aid and received representation from a law firm that did not handle legal aid cases. She reported that she had to resort to prostitution to cover her legal expenses. Such desperate and extremely damaging action may be taken by victim/survivors who find that they are not entitled to legal aid and have no other means of paying for legal help."

Those who are desperate for advice and unable to receive it or pay privately for it may resort to desperate measures.

Civil Remuneration

⁶⁰ Legal Services Commission, Equalities Annual Report 2005/6, published June 2007.

- **Question 31: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees?**
- **Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases?**
- **Question 34: Do you agree with the proposal to codify the rates paid to barristers as sent out in Table 5, subject to a further 10% reduction?**
- **Question 37: Do you agree with the proposals to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases?**

We **do not agree** with the proposal to:

- reduce all fees paid in civil and family matters by 10%;
- cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases;
- codify the rates paid to barristers as sent out in Table 5, subject to a further 10% reduction; or
- cap and set criteria for enhancements to hourly rates payable to solicitors in family cases.

As set out above in relation to financial eligibility, women's ability to obtain and benefit from their legal rights and remedies is dependent upon their ability to access legal information, advice and representation. However, despite evidence of the considerable need for quality legal advice and representation providers, research published in 2005 indicated that the number of solicitors' firms and advice agencies undertaking publicly funded family law work had gone down by 25% over a four-year period.⁶¹

Women with an insecure immigration status face multiple forms of discrimination that places them at greater risk of experiencing violence and which may prevent them from accessing life-saving services. However, as with the availability of legal aided family law advice, despite the demonstrable need for advice and representation there has been a considerable reduction in the number of solicitors' firms and advice agencies undertaking publicly funded immigration and asylum work. In relation to immigration and asylum law, where concern has been raised about the quality of advice and representation, it is of particular concern that high-quality providers, including those in the not-for-profit sector, have had to stop doing publicly funded work. For example, Refugee and Migrant Justice (formerly the Refugee Legal Centre) went into administration earlier in 2010 and the award winning Devon Law Centre has closed (resulting in a situation where those in Plymouth now have to go as far afield as Bristol to find legal representation).⁶² In the Dover ports area, no providers have been given asylum and immigration legal aid contracts.

We believe that the current levels of remuneration have resulted in a reduction in the number of providers and that this is preventing women and other

⁶¹ Department of Constitutional Affairs, A Fairer Deal for Legal Aid, July 2005.

⁶² <http://www.devonlawcentre.org.uk/>

vulnerable groups from having access to justice. The proposals will, if implemented, result in a further reduction in the number of legal aid suppliers. 14% of legal professionals who responded to our survey said that they would no longer do publicly funded work while 49% were not sure whether or not they would continue to do publicly funded work. We are therefore very concerned that the proposals to reduce levels of remuneration further threaten the very existence of the legal aid scheme; without any providers to advise and represent people, it will not matter which areas of law remain in scope or how financial eligibility is calculated.

Alternative sources of funding

- **Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme?**
- **Question 44: Do you agree that the amount recovered should be set as a percentage of general damages?**

We **do not agree** with the proposal to introduce a Supplementary Legal Aid Scheme or that the amount recovered should be set as a percentage of general damages.

We believe that the costs of providing and administering legal aid should be reduced by:

- improving the quality of Government decisions (for example, decisions on eligibility for welfare benefits or in relation to asylum and immigration law); and,
- through the proper carrying out of legal aid impact assessments when new legislation is proposed so that the costs of any changes to the law to the legal aid budget are known about and considered in advance of those changes being made.

For example, we have above set out a number of examples of poor quality decision making by the UKBA. These statistics reveal staggering incompetence and have considerable implications for the legal aid budget and court time. Under these circumstances consideration needs to be given to making the UKBA financially responsible for the consequences of its poor quality decision-making. Similar arguments can be made in relation to the implementation of changes to the Immigration Rules, regulations and policies which are poorly thought out and hastily drafted. This logic can also be applied to other areas of government decision making that raise concerns, such as in relation to welfare benefits.

Impact Assessments

- **Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?**
- **Question 50: Do you agree that we correctly identified the extent of the impacts under these proposals?**
- **Question 51: Are there forms of mitigation in relation to client impacts that we have not considered?**

We **do not agree** that the Ministry of Justice has correctly identified the range or extent of impacts that these proposals will have.

We believe that the impact assessments do not adequately reflect the impact that these reforms would have on those who are vulnerable, such as women experiencing violence and persons with disabilities. It is because of the disproportionately negative effects that these proposals will have on some of the most disadvantaged and vulnerable people in our society that we are opposing them.

The Ministry of Justice is reminded of the existing gender, race and disability duties and the new Public Sector Equality Duty that will come into force in April 2011. In order to meet both existing and upcoming equalities legislation, the proposals in relation to legal aid must be considered in light of the need to pay due regard to equality issues.

Under Section 149 of the Equality Act 2010, the Ministry of Justice must, in the exercise of its functions, have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Equality Act 2010 makes clear that having “due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”

The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

It is our submission that these proposals, if implemented, will entrench and exacerbate the disadvantage faced by women, in all spheres of life. As has been outlined, we are very concerned in general terms about the disproportionate adverse impact that these proposals would have on women’s access to justice and effective remedies (because the statistics show that women are more likely to apply and need civil legal aid). We consider that the proposals will entrench women’s inequality in key areas, where Government has identified a need to promote gender equality and challenge disadvantage. In particular, the proposals will undermine efforts to combat violence against

women in all its forms (see in particular our responses to questions 1 in particular on family law; 3 on immigration and 7 on the helpline); undermine efforts to promote women's equality in employment (see our response to question 1 on employment); and widen the economic inequality between women and men (see in particular our answers to question 3 on debt and insolvency and family law/financial relief).

We are especially concerned that the proposals will have particularly adverse and disproportionate impact on women who share more than one protected characteristic. In relation to disability, it is our contention that individuals suffering from a disability will be disproportionately affected by proposed cuts to advice on debt and welfare benefits (see our response to question 3 on welfare benefits). The Ministry of Justice in its own impact assessments has highlighted how "disabled people comprise a higher share of the present client base of civil legal aid recipients in this category than of the total population." As has been conceded by the Ministry of Justice in its own impact assessments, there is a lack of sufficient and reliable disaggregated data concerning the legal aid client group, and this is particularly true of data on race and disability. In the absence of efforts to collect or identify reliable data concerning legal aid client groups for each of the protected characteristics, we do not consider that a meaningful equality impact assessment has been conducted. Data which could have been considered, for example data concerning the high success rate on appeal of women's asylum claims (underscoring the poor quality of UKBA decision-making in women's asylum claims, and the pressing need for legal help and representation in these cases), has not been addressed in the impact assessments (see our response to question 3 in relation to asylum and immigration).

Supporting evidence

Rights of Women is submitting the additional following supporting documentation:

- Appendix 1: *Women's Access to Justice: A research report*
- Appendix 2: *The value of legal aid: case studies*
- Appendix 3: Notice of appeal to First-Tier Tribunal (Asylum Support)
- Appendix 4: SET(DV) application form

Rights of Women welcomes the opportunity to discuss any of these issues with the Ministry of Justice further. For any further information about the issues raised in this consultation please contact our Director, Emma Scott.

Emma Scott, Director

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