

RIGHTS OF WOMEN RESPONSE TO THE LAW COMMISSION CONSULTATION PAPER ON A NEW FOCUS FOR CIVIL LEGAL AID.

Background

Rights of Women is an Industrial and Provident society, which was founded in 1975 to promote the interests of women in relation to the law. We run a free, national confidential telephone legal advice help line for women. We specialise in advising in family law, especially domestic violence and Children Act matters. Rights of Women works to attain justice and equality by informing, education and empowering women on their legal rights. We are a membership organisation and our activities include producing publications, organising conferences and training courses and undertaking policy and research work.

As an organisation we are concerned about women's access to justice and are very concerned that the proposals set out in this paper may directly discriminate against women. The U.K. is a signatory to the United Nations Beijing Declaration and the Government has made a commitment to improving women's legal literacy and access to justice.

It is vital that every element of the revised funding code produced as a result of this paper be equality proofed - in that it be tested to ensure it does not discriminate on the basis of gender, race, disability, sexuality, age, religion or traveller status. Predominantly, we have dealt with the proposed changes as they affect Family cases. We have not confined ourselves to answering the questions posed and have commented on other points and issues which arose from the paper.

Overview

The paper states that its aim is to re-prioritise CLS funding so that early and effective dispute resolution is encouraged and unnecessary litigation is discouraged and to ensure that CLS funding is better targeted on deserving cases and priority areas.

Rights of Women has a number of concerns with regards to the practical enforcement of these proposals which we would like to voice. We are concerned that women who already face discrimination in various and numerous ways will suffer further discrimination for what could be viewed as a cost cutting exercise. We would strongly disagree with this happening. In particular, we are concerned that women fleeing from domestic violence, who may have English as a Second Language (ESL), are from Black and Minority Ethnic communities and those who are suffering from a physical or mental health disability already find it extremely difficult to access justice from the legal system and by implementing further monetary barriers the situation could only be worsened.

We believe there strict safeguards should be implemented and adhered to in order to ensure that there is no further discrimination to these groups. There is also a high level of flexibility required. We would like to have seen a set of preliminary safeguards and exemptions set out in section 2 as it is vital that the vulnerable are adequately protected. Although we recognise that there could never be a comprehensive list of "the vulnerable" and recognise the difficulties of assessing

vulnerability, we believe that this issue needs to be addressed prior to questions and consideration of eligibility.

Rights of women believes that the definition of vulnerable women should include but not be limited to

- survivors of domestic,
- women with English as A Second Language,
- women who have disabilities and/ or mental health problems,
- women who may have had a limited education and are therefore vulnerable due to a lack of basic understanding of how the system is supposed to assist them.

This definition, we believe would provide an adequate safeguard for all women who may be otherwise affected by the proposed changes to legal aid.

We are also concerned that safeguards which are supposedly in operation at present are actually having little or no effect and offer no protection to those very vulnerable groups that need protection eg women suffering from or fleeing from domestic violence. Therefore we would like to see evidence of far reaching research, investigation and consultation for any new safeguards implemented otherwise they are likely to fail those women again.

The proposals set out would appear to discriminate further rather than assist vulnerable groups and could ultimately result in an inability by those women to access legal assistance which is required.

We are concerned about the papers reference to “low priority” cases. What is viewed as low priority and who decides this? Should a woman fleeing from an abusive relationship be considered a lower priority than a woman facing imprisonment? The list of exceptions and categories of low priority would and could be exhaustive. It would need to be looked at on a case by case basis. Trying to make a scenario fit or not fit could mean that many women may not qualify for funding in cases where they require legal representation.

With reference to paragraph 1.18 of the consultation paper, we disagree with the view that none of these proposals would reduce access for deserving cases. They definitely would because only those cases which fit the test exactly (whether it be the test of high priority or a financial test) would be funded and in all other cases, the woman would have to meet the costs herself. For many women this simply is not an option. They cannot financially afford to take out a case against an ex partner or abuser.

It is discussed in the consultation paper ways in which equity in property could be brought into the equation in an attempt to enable more people to fund part or all of of their case. It does not appear to have been fully thought through and could certainly be a potentially problematic issue for many women. Where a woman does own or have a partial share in the equity of a home, she may not be in a position to realise the equity in the property because of her own economic position or because the other joint owner will not give consent for this to happen. Furthermore notwithstanding this, would the fact that there is equity in her home bar her from receiving legal funding even though in reality she cannot access this money? What happens in the case where a woman is unable to contest a case

because the very property she is contesting is preventing her from accessing legal aid to fund her case?

4. Is it appropriate to concentrate savings on the upper eligibility limit for Legal Representation? Should the upper limit for Legal Help and Legal Representation be aligned? What forms of safeguard should be introduced to protect the most vulnerable clients?

5. What forms of safeguard or exemption should apply if the £100,000 equity disregard is abolished? Should the £100,000 mortgage cap be retained?

Rights of women is extremely concerned about the number of women who will be affected as a result of changes in financial eligibility for legal help/representation. Although we appreciate that there currently exists a strange situation where a woman who does not qualify for legal help may qualify for legal representation it is felt that the proposal may actually result in working women being discriminated against. With the increase in the availability of benefits such as Working Family Tax Credit and Child Tax Credit, many women will automatically be above the income threshold for any type of funding assistance. This may therefore bring about the situation whereby a woman with a child and a part time or low paid job is ineligible for legal assistance of any sort due to her circumstances and is denied access to justice.

Also it is often the case that the woman although a joint owner in the property, due to dependant care arrangements, does not have her own source of income. She is unable to realise the equity in the property which is in dispute but is still ineligible for funding and is left without a way forward.

We are also concerned about women who although owning a property which may have some equity in it, she may not have the capacity to remortgage that property and in doing so to fund her case, she may be subsequently left at the end of the proceedings with insufficient funds to adequately house herself and her children. Rights of Women are therefore in favour of the "mortgage disregard" being retained in order to help prevent women from being further discriminated against and in the hope that this factor will protect those vulnerable women who are going through the court process.

We do not believe or agree that the proposals in this paper will ensure access to justice for women and in fact feel that it will hinder those aims.

We believe that if the £100,000 equity disregard is abolished, it is of paramount importance that a number of exemptions are put into place. Firstly that a woman is not left in a situation where she may have insufficient funds and be without adequate housing for herself and her children, or have such diminished funds remaining after going through the courts that this subsequently causes problems later on. We are interested in how and on what basis, in cases regarding separation and contact issues, prior to a court ruling regarding the dividing up of property, a woman can be refused legal funding based on her equity in a property, when she may subsequently not be awarded any entitlement.

6. Is the proposed restructuring of Family levels of service along the right lines? Would the new level of Family Help provide a better vehicle to

encourage the early resolution of cases than existing levels of service in the Funding Code?

We would be extremely concerned about any proposals where a woman felt forced into mediation or having to try alternative dispute resolution. The restructure must be placed in the context of **our definition** of vulnerable women as set out earlier. In a domestic violence case, alternative dispute resolution will almost certainly not be the chosen route for women. It may lead to a situation where there is a power imbalance for women. Women may feel as though they are not on a “level playing field” whilst sitting opposite their abuser trying to negotiate an agreement. Many women will not even want to enter the same room as their ex partner, for good reason, yet alone enter into discussion with him.

In matters concerning domestic violence, the restriction of multiple and repeat applications could discriminate against women. It is very often the case in these matters that repeat applications for injunctions and contact proceedings is the norm. If this proposal was implemented, many women who actually need to go back to court in relation to an issue that has already supposedly been dealt with, may be restricted from doing so and left without adequate protection and remedy. Again, we would like to see a set of safeguards set out from the outset, as to how these restrictions would be applied.

The restructure proposed by this consultation paper is basically trying to push mediation to the forefront. However, as previously stated, many issues which are of importance to our service users such as domestic violence, will still need to go to court to be decided upon. Callers to our advice line tell us they already feel pressurised into reaching agreements outside of court for fear of being viewed as unreasonable. With the trend of mediation being encouraged by these proposals, it is likely to mean that in many cases where there exists an element of domestic violence, this will not be disclosed and will remain hidden for the fear of repercussions.

We are concerned that we still do not have a legal definition of domestic violence in this country. We would like to see something along the lines of the New Zealand definition as contained in section 3 of the Domestic Violence Act 1995.

We endorse the definition used by the United Nations Special Rapporteur on violence Against women, who in the United Nations Declaration on the elimination of violence Against women which in article 2 defines violence as encompassing but not being limited to ‘physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

We believe that a unified and agreed definition would ensure that domestic violence is dealt with in a uniform way by statutory organisations. We would like to see a comprehensive definition of domestic violence within the funding code.

Safeguards and exemptions would have to be incorporated into these proposals for mediation such as domestic violence cases being automatically exempt from mediation without financial consequence and the same should also apply to

women with ESL, women from Black and Minority Ethnic communities, women with disabilities or who have dependent care arrangements.

8. Should a new criterion be introduced allowing for refusal of funding where private alternatives may be available? If so, how widely available are such alternatives and how should the new criterion be applied in practice?

10. Are there circumstances when it would be feasible for public funding to take the form of a loan repayable at the conclusion of the case? Is so, how might such an approach operate?

We do not agree with the proposal that a woman should be forced to use private funding arrangements to fund legal advice and representation or be required to repay public funds, without an adequate enquiry into her financial circumstances, not only at the time of any legal action but also any implications for the future. After her case has been concluded, a woman may be left with loan repayments on top of existing outgoings for herself and any children. Such schemes are very likely to add to the number of women in state of destitution or poverty. This will especially be the case for women on low incomes or with dependent care commitments. We feel that such proposals would discriminate against women. Furthermore we believe them to be impractical. Where money or property is the subject matter of the dispute, it is very unlikely that financial organisations will lend money to women, especially those on low incomes, when the outcome of the proceedings cannot be predicted. We believe this is especially true when any loan is to be secured against a property which at the end of the proceedings may or may not be awarded to the woman. Such schemes could lead to women feeling unable to take legal action for fear of debt or, if they do proceed with such private funding arrangements, leave women with unreasonable loan repayments and debt. Callers to our advice line already tell us of the seriously detrimental effect upon them of repaying the statutory charge in the years following legal action. We believe loan repayments will have the same effect.

We believe such financial constraints are potentially discriminatory to all women. Women may feel pressured into reaching agreements due to financial constraints and therefore be forced into coming to an arrangement for money saving reasons rather than out of consideration for their own safety or for the outcome that is best for them. Callers to our advice line who fall outside the financial eligibility for public funding frequently talk of the financial implications of taking an important matter to court and frequently tell us they feel unable to take such legal action. It is absolutely essential that if and when an agreement or settlement is reached between two parties, this comes about fairly and safely and not just because it is affordable.

Before such a proposal is put in place we would ask that there be a thorough investigation into the types of private funding arrangements that are or will be available and their conditions and a proper evaluation of how these arrangements would impact on women in the shorter and longer term. We would also ask to see clear guidelines for the repayment of public funding which ensure safeguards are put in place to avoid debt and poverty for women. We firmly believe that such arrangements would be detrimental to women, especially those on low incomes or with dependent care responsibilities.

The proposal to introduce contributions for each stage of a case may also have the same effect. Again women may feel unable to proceed with legal action because of the financial implications. We believe that certain types of legal action should be exempt including domestic violence cases and that any exemption also extends to those cases where domestic violence is an issue even if it is not “the issue” in question, for example child contact proceedings. We firmly believe that there are cases where considerations of safety must come before cost.

We believe it would be discriminatory to operate an across the board policy of refusal of public funding where private alternatives may be available. A level of discretion will be required to see what the impact of taking out private financial help would be. If, as previously stated, this would have the effect of causing any financial hardship now or in the future then this must be taken into account prior to refusing funding.

9. How could disputes over substantial matrimonial assets be removed from the scope of public funding? What changes to CLS funding, eligibility rules (including the SMOD rule) or court procedure would facilitate the funding of such disputes out of the assets themselves rather than public funds? If one party has effective control over joint assets how can the interests of the other party be protected?

Replacement of the SMOD rule by a scheme which takes into account assets which are available could also result in women being discriminated against. The theoretical availability of an asset could be extremely different from that which is available in reality or practice for a woman. Furthermore, as we have already discussed, when substantial assets are used to fund a case, this could ultimately result in financial hardship to women in the long run. In the same way as the statutory charge, repayment of legal costs from any financial settlement received will only diminish that settlement, having serious financial implications on women. Women frequently have lower earning capacity, especially those with dependent care commitments, making them less able to provide financially for themselves and any children. Taking a chunk of their settlement away could be detrimental to many women. Deferring such repayment, as the statutory charge now operates, only increases the possibility of poverty and even homelessness in later life.

11. Can the current £3,000 statutory charge exemption on lump sum recoveries still be justified? What would the impact of modifying or removing it?

Our concern about the removal of the exemption would be that once again this may lead to women’s financial settlements being entirely eaten up by their legal costs and may act as a further deterrent to women of taking necessary legal action in the first place.

12. Should we make a requirement that a single client should have no more than one Private Family Law certificate and file open at any time?

13. What steps can the LSC or the courts take to achieve better control over multiple, repeat or prolonged Private Law funding applications?

We feel that it would be entirely inappropriate to have a blanket requirement on the granting of more than one Private Family Law Certificate. By limiting the number of certificates, this will simply mean having one certificate with higher costs on it which may then be subject to the statutory charge. This could ultimately result in debt and poverty for women. We also feel that it is inappropriate and insensitive to suggest that a woman is simply going back to the court again and again just for the sake of it and to waste either the courts time or public funds. The time and effort required to go to court for numerous orders and injunctions is not something that many women will relish and to infer that they are doing so is not a true reflection of the situation. Not all situations can be measured in terms of cost, especially where the safety of women and children is involved. Once again, we believe that such restrictions will have a direct impact on women, making them reluctant to seek appropriate legal remedies through fear of the financial consequences and appearing unreasonable.

Proposals which seek to reduce the bureaucracy and wastage by solicitors is not and should not be the primary concern. The primary concern of the Funding Code should remain access to justice. Women are not concerned about bureaucracy. They want what will result in a fair and non-discriminatory result for themselves and their children.

We believe that the requirement of NI numbers for application forms will discriminate against refugees and asylum seekers who may be awaiting their NI number and are therefore prevented from applying to courts for orders when legal action is either necessary or appropriate.

14. What role does cost protection play in family cases and can it safely be abolished? Are there particular situations or categories of family case for which cost protection should remain?

Our concern with the removal of cost protection is again that women may feel pressured into reaching an agreement which may in fact put them at risk, for fear of the courts ruling that she has acted unreasonably and therefore will be liable at least partially for a proportion of the costs. This could be a dominant factor as to whether a woman goes ahead with her case. We believe once again that every case would need to be looked at in light of its very individual circumstances. There should be absolute exemptions in cases involving domestic violence, be it directly or indirectly. We would also be concerned that the impact of the removal of cost protection be considered in each woman's individual circumstances.

15. Of the services currently within the scope of Family funding, what are the lowest priority cases? Should drafting divorce petitions and legal help for changes of name be taken out of scope? Are there other categories of case which should be removed from scope? How should such changes in the scope of Legal Help be reflected in the new system of Tailored Fixed Fees?

Rights of Women would be extremely concerned if drafting a divorce petition and change of name deeds were taken out of the scope of Legal or Family Help in all circumstances.

We would argue that for many women drafting a divorce or judicial separation petition or changing their name is not a low priority issue. We would argue that divorce and judicial separation proceedings are not uncomplicated legal processes. The legal implications of choosing judicial separation over divorce as many women from Black Minority ethnic communities do, need to be carefully understood. Drafting a petition requires legal knowledge for example an understanding of when the court has jurisdiction, the fact to be relied upon and the implications of the prayer. This is a very difficult exercise for a lay woman without legal advice. Very often it is an important part of a woman's empowerment to become free from a broken marriage and we would oppose any steps taken to make it more difficult for women to access legal advice in this area.

For women fleeing a violent partner a change of name can be an important part of ensuring her future safety. We would suggest that there be exemptions to any blanket ban on Legal Help for change of name deeds to include domestic violence.

Further we believe that taking such legal actions outside the scope of Legal Help will discriminate against women who have ESL, are from Black and Minority Ethnic communities, who have physical or mental health disabilities or who have had limited education. We are particularly concerned that in some cases this will leave women in violent and abusive marriages.

Rights of Women does not believe that there can simply be a certain type of case which is within the scope of Family Funding and others which are not. No case can be classified as low priority without looking at the individual facts of that specific case and the individual seeking advice and even having done so it may still prove impossible to categorise it as a high or a low priority case.

We would ask what alternative provision the Legal Services Commission suggests will be in place to provide legal advice and support for women in such cases if they are taken out of the scope of Legal Help. There are limited voluntary sector avenues for women who need assistance with legal matters and where in existence, funding has been significantly cut. As an organisation we are able to provide free, confidential advice and information to women nationwide on such issues but do not provide casework. Without legal advice and support women tell us they already feel unable to take legal action which would improve their situation.

Rights of Women believes that access to the law and attaining justice is a fundamental human right for all women. Public funding is a vital part of enabling women to access justice. We are therefore extremely concerned about any proposals which further limit the availability of publicly funded legal advice and representation. The number of solicitors firms offering legal aid is decreasing yearly. From the Legal Services Commission's own statistics the number of CLS providers had fallen to only 4,715 nationwide. Our own experience of signposting women from our advice line, is that there are areas of the country (and not only in rural and provincial areas) where women are simply unable to access legal advice. For women, representing yourself in any proceedings, without a thorough understanding of the law, and perhaps standing against an abusive partner, can be an extremely difficult and frightening experience.

We believe that the proposals set out in this consultation paper pose a real threat to women's ability to access the law and attain justice. In circumstances of

domestic violence they pose a real threat to the safety of women and their children. They would also further discriminate against groups of women who already find it difficult or impossible to obtain access to justice. Further we believe that these proposals are in direct contravention of the Government's commitment to improving women's access to justice and improving women's legal literacy as signed up to in the United Nation's Beijing Declaration.

We would urge the Legal Services Commission, rather than reduce it yet further, to prioritise more accessible public funding for all women but especially those who are experiencing of domestic violence and other vulnerable groups of women who will otherwise be discriminated against without access to the legal system.

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