



**Rights of Women's consultation response to 'Transforming legal aid: delivering a more credible and efficient system'**

***About Rights of Women***

Rights of Women works to secure justice, equality and respect for all women.

Our mission is to advise, educate and empower women by:

- Providing women with free, confidential legal advice by specialist women solicitors and barristers.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.

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 (BME women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

***Rights of Women's consultation response***

Before answering the specific questions asked in the consultation Rights of Women wishes to draw the Ministry of Justice's attention to its commitments to respond to violence against women and ensure equal protection of the law.

Legal aid is a vital tool for the protection of women from violence.<sup>1</sup> It enables a woman who is experiencing violence to protect herself and any children that she has by making applications for protective orders, securing safe accommodation, ending a violent relationship and if necessary, regularising her immigration status. Rights of Women rejects the unsupported claim made in the consultation that the legal aid system has lost credibility with the public. Rights of Women’s research indicates that users of civil legal aid view it as a life-saving resource that secures access to justice and safety from violence.<sup>2</sup>

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

The Home Secretary, Teresa May MP:

“The ambition of this government is to end violence against women and girls.”<sup>3</sup>

In its *Call to End Violence Against Women and Girls* and its associated *Action Plan* the Government set out its absolute commitment to work towards the elimination of violence against women and girls. Central to the both documents is prevention, as the Home Secretary states in her forward to the Call:

“However, at the heart of our approach will be prevention. We will work across the whole of government on preventative measures to stop violence from happening in the first place.”<sup>4</sup>

There is no legal definition of what conduct or forms of harm constitute violence against women within UK law. However, the UN Declaration on the Elimination of Violence against Women (1993)<sup>5</sup> defines violence against women in Article 1 as:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

It is upon this that the Government’s definition of violence against women, as set out in the *Call*, is based.

It is submitted that these proposals completely contradict the Home Secretary’s commitment to prevention. The consultation document fails to recognise the impact of the proposals on women who are experiencing violence. This is all the more surprising when the residence test proposal directly impacts on migrant women experiencing violence (see further below) and the Call and its Action Plan recognise

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

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

<sup>3</sup> *Call to End Violence Against Women and Girls* page 3.

<sup>4</sup> *Ibid*

<sup>5</sup> A/RES/48/104

the particular vulnerability of asylum seeking women and women on spouse / partner visas.

In addition to the failure to formulate proposals that are in line with the Government's *Call to End Violence Against Women and Girls* (and its associated documents and commitments) it is also a cause for concern that no understanding is demonstrated of the UK's domestic and international legal commitments to respond to violence against women.

The UK is a signatory of the Convention on the Elimination of Discrimination Against women (CEDAW). General Recommendations are issued by the Committee that monitors compliance with CEDAW. General Recommendation 12 (1989) sets out the positive obligations on States to eliminate gender-based violence while General Recommendation 19<sup>6</sup> goes further in describing the positive obligations on States to eliminate gender-based violence and makes clear that States may be responsible for private acts if they fail to act with due diligence to prevent the violation of rights or to investigate and punish acts of violence.<sup>7</sup> The UK Government has removed the immigration reservation to CEDAW and so is legally required to ensure that migrant women receive equal protection from violence to that available to UK women. The European Court of Human Rights has found that a State's failure to protect women against violence is unlawful discrimination because it breaches their right to equal protection of the law<sup>8</sup>.

## Human Rights

Rights of Women is also concerned that the Ministry of Justice has not paid due regard to its obligations under section 6 of the Human Rights Act 1998 (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) European Convention on Human Rights 1950 (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 further changes made to legal aid do not breach these rights

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<sup>6</sup> General Recommendation No. 19 (11<sup>th</sup> Session, 1992) on Violence against women.

<sup>7</sup> For further information on the UK's international obligations in relation to violence against women see *From Rights to Action*, K Perks, Rights of Women, 2011 (available to download from here [www.rightsofwomen.org.uk/pdfs/VAW\\_toolkit\\_From\\_Rights\\_to\\_Action\\_Amended.pdf](http://www.rightsofwomen.org.uk/pdfs/VAW_toolkit_From_Rights_to_Action_Amended.pdf)).

<sup>8</sup> Opuz v Turkey [2009] (Application no. 33401/02) para 191

It is our contention that these legal aid proposals, when considered with the reforms implemented in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) infringe 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, housing and community care 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]<sup>9</sup> 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. 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

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<sup>9</sup> Airey v. Ireland [1979] ECHR 3

various types of litigation, or by reason of the complexity of the procedure or of the case.”

Individuals who are prevented from accessing legal aid because of the residence test, or unable to find a solicitor to bring judicial review proceedings, may be compelled to attempt to represent themselves. The possibility of self-representation is not a sufficient guarantee of an individual’s human rights, as the Court stated in Airey:

“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]<sup>10</sup> 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 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.

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<sup>10</sup> Steel and Morris v. UK [2005] ECHR 103

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 themselves). Those who are prevented from benefitting from legal aid because of the residence test will be unfamiliar with UK laws and procedures, have limited access to support networks, and may be in the hands of, or dependent, on the state. As noted above, women in these situations may also have additional vulnerabilities, such as experiences of poverty, domestic and sexual violence.

We believe these proposals (specifically the residence test but also the proposals which will affect the provision of advice, for example in public law or public child law) 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), the right to be free from torture, inhuman and degrading treatment (Article 3, ECHR) and the protection from discrimination (Article 14, ECHR).

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 CEDAW Committee has consistently affirmed the importance of legal aid to ensure access to justice:

“States parties must ... ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary”.<sup>11</sup>

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”.<sup>12</sup>

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<sup>11</sup> CEDAW General Recommendation No. 28, para 34.

<sup>12</sup> Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands, UN DOC CEDAW/C/NLD/CO/5, 5 February 2010.

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”.<sup>13</sup>

It is our submission that legal aid must be provided in cases where an individual’s fundamental human rights are engaged 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. Consequently, in addition to rejecting these proposals, Rights of Women calls on the Ministry of Justice to revisit the changes introduced by LASPO and bring private family law and immigration law back within the scope of legal aid.

### ***The consultation questions***

#### **Restricting the scope of legal aid for prison law**

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

Rights of Women agrees with the matters remaining in scope, we do not agree with the proposal to remove further areas of law from the scope of legal aid.

Ensuring the rights of prisoners is vital as the European Court of Human Rights stated in Golder v UK<sup>14</sup>:

“Justice does not stop at the prison gates.”

Rights of Women is concerned that in making this proposal the Ministry of Justice has not considered the particular needs and vulnerabilities of women prisoners. 79% of Women in Prison’s service users report having experienced domestic or sexual violence.<sup>15</sup> There is therefore a causal relationship between experiencing gender-based violence and being imprisoned.

Women prisoners may also have additional vulnerabilities including mental or physical health problems. Foreign national prisoners may not speak English as a first language and may be detained indefinitely under immigration powers. The increased vulnerability of women prisoners means that they are less likely to be able to access and utilise the ombudsman system and more likely to need advice on their rights and

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<sup>13</sup> Human Rights Committee, General Comment No. 28, para 18.

<sup>14</sup> Golder v UK [1975] 1 EHRR 524

<sup>15</sup> See the Women Offender Campaign Network’s Meeting the Needs of Women Offenders and Ex-offenders in the National Violence Against Women Strategy

assistance to benefit from them. By definition, prisoners are unable to access alternative sources of advice and support.

The issues affected by this proposal include subjects like admission to mother and baby units, food, medical care and other issues of paramount importance. These are not issues that should be left to an ombudsman system to deal with as there is no power to enforce the implementation of recommendations. The ombudsman system is also very slow.

The requirement of providers to hold a criminal law contract will result in a loss of specialist providers including those which are not-for-profit such as the Prisoners Advice Service. Specialist providers represent the best value, both for their clients and the public purse.

Finally, prison law represents just over 1% of the legal aid budget. The consequences of this proposal are wholly disproportionate to any savings that might be made.

### **Imposing a financial eligibility threshold in the Crown Court**

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

No.

We fundamentally disagree with proposals which will result in innocent people being financially disadvantaged by being compelled to defend themselves from a criminal charge. The state brings a criminal case and there is no mechanism for negotiation, mediation or opportunity to avoid the court process. If the state has brought a case that cannot be proved to the criminal standard, or which is dismissed, the state should bear the full costs rather than expecting the innocent party to do so. The proposal at 3.39 that those who can afford to pay privately should do so is fundamentally misconceived when applied to the criminal law because of the lack of choice on the part of the individual as to whether proceedings are brought.

The proposal does not provide any details as to how the threshold would operate in cases where the victim and defendant are financially linked, such as those which involve domestic and sexual violence where the victim of the offence might have had, or might have, a relationship with the defendant. In such cases the victim might be discouraged from contacting the police or supporting criminal proceedings because of the effect that any prosecution might have on her or her family's financial circumstances.

The proposal would result in an increase in the numbers of litigants in person. Whilst special measures are available to prevent the defendant cross-examining the victim in cases that involve domestic and sexual violence, these protections are not available to other witnesses who might nevertheless be intimidated by facing the perpetrator in court.



Defence solicitors play a valuable role in managing a perpetrator before and during court proceedings, including ensuring that bail conditions are understood and adhered to, controlling the evidence adduced at trial and advising clients on the strength of the evidence against them. An increase in litigants in person is likely to result in an increase in the number of defendants in domestic violence cases who take cases to trial and seek to use the criminal justice system to further control and intimidate the victim of their abuse.

Q3. Do you agree that the proposed threshold is set an appropriate level? Please give reasons.

No. See above.

### **Introducing a residence test**

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

No

**The introduction of any residence test is a threat to the rule of law and the principle of equality before the law. It is unacceptable to deny any group of people access to the courts and therefore to justice. The rule of law is a concept fundamental to the UK's constitution and system of justice. In *The Rule of Law* Lord Bingham asserts that the rule of law requires that individuals be able to resolve "without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve".<sup>16</sup> He goes on to argue that "denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law".<sup>17</sup>**

As stated above, legal aid is a vital tool for the protection of women from violence.<sup>18</sup> Introducing a residence test which would prevent those who do not meet it (or could not demonstrate that they do meet it) from being able to access civil legal aid will result in women being exposed to violence and abuse and being unable to secure safety and justice for themselves and their children. This will violate their fundamental human rights as protected by domestic and international human rights law (see above) as well as the common law of England and Wales.

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

- victims of domestic violence (including British women living in England and Wales and women eligible for settlement under the domestic violence rule);

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<sup>16</sup> *The Rule of Law*, Tom Bingham, Allen Lane (2010) page 85.

<sup>17</sup> *Ibid* page 88.

<sup>18</sup> *Womens' Access to Justice: A research report*, Rights of Women, 2011.

- victims of forced marriage who have been brought to the UK;
- parents of children who are abducted from the UK;
- parents of children who are involved in care proceedings;
- women who are in the UK lawfully (including migrant domestic workers, European citizens and their family members);
- British women who have fled abusive relationships in other countries and who are returning to the UK to seek safety;
- stranded spouses (women who are married to men who are British or settled here who are coerced or deceived into leaving the UK and who are prevented from returning);
- women who have been trafficked for sexual and other forms of exploitation; and,
- women who have British children.

*Mrs K came to the UK on a spouse visa and experienced domestic violence, including financial control and sexual abuse. Four months after her arrival in the UK she was forced to leave the matrimonial home. Mrs K made an application under the domestic violence rule and for financial support under the destitute domestic violence concession. Her solicitor also applied for a non-molestation order to protect Mrs K from further violence and then initiated divorce proceedings. If the residence test were introduced Mrs K would be denied the legal protections she was entitled to and would be compelled to remain in an abusive and potentially life threatening situation.*

By denying women access to civil legal aid the Ministry of Justice is exposing them and their children to further violence and abuse. Women who are unable to access legal aid will be unable to secure and benefit from protective orders (such as non-molestation orders and occupation orders), may remain in abusive relationships and lose rights to make a claim or lodge an appeal due to limitation periods and / or deadlines. The introduction of a residence test recreates the situation that the domestic violence rule and accompanying concession were created to resolve, namely that women should not be forced to remain in violent and abusive relationships because of their immigration status. Such a situation is in opposition to the Government's stated position on violence against women and prevention as set out at the start of this response. Indeed, the importance of legal aid for trafficked women and women with applications under the domestic violence rule was recognised by the Ministry of Justice when it drafted and amended LASPO to ensure that immigration legal aid remained available in these cases.

The affect on children of the residence test is also not considered by the consultation. We do not have the capacity to explore the Government's commitments to children under the [UN Convention on the Rights of the Child](#) here, however, the residence test will prevent the parents of abducted or abused children from seeking their return to the UK or being represented in public child law proceedings.

### Trafficking cases

Denying legal aid to a victim of trafficking who does not meet the residence test and does not have an asylum claim risks violating Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 47 of the EU Charter of Fundamental Rights (because of the Directive on Trafficking in Human Beings (Directive 2011/36/EU)).

Paragraph 19 of the introduction to the Trafficking Directive states:

“Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (1) establishes a set of victims’ rights in criminal proceedings, including the right to protection and compensation. In addition, victims of trafficking in human beings should be given access without delay to legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation. Such legal counselling and representation could also be provided by the competent authorities for the purpose of claiming compensation from the State. The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. Legal counselling should be provided by a person having received appropriate legal training without necessarily being a lawyer. Legal counselling and, in accordance with the role of victims in the relevant justice systems, legal representation should be provided free of charge, at least when the victim does not have sufficient financial resources, in a manner consistent with the internal procedures of Member States”.

The right to receive legal advice and representation is set out in Article 12 of the Directive.

Art 15(2) of the Directive also states that:

“Member States shall, in accordance with the role of victims in the relevant justice system, ensure that child victims have access without delay to free legal counselling and to free legal representation, including for the purpose of claiming compensation, unless they have sufficient financial resources.”

The vulnerability of victims of trafficking was also recognised in the exemption they received from the residence test that now applies to all applicants for criminal injuries compensation.<sup>19</sup> The consultation’s position in relation to victims of trafficking who do not meet the proposed residence test is therefore at odds with the position taken by the Ministry of Justice in relation to LASPO and the Criminal Injuries Compensation Scheme 2012.

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

*Z was trafficked into the UK for the purposes of domestic servitude. After four years she was able to escape her traffickers and access support through the National Referral Mechanism. Z did not fear persecution in her country of origin but sought to remain in the UK to receive medical treatment for the mental health problem she had developed while she was imprisoned and because she no longer had any family in her country of origin that could support her. Z made a successful application to remain in the UK on the basis of her private and family life. If the residence test were introduced Z would have been unable to secure the leave to remain in the UK she needed to recover from her experience of being trafficked.*

### Asylum

The Ministry of Justice states that asylum-seekers will be exempted from the residence test because of their particular vulnerability. However, the consultation does not state how the residence will operate in relation to those who are granted refugee status or humanitarian protection. Refugees or those with other forms of leave to remain in the UK may need civil legal aid but appear not to be able to access it because they are no longer asylum-seekers (and therefore able to benefit from the exemption) but may not have accrued one years' lawful residence in the UK.

The residence test will also operate to prevent refused asylum-seekers from being able to challenge a decision by the UK Border Agency not to accept a fresh claim for asylum. This will have a disproportionate impact on women asylum seekers because there are a range of factors that can make it harder for women to disclose their experiences at the time of their asylum claim and appeal.

Applicants submitting gender-related applications concerning, for example, sexual or domestic violence, forced marriage, honour crimes, female genital mutilation, forced prostitution and trafficking may feel unable or reluctant to disclose information relevant to their case for many reasons. These include the effects of trauma, stigma and shame, other mental health problems, lack of trust in authorities and fear of serious harm as a reprisal. The effects of trauma have profound implications on women's ability to disclose experiences of violence or abuse. Psychological symptoms experienced during asylum interviews such as dissociative experiences and flashbacks have an impact on a woman's ability to provide details about the forms of persecution she has experienced.<sup>20</sup> The UK's own credibility guidance notes that mitigating factors for delays in providing details or material facts include

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<sup>20</sup> Bögner et al (2007) 'Impact of sexual Violence on disclosure during Home Office interviews', *The British Journal of Psychiatry*, London: Royal College of Psychiatrists, Online. Available HTTP: <http://bjp.rcpsych.org/content/191/1/75.full> (accessed 21 May 2013).

trauma.<sup>21</sup>

Applicants may also simply not know that such types of harm are relevant to their case, particularly if they have been unable to receive legal advice before making a claim. Finally, the gender, cultural and educational background of a female applicant may affect her ability to relate her account to the interviewer. She may be unaccustomed to communicating with strangers and/or persons in public positions due to a background of social seclusion and/or social mores dictating that, for example, a male relative speaks on her behalf in public situations.

Women are therefore more likely to have to make a fresh claim and the factual and legal complexity of their cases makes it more likely that it will not be recognised as such by the UK Border Agency. The ability of women to be able to bring judicial review proceedings is therefore vital if they are to be able to secure protection from gender-based harm in the UK.

### Unworkable

*Y is a black British woman. She was born outside of the UK to parents who were themselves born in Jamaica before it achieved independence. Y spent much of her childhood abroad living with extended family members following the death of her parents. She came to the UK to study and, having completed university, married and had a child. Y's husband was violent towards her. Y sought to end the relationship shortly after the birth of her second child when she discovered that her husband had accessed child pornography online. J fled the matrimonial home with her children and approached the local authority for emergency accommodation. The local authority wrongly denied assistance to J and her children and she was compelled to initiate urgent judicial review proceedings. These were successful and J secured safe accommodation. J also then received legal aid to initiate divorce proceedings, obtain protective orders and resist her husband's application to have unrestricted contact with the children. Whilst J is British her ability to demonstrate that she passed the proposed residence test when she had just fled an abusive relationship is doubtful because she had been denied access to relevant documents and had lived abroad for much of her life. Without the ability to access legal aid immediately to initiate the emergency judicial review proceedings J would not have been able to secure the accommodation that enabled her to leave her abusive marriage and ensure her and her children's safety.*

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21UK Border Agency (2012) *Asylum Process Guidance: Considering Asylum Claims and Assessing Credibility*, para 4.31, Online. Available HTTP: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/considering-protection-.pdf?view=Binary> (accessed 21 May 2013)

Ascertaining whether or not someone has a right to reside and how it can be evidenced is a complex process which may itself require legal advice and assistance. Indeed, this may be the issue under dispute. The applicant may not have leave to remain due to delay or error on the part of the UK Border Agency<sup>22</sup>. British and European passports are not stamped on entry or exit to the UK. Women who are homeless or who have or are experiencing domestic violence may be unable to provide or access supporting documentation (because they are in a refuge, because of their experience of financial control etc).

### Disproportionate

The imposition of a residence test will have a disproportionate and adverse impact on the majority of legal aid applicants who do have a strong connection to the UK. Those who seek or are in receipt of legal aid are likely to be vulnerable and experiencing economic and other disadvantage. Applicants for legal aid include women experiencing domestic violence, people with disabilities, people with mental health problems and homeless people. These groups may require urgent advice and assistance but be unable to produce evidence that they satisfy the residence test.

The consultation does not state or attempt to estimate what proportion of applicants for civil legal aid do not have “a strong connection with the UK”. It is perverse and wholly disproportionate to impose such considerable burdens on providers and the majority of applicants when the projected savings outlined cannot be substantiated.

### Unintended consequences

Denying access to legal aid will result in costs being incurred by other public bodies such as local authorities, the police and NHS.

Denying access to legal aid will result in costs being incurred by the not-for-profit and voluntary sectors, including women’s organisations, who will be unable to secure advice and representation to respond to their service users needs.

Denying access to legal aid will result in costs being incurred by the civil court system which will have to respond to increased numbers of litigants in person who are unable to access advice and representation and who may have English as a second language.

Denying access to legal aid will increase the dangers posed by unregulated advisors who may be committing criminal offences by advising when they are not permitted by law to do so.

### No remedy

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<sup>22</sup> Or its replacement, howsoever named.

The exceptional cases scheme would not remedy any of the issues identified as it is only available for applications for legal aid in areas of law that are no longer in scope (such as general immigration law, see Section 10, LASPO). It cannot assist an applicant with a legal problem with an area of law that is within scope (such as a domestic violence rule application) but for an applicant who did not meet the residence test.

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

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

No.

The case of 'J', outlined above, demonstrates the importance of judicial review to women who have experienced domestic violence. Indeed, the importance of judicial review proceedings as a check to the unlawful exercise of power cannot be overstated. Judicial review proceedings can enable women to ensure that local authorities meet their legal obligations to provide them with housing and homelessness assistance; meet their community care needs; compel the UK Border Agency to accept a fresh claim for asylum; prevent an unlawful removal from the UK and ensure that victims of trafficking are correctly recognised as such.

Many public law issues can be resolved without judicial review proceeding being issued, for the benefit of the client. This includes situations where the decision is so clearly unlawful that the decision-maker withdraws or changes it as soon as the decision and possibility of legal action being taken is drawn to their attention (as occurred in 'J's' case, see above). It also includes cases where successful applications for interim relief effectively end the need for bringing substantive proceedings. If judicial review cases are only funded in cases where permission is granted then the majority of work undertaken by public lawyers will be unfunded. This will have a catastrophic impact on the provision of advice and representation in public law proceedings.

The loss of provision of public law advice and representation will have considerable implications for some of the most vulnerable groups in society, including those who are unintentionally homeless and who have community care needs. This will have a financial impact on other public authorities including the police and NHS as well as the voluntary sector.

### **Civil merits test – removing legal aid for borderline cases**

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

No.

Cases that involve violence against women are often factually and legally complex in comparison with other areas of law. Such cases are therefore more likely to be considered 'borderline' and be of significant importance to the individual concerned.

Currently the test for the receipt of legal aid in borderline cases is that they must be of wider public importance or of overwhelming importance to the individual. The current test has therefore not been set out in paragraphs 3.81-3.83 of the consultation which gives the impression that all cases that are 'borderline' are granted legal aid. In fact it is relatively few under the current system (the consultation does not state how many or provide any supporting evidence to support this proposed change). It is therefore submitted that the current merits test is appropriate and should remain unchanged.

#### **Chapter Four: Introducing Competition in the Criminal Legal Aid Market**

In relation to this chapter of the consultation, Rights of Women disagrees with the proposals and endorses the consultation response submitted by the Law Society.

##### ***Scope of the new contract***

Q7. Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.

No.

Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

No.

Any reduction of this kind would render the provision of quality advice and representation impossible.

The credibility of legal aid is determined as much by the quality of the service delivered as its cost to the taxpayer.

##### **Contract length**

Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract? Please give reasons.



No.

### **Geographical areas for the procurement and delivery of services**

Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset /Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

No.

Q11. Do you agree with the proposal under the competition model to join the following criminal justice system areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

No.

Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas, aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

No.

Q13. Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

No.

### **Number of contracts**

Q14. Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.

No.

Q15. Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.

N/A.

### **Contract value**

Q16. Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

No

### **Client choice**

Q17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

No

Client choice is the only way that the quality of advice and representation can be assured. Credibility of the legal aid system is determined by the quality of service provided not just the cost.

Evidence suggests that there are significant causal links between being a victim of domestic violence and being involved in the criminal justice system. 79% of Women in Prison's service users report having experienced domestic or sexual violence.<sup>23</sup> This may be because women are coerced or compelled to commit offences by the perpetrator of violence or as a consequence of his behaviour. Baroness Hussein-Ece discussed the nexus between being a victim of domestic violence and being involved in the criminal justice system in a House of Lords debate in 2011.<sup>24</sup> Not all providers have the specialist knowledge and skills necessary to advise and represent women who are involved in the criminal justice system and who have or are experiencing violence. Not all providers have the specialist skills necessary to identify victims of trafficking. Client choice is necessary to ensure that women defendants are able to seek representation from a provider who understands and is available to respond adequately to their situation.

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<sup>23</sup> See the Women Offender Campaign Network's Meeting the Needs of Women Offenders and Ex-offenders in the National Violence Against Women Strategy

<sup>24</sup> "We know that half the women in UK prisons say that they have suffered domestic violence. We also know that perpetrators of domestic violence often make false allegations about the victims of abuse to the police, which can result in criminal proceedings and possibly a conviction. The convictions cited could be for minor offences. I will give an example. As I mentioned in the debate we had some time ago on International Women's Day, I set up the first domestic violence project for women with a Turkish and Kurdish background in Hackney and Islington nearly 20 years ago. I saw the full range of abuse suffered by the women whom we helped, in all its horrors. Many of these women were often too scared to come forward and get help because of threats from other family members and for fear of being ostracised by their immediate community if they reported their abusive partner to the police. For example, a woman may be trapped at home looking after her children and be totally reliant financially on her partner. He could refuse to give her money to buy food. I know that such cases have happened. I have dealt with a similar case where, in these terrible circumstances, a woman who took food from a shop - she stole food to feed herself and her children in a quite desperate situation - went on to receive a conviction for shoplifting..." Hansard 16 May 2011 : Column 1216.

### **Case allocation**

Q18. Which of the following police station case allocation methods should feature in the competition model? Please give reasons.

Other: client choice, see above.

Q19. Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the Legal Aid Agency or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

No, see our answer to question 17 above.

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

No, see our answer to question 17 above.

### **Remuneration**

Q21. Do you agree with the following proposed remuneration mechanism under the competition model? Please give reasons.

No.

Q22. Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons.

No.

### **Procurement process**

Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

An understanding of the gendered dynamics of domestic and sexual violence.

An understanding of the trafficking indicators.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

No.

## **Chapter Five: Reforming Fees in Criminal Legal Aid**

### **Restructuring the Advocates' Graduated Fee Scheme**

Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;  
reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and  
taper rates so that a decreased fee would be payable for every additional day of trial?

No.

The consultation does not provide any evidence to support the proposition that trials are taking unduly long. It is inappropriate and unjust to use remuneration to seek to reduce the length of trials or in any way to affect the outcome of criminal proceedings. Trial management is the responsibility of the trial judge and the consultation does not provide any evidence to support the idea that trial judges are failing to appropriately manage proceedings.

The credibility of legal aid is determined as much by the quality of the service delivered as its cost to the taxpayer.

### **Reducing litigator and advocate fees in Very High Cost Cases (Crime)**

Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

No. See our answer to question 26.

Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

No. See our answer to question 26.

## **Reducing the use of multiple advocates**

Q29. Do you agree with the proposals:

to tighten the current criteria which inform the decision on allowing the use of multiple advocates;  
to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and  
to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?

No.

## **Chapter Six: Reforming Fees in Civil Legal Aid**

### **Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme.**

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

No.

There is a correlation between domestic violence and abuse and being involved in public law children proceedings. Children who are subject to public law proceedings are vulnerable and in need of special protection. The family courts are already under pressure to resolve public law cases expeditiously.

Any further reduction in fees in public law cases (which, by definition, are complex cases that require considerable care and attention) risk reducing the number of specialist providers who undertake this work.

### **Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings**

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

No.

The consultation does not recognise that barristers are self-employed advocates and that therefore their fees represent a gross income from which they must deduct outgoings, pension and tax.

## **Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases**

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

No.

The removal of the uplift should only be considered if the low underlying payment is considered and increased.

Current legal aid contracts in immigration cases have been designed and bid for on the basis of certain types of work (such as appeals to the Upper Tribunal) being available. The loss of the uplift will have serious implications for providers who are already committed to delivering a certain level of service. Any further changes to contracts may decrease the number of providers willing to do 'at risk' work or immigration and asylum work at all. The way that immigration and asylum law is regulated means that alternative sources of advice and representation are limited.

## **Chapter Seven: Expert Fees in Civil, Family, and Criminal Proceedings**

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

No justification for any cut to expert fees is provided in the consultation. Expert evidence is of vital probative value to the courts in civil proceedings. In family proceedings involving domestic violence, expert evidence enables the court to ascertain issues like the risk posed to children by abusive parents. In asylum cases experts provide evidence on issues including conditions in an applicant's country of origin. In immigration cases experts provide evidence on issues including on whether or not a person applying under the domestic violence rule has experienced a particular form of domestic violence. A cut of 20% is likely to have significant implications for the provision of reports which are necessary to assist the courts in complex cases, such as those that involve violence against women.

There is already concern that expert reports are not being sufficiently used in cases that involve domestic violence in the family courts. In *Picking up the pieces* Rights of Women recommends that:

“Courts must seek risk assessments from specialist domestic violence organisations before making a decision about contact. Such risk assessments should follow the principles and guidance set out in *Expert Domestic Violence Risk Assessments in the Family Courts* (see Newman, 2010)”<sup>25</sup>.

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<sup>25</sup> *Picking up the pieces: domestic violence and child contact*, Rights of Women, 2012 page 5.

Rights of Women's research demonstrated that in the current system women and their children were continuing to be placed at risk of violence in the family courts due to inadequate assessment of the risks they faced by the judiciary and other professionals.

The use of experts in legal proceedings (whether civil or criminal) should be determined by the Court having regard to the probative value of the evidence sought. Courts should not be disadvantaged by a lack of expert evidence.

### **Chapter Eight: Equalities Impact**

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

No. See the answer to question 35.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

No.

The EIA fails to examine the impact of these proposals on individuals with one or more protected characteristics (race, age, disability, religion or belief, sexual orientation, sex, marriage and civil partnership, pregnancy and maternity and gender reassignment). The Legal Aid Agency collects information about the gender, race and disability status of legal aid applicants; this is not drawn upon to reach any conclusions about the potential impact of these proposals on the vulnerable groups who would be adversely affected by them.

Figures from the Community Legal Service demonstrate that more women than men apply for civil legal aid.<sup>26</sup> Women will consequently be particularly affected by the proposals that effect eligibility for and access to civil legal aid (including the residence test and the proposed changes to the remuneration of judicial review cases). 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. Women will therefore be disproportionately affected by these proposals, women who experience multiple forms of discrimination, such as disabled women, will be particularly disadvantaged.

These proposals do not, therefore, comply with section 149 of the Equality Act 2010 which places positive duties on public bodies to have due regard to specific equality aims, including alleviating discrimination against women. Indeed public authorities are required to have due regard to the need to *advance* equality of opportunity, not

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<sup>26</sup> See *Measuring up? UK compliance with international commitments on violence against women in England and Wales*, 2010, Rights of Women.

merely to promote it or prevent disadvantage. The EIA does not attempt to explain how the proposals advance equality.

The EIA also completely fails to explain or justify how any savings made (which are disputed) can be assessed against costs which would be incurred by other public bodies such as the courts, local authorities, the police or NHS or legal aid providers.

**Q36. Are there forms of mitigation in relation to impacts that we have not considered?**

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.<sup>27</sup> The current financial climate has exacerbated this vulnerability and many women's organisations are currently in a funding crisis. Consequently, we believe that the Ministry of Justice should consider providing funding, either directly or indirectly to women's voluntary organisations and other voluntary sector advice providers, such as Citizens' Advice Bureaux and Law Centres.

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3<sup>rd</sup> June 2013

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<sup>27</sup> *Why Women Only?*, Women's Resource Centre, 2007,  
[www.wrc.org.uk/resources/wrcs\\_research\\_and\\_reports/why\\_women\\_only.aspx](http://www.wrc.org.uk/resources/wrcs_research_and_reports/why_women_only.aspx).