



Rights of Women Consultation Response: Legal Aid Reform: Family and Family Mediation Fee Schemes

About Rights of Women

Rights of Women is a well established and expanding not-for-profit feminist women's organisation committed to informing, educating and empowering women on the law and their legal rights. We are a membership organisation, with almost 200 members, both individual women and other women's organisations. Our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run two national confidential legal advice lines for women provided by women, one general advice line specialising in family law issues, including domestic violence, and another on criminal law and procedures in relation to sexual violence.¹

1. GENERAL POINTS

Rights of Women is responding to this Consultation Paper for two important reasons. Firstly, as an organisation providing legal advice to women, Rights of Women is concerned about the impact of fixed fees on women. Secondly, as a voluntary sector organisation providing advice, we consider that further decreases in legal aid practitioners is likely to increase the demand experienced by organisations such as ours. This consultation response focuses on private family law.

i) Fixed fees

Whilst we note that the LSC has already decided on the fixed fees route, Rights of women would still like to take this opportunity to voice our strong-held concerns over the use of fixed fees. We are concerned that fixed fees cannot take into account the complexities of different cases or the particular needs of a diverse range of individuals. From our advice line services we know that women's legal cases are likely to involve more work than the proposed fixed fees will allow because women are more likely to have experienced or be at risk of domestic violence, be involved in full-time care of children, elderly or disabled relatives and be in an economically weaker position than men. Cases will require still more time if a woman has language or literacy issues, mental health problems, a disability, or is housebound or in prison.

¹ Sexual Violence Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). General Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2-4pm and 7-9pm and Friday 12-2pm). For further information, see www.rightsofwomen.org.uk

Rights of Women is very concerned that the restrictions of the fixed fees scheme will mean that in reality, lawyers will be financially rewarded for taking on simple cases or left with the stark choice of having to undertake a significant amount of work for which they will not be properly paid. This will leave some of the most vulnerable women, those with complex needs, without access to a lawyer or legal representation.

Since 1997 civil legal aid has fallen by 22%. We know from our callers and women who attend our training that there are a significant number of 'advice deserts' (areas where there are no legal aid services available). We are very concerned that the legal aid reforms will result in a further reduction in the number of lawyers providing advice and representation, particularly in family law. We note that in the last six years there has been a decrease of more than a third in the number of family contract holders, currently less than 3000 as compared to 4,500 in 2000. We also note with concern the results of a Law Society survey conducted at the time of the publication of the Cater Report and the Government's consultation paper 'Legal Aid: A Sustainable Future'. This survey found that 82% of family practitioners believe that their firm is less likely to undertake legal aid work in the future.²

Rights of Women is concerned that the fixed fees are likely to have a negative effect on the number of practitioners willing or able to take on legal aid work, and this will result in an inevitable decline in the availability and quality of service by remaining practitioners. Rights of Women strongly believes that the legal aid service must be based on the real needs of individuals seeking advice and representation.

ii) Impact on women

Women's access to justice is a key issue for Rights of Women. The UK 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. However, Rights of Women is concerned that the move to fixed fees is likely to discriminate against women. We believe that these reforms will have a particularly significant impact on women because their lower economic status means that they are less likely to be able to afford to pay for legal advice, and as women are often primary carers it can be difficult for them to travel out of their area to seek legal advice. As the LSC's 2005/6 data states 60.3% of applications for legal aid are made by women and more women than men apply for representation in family law areas.³

Legal aid is vital to ensure that women have access to the fullest protections available in law, such as protection from domestic violence. It ensures that women are not disadvantaged by power imbalances, either within

² 'Impact of pay structures on family legal aid work: Results of an online survey' (published 21 August 2006)

³ Legal Services Commission 'Engagement Draft Gender Equality Scheme', March 2007, available at: www.legalservices.gov.uk/docs/about_us_main/EngagementDraftGenderEqualityScheme1.028.03.07.pdf

relationships (between themselves and more economically powerful men) or against the State (as for example in care proceedings).

iii) Regional fees

Rights of Women has concerns about the regional fees proposed in the paper. We welcome the LSC's acknowledgement that there are significant differences between the regions. However, for regional fees to be effective they need to be based on actual regional variations, not arbitrarily decided on the basis of where the LSC has regional offices. We recommend that the LSC reconsiders its approach to regional fee variations, conducting in-depth research on where there is acute need and the relationship to actual outgoings.

2. FAMILY HELP - PRIVATE

i) Domestic violence⁴

Rights of Women notes in the Consultation Paper that 'domestic violence cases will be treated differently' to other private family law (para 3.3). At para 3.4 the Paper states that emergency representation for domestic violence cases will be excluded from the fixed fee scheme, with the exception that initial advice will be subject to the Level 1 fixed fee (£94 + VAT). Rights of Women would like clarification of what is meant by domestic violence cases. It appears, although it is not explicitly stated, that the Paper is referring to applications for domestic violence injunctions. Does this refer to orders available under Part IV of the Family Law Act 1996 and/or include injunctions under the Protection from Harassment Act 1997. We would also like clarification as to how domestic violence will be considered within cases subject to fixed fees, such as child contact. If cases such as these fall within Level 1 initial advice, it calls into doubt the LSC's claim that domestic violence cases will be treated differently to other family cases. Rights of Women is concerned that domestic violence is given due consideration in the legal aid reforms.

ii) Escape mechanism⁵

Rights of Women welcomes the LSC's acknowledgment that the original escape mechanism for lifting cases out of fixed fees into the exceptional hourly rates of pay, was set too high at four times the fixed rates. However, we are not convinced that bringing the threshold down to three times the fixed fee rate will address concerns that the threshold is too high. Rights of Women do not consider that it is appropriate to deal with our concerns, as set out in this paper, to be dealt with by simply stating that complex cases are likely to meet the exceptional case mechanism. Rights of Women, along with other organisations,⁶ is concerned that the fear is that the majority of cases will fall short of this threshold. This will leave providers either having to do more than

⁴ Consultation Paper, paragraph 3.3-3.4

⁵ Consultation Paper, paragraph 3.14 -3.15

⁶ Such as Citizens Advice Press Release: 'Legal aid plans 'could deny help to most vulnerable' (11 Jan 2007), available at:

www.citizensadvice.org.uk/index/pressoffice/press_index/press_20070111

they are being paid for, a decision which many may not be willing or able to make ,or withdrawing from legal aid work, leaving women with inadequate legal provision. Rights of Women believe this is unacceptable. If the Government is not willing to look at fixed fees, then we believe that the levels of those fees and the escape mechanism must be subject to wide-ranging research and consultation both with solicitors and not-for-profit providers.

iii) Conciliation⁷

At paragraph 3.34 the Consultation Paper asserts that it the LSC's 'intention that save in exceptional circumstances the solicitor should not attend the conciliation appointment with the client and the CAFCASS officer. There may be exceptional cases where suppliers may choose to attend at court with their client. This is covered by the Level 2 fee and there will be no additional payment for this work.' Rights of Women is concerned by this assertion, our comments below in relation to mediation and ADR apply in this regard. It is important that vulnerable women, such as those who have experienced domestic violence, women who have English as a Second Language and disabled women have representation during conciliation to ensure that they are treated fairly. Lack of representation during conciliation may add to the pressure to settle, where settlement is not necessarily appropriate (see 'Focus on settlement, below). It is not appropriate to expect solicitors to provide representation at conciliation without any payment – to say payment for such 'exceptional cases' is included within the Level 2 fee is nonsensical given that the LSC intends such representation to not occur as standard. Rights of Women believe that the LSC should recognise representation at conciliation as an additional payment or increase the fixed fees accordingly.

iv) Focus on settlement⁸

Rights of Women is concerned about the LSC's focus on early settlement of cases. We acknowledge that early settlement may be beneficial in many cases. However, we are concerned by the across the board emphasis on settlement and the use of incentivising higher fixed fees for settlement. Many issues which are of importance to our service users will need to go to court to be decided upon. Rights of Women believe that each case needs to be looked at on an individual basis to determine whether settlement is appropriate. If a woman agrees to settlement it should be based on what is the best outcome for her, and one which does not compromise her safety (see below 'Exceptions to mediation: domestic violence'). However, we are concerned that women may feel pressured by their solicitors into reaching settlements due to the financial incentivising. We are concerned that the use of incentives in favour of settlement are likely to lead to compromises in the quality of legal services, to cases being inappropriately settled, and/or solicitors effectively being penalised for going to court when settlement is not appropriate for their client. Rights of Women therefore does not agree with the proposed concept of a higher fixed fee for achieving settlement and avoiding proceedings.

⁷ Consultation Paper, paragraph 3.34

⁸ Consultation Paper, Questions 16 and 18, pages 23 and 24, respectively.

v) Statutory charges⁹

Rights of Women has a long held concern about the statutory charge and the disproportionate impact it has on women. Callers to our advice line tell us of the seriously detrimental effect upon them of repaying the statutory charge in the years following legal action. This scheme has a particularly serious impact on women with low incomes and/or dependent care responsibilities.

We note in the Consultation Paper that where a home is recovered under Levels 1 and 2 it will be exempt from the statutory charge (para 3.61). Rights of Women welcomes the prospect of exemption from the statutory charge, given its disproportionate impact on women. However, we are cautious about how this will operate within the Level 2 scheme, where the incentivising fees encourage settlement. Rights of Women strongly believes that exemption from the statutory charge should not be used to pressure women into settlement (see our comments on settlement, above).

vi) Direct Consultation with children¹⁰

Rights of Women has concerns regarding the direct consultation of children in mediation. The involvement of children in legal proceedings is governed by the principle of the child's best interests, and has the additional support mechanism of CAFCASS – a specialised body for this purpose. Indeed the Government has yet to publish its recent consultation on the separate representation of children in family proceedings.¹¹ Given that there has been this level of consideration on whether children should have representation at court, we would question whether mediation is properly equipped to engage in direct consultation with children and who will be ensuring that the best interests of the child are met.

vii) Mediation exemptions: domestic violence¹²

Rights of Women is very concerned about proposed changes to the exemption from mediation where an applicant has reasonable fear of domestic violence. Within a domestic violence case, mediation, conciliation or alternative dispute resolution will almost certainly not be the chosen route for women. Mediation in this situation takes place where there is a power imbalance for women, as sitting opposite an abuser trying to negotiate an agreement is highly unlikely to operate on the "level playing field" required for appropriate and effective mediation. Many women will not even want to enter the same room as their abuser, for good reason, let alone enter into discussion with him. Given our concerns about mediation we welcome the LSC's assertion that there is 'no question of any applicant being forced into mediation' (page 39). The issue of domestic violence, safety and family proceedings was subject to a highly critical report by HM Inspectorate of Court Administration in December 2005. As the report notes there is an 'inherent danger highlighted by Inspectors is the current policy emphasis on seeking mediated agreements between parents in ever larger numbers of disputed family proceedings. Arrangements for assessing the risks associated with

⁹ Consultation Paper paragraph 3.61

¹⁰ Consultation Paper paragraphs 6.21-6.22

¹¹ Department for Constitutional Affairs 'Separate representation of children' (2006).

¹² Consultation Paper, paragraph 7.20

allegations of domestic violence need markedly strengthening. At present, we conclude that ensuring the safety of both children and adults receives insufficient consideration - this is a strong and consistent message from Services Users we consulted." (Chief Inspector's forward). Further, the report notes that the 'focus on agreement-seeking is judged by women as out of balance because it does not pay proportionate attention to safety issues in domestic violence cases (p. 8).' The reports critique of providing appropriate and effective services following family breakdown and understanding the impact of domestic violence is particularly relevant to the present consultation on legal aid in family matters.

Currently, the domestic violence exemption is determined by a woman's solicitor. However, the Consultation Paper proposes that the exemption 'should apply whenever the *mediator* is satisfied that the client has such a reasonable fear' (page 39, original emphasis). We do acknowledge that there are problems with the current situation, as some solicitors may not be screening for domestic violence. Further, as with all forms of violence against women, domestic violence is widely acknowledged to be under-reported and many women may not feel confident disclosing abuse to their solicitor. Issues around screening can be addressed by raising awareness about the domestic violence exemption to mediation.

Rights of Women has serious concerns about the proposal to take the decision about the application of the exemption away from solicitors and place it in the hands of mediators. As we noted above, there are serious concerns about the use of mediation in domestic violence context. Yet the Consultation Paper asserts that:

'...the purpose of this amendment is simply to make it clear that mediation should not automatically be ruled out. Many mediators would take the view that mediation can be of benefit even where they may have been domestic abuse issues in the past, and the intention is to provide an opportunity for mediation to take place if the parties are willing. There will always be an initial assessment of whether mediation is appropriate. We are not requiring the mediator to meet the client in all cases before considering the exemption. In some cases a telephone call between the solicitor and the mediator may be sufficient for the mediator to be satisfied that mediation is clearly inappropriate. Usually however the mediator would want to meet the client separately if necessary to assess whether mediation is suitable.' (page 39)

Aside from our objections based on principle, detailed below, at a practical level, Rights of Women takes issue with the way this very significant proposed reform has been dealt with in one paragraph. There is very little guidance on how such a proposal would operate in practice, leaving it entirely within the discretion of a mediator who is not trained to assess domestic violence and who will not be subject to LSC regulation on how to do this – as the Consultation Paper states 'we would not wish to be prescriptive as to how mediators should consider this test' (page 39). Indeed as a neutral party in

the mediation process, the mediator, unlike a woman's solicitor, is not working on the basis of what is in a client's interest.

As noted above, mediation is highly problematic in domestic violence situations. Rights of Women suggests that LSC rather than seeking the views of mediators on the use of mediation in domestic violence cases would be better placed to seek the views of those organisations that have the knowledge and many years of experience of supporting women experiencing domestic violence. Rights of Women, which has such expertise gained over more than thirty years, considers domestic violence to be characterised by an imbalance of power. This imbalance of power often results in further control and manipulation of women when placed in mediation/ADR situations. Regarding the issue of being a 'willing' party to mediation, 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 domestic violence exists it will not be disclosed and will remain hidden for the fear of repercussions. Therefore Rights of Women recommends that the LSC does not implement the proposed changes on mediation and domestic violence.

Rights of Women has additional concerns about how the domestic violence exemption from mediation will operate within the context of the proposed legal aid reforms. With the promotion of incentivising fixed fees, offering higher payment for cases settled without going to court, Rights of Women questions what further pressure will be put on women to mediate?

viii) Additional Exemptions to Mediation

Given that the LSC is considering the exemptions to mediation in this consultation, the opportunity presents to look at additional areas of concern. Rights of Women suggests that the LSC seriously considers further exemptions in relation to women with English as a Second Language and/or disabled women and/or women with mental health problems. Our concerns highlighted above in regard to mediation and domestic violence, are also applicable to these groups of women who may also be considered 'vulnerable'. Instituting exemptions in these areas would better safeguard vulnerable women who may otherwise be subject to an unfair and inappropriate process.

2. Care Proceedings

Rights of Women is very concerned about the likely impact of the proposed reforms on care proceedings, both in terms of the representation of children and of parents. Care proceedings are crucial to the safety of children, and as such proceedings involve some of the most "draconian" powers available to the courts. It is also vital that parents are provided with effective and appropriate representation to engage in proceedings.

Rights of Women is concerned that the fixed fees as set out in the Consultation Paper, particularly in light of removal of the 15% panel uplift

(paragraph 2.9), is likely to mean that many children and parents will not have access to the experienced specialist advisors and representation they require. The nature of care proceedings are such that junior and inexperienced legal representation is unlikely to be the best option.

Rights of Women recognises that the LSC has reduced the fixed fee escape mechanism for care proceedings down to two times the fixed fee rate. However, we are still concerned by the low amount the fixed fees are set at in the first place and the ill-conceived nature of the fixed fees.

In addition, Rights of Women is very concerned that the LSC is, in a separate consultation, proposing to change the funding code so that some care cases will be merit tested.¹³ Rights of Women is considering its response to this consultation, but our initial opinion is that there are serious difficulties with merit testing care proceedings, carrying the risk that a number of cases will be taken out of the scope of legal aid.

3. Conclusion

Rights of Women urges the LSC to take on board the concerns raised in this response, and to help ensure that women able to access justice.

April 2007

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¹³ 'The Funding Criteria for Child Care Proceedings: A Consultation Paper', March 2007