



**Submission to the
Government Post-Implementation Review
of the
Legal Aid, Sentencing and Punishment of Offenders
Act 2012 (LASPO)**

September 2018

Introduction

Rights of Women [Established 1975] works to secure justice, equality and safety 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

Our services are primarily targeted at women experiencing violence and abuse with an emphasis on reaching those who may be facing additional intersectional or structural discrimination including black, minority ethnic, refugee and asylum-seeking women (BMER women) and women involved in the criminal justice system (as victims and/or offenders). 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.

On a daily basis we provide free specialist confidential legal advice directly to women throughout England and Wales via three telephone advice lines covering family, immigration and asylum and criminal law. We advise an average of 2000 women annually via our lines. Advice is provided by our legal staff team and 40 women volunteers, all of whom are qualified solicitors or barristers.

We would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills and experience.

This submission has been written by the staff team of Rights of Women.

Approach to gathering and presenting data evidence

Case studies from our advice lines are fully anonymised in accordance with best practice to protect identification of any individual; this includes use of pseudonyms and the removal or alteration of any other personally identifiable factors. Individuals quoted have done so with consent (for example where we have used quotes taken from surveys or our Athena evaluation). Case studies used in Section 5 of this report relate to participants in a project who have provided written authorisation of their understanding of the nature of the project being for research to make policy recommendations to Government.

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1. The impacts of LASPO

1.1 Introduction

The impacts of LASPO have been wide reaching and devastating. We echo the Justice Committee's concerns that the Ministry of Justice (MOJ) have failed to consider the wider impact of the legal aid reforms. In their 8th report¹ they have concluded that the reforms have harmed justice. In this section we will consider the impact on individual women, Rights of Women's services, the advice sector and the wider impacts on society. We provide information specific to our expertise in the areas of family and immigration and asylum law.

1.2 Impacts on individual women

1.2.1 Family Law

The report *Evidencing domestic violence: nearly 3 years on* [Rights of Women, Women's Aid and Welsh Women's Aid, December 2015] demonstrates the devastating impact of LASPO three years after its introduction on individual women affected by violence who have not being able to access family law legal aid.

Whilst there have been changes to the law since this report was published which make it easier for survivors to evidence domestic violence and pass the "domestic violence gateway"², its findings remain relevant and timely to this review. It provides a unique insight into the first-hand experiences of women survivors across England and Wales and shows the human cost to them of LASPO. For example, the report revealed barriers to accessing legal aid, in addition to the domestic violence gateway, including:

- Women being genuinely unable to afford legal support but failing the legal aid means test (which would make them ineligible for legal aid regardless of whether or not they have evidence of domestic violence)
- Women facing difficulties in finding or travelling to a legal aid provider

The quotes used in this section are from women survivors who responded to the survey reflect the comments we hear regularly on our family law advice lines.

¹ JSC 8th report *Impact on changes to civil legal aid under part 1 of LASPO 2012*, <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

² The Domestic Violence Gateway enables those who have experienced or at risk of experiencing domestic violence to potentially access legal aid for private family law matters, otherwise out of scope for legal aid, providing they can provide documentary evidence of the domestic violence from a prescribed list. They are still subject to a means test after having satisfied the gateway evidence requirements.

Personal wellbeing and safety

One of the most obvious and worrying consequences of the cuts to legal aid is the negative impact on women's health and safety. Physical separation from an abusive partner is often only the first step towards ending the relationship. Resolving complicated issues such as property ownership, joint tenancies, divorce, and children with an abusive and controlling ex-partner without the support of a lawyer is often too daunting for many of our callers. For those who responded to our survey on *Evidencing domestic violence: nearly 3 years on*, 52.8% of survivors said they took no further action in their case as a result of not being able to apply for legal aid. This often means remaining in an abusive relationship:

"[I] continued to live with [my] partner in the hope that things would get better."

Litigants in person

Some survivors who cannot fund legal support and are not eligible for legal aid take part in proceedings as litigants in person. Survivors often describe the trauma of being in court unrepresented.

"I represented myself in court and had to go against the man who raped me."

"It was a truly traumatic experience having to face him so soon after the assault."

Women also describe how their lack of understanding of the law and the family justice system put them at significant disadvantage, particularly in proceedings with a represented party.

"I looked stupid in court. I was humiliated in court through my lack of knowledge and felt more like a criminal than a victim in court."

"I am doing my best to represent myself, while the other party's solicitor is pulling all sorts of stunts and legal jargon that I know nothing about."

Women and children

The impact of LASPO on the health of women and children has not, as far as we are aware, been researched and requires further consideration. Anecdotally, we often hear from women (who are both survivors and non-survivors of domestic violence) that lack of legal representation and the stress of litigation causes a deterioration in their mental and physical health:

"Not being able to afford legal advice and be represented properly has hugely affected mine and my children's health and wellbeing. We are still suffering abuse indirectly 18 months after leaving."

Debt

Another issue requiring consideration is the debt that women (both survivors and non-survivors) find themselves in as a result of LASPO and an unfair system of assessing means. We regularly hear from women who find themselves in significant amounts of debt in order to pay legal fees. Many women are turning to 'litigation loans' that typically charge 18% interest, which can amount to thousands of pounds. Other women seek loans from other providers, accrue debt on credit cards or borrow money from friends and family. In extreme cases, Rights of Women has received calls from women who face losing their homes and bankruptcy as a result of paying for legal fees.

"I am a low earner and single parent who at the moment has almost £5000 legal fees on credit cards, have a further £2300 to pay and £1000-2000 more accumulating. I don't know how I will ever pay this debt."

"So far I have incurred £15,000 in legal costs and am back in court again regarding custody and school moves for our youngest child."

"I am currently in debt as I couldn't afford a solicitor but needed a divorce due to domestic violence."

Kaganas' article³ provides a comprehensive analysis of the impact that LASPO has had on family law disputes and concludes that *"it is the competent poor, the unacknowledged vulnerable and the unassertive who are most affected by the LASPO Act. Since women, collectively, are more likely than men to fall into these categories, the result is that women, in particular, who benefited historically from wider and easier access to justice, are those who are most disadvantaged by its curtailment."*

McKenzie Friends

Following LASPO the use of McKenzie Friends or, as some of them call themselves, "lay advisors", has increased in the family courts. McKenzie Friends can be an important and useful source of support for litigants in person. However, there are concerns that some McKenzie Friends operate in a manner that is not in line with best practice in advice-giving by not being client-centred, impartial or focused on enabling the litigant in person to make informed choices. We know, anecdotally, of McKenzie Friends giving advice to clients that has had a detrimental effect on their case.

Recent research⁴ into paid McKenzie Friends has found that most of the work paid McKenzie Friends do is outside the courtroom. This is invisible to judges, but our experience is that it has a significant effect on the case. The increase in paid McKenzie Friends is particularly concerning given that there are McKenzie Friends

³ *Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy*, Kaganas, 2017

⁴ https://www.barcouncil.org.uk/media/573023/a_study_of_fee-charging_mckenzie_friends.pdf

charging clients who are not always cheaper than solicitors. McKenzie Friends are unregulated which means there is little or no redress for people who suffer loss following negligent advice or poor services and this practice goes on without any scrutiny or oversight.

1.2.2 Immigration and Asylum law

Many women that call our immigration and asylum advice line are vulnerable migrant women fleeing violence. They have been deprived of their right to access legal aid, which has resulted in many of them being unable to take steps to regularise their immigration status. A person's entitlement to benefits, access to work and healthcare is largely dependent on their immigration status and a lack of immigration status can result in poverty and homelessness or a decision to remain with the abuser. The reality is that this is not a proper choice and the human cost in terms of our callers' wellbeing is immeasurable.

Litigants in person

Litigants in person have always been part of the justice system through choice until the LASPO reforms. LASPO has been the main contributing factor to the increase in individuals dealing with their own applications and litigating in the courts. The alternatives are to take no action, pay for advice and or representation or to secure pro bono representation. It is a grave injustice that some individuals, whether litigants in person or pro bono lawyers with complex cases requiring expert evidence, are unable to present the best evidence in their case for financial reasons. Expert evidence can greatly improve the prospects of an individual successfully being granted permission to remain in the country or their appeal being successful.

Litigants in person increase costs to the tribunal and court systems and increase court time. In the immigration context, litigants in person struggle to navigate the law and efficiently articulate their arguments, even if they possess higher levels of education and confidence. This is no surprise considering that even experienced lawyers find it challenging to keep abreast of constant changes to immigration law and policy. The MOJ, in its proposals to reform legal aid, commented that legal expertise and skills would not be necessary for litigants in person in the immigration tribunals. It is unfathomable to us that a vulnerable migrant can be expected to grapple with the law, know how to address the court, know how to open and close arguments and examine and cross examine witnesses. Additionally we question how vulnerable migrants can be expected to prepare court bundles, comply with directions and prepare skeleton arguments.

1.3 Impact of LASPO on Rights of Women's services

1.3.1 Immigration and Asylum law

Rights of Women are currently the only free immigration and asylum legal telephone advice service for women experiencing or at risk of abuse. We advise around 300 callers a year on our immigration advice line and in many cases we are the caller's

only source of advice. These vulnerable migrant women may have multiple issues such as limited English, mental health issues, disabilities and or, trauma and it is imperative that they are able to seek free immigration advice to make informed decisions about which immigration option to pursue. There are limitations on the service that we can provide and we are not a substitute for face-to-face advice where advisers have the opportunity to scrutinise the client's relevant documents and the benefit of interpreters.

Some callers to our line report that they are so desperate to seek legal advice and to submit an immigration application that they will borrow money from friends and family members. Sums can run into thousands of pounds as funds are required to pay solicitors fees, application fees and the immigration health surcharge. These individuals consider that taking no action could lead to their detention and subsequent removal which is a fate far worse than being in debt, this is especially so for women who fear gender-based violence in their country of origin. Our immigration advisers can offer reassurance and talk them through the law, the application process, the correct forms and fees.

We have noted over the last few years that many of our callers experience problems in clusters and frequently require welfare benefits, housing and family law advice simultaneously. The duration of calls can increase significantly in these scenarios. We do not have expertise in the areas of welfare benefits, housing or community law and can only provide generalist advice. The number of callers needing advice on section 17 local authority support under the Children's Act has also increased and Rights of Women would assert that the reason for this is that section 17 support is a last resort for most of our callers and women without any immigration status can access section 17 support if they meet the statutory criteria.

Unfortunately we are aware that there are a substantial number of women that are unable to access our service despite the fact that we have increased our capacity in the last 2 years.

The increasing difficulties for women migrants in obtaining immigration legal advice have been highlighted in our Athena Project Final Evaluation report.⁵ The 'Athena Project' is the name for our immigration and asylum work delivered between 2014-2017 and the evaluation covers three strands of our services: our advice line, interactive network and capacity building programme including training.

The key findings⁶ for the line are that it is in high demand and filling critical gaps in services, which highlights the erosion of other available advice provision as a result of closure to other advice services and the decrease in good quality legal advice across England and Wales. In particular, it enables advice to be accessed by women

⁵ *Athena Project Final Evaluation Report* [September 2017, Ceri Hutton and Jane Harris (On The Tin)] <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/RoW-Athena-Project-Final-Evaluation-Report.pdf>

⁶ *Athena Project Final Evaluation Report* – Page 11 'Key findings'

outside London, where there is a dearth of services. The advice line is working to capacity and demand of the service is increasing.

1.4 The impact on legal aid providers and the advice sector

1.4.1 Family Law

The Ministry of Justice's most recent legal aid statistics⁷ show that the number of providers delivering civil legal aid has decreased by around a third from 2012 to 2018. Many firms and organisations have stopped or reduced the legal aid work they take on. One reason for this is that the fixed fees that they receive for the work are so low that legal aid work is not financially viable for them as a business.

The knock-on effect of this is that even women who are eligible for legal aid are finding it increasingly difficult to find a solicitor to represent them. 75% of respondents to our survey⁸ said it was difficult (40.7%) or very difficult (34.3%) to find a legal aid solicitor for family law in their area. 33% of respondents were having to travel between 5 and 15 miles to find a legal aid solicitor. 23% had to travel more than 15 miles.

A lack of providers means those who continue to provide civil legal aid are able to pick and choose the cases they take on. Unsurprisingly, they will pick those with the highest fixed fees and easiest to manage clients. This may leave some very vulnerable people without legal advice (even if they are eligible for legal aid). For example, a woman who speaks a little or no English will struggle to instruct a solicitor without an interpreter but the solicitor will not be able to fund an interpreter on legal aid until after they have taken on the client. Clients in this position are some of the most vulnerable in society but will find it extremely difficult to find a solicitor who can take on their case.

Rights of Women's legal officers know from personal experience that low fixed fee schemes result in junior members of staff completing the least profitable work. The junior members of the profession find that they must take on a huge volume of work in order to meet targets and this coupled with the restrictions placed on the work they can do by funding limitations results in a poorer service for clients. This leaves young legal aid lawyers feeling deeply dissatisfied and overworked, and in some parts of the country there are real concerns around recruitment and retention. Rights of Women is concerned that women will find it increasingly difficult to find a legal aid provider in the future.

1.4.2 Immigration and Asylum law

The immigration advice sector has witnessed a decline in legal aid providers due to a decrease in legal aid income over the years. The first major change that impacted on

⁷ [Legal Aid statistics tables](#) - January to March 2018

⁸ *Evidencing domestic violence: nearly 3 years on*, Rights of Women, Women's Aid, Welsh Women's Aid – December 2015

legal aid providers was the introduction of fixed fees in 2006, which resulted in many legal aid practices closing their doors or substantially reducing their services. Further cuts to fees and increased administrative costs due to legal aid bureaucracy coupled with the majority of immigration matters being taken out of scope have been the last straw for some providers.

It has also been reported by various stakeholder and Government departments that the decline in legal aid providers is at crisis point in some regions of England and Wales. Indeed the National Audit Office has stated⁹ that the reforms had a potential to create additional costs both to the Ministry and wider government and there may also be costs to the wider public sector if people whose legal problems could have been resolved by legally aided funded advice suffer adverse consequences to their health and well being as a result of no longer having access to legal aid.

More recently the Law Society¹⁰ and the Joint Committee for Human Rights¹¹ have commented on their concerns regarding how rights to access to justice are being eroded and questioning the sustainability of legal aid given the increasing geographical regions where it is near impossible to receive legal aid advice.

We hear anecdotally from women who call our advice line that there are no legal aid solicitors in their area. A professional Athena partner supporting her client commented that¹² *“there is a particular shortage of immigration advice services outside London. Accessing telephone advice is therefore very important for women who live outside London, potentially saving them time and money as well as giving them the advice they need.”*

Rights of Women also have serious concerns about the capacity of advisers that remain in the legal aid sector. We often hear from women calling our advice line for the 2nd or 3rd time that they have tried all the legal aid providers we have suggested and have been informed that they have no capacity to take on their cases or they have been placed on a waiting list and have been told that they will need to wait for several months before they can receive advice. This is borne out by the legal aid statistics. Many of the women that call our advice lines are in crisis and stakes are high, preventing them from accessing legal advice is an infringement of their human rights. We have also noted that some of the migrant women that call our line have had to travel a long distance to seek legal advice from legal advisers that they anticipate they will be able to converse with at a comfortable level and who understand the cultural barriers in accessing legal information and advice; very often they may be from their own communities or the caller may prefer a woman adviser if she has been a victim of violence and would feel more at ease with a woman.

⁹ *Implementing reforms to civil legal aid*, NAO, November 2014, <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

¹⁰ *Access Denied? LASPO Four years on*, Law Society, June 2017, <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>

¹¹ *Enforcing human rights*, JCHR, 19 July 2018

¹² *Athena Final Evaluation Report* – page 14 ‘How the advice line has helped the client’

Language can also be an issue as some of our callers may have specific requirements, such as to speak a particular dialect that is uncommon and they are facing difficulties in finding an interpreter.

One of Rights of Women's Athena partners participating in our capacity-building programme described the relationship between participating in our training and the increasing demand for immigration advice and limited sector capacity as follows:¹³ *"an increasing number of our clients have immigration issues. A lot of women have insecure immigration status. In 2009 we had 5 people, in 2011, we had about 50 to 60 people. Now in a year we receive something like 120-130 cases of NRPF (those not having recourse to public funds). We wanted to do this mainly so that we have members of staff who are better skilled and legally we know exactly what we are doing when we offer support to women and when we interact with solicitors. The spouse's application is getting harder because the numbers are rising. We want to be in a professional and knowledgeable place so that women receive the best advice."*

In addition, Rights of Women hosted a strategic review meeting as part of our Athena evaluation with external stakeholders, during which it was noted¹⁴ *"that there were some areas which they are concerned about, most strikingly the need to ensure that the availability of higher level advice and representation (OISC 3 and JR) is able to keep pace with initiatives supporting migrants into advice provision and that more specialist immigration advisers and lawyers are not lost to the field through legal aid cuts."*

Refugee Action also report that since 2006 when fixed fees were introduced, there has been a reduction in the amount of time taken on cases which means that advisers cannot always do the best for their client which leads to costs further down the line. They recommended that early advice at the beginning of the process is essential.¹⁵

The legal aid statistics show an overall decrease in the volume of legal aid immigration cases, which have halved between April to June 2012 and April to June 2017 due to the removal of immigration from scope.¹⁶

There are copious reports of legal aid practices, particularly not-for-profits, being at breaking point. Law Works have stated that 67% of clinics have seen an increase in the number of clients they see in crisis or distress.¹⁷

¹³ Athena Final Evaluation Report – Page 44 'Outcome for partner agencies'

¹⁴ Athena Final Evaluation Report – Page 59 'context for future work'

¹⁵ Refugee Action and NACCOM in Access to Justice in the Asylum System- 'Tipping the scales' survey, <https://www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/>

¹⁶ [Legal aid statistics](#)

¹⁷ [Law Works Clinics Report 2016-17](#), page 3

The Law Centres Federation reported in 2014/2015 in their publication ‘Picking up the Pieces’ that almost 40% of law centres funding has been lost since 2011 and that 11 law centres had closed by 2015.¹⁸

We have heard from the voluntary immigration advice sector that there has been a significant increase in demand for immigration advice and services. This is not surprising given the MOJ’s own statistics reveal that not-for-profits lost 77% of their legal aid income as compared to 25% of solicitors following the LASPO reforms.

Many of these organisations refer women to our advice line because they do not have capacity to take on cases. We can also only provide a limited service and have to signpost women to legal aid providers to undertake their casework.

Refugee Action reported¹⁹ that in the first half of 2018, 76% of those interviewed were finding it difficult or very difficult to refer people for legal representation and 87% commented that it was more difficult than 6 years ago. Over half of providers in the areas of asylum and immigration were lost between 2005 and 2018 which is a drop of more than 64% for not-for-profits. There has been a staggering 56% drop in providers since 2005 for legal aid immigration and asylum. In 2018, 36% of not-for-profits remain.

The disparity between regions of the number of provider offices completing work is also worrying and further illustrates the dearth of providers geographically.

Type of provider	2011/2012		2017/2018	
	London	Merseyside	London	Merseyside
Solicitors	692	96	540	66
Not for profits	90	20	66	11

In terms of costs, London accounted for 23% of all legal aid and Merseyside 3% in 2016 to 2017.²⁰

Civil legal aid providers by region

The failure of the Legal Aid Agency and the Home office to coordinate advice providers to areas where asylum seekers are being dispersed has also been raised by Refugee Action. We would concur and further say that dispersing people to areas where there are no providers is poor practice and detrimental to the wellbeing of asylum seekers.

¹⁸ Annual Review, www.lawcentres.org.uk

¹⁹ Refugee Action and NACCOM in Access to Justice in the Asylum System- Tipping the scales survey: <https://www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/>

²⁰ <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>

It is also significant to note that a quarter of the legal help total starts were for BME groups and a third from disabled people from 2015 to 2018. The average number of women for whom legal helps were started over a 3-year period was 45%.²¹

This indicates that it was necessary for a significant number of individuals with protected characteristics to access legal aid in order to progress their cases.

The Government have stated that they expect lawyers to undertake more pro bono work. The majority of legal aid lawyers and some corporate lawyers do undertake some pro bono work. It is unrealistic to expect them to fill the gaps left by the LASPO reforms. It simply is not sustainable for an immigration legal aid practice to carry a large proportion of pro bono cases. Pro bona work should complement legal aid and not substitute it.

Over the last few years there has been an emergence of law clinics to help fill the gaps post LASPO. Most of these law clinics are operated in higher education settings by students who are supervised by more experienced advisers. We welcome any measures that will increase the provision of immigration advice and services to vulnerable individuals as long regulatory requirements are adhered to and adequate supervision by more experienced lawyers is in place.

Rights of Women have recently started a specialist advocacy service to follow up advice line calls with one off advocacy that could make a significant difference to a caller (such as providing a letter for DWP that they have a right to reside for benefit purposes). We receive many calls from women who have been wrongly advised that they are unable to access benefits due to their immigration status. This is more prevalent since LASPO as welfare benefits advice and representation before the First Tier Tribunal (FTT) is out of scope and wrong decisions are going unchallenged. The Law Centres Network has also voiced their concerns about a sharp rise in inaccurate decisions due to social security reform.²² It was also highlighted in our *Athena Final Evaluation Report*²³ that in addition to more straightforward legal queries about immigration status, advice line staff noticed an increasing number of callers who were also grappling with issues relating to benefits and entitlements and incorrect decisions based on their immigration status.

It is of major concern that we are in danger of losing even more highly experienced and skilled immigration advisers. There has been no concerted effort on the part of the MOJ to replace those providers that were lost following the introduction of fixed fees and reduction in the scope of legal aid. A lack of specialist advisers will mean that access to justice will be impeded for the most vulnerable and marginalised

²¹ Legal aid statistics: www.gov.uk/government/collections/legal-aid-statistics

²² www.lawcentres.org.uk

²³ *Athena Final Evaluation Report* – Page 14 ‘the type and level of support provided-’

individuals. Many complex immigration matters involving challenges to the Home Office, including judicial reviews with merit, will never be initiated and the Government will not be held to account for making unlawful decisions, which will fundamentally undermine the rule of law.

Recommendation

The MOJ conduct a review of unmet needs for legal advice in some regions of England and Wales and consider how best to deal with the demand for legal aid. We would propose periodic tendering opportunities for new and existing providers, which should be conducted following a mapping exercise of unmet need to ensure that all those eligible for legal aid are able to access it in a timely manner.

Unscrupulous advisers

We have heard from callers with disturbing accounts about their experiences with advisers and are concerned that vulnerable migrants are being exploited. These advisers charge huge sums of money in fees and in return provide poor immigration advice. This can have a devastating impact on the individual with the likelihood of a refusal of their immigration application and the prospect of being removed. We have even heard of cases where the so-called ‘adviser’ pockets money and claims that they made an application to the Home Office and it materialises later on that they haven’t.

We also hear from callers who have been given the wrong advice but have presumed that they have been given accurate advice. It is only after they have submitted repeat applications and instructed a different adviser or called our advice line, in a crisis, that they are informed that the wrong advice has been given and that it was not surprising that their applications had been refused. Although the provision of immigration advice and services is heavily regulated it is difficult to ascertain how these challenges can be resolved as individuals do not complain to regulators, either because they are not aware that there is a complaints process available to them, they do not know how to complain or they are not aware that they have a reason to complain.

Case study – Linda

Linda has been residing in the country for 17 years. Linda approached a lawyer to extend her leave. At the time of instructing the lawyer she had permission to work and to claim public funds and was in receipt of benefits. She provided all the information and funds requested by the representative. The application was submitted on time but with insufficient funds. The Home Office wrote to the lawyer requesting further information and funds giving a deadline within which to provide the information. He did respond to the Home Office, with further information but not with the funds and did not inform Linda that further funds were required. The application was subsequently rejected and a fresh application

had to be submitted. Linda was not advised of the repercussions of submitting the application late and that she would not be able to work or claim benefits.

We also discovered that the representative had not provided Linda with a client care letter and therefore she did not know how to make a complaint against the representative. She had also not been advised that she may have been eligible for a fee exemption.

Linda would not have been able to access legal aid for her article 8 matter as it was out of scope. However, she would have been able to make an application for ECF, which she was not advised on. Linda would not have been able to complete either the ECF forms or the Home Office application forms without advice and assistance due to her vulnerabilities.

Rights of Women have been vocal about sanctions against unscrupulous advisers and also about providing better information for vulnerable migrants to enable them to access legal information and advice. We have raised our concerns with the Solicitors Regulatory Authority (SRA) as to what would constitute better information for migrants. We highlighted that there needs to be a mechanism in place to distinguish between poor and good advisers. The current economic and legal funding landscape enables unscrupulous advisers to exploit vulnerable individuals desperate for immigration advice.

Additionally there have also been cases where immigration advisers (both solicitors and OISC regulated advisers) have acted unethically by failing to advise individuals that their matter is in scope for legal aid and explaining the significant benefits of being advised and represented under the legal aid scheme. This is a clear breach of regulatory codes and standards as the adviser is clearly not acting in the best interests of the individual.

Recommendation

Rights of Women propose that the MOJ studies data on migrant families in section 17 accommodation and the barriers to them moving on. We would contend that their situation relates to their immigration status, which cannot be resolved without access to legal advice.

1.5 The impact on the funding landscape for the voluntary community sector

It is worth noting the impact of LASPO cuts on voluntary and community sector advice providers in relation to increased demand on our services and the related difficulties in addressing this within the funding landscape in which we operate. Across the board, funders from charitable trust and foundations have always quite rightly been clear that the funding they provide should not serve as a replacement for work where public funding is available and that any pro bono work should not replace work that could be carried out under legal aid. However, drawing a clear line between the two has become increasingly difficult post-LASPO, which in our view

has been detrimental to both voluntary community sector (VCS) organisations and our beneficiaries.

Reducing legal aid has not reduced the need for legal advice, it has simply pushed the demand elsewhere. Responding to high levels of need without duplicating existing or previously existing legally-aided advice has been resource-intensive on our sector. Funders in our sector are fully aware that levels of need of beneficiaries are at critically high levels and are trying to avert crisis through their funding whilst not duplicating legal aid services. The result is that we find ourselves in a position of being funded to trial and test different models to increase advice delivery through alternative methods (for example, capacity-building other organisations) with mixed success or real impact only being possible if the model is invested in long term. This is at odds with the precarious funding environment we exist in where grants tend to be short and continuation funding only possible if impact is demonstrated. The monetary and resource cost to funders and to small charities like ours of changing our services in this way is significant. We have been frustrated to witness the impact on beneficiaries who would have been better served by straight-forward access to a legal aid solicitor.

1.6 Impacts on the statutory sector

1.6.1 Family Law

Anxiety and stress is heightened for all women through a lack of knowledge of their legal rights. Areas of complex law are excluded from scope, resulting in women being unable to resolve their legal problems. The issues that legal aid used to cover are crucial to a person's wellbeing – such as when they will see their children, whether they will have enough money to feed themselves, whether they will be deported. Without the ability to resolve these issues, it is natural that anxiety and stress will escalate. This has a knock-on effect on other public services such as the NHS.

Example of impact on other services

A cohabiting relationship breaks down. The couple have two children and one of them has taken time off work to raise the children. The property is owned by the woman's ex-partner who tells her to leave. The law in relation to whether this woman has a financial claim to the property is complex. It falls between family, trusts and property law. The woman has no income as she stays at home to care for the children. She has no savings. She would be financially eligible for legal aid to get advice about whether she could make a financial claim over the property but this type of case is out of scope. The woman presents to the council as homeless as this is the only thing she can think of to do. This places an extra financial burden on the council.

The increase in the number of unrepresented parents in family proceedings we believe leads to an increase in parents seeking support from children's services and from schools. As part of the training we run for professionals working with victims of domestic abuse, professionals from many parts of the public sector attend. They inform us that they need to know what the legal options are for the women they support as those women have no other legal support. This includes safeguarding leads in schools, nurses, police officers, social workers and housing officers.

We receive calls from parents who make referrals to children's services about the contact the other parent is having because they do not know what else to do.

Cuts to legal aid have led to an increase in costs to the court service. This is not simply through an increase in unrepresented parties making applications to court when early advice and mediation could have prevented this (as explained below) but also because once in proceedings, unrepresented parties do not know what applications are necessary or sensible, increasing the burden on the court service and staff. This includes cases where unrepresented parties are making incorrect applications to the court, which have to be listed for hearing and resolved by the court in some way. Where the judge does not spend time working out what application should have been made, issues are not resolved by the parties.

Case Study - Aisha

Aisha called the advice line for advice in relation to an application to the family court for a child arrangements order (contact) made by the father of her child. She had experienced domestic abuse but was not eligible for legal aid as the GP would not provide a letter in accordance with the domestic violence gateway. Aisha was calling after there had been a number of hearings in the case in which she represented herself. The father's application for a child arrangements order was ongoing. Aisha believed that the father had given undertakings to the court at an earlier hearing because during the hearing the judge had discussed undertaking with both parties and it was recited in the order that the father had agreed certain things in relation to contact. When he subsequently broke that agreement, Aisha believed that he had breached an undertaking and applied for enforcement.

Aisha also appealed a later order made by the court. The case had been listed 8 times for the father's application and for various applications made by Aisha. Following discussing the case with Aisha, it became clear that her applications (both of which had been listed for 2 separate hearings by the court) were unfounded. The father had not actually given undertakings and Aisha did not need to appeal the order. She simply needed to request a directions hearing and ask for the interim order to be amended.

Aisha stated she was finding the whole process incredibly complicated and upsetting. It was causing her significant anxiety. Due to her lack of understanding of

the legal process, Aisha had, in good faith, made applications to the court which would use court time and resources that were unnecessary. She simply didn't know what her legal options were and having done an internet search and spoken to court staff (who are unable to give legal advice), had ended up making the wrong applications. There is a risk that Aisha will be asked to pay the father's costs in relation to these applications and a judge will have to spend time untangling exactly what it is that Aisha wants to achieve and how best to do that in a way that is fair to both parties.

If Aisha had been represented, this situation would simply not have arisen. The extra cost to public services would not have arisen not to mention the emotional cost to Aisha and her child of trying to resolve issues without any support or guidance.

1.6.2 Immigration and Asylum Law

The LASPO reforms have led to costs being increased elsewhere in the justice system particularly in the proliferation of litigants in person. There has been a knock-on effect on the health service and also on social services. The National Audit Office and Public Accounts Committee have concluded that costs have increased elsewhere and there was an increase in the difficulties people face in obtaining help with their legal problems.

We have heard from vulnerable women unable to access immigration advice, who are trapped in cycles of exploitation and abuse for longer, increasing the burden on other services. In our experience children's services have been particularly affected.

We have also recorded that many callers to our advice line develop health problems due to their legal issues. Our immigration records illustrate that vulnerable migrant women fleeing violence who are unable to regularise their status without free legal advice will often develop mental health issues associated with trauma and will be forced to access care and support from their GPs and specialist health services.

Social services are fully stretched with the demand on their services and have an obligation to support 'children in need' under section 17 of the Children's Act. Many of our callers are forced to turn to social services for support when they are at crisis point because their immigration status prevents them from accessing public funds and work.

2. Scope

2.1 Family Law – Overview

As predicted, the removal of family law legal aid for most people has resulted in an increase in litigants in person (LiPs). It has been estimated that the increase of LiPs in the family courts had cost the Ministry of Justice £3.4million in 2013/14 and cases can take on average 50% longer than cases where both parties are represented.²⁴ This indicates that the MOJ has not met its objective to discourage unnecessary and adversarial litigation at public expense or deliver better value for money for the taxpayer. The objective of making significant savings to the cost of the legal aid scheme may well have been met, however, those costs appear to have simply been shifted to the courts and other public purses.

One way to mitigate the negative impact of the cuts on women and to achieve the objectives initially set for LASPO is to bring some areas of family law back into scope for legal aid.

Cases involving children

In the LASPO Equality Impact Assessment the Government states that it “*does not consider most private family law cases as high priority for legal aid compared with cases, for example, involving homelessness, domestic violence or liberty*”. Rights of Women disagrees with this assessment. Private law children cases routinely involve complex issues and the outcome of these cases have profound consequences for women and their families, for example:

- Removing the child from the care of a parent (for example, following an application for a child arrangements order for the child to live with the father, or an application for a special guardianship order by a family member)
- Relocating a child to another country
- Deciding whether it is in a child’s best interests to have contact with a father who may pose a risk of harm to the mother or the child

Private law children is by far the most common area of law that lawyers on our family law advice lines are asked to advise upon, which indicates that the issues are too complex for women to tackle without legal advice.

By restricting legal aid for private law children cases the Government is not only failing to promote the human rights of women, it is also failing to promote the rights of children²⁵. Restoring legal aid for private law children matters will help ensure that the best interests of mothers and children are properly advocated and promoted.

²⁴ House of Commons Library, *Litigants in person: the rise of the self-represented-litigant in civil and family cases* (HC (14 January 2016) Briefing paper 07113)

²⁵ See Joint Select Committee report on *Enforcing Human Rights*, para 57

Disputes relating to finance and property

Rights of Women disagrees with the Government's Equality Impact Assessment which states that "*these cases are routinely as complex as other areas*" (para 2.135). The MOJ's own research found that "*family finance problems were perceived to be complex to understand, and difficult – if not impossible – to negotiate without the assistance of a solicitor.*"²⁶

We receive calls from many women who are facing financial proceedings unrepresented and find the process extremely difficult. The women that we speak to on the line require advice about the entire process including advice about how to draft various court documents, what applications they can make, what powers the court has and what to expect at each hearing. Navigating this system without any support at all must be extremely daunting and, we suspect, many women choose not to do so because of how complicated it is.

The fact that financial proceedings were removed from scope makes little sense. A properly functioning statutory charge should make financial proceedings close to cost neutral. This suggests that the removal of financial proceedings from the scope of legal aid was a purely ideological cut to public services for those on a low income and not intended to meet any of the aims of LASPO. Removing an area of law from the scope of legal aid that does not save money seems grossly unfair, especially one which enables those on a low income to try to manage their financial future without burdening the state. This will not always be possible but in many cases, it is.

If money has been saved from this measure, that is a sign that the statutory charge is not working properly but the solution to this problem is to improve the functioning of the statutory charge, not to remove it from scope.

Cases which require expert evidence

There is currently no provision for the payment of expert reports in the family courts where neither party can afford to pay and neither party are eligible for legal aid. This can include DNA paternity reports, drug and alcohol reports, risk assessments and evidence from medical experts on injuries and mental health. In family proceedings involving domestic violence, expert evidence enables the court to ascertain issues like the risk posed to children by abusive parents. Expert evidence is of vital probative value to the courts in civil proceedings and can be essential to the judge's decision. By failing to provide funding for experts, the government is asking judges to make decisions which have huge implications on the lives of children and families without all the necessary evidence.

The cost of an expert is not the only barrier to achieving justice when an expert is required. Even the most capable LiP is likely to find it prohibitively difficult to navigate the convoluted law and procedure on obtaining permission to instruct an expert and instructing the expert. Further obstacles are likely to arise once the

²⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484182/varying-paths-to-justice.pdf

expert report has been provided, particularly for vulnerable LiPs who may find it difficult to understand the report and, potentially, cross-examine the expert.

Recommendation

Rights of Women recommends that legal aid be restored for cases where the court determines that an expert may be required.

2.2 Family Law – Domestic Violence Gateway

The Government repeatedly stated that legal aid would continue to be available for victims of domestic abuse both during the passage of the Bill and in its Equality Impact Assessment. Despite this, research by Rights of Women and others showed that the procedure regulations introduced by the Lord Chancellor excluded a significant number of survivors from the legal aid scheme²⁷. Following Rights of Women’s successful appeal on the restrictive evidence requirements of the domestic violence gateway²⁸, the Government reviewed the regulations and has significantly widened the types of evidence that can be accepted as evidence of domestic violence by introducing the Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2017 (the Regulation). Rights of Women is of the opinion that the Regulation requires some important amendments and this is explained further below.

Survivors who never report domestic violence

It is important to note, however, that even with the new Regulation, survivors are still required to provide some sort of evidence of domestic violence. The types of evidence that can be accepted are all predicated on the survivor having reported the abuse to a professional (such as the police, a medical professional or a domestic abuse service). In our experience, there are many survivors who don’t take any action to resolve their domestic abuse issues, and the first time the issue comes to light is during their conversation with their lawyer. They are some of the most vulnerable women in our society and most in need of legal representation, but they are falling through the gap. We have seen no evidence that the ECF scheme is providing a safety net for survivors who have never reported abuse.

Amendments to the Civil Legal Aid (Procedure) Regulations

Whilst we welcome the amended Regulation overall, we are concerned that legally inaccurate information has been included within the Statutory Instrument (SI) which could restrict access to survivors who are migrant women applying for leave to remain after July 2012. As the Government has acknowledged this error and now finds itself in the position of needing to amend its own legislation to address the error we have offered a number of other sensible suggestions based on our specialist expertise to improve the existing SI to ensure it is factually accurate, coherent with the accompanying guidance and aligns with the purpose of amending this LASPO

²⁷ *Evidencing domestic violence: nearly 3 years on*, Rights of Women, Women’s Aid, Welsh Women’s Aid – December 2015

²⁸ *R (Rights of Women) v Secretary of State for Justice* [2016] EWCA Civ 91

regulation in the first place: to enable full access to legal aid for survivors of domestic abuse in private family law proceedings. We have provided a full copy of our recommendations submitted to the MOJ in **Annex 1**

Lack of understanding amongst advice providers

Rights of Women is concerned about the number of survivors who are being misinformed about their eligibility for legal aid. This indicates a lack of understanding amongst both the general public and legal professionals about the availability of family law legal aid for survivors of domestic violence. For example, callers to our advice line have reported that they contacted a legal professional and were told that:

- legal aid is no longer available for family law (with no exploration as to whether she was a survivor of domestic violence)
- they cannot obtain legal aid to apply for a non-molestation order or a domestic violence injunction unless they have evidence from the domestic violence gateway (when in fact gateway evidence is not required to obtain legal aid for domestic violence injunctions)
- they did not have a type of evidence that would pass the Domestic Violence Gateway criteria when they did. In these cases the solicitor has either failed to discuss all the types of evidence that the survivor might have, or has failed to keep up to date with changing regulations and was not aware what evidence is accepted

These concerns are reflected in the Ministry of Justice's research on *The Varying Paths to Justice*²⁹ which suggests that "further work may need to be done to ensure that legal professionals are providing accurate advice and guidance on legal aid eligibility. The rules around legal aid and family cases need to be made clearer to legal professionals and people who have experienced domestic abuse as there was evidence that they are currently being misinformed, leading to assumptions that they are ineligible for legal aid."

This is connected to concerns about the sustainability of the current legal aid system as a whole. We believe that a contributing factor to this situation is that fact that it is paralegals, trainees and junior members of the profession who are screening these calls and do not have the experience or time to talk through the legal aid position with new clients. This is not work that they are paid for as it is at the stage before the woman seeking legal aid is a client. These issues are interconnected and should not be looked at in isolation.

2.3 Immigration and Asylum law

Rights of Women has opposed the withdrawal of legal aid from immigration law since it was originally proposed by government in 2010 and our experience of

²⁹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484182/varying-paths-to-justice.pdf

working with migrant women since the implementation of LASPO has only served to strengthen our opposition. We have already set out above our experiences of the impact of the removal of legal aid in relation to immigration matters on individual women and other key stakeholders. In this section we will address specific flaws in LASPO that have come to light since the passing of the Act.

Since the passing of LASPO there have been fundamental changes to immigration law and policy that call into question the continuing soundness of the Government's justification for removing legal aid from immigration cases.

On embarking on its reform of legal aid in England and Wales, key factors in the Government's approach to deciding which types of issues and proceedings should receive legal aid were the importance of the issue and the individual's ability to present their own case, the latter of which took into account the individual's vulnerabilities and the complexity of the law.³⁰

In assessing the importance of the issue in immigration cases, the Government's view was that as the issue arose from the individual's own free and personal choices they are less likely to concern issues of the highest importance and therefore routine public funding is less likely to be justified³¹. This simplistic analysis breaks down when viewed in the context of past and potential future high profile cohorts of cases. The immigration issues arising from so-called Windrush cases were certainly not attributed to the free and personal choices of those individuals affected. Furthermore, the more than 3.5 million EU citizens and their family members likely to be affected by the UK's withdrawal from the EU have made no free and personal choice to be stripped of their rights of residence.

In its assessment of the individual's ability to present their own case, the Government relied on its assertion that immigration cases do not generally involve complex legal issues to conclude that individuals in immigration cases are more likely to be able to represent themselves³². This assertion was incredible at the time it was made in 2010, however the changes to immigration law and policy since the passage of LASPO clearly make the assertion unsustainable. The complexity of immigration law is near impossible to dispute. The Law Commission's 13th Programme of Law Reform includes a project addressing the simplification of the immigration rules. Following extensive consultation, the Law Commission has described the problem it now seeks to address as follows:

"Hundreds of thousands of decisions are made annually under the Immigration Rules. Decisions which can be life changing for those seeking entry or leave to remain in the UK and their families.

³⁰ *Proposals for reform of legal aid in England and Wales*, Consultation Paper CP12/10, November 2010

³¹ *Ibid*, para 4.201

³² *Ibid*, para 4.202

But the Rules are widely criticised for being long, complex, and difficult to use. On 1 May 2017, the Rules totalled 1096 pages in length and their drafting is poor.

Many provisions are duplicated, cross references are often incomplete and some parts are incomprehensible.”³³

Furthermore, the contemplated legal proceedings in immigration for which legal aid was withdrawn by LASPO have now fundamentally changed. At the time LASPO was passed, it was possible to appeal a range of immigration decisions including appeals against refusal of visit, work and study visas. This is no longer the case. The Immigration Act 2014 made wide reaching changes to the immigration appeals regime and since 6 April 2015, putting asylum aside, rights of appeal in relation to immigration cases are limited to human rights and European rights grounds. All cases before the First-tier Tribunal (Immigration and Asylum Chamber) therefore now relate to fundamental rights whether they are asylum, human rights or European rights. The importance of the issues in these proceedings are self-evident.

Domestic Violence Rule

Victims of domestic violence have been left without access to legal aid to pursue their immigration cases in circumstances where they are unable to bring their case into the narrow criteria set out in Schedule 1 of LASPO. Paragraph 28 of Part 1 of Schedule 1 LASPO makes legal aid available to individuals applying for indefinite leave to remain in the UK on the grounds that they were given limited leave as the partner of another person present and settled in the UK and that relationship has broken down permanently as a result of domestic violence. It was the Government’s intention to make available legal aid for applications under the so-called domestic violence immigration rule. In making legal aid available in such applications the Government cited the *“real risk that without legal aid spouses will stay trapped in abusive relationships for fear of jeopardising their immigration status. The trauma that they may have suffered will often make it very difficult to cope with that type of application...”*³⁴ Paragraph 28, however, in its narrowly drafted terms, operates in such a way as to exclude victims of domestic violence who have grounds to apply for leave on the basis of domestic violence.

Rights of Women has advised a number of women with a form of leave as a partner who were trapped in abusive relationships because of domestic abuse. This has included women with leave as the pre-flight spouse of a refugee and women with leave as the dependant of a settled person who had obtained indefinite leave following a period of limited leave as a points-based system migrant. These women could not apply for indefinite leave under the so-called domestic violence rule because of its eligibility criteria requiring the applicant’s last grant of leave to have been under Appendix FM as the partner of a settled person. Notwithstanding this, we advised these women to apply for indefinite leave as a victim of domestic violence outside the immigration rules relying on complex legal arguments. These

³³ Law Commission Website, <https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules>

³⁴ <https://hansard.parliament.uk/Commons/2011-10-31/debates/1110315000002/LegalAidSentencingAndPunishmentOfOffendersBill#contribution-11103114000043>

women were not eligible for legal aid because they did not meet the narrow terms of paragraph 28. On more than one occasion we were dismayed that the lack of available assistance led our clients to return to perpetrators of abuse.

Paragraph 29 of Part 1 of Schedule 1 LASPO has been of minimal assistance to victims of domestic violence. It makes legal aid available to victims of domestic violence applying for an EU residence card after divorce where they have retained a right of residence on divorce. This provision was always bereft of value due to its misunderstanding of the nature of EU law rights. EU rights of residence are inherent rights that arise automatically on the fulfilment of specified criteria and do not require the issuing of residence documentation. Paragraph 29 makes legal aid available to victims of domestic violence only after their divorce has finalised and, by operation of law, their immigration status has automatically changed. This is simply too late – individuals need advice before they take steps to change their immigration status, not after the change has already taken place. Women call our advice line for advice on their right of residence even before they have separated from their abusive partner because, as the Government understood at the time of the passage of LASPO, victims of domestic violence often feel compelled to remain in abusive relationships where separation would jeopardise their immigration status.

Furthermore, paragraph 29 does not properly protect victims of domestic violence with EU rights of residence because of its narrow remit relating to applications under the retained right provisions at Regulation 10 of the Immigration (EEA) Regulations 2016. Victims of domestic violence who are family members of EU citizens are routinely denied their EU law rights and entitlements because they are unable to effectively assert their rights due to the abusive behaviour of perpetrators. In order to assert their rights they are required to evidence the nationality and economic activity of their EU citizen family member. This puts victims of domestic violence in a more vulnerable position because their abusive family member is in control of their right of residence, right to work and right to access services. All victims of domestic violence who are dependent on an EU citizen for their right of residence require advice and assistance in relation to residence card applications however paragraph 29 does not make legal aid available to them.

Case study - Alma

Alma is a non-EU citizen who is married to an EU citizen resident in the UK. During her pregnancy and following the birth of their child, Alma's husband became increasingly violent toward her. She attempted to flee on a number of occasions, even once staying in a women's refuge with her baby. When she was refused housing benefit on account of her immigration status she felt she had no choice but to return to her abusive husband. When the violence escalated she fled again and this time Children's Social Services agreed to pay for her accommodation in a women's refuge while she established her entitlement to benefits. Alma had a residence card as the wife of an EU citizen which had been issued several years previously, shortly after she entered the UK, however when she presented it to the authorities to access services, she was refused because she could not produce

evidence of her husband's recent work in the UK.

Rights of Women advised Alma that because she had lived in the UK continuously for more than five years as the wife of an EU citizen who had been working she had acquired a permanent right of residence under EU law which entitled her to welfare benefits and other services. It was her inability to produce evidence of her husband's work over a five-year period that meant she was being refused benefits.

Alma is entitled to a permanent residence card but legal aid is not routinely available to her to apply for one as her circumstances do not fall under the narrow remit of paragraph 29. Even if she divorced her husband, legal aid would still not be available to her because she would not need to rely on the retained right of residence provisions at Regulation 10 of the Immigration (EEA) Regulations 2016 as she had already acquired permanent residence.

Victims of trafficking

Paragraph 32(1) of Part 1 of Schedule 1 LASPO makes legal aid available to victims of trafficking in relation to an application for leave only once there has been a positive reasonable grounds or conclusive grounds determination. This means that victims of trafficking must consent to admission to the National Referral Mechanism before they can access legally aided advice.

This extraordinarily vulnerable group of individuals are at risk of removal from the UK on account of their insecure immigration status. Presenting to the authorities is evidently a step that increases the risk of removal significantly and there is understandably considerable reticence in doing so. In our experience, victims of trafficking express fear and reluctance to consent to being admitted into the National Referral Mechanism without first receiving impartial advice.

We have heard from frontline charities supporting trafficking victims and lawyers advising trafficking victims that it is not uncommon for the competent authority to take longer than the Government's recommended 5 working days to make a reasonable grounds decision and we have heard that in some cases many months can elapse before a decision is made leaving traumatised victims unable to resolve their immigration issues and causing a deterioration in the mental well-being of some individuals.

Once again, the legal aid made available to victims of trafficking under paragraph 32(1) is too late to be of value to many. If the Government is serious about protecting victims of trafficking it must accept that early impartial advice is critical to its response.

2.4 Welfare Benefits

Rights of Women does not operate any benefits advice services and yet our experience in operating our immigration advice line since LASPO is that there has been a significant increase in callers who seek advice from our immigration lawyers

following the refusal of welfare benefits. The benefit refusals in the cases we see relate to the immigration status of the applicant and therefore fall, to some extent, within our area of expertise.

LASPO removed legal aid from all welfare benefits cases below Upper Tribunal level. In practice, this means when an individual is refused a benefit she cannot get legal aid to assist her to challenge it in any internal review process (known as 'mandatory reconsideration') and thereafter to the First-tier Tribunal.

This lack of legal aid has led to devastating consequences for migrant women, in particular women with rights of residence and entitlement to benefits deriving from EU law. The vast majority of the welfare benefits queries we receive relate to European rights of residence and specifically refusals on the basis the applicant has not provided evidence that they have a qualifying right of residence. The reason this issue is most prevalent is the complexity of EU law. The effect is that these women are unable to access the support and services they need to exit abusive relationships.

Case study - Karolina

Karolina is an EU national who came to the UK as a child with her parents. She is now an adult and is estranged from her parents. Karolina has been subjected to sexual violence and domestic abuse and is homeless. Her application for benefits has been refused leaving her unable to access safe accommodation and support.

Rights of Women advised Karolina that she had a permanent right of residence in the UK, which entitled her to benefits. On reviewing her benefit refusal we identified basic, and sadly common, errors made by the benefit authority. The benefit authority had omitted to consider whether Karolina, though economically inactive herself, had a right of residence through her family relationship with her EU national parents who were working.

Karolina's level of trauma was too great to be able to represent herself and so Rights of Women advised her support worker how to challenge the refusal.

The mandatory reconsideration decision taken by the benefit authority also resulted in a refusal. While in this second attempt at decision-making the benefit authority had addressed the correct provisions of the law, it refused the application because Karolina was unable to provide evidence of her father's work for a five-year period.

It was necessary to appeal this decision. Before the appeal hearing, the benefit authority changed its decision after considering further evidence and making its own enquiries. This third attempt at decision-making correctly concluding that Karolina was entitled to benefits on account of her European right of residence.

Without the professional assistance Karolina received from Rights of Women and her support worker she would have been denied the benefits she was rightfully entitled to leaving her destitute, homeless and vulnerable to further abuse.

Our experience is of chronically poor decision-making amongst benefits authorities when asked to recognise European rights to social security is leading to dangerous consequences for women.

The most common scenario we regularly encounter is of victims of domestic abuse being denied benefits because they are unable to provide evidence of the perpetrator's work in the UK.

In justifying the withdrawal of legal aid from welfare benefits cases the Government declared welfare benefits cases to be *"of lower objective importance (because they are essentially about financial entitlement), than, for example, fundamental issues concerning safety or liberty."*³⁵ One might conclude that this betrays a deep lack of understanding of the role financial dependence plays in trapping women in abusive relationships. However this cannot be said of Government policy-making generally, which does, in other contexts at least, recognise the need for victims of domestic violence to access benefits in order to secure their safety. Indeed the premise of the immigration policy known as the 'destitution domestic violence concession' is just this. The concession invites victims of domestic violence to apply to the Home Office on a form which states: *'complete this form if you want to notify us that you require access to public funds (income-related benefits), in order to find safe accommodation and support yourself before you apply for indefinite leave to remain. This is on the basis that you have been a victim of domestic violence.'*³⁶ The Government's reasoning in withdrawing legal aid from welfare benefits, for victims of domestic violence at least, does not stand up to scrutiny when understood in the context of the critical role welfare benefits play in helping women exit abusive relationships.

Case study - Alma

Alma had made a series of applications for benefits and homelessness assistance after fleeing her abusive EU citizen husband, all of which had been refused because of her immigration status.

Alma's refuge support worker called our immigration advice line for help. We advised her on Alma's right of permanent residence and eligibility for benefits. As Alma was unable to give the benefit authorities evidence of her estranged husband's work to prove her right of residence it was necessary for her to rely on the benefit authorities to access government-held data on her estranged husband's work history. Despite Alma being in a domestic violence refuge, the benefit authorities had consistently refused to undertake any checks to help her prove her entitlement.

We advised Alma's refuge support worker of the issues to raise in the mandatory reconsideration, and when that was refused, also at appeal. Before the appeal

³⁵ para 4.217, *Proposals for reform of legal aid in England and Wales, Consultation Paper CP12/10, November 2010.*

³⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737469/dv-notification-form-31-08-18.pdf

stage, the benefit authority had refused to make its own enquiries into Alma's husband's work history citing data protection reasons. One week after the First-tier Tribunal directed the benefit authority to set out Alma's estranged husband's work history, the benefit authority reconsidered their refusal and granted her benefits. In their reconsideration decision, the benefit authority had checked its records and was able to confirm Alma's estranged husband was working making Alma eligible for benefits. This decision came more than 8 months after Alma applied for benefits.

For every case like Alma, who was lucky enough to have a refuge support worker with capacity to assist her with her benefits applications and who in turn was lucky to get through on Rights of Women's oversubscribed telephone advice line, there are undoubtedly countless others who are wrongly refused benefits but unable to access the advice and assistance they need to have these decisions overturned.

3. Early Advice

3.1 Overview

We agree unequivocally with the Law Society's findings³⁷ that the provision of early advice is crucial to prevent legal problems from escalating into a much larger problem and causing distress to people further down the line.

In 2014/2015 the estimated savings to the legal aid budget were £350 million. Annual savings of this scale could be reinvested into the legal aid scheme and utilised towards a programme of public education. Research reveals that the majority of the public do not seek help until they are at a critical stage either because they have not identified that a problem is legal in nature or that they do identify the problem as being legal but cannot afford legal advice. The majority of the public are not aware what is and what is not in scope.

The Law Society reports that one in four of those who receive early advice resolve their problems within 3 to 4 months and that for those who did not receive early advice it was not until 9 months after the issue first occurred that one in four resolved their problem. Those on modest income outside the means test were unlikely to seek advice.

The Legal Services Board³⁸ report that the most significant barriers in preventing consumers from accessing legal services are cost and lack of information, non-financial barriers included language barriers and not being able to identify service needs. Our experience with service users reinforces these findings particularly for our immigration service users.

The aforementioned statistics are particularly worrying and strengthen the case for public education on access to legal information and legal aid including how and where to access legal advice.

The MOJ's approach to the problem appears to be the digitalisation of the court system on the basis that it would be user-friendly. It is important to note that although useful for some consumers, it would not be accessible for certain individuals such as those with limited English or literacy difficulties and those that cannot access the internet.

Recommendation

We are not tied to the current model of legal help but are clear that any revised early advice scheme must be delivered by qualified legal professionals.

Any scheme should seek to avoid concentrating provision through a telephone

³⁷ Analysis of the potential effects of early legal advice/intervention, Ipsos Mori, November 2017 - www.lawsociety.org.uk

³⁸ <https://research.legalservicesboard.org.uk/analysis/demand/individual-consumer-needs/>

service alone as this is not accessible for vulnerable users.

Any scheme must resource and offer access to face-to-face support and include disbursements for interpreters or intermediaries.

Any scheme must be genuinely available across the whole of England and Wales.

3.2 Family Law

There is general lack of knowledge on the law and how it works to resolve disputes and problems within families. By removing family law legal aid for most people and not replacing it with any other source of reliable advice and information, the Government has left women grappling in the dark and significantly reduced their chances of achieving justice for themselves and their children. Early advice may be the most efficient way of helping families understand their options and achieve a swift solution³⁹. The Ministry of Justice's research on *The Varying Paths to Justice*⁴⁰ found that the participants in their survey lacked understanding on the law and legal options and that "*Professional advice was important and, when accessible and free, served as an enabler to help participants make a more informed choice of pathway*". Those that were able to obtain some free initial advice used it as an opportunity to find out what their legal rights were and find out whether it was worthwhile to go to court.

Simple legal problems become insurmountable when people do not understand the law behind the decisions they are making. School holidays are a straightforward example of where early advice to both parents to resolve disputes about contact arrangements and holidays abroad save public expenses further down the line. Before the school summer holidays, we start to receive calls from mothers who are struggling to agree arrangements for the children during the holidays with the father of their children. If both parents had legal advice, most of these issues would be resolved with limited expense and for the benefit of all parties, including the children. However, we are left advising mothers that if they are not able to obtain agreement to holidays, or the father will not attend mediation (a common response from unrepresented parties), then they either cancel their holiday or they make an application to the court at great public expense to HMCTS and great stress to the parents and children.

This is a seemingly trivial example of the benefits of early advice but highlights how important it is. Parents who require legal advice to resolve these seemingly straightforward issues will, undoubtedly, find it impossible to agree much bigger issues without legal advice. When people are given legal advice that they may

³⁹ Research undertaken by Ipsos-MORI in collaboration with the Law Society Research Unit shows a clear statistical link between getting early legal advice and resolving problems sooner: <http://www.lawsociety.org.uk/support-services/research-trends/research-on-the-benefits-of-early-professional-legal-advice/>

⁴⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484182/varying-paths-to-justice.pdf

struggle to achieve what they want in court proceedings, they are more inclined to agree issues. They cannot know that they will not necessarily achieve what they want in court without legal advice and, therefore, members of the public make applications to the family court expecting to achieve something that is unrealistic. Good legal advice before proceedings are started will not deter everyone from applying to court for orders but many people benefit from understanding the approach the court will take and what orders they are likely to achieve in order to encourage them to agree issues with their ex-partner without having to resort to court proceedings.

Early advice and mediation

Prior to the introduction of LASPO many organisations voiced concerns about the likely increase in litigants in person and the impact this will have on the family courts. The proposal was that legal aid would remain available for mediation for family law disputes and the intention was that everyone who did not qualify for a mediation exemption would attend mediation. The profession expected this policy to fail and it has. The number of mediation starts had been increasing steadily to a maximum of 15,357 in 2011-2012, and then declined when LASPO was reduced and every year to its lowest in 2017-2018 (6,288 mediation starts).

The reason why it does not surprise solicitors that this policy has failed is because despite explanations at the time, the Government seemed unwilling to understand the process of obtaining a legal aid certificate. Solicitors were the main source of referrals to mediators and every legal aid solicitor advised their client that they had to attempt mediation with the other side because if they did not, it was not possible to obtain a public funding certificate to make an application to court. Mediation has to be attempted and fail before a client could move on to the next level of legal aid. The advice provided by solicitors encouraged clients to mediate and then finalised any legal issues once agreements had been reached in mediation, such as the drafting of consent orders to ensure that agreements between parties were as enforceable as possible. The reintroduction of early family law advice would increase the uptake in mediation, and decrease the number of litigants in court, thereby reducing the cost to the public purse.

Early advice and survivors of domestic violence

There are and will continue to be survivors of domestic violence who do not have the DV gateway evidence (because they never reported abuse), and other groups of people for whom mediation is not safe or appropriate. For these groups of people it may be more appropriate and safer for the lawyer to attempt initial negotiations with the other party (for example in relation to child arrangements or finances) and this could be possible under early advice (as was previously the case under Legal Help).

There are other important steps that a lawyer could take to support and protect survivors under early advice such as:

- Assist the survivor in registering her matrimonial home rights or severing a joint tenancy
- Provide basic legal advice on her legal options (divorce, housing, finances) which provide her with the knowledge and confidence to leave an abusive partner
- Communicate with the perpetrator on behalf of the survivor in order to resolve some legal issues for which court proceedings can be avoided
- Obtaining evidence which complies with the Domestic Violence Gateway requirements can be difficult and complicated. Solicitors are reluctant to help in these circumstances as they do not have the capacity to carry out this work unpaid. The reintroduction of early legal advice should enable solicitors to assist women in securing DV gateway evidence.

3.3 Immigration and Asylum Law

The following case study is an example of where access to early legal advice would have, in our view, been efficacious for all involved. We appreciate it is lengthy, however this serves to demonstrate the complications and additional steps to the process that result from a lack of access to early advice.

Case Study – Mary

Mary called our advice line a number of times over a course of a nine-month period after receipt of negative immigration decisions and threatening communications from social services.

She entered the UK as a student but her leave was curtailed because she was too traumatised to continue with her studies due to domestic abuse. She has a child with a disability.

After separating from her abusive partner, she made several applications for leave to remain without the benefit of legal advice. Her application for discretionary leave had been refused and her appeal dismissed.

Sadly, Mary contacted us only at the point that the First-tier Tribunal (FTT) were considering her permission to appeal to the Upper Tribunal (UT). We advised her on the grounds of appeal and on further evidence that she could submit. We also advised her that the FTT often refuse permission to appeal to the UT but she would have the opportunity to appeal directly to the Upper Tribunal in the event of refusal. We also advised her to claim social services section 17 support.

Social services had started providing her with support but threatened to withdraw support when her application to appeal directly to the UT was pending. They informed Mary that they were going to withdraw support within the next month.

Mary was unable to get an appointment with a public law specialist at short notice, so we advised her to write to social services and gave advice on the content of the letter in explaining why support should continue.

As a result of our intervention support Mary was able to continue receiving section 17 support.

Subsequently the application before the Upper Tribunal (UT) was refused because the evidence that she presented had not been put before the FTT and the UT did not consider the decision to be unreasonable. We advised Mary to obtain her Home Office file and to contact a lawyer to consider her options. We provided her with details of legal aid lawyers.

She contacted all the lawyers that we had suggested and not one of them had capacity to take on her case.

Upon receiving threats from the social services that they were intending to withdraw support again, Mary hastily proceeded to make a weak application to the Home Office as she felt she had no other option. To do this, she first had an informal chat with a solicitor who advised her on how to make an application based on her long residence but informed her that it was unlikely to succeed as she didn't meet all the criteria and could be refused.

Before notification of the Home Office decision, she made an application for exceptional case funding (ECF). The form had been given to her by a charity and although they undertook ECF applications they didn't have capacity to take on her case. The first time she did not complete all the questions and was asked to complete another form. The second time she completed the form, the ECF team told Mary the application was premature and to wait until she had received the Home Office decision. She was given an appeal form and told us that she didn't understand the ECF forms and just completed them as best as she could.

Subsequently her immigration application was refused. We tried to reassure her that social services could not withdraw support as they continued to have an obligation to provide support. We advised her to obtain her Home Office file and to contact us upon receipt. We would try and find her an immigration provider or provide her with further assistance. The Home Office had told her that removal was imminent. We had been conducting a limited amount of ECF casework during that period but had reached capacity just before Mary called our advice line so we were unable to assist her.

This is a classic example of how an early intervention would have prevented the stress and trauma that Mary endured. We could have helped her to find a legal aid provider to complete the ECF form before she made her initial application. Mary had no alternative, in her view, but to make the application even though it was unmeritorious, to prevent her and her child falling into destitution and becoming

homeless. Mary was unrepresented at both the First-tier Tribunal and Upper Tribunal. She required expert evidence relating to her child's disability and lack of a support network in her country of origin. She could not obtain this evidence without legal aid and she did not have the funds to instruct a private lawyer.

Our experience is that immigration cases are simply pushed further down the line for resolution because people are unable to resolve their status earlier.

Some of our callers, who are unable to make immigration applications, are subsequently detained and then are compelled to initiate costly judicial review proceedings.

We also speak to women trapped in a desperate cycle of sending off unmeritorious applications to the Home Office that are rejected despite there being a strong underlying case that could be resolved with early immigration advice.

We refer back to the case study of Mary, where access to free legal advice at the point that she fled her abusive relationship may have resulted in an early resolution of her case. Her case was particularly complex and she had good human rights grounds for making an article 8 application on the account of her child's disability. She would have been able to make an application for public funds and provided that the no recourse to public funds condition had not been imposed on her leave she would not have had the need to access the immigration tribunal or to plead with the social services to support her, nor would she have had to endure the stress and trauma of having to make immigration and ECF applications that she did not have the expertise or knowledge to make.

Many of the women that call our advice lines have been granted permission to be in the UK as dependants of their partners and when they call our advice line they do not understand the implications of the relationship breakdown on their immigration status and they will often say 'but my visa doesn't run out until next year.' They are not aware that they are obliged to inform the Home Office on relationship breakdown and that their leave can be curtailed. Often ex-partners will report the separation, which can lead to a curtailment of leave without the caller's knowledge. This can have dire consequences for the caller such as having no permission to be in the UK or to work. Employers who would have carried out immigration checks when employing the applicant will be unknowingly committing a criminal offence by continuing to employ the individual.

Recommendation

We propose that the MOJ obtain the view of the Home Office and Tribunals on re-introduction of legal aid for human rights / EU rights claims.

The Law Society⁴¹ have commented that a need for advice arises due to a person's situation and not an area of law. We reinforce these comments and have noted that problems can occur in clusters. Callers who require immigration advice often need to access funds in order to live and pay their rent, they may also need advice on seeking protective orders against an abusive ex-partner on whom they were relying when they fled their home. Mary's case study is a good example of how problems can be clustered.

Community Advisers

The Legal Services Board have commented that community advisers could be a source of information and early advice.⁴² Of course we agree there are reputable 'community advisers' in the advice sector. However, individuals need to be wary and not feel pressurised into seeking advice from someone whom they see as their 'local community adviser' simply because it appears that is what others around them are doing. In some cases they will not be able to ascertain the quality of the advice being given. Frequently, in the case of our callers, these advisers have been recommended by friends or family members of the caller and therefore if the caller is not happy with the service, they may be inclined not to complain. Many callers to our advice line have often been advised by 'community advisers' and have not received positive outcomes.

We have liaised with both regulators and the voluntary sector on how these issues can be addressed, hence our contribution to the Bar Standards Board (BSB) publication⁴³ which was aimed at community support organisations supporting migrants with immigration issues. The guidance deals with identifying legal issues, choosing a provider, types of providers, the difference between regulated and unregulated and how it can be funded.

The majority of callers to our line indicated that lack of confidence is a barrier to accessing legal advice and that they feel much more confident in dealing with their immigration issues after speaking to us and just need to be pointed in the right direction.

Given the above challenges it is disappointing to note that the MOJ have not invested further funds into educating the public about how and where to access

⁴¹ <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>

⁴² *Lowering barriers to accessing services* – Lessons from other sectors 2016, https://www.legalservicesboard.org.uk/news_publications/publications/pdf/2016/20160331_Lowering_Barriers_Final_Report.pdf

⁴³ 'Guidance for professionals working with people with immigration and asylum issues. How to help clients navigate the legal system', June 2016, https://www.barstandardsboard.org.uk/media/1837121/immigration_guidance_for_professionals_report_-_for_web.pdf, leaflet for consumers https://www.barstandardsboard.org.uk/media/1837125/need_help_with_your_immigration_and_asylum_issues_-_for_web.pdf

legal information and advice. The Civil Justice Survey⁴⁴ indicated that many individuals were not aware of legal issues for which legal aid is available. This must be remedied.

Recommendation

The MOJ reinvest part of the savings to the legal aid fund into educating the public on how and where to access legal information and advice.

⁴⁴<http://webarchive.nationalarchives.gov.uk/20130403062222/http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/lsrc-report-csjps-wave-2.pdf>

4. Means test

4.1 Family Law

The gap between those who are financially eligible for legal aid and those who can afford to pay privately is huge.

"I earn a low income, yet I've been assessed as having too much disposable income (they don't take into account living costs for utilities etc...) and when you aren't eligible you're expected to pay full solicitors costs - there's no help anywhere in between. I've had to face my violent ex-partner in court twice now, and will have to continue to do so as I simply cannot afford costs"¹

A research briefing by the Public Law Project⁴⁵ examines the current means test and found that:

- None of the upper limits have been increased since 2009 despite inflation
- The amount deductible for rent for a single person with no dependants has not changed since 2001 despite the average rent increasing by 15.7% in the last 7 years alone
- Mortgage and equity disregards have remained at £100,000 since 2000 despite house prices increasing by over 200%
- In many cases households with disposable income above the upper thresholds will already be in poverty
- Families with children, and homeowners with low income are particularly prejudiced by the stringent means test

A thorough review of the way means is assessed for civil legal aid (not just the changes introduced by LASPO) is long overdue.

Income

The current means assessment calculation results in completely unrealistic calculations for disposable income. Income to cover costs for children (such as child benefit and child maintenance) is included in the calculation for gross income, yet expenditure on children is set as a standard fixed amount regardless of how much is actually spent on them. Essential and unavoidable living costs such as food, utilities and council tax are not deducted as outgoings. Employment related costs are capped at £45 per month, (in reality the cost of travel to work is often far higher) and rent for people without dependants is capped at £545, which is unrealistic across many parts of the UK. Research commissioned by the Law Society revealed that

⁴⁵ *The gap between the legal aid means regulations and financial reality*, Isaac Richardson, 12 July 2018 <https://publiclawproject.org.uk/resources/the-gap-between-the-legal-aid-means-regulations-and-financial-reality/>

people whose incomes are below the minimum for an acceptable standard of living in the UK today are ineligible for legal aid.⁴⁶

Capital

Since the introduction of LASPO, applicants who are in receipt of income-based benefits are automatically 'passported' for the income part of the means assessment, but are no longer passported for the capital part of the assessment. This means that a person in receipt of income support who owns a home will be expected to sell their home in order to pay for legal fees. Selling a home can take at least several months, which could be hugely detrimental especially for those who require urgent court orders. Apart from the delay, selling the home and spending all the money on legal fees could result in homelessness or increased reliance on social benefit. For the women who call our lines the reality is selling their homes or releasing capital from their home to pay for legal fees is simply not an option and they either have to proceed as litigants in person or do nothing to resolve their situation. Those who are on low incomes experience very similar obstacles to those on passporting benefits.

Recommendations

The Government reverse its decision to subject applicants who are in receipt of passporting benefits to a capital assessment

The Government remove the home in which the applicant lives from the capital assessment for applicants (regardless of whether they are in receipt of passporting benefits)

The current caps imposed on the mortgage, equity and subject matter of dispute disregards (currently all set at £100,000 each) are all unjustified and result in unrealistic assessments of a person's disposable capital. It is unclear why the mortgage disregard would be capped in any event as this is debt owed to someone else. Even if it were fair or realistic to expect people to sell their homes to pay for legal advice (which we do not believe it is), the assessment of disposable capital lacks any grounding in fact. Someone who owns their home but is in negative equity could easily be assessed as having a significant amount of disposable capital as a result of the cap placed on the mortgage disregard. This problem is particularly acute for applicants who live in areas where house prices are high and mortgages are likely to be far higher than £100,000. For many people, their home is the only capital they have.

Case Study - Sara

Sara (a survivor of domestic violence) and her husband jointly own their marital home. Sara fled the marital home and obtained shelter at a domestic violence refuge, where she stayed until the refuge helped her secure a one-year tenancy

⁴⁶ *Priced out of Justice? Means testing legal aid and making ends meet*, Professor Donald Hirsch, Loughborough University, March 2018.

with a housing association. The refuge paid her rent for a few months and the Local Authority Children's Services paid thereafter. She needs to make an immigration application for herself and her children in the UK. She is unable to make this application without assistance and cannot afford to pay for legal fees.

Sara has very little income and is well below the threshold for the income part of the legal aid means assessment. When calculating Sara's capital the LAA will look at the total value of the property. Mortgages will be disregarded from the total value but only up to a combined maximum of £100,000. The only other disregard that may be available to Sara is an equity disregard for her main dwelling home. However, as Sara no longer resides at the marital home and has a long-term tenancy agreement for her current place of residence, the LAA will not consider the marital home (which she was forced to flee following domestic violence) as her main dwelling home and the disregard will not apply.

The figures

Value of marital home:	£180,000
Outstanding mortgage:	£150,000
Actual equity:	£30,000
Sara's share:	£15,000

Sara does not have access to this capital as she jointly owns the home with her abusive husband who remains living in the property.

Disposable capital calculation

Value of marital home:	£180,000
Deduct mortgage disregard:	£100,000
Deduct equity disregard:	does not apply as she has moved out following domestic violence and has her own tenancy.

Capital assessment: £80,000

Sara 50% share of joint capital = £40,000

Sara is not eligible for legal aid.

In the example above, Sara is considered as having £40,000 to fund her own legal fees. However:

- a) The only way to release that capital is to sell the properties. It is unlikely that her husband will agree to selling the properties, and her only other option would be to apply for court orders to force the sale of the property which will take time and further expense.

- b) Even if the property is sold to release the capital, the mortgage cap has resulted in a wildly unrealistic assessment of her capital. In reality, the mortgage means that at most she has £15,000 in equity. Despite this being her only asset and having had to flee the marital home as a result of domestic abuse, she is not entitled to the equity disregard because she has been able to secure accommodation for herself and her children.

If the LAA had the discretion to apply the main dwelling home disregard when one of the joint owners is still living there then Sara would be eligible for legal aid.

There will be many other examples of circumstances where survivors cannot access income or capital as a result of domestic violence.

Recommendation

Rights of Women recommends that capital is disregarded when the home is jointly owned with the perpetrator of domestic abuse.

Contributions

Legal aid is not always free. Even those who are eligible for legal aid are likely to have to pay something towards their legal costs. Many applicants are asked to pay a contribution from their income or capital. Given the problems highlighted in the way disposable income and capital are calculated, the contributions applicants are expected to pay are often unaffordable. We hear from survivors who tell us they lost or refused legal aid because they could not afford the contribution⁴⁷. This reinforces our view that the regulations and guidance on means assessment require urgent review.

The National Centre for Domestic Violence (NCDV) collated data on legal aid eligibility during October and November 2014. The data showed that one in five of the 2,026 callers to the NCDV helpline who wished to apply for a non-molestation order, were unable to proceed with their application because they could not afford the legal aid contributions.⁴⁸

Gathering evidence of means

Applicants are required to provide evidence of their means such as bank statements, wage slips, benefit letters, mortgage or rent statements and childcare receipts. Many applicants, especially those fleeing domestic violence, do not have access to that evidence, resulting in the refusal of legal aid.

⁴⁷ Research shows that some households whose income barely covers basic living costs and cannot afford clothing, household goods and personal care items are expected to pay contributions to legal aid. *Priced out of Justice? Means testing legal aid and making ends meet*, Professor Donald Hirsch, Loughborough University, March 2018.

⁴⁸ <http://www.lawsociety.org.uk/Support-services/Research-trends/impact-of-legal-aid-thresholds-for-victims-of-domestic-violence/>

Case study – Lucy

Lucy is a survivor of domestic violence who seeks contact with her children. The children reside with the perpetrator. Lucy approached a legal aid provider who assisted her in applying for legal aid. The LAA demanded that she provide documentary evidence of the value of a property, the mortgage and bank statements. Lucy is not able to provide the evidence as she does not have access to these documents as they are in the perpetrator's possession. Lucy was informed that she is not able to access legal aid due to her inability to provide documentary evidence to complete the means assessment.

Current guidance allows solicitors to assist survivors of domestic violence in obtaining protective orders even if they are not able to provide evidence of means straight away. However, Rights of Women has received reports from solicitors that they have assisted women with obtaining urgent domestic violence injunctions and the legal aid they have granted using their delegated functions has been "nullified" (which means they will not get paid) because the survivor has been unable to produce evidence of her means when later requested by the LAA. This is extremely worrying, not least because it is likely to deter legal aid solicitors from assisting survivors unless they are able to produce evidence of means straight away.

If the Government is serious about its stated intention to provide legal aid to survivors of domestic abuse then it must accept that survivors of domestic abuse will not always be able to provide evidence of means, and that this should not preclude them from accessing legal aid.

Financial Abuse

There is no discretion allowed from women experiencing financial abuse in relation to the means test. The unfairness of this manifests itself in many different ways depending on the nature of the financial abuse. Here are some examples we have come across from our callers:

Example 1

The caller had been coerced into debt by a financially abusive partner. She was working and her gross income fell below the legal aid limits. However, her disposable income was assessed as above the limits despite the fact that she was making significant loan repayments to pay off her ex-partner's debt and had no disposable income at the end of the month.

Example 2

The caller failed the capital assessment due to jointly owning the family home with the perpetrator of financial abuse. However, she passed the income assessment largely because she had been forced to leave her job as part of her ex-partner's controlling and coercive behaviour resulting in her having no income to fund legal advice privately.

Even if the Legal Aid Agency recognises the financial abuse and gateway evidence is provided, which would mean these women would be eligible for legal aid, no account is taken of the financial abuse in the means assessment leaving many women without representation and unable to pay privately for advice.

5. Exceptional Case Funding Scheme

5.1 Overview of our ECF project

In this section we present data and findings from a Rights of Women research project [April 2017 – present] dedicated to examining the effectiveness of the Exceptional Case Funding scheme. Exceptional Case Funding (ECF) was put in place for individual cases that fall outside the scope of legal aid, but merit funding on human rights or EU rights grounds. Applications to the ECF scheme are handled by the Legal Aid Agency (LAA).

The ECF scheme is supposed to be accessible to laypeople (non-lawyers), however, it has been widely criticised for being too complex and time-consuming for individuals, particularly those that are vulnerable⁴⁹, and therefore failing to deliver justice to those that need it most. The Government responded to concerns about this in July 2015, stating the Legal Aid Agency *“is always looking to improve the customer and provider experience and has sought feedback on the form and will consider making changes to streamline the process.”*⁵⁰

Under this project we have been supporting women experiencing or at risk of domestic or sexual violence or abuse (DSVA) to make ECF applications to the Legal Aid Agency within the areas of family law and immigration. The research provides a snapshot across the current system over the course of just over a year (between August 2017 and August 2018) and provides a broad set of data and observations encompassing areas that include: how accessible the scheme would be to individuals making their own applications, the scheme’s responsiveness to individuals who are survivors of DSVA; the amount of work needed in the application process; and, Legal Aid Agency’s handling of cases and decision-making.

Additionally, although it was not an intended focus of our research, we have included observations about the ability of the current scheme to provide real access to justice by studying how effectively it functions ‘on the ground’ in practice with the legal practitioners that DSVA survivors encounter. This is in consideration of the well-known and documented reviews of the scheme that have concluded the lengthy process combined with a lack of payment for unsuccessful applications are a disincentive for practitioners to take cases on⁵¹. We cover our experiences with external legal service providers (legal aid and private), for example, regarding their awareness of the scheme’s availability and understanding of when a matter is in scope, reluctance to take ECF cases on in some cases and the lack of available providers to refer cases to after a successful ECF decision.

⁴⁹ For example, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Justice Committee Report, March 2015, para 47

⁵⁰ *Government Response to Justice Committee’s Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, July 2015, page 8

⁵¹ For example, *Cuts that hurt: The impact of legal aid cuts in England on access to justice* Amnesty International, October 2016

For ease, the evidence presented here focuses on one strand of the project only: ECF applications made in the area of immigration law. Our data and findings in this area provide ample examples of systemic problems we have observed across both strands of the project that illustrate how the ECF system is not fit-for-purpose. It is notable, however, that with specialist legal casework support from Rights of Women the women we supported were all successful in their applications for grants for ECF. This amounts to a 100% rate. We believe this demonstrates both the strength of applications by DSVA cases in meriting the granting of legal aid and the dedication of our team in preparing applications.

This is the first presentation of this data in the public domain. We will be publishing a detailed report containing the full data set, analysis, findings and recommendations of the project later in 2018.

5.2 Referrals to our ECF project

When we launched the project on 8 August 2017, we enabled external referrals by disseminating information about the project to both women’s rights and migrant rights organisations. We also accepted internal referrals from our advice line. However, because we had a long waiting list as a result of referrals from external providers and a finite number of women we could assist due to capacity, we were unable to refer all cases that would have been eligible from our advice line during the period.

	Immigration & Asylum Law
Number of referrals to ECF project	
Referrals from our advice line (internal)	11
Referrals from external providers	38
Total number of referrals	49
Breakdown of sources of referrals from external provider figures above	
DV professional or DV/women’s organisations	20
Non-DV specialist organisations	13
Statutory organisations	1
Law firm unable to cover area of law ECF application required in	2
Law firm able to cover area of law ECF application required in with legal aid contract	2
Total referrals from external providers	38

5.3 Assessment of referrals

Of the 49 immigration referrals to the ECF project, 18 were accepted and casework undertaken.

Outcome of assessment of referral by ROW	
Referral accepted and casework undertaken	18
Referral refused	31
Total number of referrals	49
Breakdown of refusals above by referral source	
Referrals from our advice line (internal)	6
Referrals from external providers	25
Total number of refusals	31

Of the remaining 31, the below reflect the reasons for refusal:

	Referrals from our advice line (internal)	Referrals from external providers
Breakdown of reasons for refusal for cases		
Legal aid lawyer already instructed at time of initial assessment	2	3
Lawyer already instructed at time of initial assessment (legal aid provider status unknown)	0	3
Matter in scope for legal aid	0	4
Legal aid provider already instructed at time of referral	0	3
Referral made by legal aid provider able to cover area of law ECF application in	0	2
ROW referred case to legal aid provider who agreed to do ECF	1	0
Individual decided to leave the UK and not pursue application	0	2
No capacity to act in timeframe required	0	2
Private lawyer already acting for client at time of referral and fees already paid	0	1
Another organisation assisting with ECF application at time of assessment	0	1
Weak merits of underlying case	0	1
Individual chose to pay privately	1	0
No application for leave necessary	0	1
Financially ineligible for legal aid	0	1
Weak ECF merits (client proven ability to represent self)	0	1
Unable to make contact with case	1	0
Individual submitted her own immigration application which was pending	1	0
Total	6	25

5.4 Needs and characteristics of our immigration clients

Level of legal aid needed

Of the 49 immigration referrals to the ECF project, 43 were for legal help – the level required for advice and assistance with making an application to the Home Office - and 6 were for controlled legal representation – the level required to assist with appeals before the First-tier Tribunal and Upper Tribunal. This matches our general experience from our advice line where the vast majority of women who contact us for assistance with their immigration problem need the lowest level of legal aid available to assist them to make an application to the Home Office.

Of the 18 immigration cases we accepted, 16 were for legal help and 2 were for controlled legal representation. The type of service they needed is broken down as follows (note: more than one type of service can be required by the same case):

Type of service needed	Number of women needing this type of support
Advice on the options available to resolve their legal problem	15
Help with making an application to the Home Office	16
An expert report(s)	4
Representation at court or tribunal	2
Preparation of appeal	2

Vulnerabilities of women we assisted to make an ECF application

The eligibility criteria for Rights of Women’s ECF project required all referrals to be of victims of domestic or sexual violence and abuse (DSVA). For this reason all of the women we represented had this vulnerability.

We recorded the following vulnerabilities in our caseload:

Vulnerability	Number of women with this vulnerability
Victim of domestic or sexual violence and abuse	18
English not first language	13
Mental health issues	11
Homeless / insecure accommodation	7
No source of independent income	6
Needs an interpreter	4
Physical disability	2
Victim of trafficking or modern slavery	2
Age under 25	1
Caring for children with complex health needs	2

In addition to being a victim of DSVVA, all 18 women we represented had one or more additional vulnerabilities. Of the 18 women we represented:

- 1 woman had 2 of the above listed vulnerabilities
- 9 women had 3 of the above listed vulnerabilities
- 5 women had 4 of the above listed vulnerabilities
- 2 women had 5 of the above listed vulnerabilities
- 1 woman had 7 of the above listed vulnerabilities

Importance of what is at stake for client

Of all the women we assisted to make applications for ECF, all needed legal aid to address issues of overwhelming importance to themselves or their children. Please see table below for a breakdown of issues:

We recorded the following issues in our caseload:

Issue	Number of women with this issue
Welfare of children	16
Access to accommodation / financial support / means of sustaining self and family	16
Right to remain in the UK	15
Physical and / or mental well being	16
Protection from violence or abuse	12

That welfare of children is a factor of such prevalence reflects the fact that 16 out of 18 of our immigration clients had one or more children.

All but two of our immigration clients needed help with their own immigration status. For this reason, without legal assistance to resolve their immigration problem their ability to work and / or access public funds was at stake. The two clients for whom this was not in issue had secure status in the UK which permitted them access to public funds, but needed legal assistance to apply for their children, from whom they were separated because of domestic violence, to join them in the UK.

The vast majority of our immigration clients were experiencing considerable stress and anxiety because of their immigration problem and any consequential problems such as destitution. 16 out of 18 specifically talked to us about how their physical and / or mental well being had been affected.

While all of our immigration clients were victims of domestic or sexual violence and abuse, we recorded 12 instances where protection from violence or abuse was an important issue in the case. Of the remaining 6, they had had no contact with the perpetrator of abuse for more than one year and were able to resolve their immigration case independently without relying on the perpetrator.

5.5 Applying for exceptional case funding

Preparing the ECF application – length of time and length of application

The amount of time it took for our caseworker to prepare the ECF application for submission varied between 6 hours and more than 12 hours. On average, our caseworker spent 9 hours preparing an application for ECF.

In addition, our caseworker spent a considerable amount of time speaking with clients to obtain the information needed to prepare the application.

Our caseworker's applications for ECF included the completion of the 11-page form CIV-ECF1 as well as the relevant means and merits forms i.e. form CW1 (for legal help) or CW2 (for controlled legal representation). In addition, she prepared a detailed cover letter addressing why the applicant was eligible for legal aid.

The cover letters ranged from 7.5 to 15 pages long. The average cover letter was 11.5 pages long giving some indication of the detail submitted with the application.

	Average length
Time spent by our adviser preparing each ECF application	9 hours
Number of pages to covering letter written by our adviser for each application	11.5 pages

When applications were submitted and decided

Of our 18 immigration cases, the first was submitted in mid-September 2017 and the last in mid-August 2018.

Our immigration applications were made and decided (and granted in all cases) in the following months:

Month ECF application made	Number of ECF applications made	Decision received (and ECF award granted)
September 2017	1	0
October 2017	1	1
November 2017	1	1
December 2017	5*	2
January 2018	1	3
February 2018	1	1
March 2018	2	2*
April 2018	1	2
May 2018	2	0
June 2018	0	3
July 2018	2	0
August 2018	1	3
Total	18	18

This equates to: a total of 12 applications made in the financial year 2017-18 and 6 applications in the financial year 2018-19. A total of 10 decisions granting ECF in the financial year 2017-18 and 8 decisions granting legal aid in the financial year 2018-19.

* One of these applications was submitted by a non-profit legal aid provider after we handed over our application to them to submit on behalf of the client. While the legal aid provider did not draft the application, it will nevertheless be recorded by the MOJ in its published statistics as an application made by a provider. As a result, 11 of 12 applications we prepared in 2017-18 and 9 out of 10 decisions granting legal aid we received in 2017-18 will be recorded as applications made by an individual in MOJ statistics.

LAA decision-making timescale

The LAA's ECF Provider Pack dated July 2016⁵² states that it aims to process an ECF application within 20 working days. If a case is urgent the LAA states that if they agree that the application is urgent, they will deal with the case ahead of others and make a decision within 5 working days.⁵³

Of the 18 applications we submitted, we requested an urgent decision in 6 of them. We describe these below as 'urgent cases'. The remaining 12 applications for which we did not request urgency are described as 'non-urgent cases'.

Non-Urgent cases

Of the 12 non-urgent applications we submitted, none were determined within the LAA's 20 working day timeframe. The decisions were received after:

Number of days LAA took to make decision (compared to the 20 day timeframe for non-urgent cases)	Number of cases that received decision within this timescale
22 working days	1
23 working days	1
24 working days	2
25 working days	1
26 working days	1
27 working days	3
29 working days	2
37 working days	1

⁵²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf

⁵³ The gov.uk page has similar guidance for individual applicants stating that applications are usually processed within 20 working days and if the LAA agrees a case is urgent, they will prioritise it and make a decision within 5 working days <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>

Reasons given for delay in these non-urgent cases were:

- In 10 of these 12 cases, when we chased the decision on or after the 20th working day, we were informed by the LAA that they were running behind schedule due to a backlog of cases. Our contact with the LAA during which we received this response ran from November 2017 to June 2018. On some occasions we were told the extent of their delays at that time, for example in January 2018 and May 2018 we were told they were running 10-15 working days and 10-12 working days behind schedule respectively. On other occasions we were given a less specific response, such as in March 2018 when we were told the ECF team was *'currently dealing with unprecedented amount of immigration applications'* or in June 2018 when we were told the ECF team had a *'higher than usual number of applications'*.
- In 1 of these 12 cases, no reason was ever given for the delay when we chased a decision.
- In 1 of these 12 cases in August 2018, when we chased the decision on the 20th working day, the customer services team informed us that the LAA's target date for decision was 25 working days. When we pointed to the gov.uk website and the ECF Provider Pack which still published the 20 working day timeframe, the call handler informed us the ECF team had been very busy and so the new target of 25 working days had been set to better manage our expectations. Our call to the LAA on the 20th working day was the first occasion the LAA had informed us of the change in timeframe.

Urgent cases

Of the 6 urgent applications we submitted, only one was determined within the 5 working day urgent timeframe

Number of days LAA took to make decision (compared to the 5 day timeframe for urgent cases)	Number of cases that received decision within this timescale
5 working days	1
6 working days	1
9 working days	1
21 working days	2
51 working days	1

The LAA did not give an early indication of whether they agreed to treat the application as urgent in any of our 6 urgent applications.

- 4 out of 6 of the urgent applications received no acknowledgment at all after submission.
- 2 out of 6 of the urgent applications were acknowledged by the LAA by email. However in both acknowledgment emails the LAA cited the non-urgent timeframe

for decision with no mention at all that the application had been submitted requesting consideration within the urgent timeframe. Astonishingly, in the most recent of these urgent applications submitted in July 2018 the LAA cited a 25 working day decision-making period - longer than the non-urgent timeframe.

The only case in which we ever received reasons for refusing to treat the application as urgent was Case study 4 (see below). In that case the LAA explained that an application for legal help to submit an application for leave is not usually considered urgent and that their urgent consideration is usually reserved for applications with imminent hearing dates or where there is an immediate risk of deportation.

This does not match our experience. 2 out of 6 of our urgent applications were decided within 5 and 6 working days respectively (Case studies 2 and 5 below). While the LAA never told us that they considered the first application as urgent, they did issue a decision within 5 working days. The LAA confirmed it would treat the second application as urgent on the 5th working day after we chased it and issued a decision on the 6th working day. The two urgent applications with an imminent hearing date were decided in 51 (Case study 3) and 21 working days respectively.

Case studies on application handling and decision-making timescales of the LAA

Case study 1

This was made as an urgent application.

The LAA did not acknowledge the request for urgency nor confirm whether it was accepted or not. After 10 working days, we contacted the LAA to chase a decision and were informed by the LAA's customer services team that they could find no record of the application having been received. The LAA call handler was unable to reach the ECF team by telephone and instead resolved our query by emailing the ECF team to ask them to contact us directly to confirm receipt of the application and when a decision would be received. 16 working days after submitting the application and a week after chasing the LAA, we had still received no response. We called the LAA customer services team again and were again informed that they could not locate any record of the application. Again, the LAA call handler's resolution of our query was to email the ECF team to ask them to contact us directly.

21 working days after submitting the application and after two attempts to chase, we had still not received any decision. We emailed the LAA's ECF team on their generic contact email address (which is the only email contact published by them in the public domain) requesting an urgent decision. We doubled our efforts by also calling the LAA customer services team who in turn emailed the ECF team on our behalf to raise our request for an urgent decision. That same day we received a call from a caseworker in the ECF team informing us that they had allocated the application to a caseworker for consideration that day and they hope to issue a decision within two days. They made no comment on our request for urgency and informed us that the 20 working day timeframe is usually met but that this was a

busy period.

We received a decision that same day, 21 working days after the urgent application was submitted.

Case study 2

This was made as an urgent application.

In requesting urgency we cited the detailed reasons explaining relevant deadlines for the applicant. We argued that without urgent consideration, the grant of ECF would be too late to instruct a legal aid provider to properly prepare an application needed by the applicant.

On the same day of submission, we received an email from the LAA acknowledging the application and advising that we could expect to receive a decision within 20 working days. The LAA did not mention our request for urgency.

Three days later we wrote to the LAA ECF team by email asking it to acknowledge our request for urgency and make a decision within 5 working days. We received no reply to our email.

The LAA granted ECF on the 5th working day.

Case study 3

This was made as an urgent application. Unlike the other applications for exceptional case funding, Rights of Women did not submit this on behalf of the individual. The applicant was able to secure an offer of assistance from a non-profit legal aid provider in her area. As we had already prepared most of her ECF application and the legal aid provider did not have capacity to work on it we agreed to finalise the application and send it to the legal aid provider for submission, which they did.

The non-profit legal aid provider received confirmation of the grant of ECF 51 working days after this urgent application was submitted and more than 3 weeks after the tribunal process that the applicant had needed the ECF for taken place. Despite not knowing whether it would receive funding for its work, the non-profit legal aid provider had nevertheless acted for the applicant.

The ECF team responded to the application 27 working days after it was submitted to request further information and again at 30 working days after submission and several days before the applicant's appeal hearing.

The grant of legal aid was finally confirmed 51 working days after the application had been submitted. As the grant of ECF was backdated it could be relied upon to fund the appeal hearing.

Case study 4

This was made as an urgent application.

In requesting urgency we cited the detailed reasons explaining relevant deadlines for the applicant.

We submitted the application for ECF however received no acknowledgment email from the LAA. On the 4th working day after submission we wrote again to the LAA by email asking for confirmation whether they had agreed to treat the application as urgent and make a decision with 5 working days. We received no reply to this email. On the 6th working day after submission when no decision had been received, we wrote again to the LAA asking for a response by the close of business the following day. When no response was received by the deadline, we referred the case to a specialist legal charity with expertise in legal aid to send a letter before action in relation to judicially reviewing the unreasonable delay.

On the 9th working day we received a letter from the LAA granting legal aid.

Case study 5

This was made as an urgent application.

In requesting urgency we cited the detailed reasons explaining relevant deadlines for the applicant.

When we submitted the urgent application for ECF we did not receive any email from the LAA acknowledging its receipt. After 2 working days we wrote to the ECF team by email asking for confirmation whether they agreed to treat the application as urgent. We received no reply to our email.

On the 5th working day after submission we called the customer services team to chase a decision. The call handler we spoke with was unable to find any record of our application on the spreadsheet they had access to – they explained that it was because the spreadsheet only recorded cases lodged 10 days or more ago therefore it could not show any details of applications lodged in the meantime. The call handler called the ECF team and following their discussion asked us to explain the reasons for urgency – we repeated the reasons for urgency as set out in our application cover letter and in the email we sent lodging the application. The call handler informed us that the ECF team would contact us directly.

Later that day we received an email from the LAA confirming they were treating the application as urgent and they would aim to make a decision within the following days. The following day, the 6th working day after submission, we received a letter from the LAA granting ECF.

5.6 LAA 'customer service'

Acknowledgment of applications

Applications for ECF can be submitted by email to contactECC@legalaid.gsi.gov.uk or by post to Exceptional Case Funding Team (ECF), Legal Aid Agency (7.38), 102 Petty France, London SW1H 9AJ. The contact details are available on the gov.uk website.

To benefit from immediate delivery and to reduce the cost of having to send applications by recorded or special delivery, Rights of Women opted to lodge ECF applications by email in all cases.

After sending an application by email to the ContactECC email address, the sender receives an automatic reply. The automatic email makes no attempt to acknowledge receipt of ECF applications.

Our experience of receiving acknowledgment emails from the ECF team with confirmation of their timescale for determining the application was mixed and inconsistent.

- Overall we received acknowledgement emails with a timescale for decision in 7 out of 18 of our applications.
- Of the 12 non-urgent applications we submitted, we received acknowledgement emails with a timescale for decision in 5 cases.
- Of the 6 urgent applications we submitted, we received acknowledgement emails with a timescale for decision in only 2 cases and they both contained an expected date of decision within the non-urgent timeframe and failed to acknowledge our request for urgency.

The customer services team

The contact telephone number for the ECF team published on gov.uk and given to applicants in email correspondence from the ECF team lists the telephone number 0300 200 2020 which is the LAA's general customer services team.

We understand that prior to our project commencing there was a dedicated telephone number for the ECF team which would allow direct communication, however it was closed down in early 2017 since which time it has been impossible to speak directly to the ECF team. Throughout our work, our only option if we wanted to speak to the LAA was to call the customer services team.

The customer services team acted as a 'go between' with the ECF team. Whenever we called them to enquire about the progress of an ECF application, the customer services team had three options to resolve our query:

1. Pass on information from their spreadsheet which contained a limited amount of information about ECF applications (see further details below in 'chasing decisions')
2. Call the ECF team on our behalf to enquire about the progress of application
3. When they could not reach the ECF team by telephone, send an internal message to the ECF team asking them to contact us about the progress of an application. We were never consistently advised whether there was a time period within which we could expect a response. Some call handlers gave no time limit, some said 2 days, others said 5 days.

Generally our experience with the customer service team was of call handlers following the above practice with little difficulty, however we also experienced some more unhelpful services:

- One call handler told us they could not access the ECF spreadsheet as they had not been in post long enough and only senior call handlers were permitted access.
- We were told on at least two occasions from different call handlers that they cannot share information with us without our client present for data protection reasons. While we had sent signed authority with our applications it would appear the customer services team did not have access to it.
- Occasionally we received incorrect information. For example, one call handler informed us the 20 working day service standard did not apply to ECF cases.

Invariably on each occasion we contacted the customer service team we spent a period of time on hold waiting for an available call handler. Our experience was of waiting 10-15 minutes maximum for calls to be answered.

Chasing decisions

On each of the non-urgent cases, our caseworker chased the LAA for a decision after the 20 working day timeframe had passed without a decision having been received.

The only mechanism to contact the LAA to chase decisions was either to call the customer services team on 0300 200 2020 or to email the ECF team using the ContactECC email inbox. From our experience, our emails to the Contact ECC inbox were never answered until a call had been separately logged with the customer services team and so our primary means of communication was usually to call the customer services team.

We soon learned through experience that the customer services team does not have access to all the LAA's data on ECF applications.

Customer service team call handlers told us that they cannot view all the information available to LAA staff in the ECF team because the teams use different systems. The Customer service team call handlers can only access a basic spreadsheet from which

they are able to view a limited amount of information. This information appeared to be limited to whether the application has been received, what the target date for completion is, whether the application has been through initial means testing and whether a decision has been made. For any further information the customer services team need to contact the ECF team internally, which they would commonly attempt to do in order to seek a resolution to our query. The customer service team commonly found it difficult to reach the ECF team by telephone and in the majority of cases their calls were not answered. When unable to reach the ECF team the call handler told us the only resolution they could offer us was to send an internal message to the ECF team asking them to contact us directly with an update on progress of the case.

Our experience of the response by the ECF team to these internal messages from the customer services team was mixed. Of the 12 non-urgent cases we submitted, 8 were chased via the customer services team who sent internal messages to the ECF team asking them to respond directly to us. In 4 of these 8 cases never received any reply from the ECF team until the decision was issued (3-5 days after chasing). In the other 4 cases we did receive responses from the ECF team informing us of delays in their decision-making.

Our experience of emailing the ECF team directly without first going through the customer services team had less success. We attempted this in 2 of the 12 non-urgent cases. We received no reply to our emails sent to the ContactECC inbox in either case and had no contact from the ECF team until the decisions were issued (2-3 working days later).

In 2 of the 12 non-urgent applications we submitted, the customer services team was able to explain the delay to us directly, in both cases by getting through to the ECF team themselves during our call.

5.7 ECF application outcomes and post-grant work

Application outcomes

All immigration applications were granted ECF representing a 100% success rate.

Referrals to legal aid providers

Of the 18 immigration cases, we assisted the clients to secure a legal aid provider by making referrals in 15 cases.

The reasons why we did not participate in the search for legal aid providers in 3 cases were as follows:

- One client had secured the offer of assistance from a non-profit legal aid provider before we had submitted the ECF application.

- One client had secured the offer of assistance from a legal aid provider subject to her being granted ECF. Once ECF was granted we were able to refer the case directly to the legal aid provider who had previously accepted subject to funding.
- One client's support worker had secured the offer of assistance from a legal aid provider subject to ECF being granted and so we referred directly to that provider once funding was granted.

Of the 15 cases in which we assisted the clients to find a legal aid provider following the grant of legal aid, we were able to secure representation in all cases after considerable time and effort was spent in making referrals and chasing responses.

In most cases it was necessary to make referrals to multiple providers in order to secure representation:

Number of referrals made before securing representation	Number of cases this applies to
One legal aid provider	2
Two legal aid providers	2
Three legal aid providers	4
Four legal aid providers	3
Five legal aid providers	3
Eight legal aid providers	1

The length of time it took to secure an offer from legal aid providers to accept the case varied. Some providers responded immediately to our referrals, and in other cases there was a longer wait:

Length of time before securing representation	Number of cases this applies to
Within a week (0-5 working days)	8
Within 2 weeks (6-10 working days)	1
Within 3 weeks (11-15 working days)	5
Within 5 weeks (21-25 working days)	1

The above figures relate to the length of time between our referral and the offer to take a case from a legal aid provider. The figures do not represent the length of time until the client was offered a first appointment with the legal aid provider who accepted the case.

The majority of cases had an initial appointment with their legal aid provider within 2 weeks of their having accepted the referral. However, there were instances of considerable delays between providers accepting the referral and offering the client an initial appointment.

The length of time between the legal aid provider accepting the referral and the initial appointment with the client:

Length of time between referral acceptance and initial appointment	Number of cases this applies to
Within 2 weeks (0-10 working days)	9
Within 4 weeks (11-20 working days)	4
Over 4 weeks (21 working days plus)	2*

* Both clients who had to wait more than 4 weeks for an initial appointment had to wait a considerable time – one waited 50 working days (10 weeks) and the other 54 working days (over 10 weeks). In both cases this was attributed to the legal aid provider being busy. In both cases our resources were invested in chasing the legal aid providers who had already accepted the referrals to progress the matter.

Of the 53 referrals we made to legal aid providers relating to 15 of our cases the responses we received were as follows:

Length of time between referral acceptance and initial appointment	Number of cases this applies to
Rejecting referral - no capacity	19
Accepting referral	22*
No reply	9
Rejecting referral - merits of underlying immigration application	2**
ROW withdrew referral after another provider accepted	1

*In 7 of these acceptances, the legal aid provider accepted the referral after the case had been picked up by another provider. In the remaining 15, the legal aid provider was instructed in the case.

**Both merits rejections related to the same case.

5.8 Findings and conclusions

5.8.1 Key findings summary

Finding 1: Prevalence of multiple vulnerabilities

All of the women in our immigration caseload were victims of domestic or sexual violence and abuse, this was part of the eligibility criteria for our service.

Unsurprisingly for this group of migrant women, there was also a high incidence of additional vulnerabilities. All of the women had one or more additional vulnerabilities.

Most common amongst the additional vulnerabilities were having English as an additional language, mental health issues, homeless / insecure accommodation and no source of independent income. Language barriers, mental health problems and

destitution are, in our experience, issues affecting the overwhelming majority of migrants with insecure immigration status.

Finding 2: Legal aid is needed to address issues of overwhelming importance to individuals and society

Exceptional case funding is only available where it is established that a failure to provide legal aid risks a breach of an individual's human rights or enforceable EU rights.⁵⁴

All of the immigration cases in our project therefore engaged the women's human rights or EU rights and in each case we successfully demonstrated why their rights would be breached if legal aid were not made available.

In addition to each case engaging the applicant's human rights or EU rights, the cases raised issues of overwhelming importance including the welfare of children; the applicant's access to accommodation, financial support and the means of sustaining herself and any family; the applicant and any children's right to remain in the UK; the applicant and any children's physical and / or mental well being; and the protection from violence or abuse.

Finding 3: Immigration cases engaging human rights and EU rights are inherently complex

In the first quarter of 2018, 59% of all human rights appeals and 52% of all EU rights appeals in the First-tier Tribunal (Immigration and Asylum Chamber) were granted. This tells us that Home Office officials, who receive training on immigration law, cannot make the correct decision in the majority of human rights and EU rights cases they determine. Yet, the Government, in removing legal aid from human rights and EU rights cases holds the view that there is nothing inherently complex about them that individuals cannot represent themselves. These are two matters of fact that contradict one another.

The complexity of these cases do not challenge only Home Office decision-makers. Home Office policy makers have themselves demonstrated time and again that their approach to human rights claims is incompatible with the Human Rights Act 1998. It was only last year that the Supreme Court in the case of MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10 declared the Home Office's own approach to evaluating family life claims outside the rules under Article 8 ECHR was unlawful. Additionally the Supreme Court declared that the immigration rules and guidance had failed to take proper account of the Home Office's duty under section 55 Borders Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children when making decisions that affect them.

The complexity of immigration law is roundly accepted outside of government. The Law Commission's 13th Programme of Law Reform includes a project addressing the

⁵⁴ Section 10, Legal Aid, Sentencing and Punishment of Offenders Act 2012

simplification of the immigration rules. Following extensive consultation, the Law Commission has described the problem it now seeks to address as follows:

“Hundreds of thousands of decisions are made annually under the Immigration Rules. Decisions which can be life changing for those seeking entry or leave to remain in the UK and their families.

But the Rules are widely criticised for being long, complex, and difficult to use. On 1 May 2017, the Rules totalled 1096 pages in length and their drafting is poor.

Many provisions are duplicated, cross references are often incomplete and some parts are incomprehensible.”⁵⁵

Judges have added their voice to the chorus of criticism. Sir Ernest Ryder, the Senior President of Tribunals described the complexity of immigration law when giving evidence to the Constitution Committee of the House of Lords in December 2016:

“We have had eight immigration Acts in 12 years, three EU directives and approximately—my apologies for being approximate—30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in—if I may say so—rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant whose first language is not English and you have no recourse to public funding, because this is an immigration case, not an asylum case, your chances of accessing any of that material and putting it together in a coherent way are negligible.”

In all of our 18 immigration cases, it was beyond question that the complexity of the issues in the case alone were such that the applicants could not effectively represent themselves.

Finding 4: A need for early advice and assistance

88% of our immigration referrals and 89% of our immigration casework was in relation to the level of legal aid known as ‘legal help’. This is the level of service which provides for legal advice and assistance and, in an immigration case, would cover the making of an application to the Home Office.

Without access to legal aid for early advice and assistance we have seen that our clients’ problems become protracted and more complex as they seek to represent themselves despite being ill equipped to do so.

⁵⁵ <https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/>

We have also observed with concern amongst our client group the exploitation of vulnerable migrants who are victims of unscrupulous immigration advisers providing a poor service or people providing an unregulated and therefore unlawful immigration service.⁵⁶

Finding 5: A lack of awareness of what is ‘in scope’ of legal aid

More than one in ten of all the referrals we received from external organisations seeking immigration ECF for their service users were assessed by us to not require ECF because the matter was in scope of legal aid.

There evidently remains a considerable degree of confusion about what is in scope of legal aid. While the complexity of LASPO and the lack of accessible information for non-legal professionals and the public certainly play a large role in this confusion, a critical issue is also the lack of understanding amongst legal professionals and particularly legal aid providers.

Case study

We received a referral to our ECF project from a professional in a domestic violence charity. The professional had already sought immigration advice from a legal aid provider before making the referral to Rights of Women. Following a consultation with the client, the legal aid provider advised her that she could make an application for indefinite leave as a victim of domestic violence but that she would have to pay privately. As the client was plainly financially eligible for legal aid, we can only infer from their response that the legal aid provider assessed the matter to be out of scope.

As the client was unable to pay for legal representation, the referrer sought a further opinion from a non-profit immigration charity that recommended a referral to our ECF project.

After taking instructions from the client and reviewing relevant documents it became apparent to our caseworker that the client had entered the UK with leave (albeit outside the rules) as the wife of a British citizen and that their relationship had broken down as a result of domestic violence. This made her eligible to apply for indefinite leave as a victim of domestic violence, an application which was in scope of legal aid under paragraph 28, Schedule 1 of LASPO.

Alongside rejecting the referral and signposting to legal aid providers, we gave immigration advice to the client and her support worker which included detailed guidance on the relevant parts of LASPO and why the matter was in scope so that they could challenge any further rejections by legal aid providers.

⁵⁶ It is a criminal offence under section 91 of the Immigration and Asylum Act 1999 to provide immigration advice or services unless qualified to do so under section 84 of the same Act. For non-legally qualified persons this generally requires registration with the Office of the Immigration Services Commissioner.

Finding 6: A lack of awareness of the availability of exceptional case funding

There is a lack of understanding generally about the availability of exceptional case funding amongst the public, non-legal professionals and, to a lesser extent, legal professionals.

The overwhelming majority of our advice line callers are unaware of the availability of exceptional case funding, this is the case notwithstanding their previous contact with non-legal professionals, for example social workers or domestic violence support workers, as well as other legal professionals.

It is common for callers to our advice line to have had contact with immigration advisers before seeking advice from us. Their experience is of being informed that legal aid is not available for their case and / or receiving quotes of private fees. Generally, callers will hear about the availability of exceptional case funding for the first time when we advise them on it.

Those referred to our ECF project had similar experiences. Despite having contact with immigration lawyers their common experience is of being informed that legal aid is not available for their case and / or receiving quotes of private fees. Such responses from immigration lawyers have included those who are legal aid providers.

We can only conclude that this lack of awareness of the availability of ECF has contributed to the low number of applicants for exceptional case funding.

Finding 7: A lack of help to apply for exceptional case funding

Legal aid providers

Legal aid providers are the most obvious party to apply for exceptional case funding for those who need it. They are ideally equipped because they receive queries from those who need legal aid to solve their immigration problem, are qualified to apply the relevant means and merits tests for legal aid and are qualified to identify the human rights / EU rights issues in the case as well as the complexities in the case. Despite this, the number of new ECF applications by providers in 2017/2018 was less than 1200. While the figure is certainly an increase since the implementation of LASPO, it remains considerably lower than expected.

Rights of Women is aware of very few legal aid providers who are willing to undertake exceptional case funding applications. Indeed, as referrals to our ECF project demonstrates, legal aid providers were in some instances referring cases to us to complete the exceptional case funding on their behalf. One legal aid provider of the providers who referred to us informed us that their firm does not do exceptional case funding applications. Another provider we spoke to about ECF applications during the project informed us that they would only apply for exceptional case funding at appeal stage.

The MOJ does not publish data on the number of legal aid providers who apply for exceptional case funding and the proportion of their legal aid work this represents. This data must be analysed and if, as is expected, it reveals a low number of providers undertaking exceptional case funding applications, the reasons behind this must be studied and countervailing measures put in place to address the barriers preventing legal aid providers undertaking this work.

Without wishing to pre-empt this important study, our experience in the legal sector tells us that in an environment in which legal aid providers are already expected to undertake a huge amount of work either unpaid or at shamefully low rates of payment there is simply no room within the fragile business model of a legal aid practice to do more unpaid work (applying for ECF) in order to bring in more legal aid work at such a low rate of payment (the immigration non-asylum legal help standard fee is £234). Applying for ECF is entirely unpaid if the application is refused. If ECF is granted and it is backdated by the LAA, time spent on the ECF application can be charged however the LAA's Costs Assessment Guidance will not fill legal aid providers with confidence that all the work they do an ECF application will be reimbursed. The 'Costs Assessment Guidance: for use with the 2018 Standard Civil Contracts' states at paragraph 2.60:

*"A claim may be made for completion of application forms for Controlled Legal Representation in Immigration cases and for licensed work certificates (in the latter case, time will be claimed under the certificate itself following a delegated, telephone or faxed application grant of legal aid, otherwise under legal help; see further Part C, section 10.15). **The basic time standard for such forms is 30 minutes, but more may be payable in complex cases, particularly if a substantial statement of case is required and where the application is for emergency legal aid or is to report a grant of emergency legal aid by delegated functions.**"*

Unfortunately, this guidance does not explicitly refer to completing ECF applications however one might hope that an ECF application would be recognised by the LAA as being a 'complex case' requiring a 'substantial statement of case'. Even if this were accepted, the promise is to pay more than 30 minutes, not how long it takes to do the work. As our above data shows, our caseworker spent on average of 9 hours preparing an ECF application. We think it unlikely the LAA would pay providers for the actual time it took them to prepare an ECF application so that, as in so many other areas, this again would be an area they are expected to absorb unpaid work.

One way in which legal aid providers have sought to address the problem they face by the economically unreasonable premise of the ECF scheme is to charge for their work in completing ECF applications. While there can be no criticism of legal aid providers who offer this service for a fee as long as they subsequently refund clients if the ECF application is successful, it reveals an inherent and wholly unreasonable premise in the Government's ECF scheme. There is a provision within the legal aid contracts with providers that states:

“You may charge privately for civil legal services which are not described in Part 1 of Schedule 1 to the Act (including for making an application for a determination under section 10 of the Act). If the case later becomes an Exceptional Case you may not charge privately for any work which becomes payable under Legal Aid pursuant to a determination under section 10 of the Act. For the avoidance of doubt, where you have already received payment from the Client for work which has become payable under Legal Aid pursuant to a determination under section 10 of the Act, you must refund such payment to the Client.”⁵⁷

When the Government introduced the ECF scheme, it envisaged legal aid providers charging clients, who are financially eligible for legal aid and thus deemed to have insufficient resources to pay for legal assistance, to access legal aid through the ECF scheme. This can also be interpreted as the Government intending those who wanted to apply for ECF to pay to do so in the first instance, and bear the full cost of doing so if they were refused legal aid.

5.8.2 Conclusions about accessibility of scheme in relation to individuals

Legal aid providers are not meeting the demand for making exceptional case funding applications. This leaves individuals with the options of making their own application for exceptional case funding, finding a third party to help them apply or not applying for legal aid at all.

Wherever there is a crisis left behind by government cuts, there is a space in which civil society and others seek to work in the interests of vulnerable people. This has been true of the access to justice crisis left behind by LASPO. One response from charities, universities and pro bono lawyers has been the creation of projects that assist individuals to apply for exceptional case funding. Rights of Women’s ECF project ran for one year doing just this from August 2017 – September 2018. Coram Children’s Legal Centre has been offering this service for longer. The Public Law Project currently has a list of seven organisations on its website offering assistance with exceptional case funding applications⁵⁸. There are additionally various clinics of university law students offering assistance e.g. City, University of London.

While these services can be enormously beneficial as evidenced by our 100% success rate in obtaining ECF for our clients, this is little surprise when the service is provided by legally trained professionals investing the resources needed to prepare comprehensive ECF applications. These free to use services however are unable to meet demand, illustrated by the number of referrals from Coram Children’s Legal Centre we received notwithstanding its own internal expertise. Moreover, these services are not sustainable illustrated by the temporary duration of our own ECF project.

⁵⁷ paragraph 1.38 of the 2018 Standard Civil Contract Specification, paragraph 1.37 of the 2013 Standard Civil Contract Specification, paragraph 1.50 of the 2010 Standard Civil Contract Specification

⁵⁸ <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/legal-aid/exceptional-funding-project/database-of-organisations-supporting-ecf-applications/>

While there is a procedure for individuals to apply for ECF without a legal aid provider or other assistance, the number of individual applicants is low. Ministry of Justice statistics claim that in 2017/18 there were 438 applications for ECF across all categories of law by individuals, compared with 2190 applications made by legal aid providers. This equates to around 17% of all ECF applications in 2017/18 made by individuals.

More significantly, the MOJ statistics tell us that of 254 individual applications determined in the immigration category, 170 were granted – a success rate of nearly 67%. The same statistics tell us that of 1246 provider applications determined in the immigration category, 884 were granted – a success rate of nearly 71%. On first sight, this would suggest that applications made by individuals were as likely to succeed as applications by providers. On closer consideration, we know this not to be the case.

Any claim that these figures are indicative of the accessibility of the scheme to individuals would be grossly misleading. The figures on individual applicants fail to distinguish applications made by individuals and those made by third party organisations who do not hold legal aid contracts but make applications on behalf of their service users e.g. Rights of Women and Coram Children’s Legal Centre.

The applications we undertook on behalf of our service users under this project are recorded as ‘individual’ applications by the Ministry of Justice. Of the 170 individual applications granted ECF in 2017/18, 9 were applications prepared by Rights of Women and 23 were applications prepared by Coram Children’s Legal Centre. These two organisations alone prepared and submitted 19% of the successful applications made by individuals in 2017/18. We believe the proportion of applications recorded as ‘individual applications’ and yet submitted by professionals on behalf of individuals is significantly higher.

We regularly advise callers to our advice line about the availability of exceptional case funding and how to apply. While we have repeat callers to our service who call back asking for further assistance, we have never had a repeat caller informing us they are or have applied for exceptional case funding alone. We fear the number of individual applicants and their chance of success is likely very low.

The Ministry of Justice must disaggregate the data it publishes on individual applications to distinguish applications made by individuals and those made by third parties on their behalf. Only then will the data speak to the accessibility of the scheme to individuals.

Individual applicants cannot seek assistance to apply for exceptional case funding from the Legal Aid Agency. During the case of *The Director of Legal Aid Casework and the Lord Chancellor v IS [2016] EWCA Civ 464*, the Court of Appeal overturned the court below’s finding that the ECF scheme was inherently or systematically unfair. In so doing the Government argued that its website and a telephone helpline operated by LAA caseworkers or lawyers provided material assistance to individual applicants.

In making its findings the Court of Appeal declared the website and helpline to be ‘of significant material assistance to applicants’⁵⁹. There is no telephone helpline available to applicants. PLP reports that this service was closed down in March 2017.⁶⁰

When Rights of Women closed down its ECF project in September 2018 we sought to obtain information about the availability of assistance from the LAA so that we could suitably signpost service users in future. We called the LAA customer services team (the only remaining point of contact for ECF enquiries) to find out about the material assistance it offered to individual applicants. The LAA call handler, after consulting with a senior colleague, informed us that the customer service team cannot offer any assistance to individuals who wish to apply for exceptional case funding. The reason given by the call handler was that it would be a conflict of interest if they were to provide assistance when the LAA is also the decision-maker. Instead, we were informed that when the customer service team receives a query from an individual seeking assistance with an exceptional case funding application, they would signpost to information available on their website and to the Citizens Advice Bureau for any additional help.

5.8.3 Conclusions in relation to accessibility of application process – forms

The gov.uk website contains information about applying for ECF. It tells the public that “[t]he forms are designed to help you provide the right information in your legal aid application, but you don’t have to use them. You must sign your application, whatever format you have made it in.” There appears therefore to be no requirement for the form of an application other than a mandatory signature. It is concerning to see that in 2017/18, 45 out of 254 determinations of individual applications were rejected by the LAA as ‘incomplete’. This is more than 1 in 6 of all applications made by individuals and suggests that either these 45 applicants did not sign the written application they sent to the LAA or the LAA is operating additional mandatory criteria which are not published publicly. The Ministry of Justice must analyse the basis on which these applications are being rejected and report on its findings.

Research by the Public Law Project found that in practice all applicants are expected to complete the LAA’s applications forms and if they do not, they are asked to complete them before their application is considered⁶¹. The application forms an individual would need to complete to apply for exceptional case funding to make an immigration application are the CIV ECF1 form and CW1 form or, if the matter were a Tribunal appeal a CW2 form.

⁵⁹ paragraph 55 *The Director of Legal Aid Casework and the Lord Chancellor v IS [2016] EWCA Civ 464*

⁶⁰ <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>

⁶¹ <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>

While the LAA made changes to the CIV ECF1 form following legal action, it is wholly unrealistic to suggest the application form is accessible to lay persons generally let alone applicants with English language barriers. The form uses technical language which requires knowledge of legal aid law, policies and practices. For example the technical language of ‘provider’, ‘controlled work’, ‘contract category’, ‘legal help’ are terms that assume knowledge whereas in reality they are terms most lawyers who have never undertaken legal aid work would not recognise.

When Rights of Women asked our ECF clients to complete the legal aid forms relevant to their case without our assistance, the responses we received immediately demonstrated the inaccessibility of the legal aid forms to individuals.

Case studies on ability of clients to complete ECF application forms

Case study - Fola

Fola was only able to complete the applicant details on page 1 of the CIV ECF1 form and the equal opportunities monitoring section and client details section on page 1 of the CW1 form.

Case study - Stacey

Stacey attempted to complete the CIV ECF1 and CW2 forms for her immigration appeal.

The only section of the CIV ECF1 form she was able to complete was the applicant details section on page 1. Similarly on the CW2 form she was able to complete the equal opportunities monitoring section and client details sections on page 1. Stacey completed the provider details on page 2 of the form by entering the name and contact details of Rights of Women. Her mistake in completing this section of the form illustrates her lack of understanding of what the question was asking likely due to the language of ‘provider’ on the form.

When it came to signing the declarations on the completed legal aid forms, Stacey mistakenly signed the litigator’s certification on the CIV ECF1 form, again illustrating the barrier that technical, legalistic language has on a layperson’s ability to correctly complete the form.

Case study – Shannon

Shannon’s English language ability was limited. When looking at the CIV ECF1 form unassisted she was only able to complete parts of the ‘applicant details’ section on page 1. She could identify that page 1 was asking for her personal details however there were several errors in her understanding of the questions on page 1. She misunderstood the question ‘title’ and understood this to have a connection with a document due to a similar word in her first language. She was not able to identify that the ‘provider detail’ section did not relate to her. When attempting to read and

understand the question on page 3 of the form *'what legal work do you think you / your provider will need to do in order to make this application?'*, she made the fundamental mistake of recognising the word 'work' in the sentence and drawing incorrect conclusions from that – she thought the question required her to show she had a job in order to apply for legal aid.

Case study – Ngozi

When Ngozi attempted to complete the CIV ECF1 form the only sections she was able to understand and complete were:

- The urgent application query on page 1.
- The 'applicant details' section on page 1
- The applicant declaration.

She completed the following sections of the CW1 form:

- tick to confirm it is an ECF application on page 1
- equal opportunities monitoring on page 1
- client details on page 1
- Financial eligibility: type of case on page 3
- Client's certification
- Evidence checklist on the last page

Ngozi told us that she was unable to complete the rest of the forms because she did not understand them.

Further she made several mistakes on the CW1 form including specifying the type of case as 'family'. Hers was an immigration application under Article 8 ECHR involving her family members. The correct answer to this question was 'immigration'. When signing the declaration, she ticked the box 'I have already received legal help or family help (lower) from a solicitor or contracted provider on this matter'. While Ngozi had received legal aid in the past it was not on the same matter and so this too was a mistake.

Case study – Gloria

Gloria's English language ability was limited. Rights of Women required the use of an interpreter in order to obtain the information to draft her application.

When looking at the CIV ECF1 form unassisted she was able to understand most of the 'applicant details' section on page 1 however did not understand the question asking for her initials and needed the interpreter to assist in translation. She could not understand question 1 on page 4 which reads *'please provide us with brief details about the case if they are not already in the other forms / documents that you are supplying.'* She was able to understand the general gist of question 2 on page 4 however did not understand the word 'issues' in the question *'how important are*

the issues in the case for you / your client.' She could not understand the meaning of question 3 on page 4 at all, the question being '*how complex are the proceedings, the area of law and the facts / evidence in the case?*'. She pointed in particular to the words 'complex' and 'proceedings' and her lack of understanding of these words.

Case study – Lina

Lina has extremely limited English language skills. Rights of Women needed an interpreter to prepare her application for exceptional case funding. Lina was unable to read and understand the CIV ECF1 form without the assistance of Rights of Women explaining it to her through an interpreter. When looking at the form unassisted she was only able to understand parts of the 'applicant details' section on page 1.

Case study – Ruth

Ruth has extremely limited English language skills. Rights of Women needed an interpreter to prepare her application for exceptional case funding. Ruth was unable to read and understand the CIV ECF1 form without the assistance of Rights of Women explaining it to her through an interpreter. When looking at the form unassisted she was only able to understand parts of the 'applicant details' section on page 1.

The ECF scheme operates in such a way that individual applicants must provide sufficient information and evidence to prove that the failure to provide legal aid would be a breach of their human rights or enforceable EU rights (i.e. the criteria for ECF) and also provide information and evidence to prove they are financially eligible for legal aid and their case meets the relevant 'merits' criteria. There is no way for individual applicants to know what the relevant 'merits' criteria in their case is. While there is an online civil legal aid calculator to calculate financial eligibility it does not assist inexperienced individual applicants as its language, style and accompanying guidance replicates that of the forms and guidance written for legal aid providers.

Assessing financial eligibility for legal aid can be complex and ensuring evidence of means is obtained in a form acceptable to the LAA is a task that requires knowledge of LAA guidance and practice.

Individual applicants for ECF should not be burdened with the responsibility of proving the means and merits criteria are met. The LAA should issue provisional grants of ECF that are subject to the means and merits criteria being met⁶². The task of proving means and merits can then fall to the legal aid provider who accepts the case. These are tasks the legal aid provider will be undertaking in the rest of its legal aid caseload in any event.

⁶² Provisional grants of ECF subject to means and merits were in the past issues, however the LAA stopped this practice before our project commenced

For matters that are in scope of legal aid, the assessment of means and merits in relation to immigration work is largely exclusively delegated to legal aid providers⁶³. Yet, in relation to exceptional case funding, legal aid providers have no delegated functions, save for the means test of a Legal Help.⁶⁴

5.8.4 Conclusions on chronic delays in decision-making

The LAA's claim to process applications within 20 working days was never met in respect of the non-urgent immigration applications we submitted. We were met with a variation of the same reason every time we chased a delayed application – that they were 'running behind schedule', experiencing a 'backlog', dealing with a 'higher than usual number of applications'. Bearing in mind our applications were submitted from September 2017 to August 2018 it is plain that that the delays were not a one-off attributable to unforeseen spikes in applications, we consider it reasonable to conclude that the delays in decision-making within the ECF team, as far as immigration applications are concerned, are chronic. An injection of resources is likely the only solution to this situation.

Instead, we are disturbed to see that following applications made in July and August 2018 the LAA informed us that they aimed to make a decision within 25 working days. There has been no consequential amendment to their published guidance to individuals on gov.uk or to providers in the ECF provider pack. This appears to be an, as yet, unpublished change in policy which will leave applicants waiting even longer for an ECF determination.

5.8.5 An urgent case procedure that is not fit for purpose

The urgent case procedure is beset with uncertainty and lacks transparency.

There is no guidance for individual applicants as to when the LAA might treat an application as urgent, they are simply told by the LAA: *"If we agree a case is urgent, we will prioritise it and make a decision within 5 working days. You can tell us the case is urgent on the ECF1 form."*⁶⁵ Providers are given a hint as to the circumstances in which the LAA may treat the application as urgent, but this offers very little in the way of certainty:

"If you wish the application to be treated as urgent you should complete page 6 of the CIV ECF1 to provide us with details as to the urgency of the case, for example an imminent date for a hearing or the imminent expiry of a limitation date or reasons why delay would cause risk of harm or prejudice to the client's case. We will consider the information that you have provided including information as to how the urgent

⁶³ This is the case for all 'controlled work' which includes applications to the Home Office and all work at the First-tier Tribunal and Upper Tribunal levels

⁶⁴ para 8.12 2018 Standard Civil Contract Specification, Category Specific Rules: Immigration and Asylum

⁶⁵ <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>

situation has arisen and why exceptional funding is needed to deal with the emergency situation) and if we agree, then we will deal with your case ahead of nonurgent applications and within 5 working days. We aim to determine all cases within 20 working days from the date of receipt of the fully completed application.

However we cannot guarantee that the application will be determined before a hearing day or before specified urgent work is needed. We can provide information if you call our ECF telephone enquiry line about the likely timeframe for completion of a pending application. On receipt of an application we will notify you of the date for the 20 day timeframe.”⁶⁶

The analysis of our urgent cases in section 5.5 above, demonstrates that we have been unable to discern any patterns in the LAA’s approach to urgent applications. There appears to be no system or at least no adequate system in place to identify urgent cases as they are submitted. We marked our applications as urgent in every way possible – on the CIV ECF1 form itself, on the cover letter accompanying it, and in the email we sent lodging the application. Yet despite this, we were never told by the LAA whether they agreed the application was an urgent one and would be determined within 5 working days. Instead in some cases we received an acknowledgment email referring to a decision being made within the non-urgent timeframe which led us to believe that the LAA had made a decision that the application was not urgent. While this seemed a reasonable conclusion to draw from those emails, it transpired not to be the case because in at least one instance after receiving an email informing us a decision would be made within 20 working days, we received the decision on the 5th working day.

In one urgent case (see Case study 5 at page 55 above) it was our chasing of a decision on the 5th working day that prompted the LAA to consider the application and confirm it would be treated as an urgent case. Whatever system the LAA has in place to identify and prioritise urgent cases clearly failed in this instance.

Not only does the LAA routinely fail to inform applicants whether it will treat the application as urgent, it also gives out misleading information when it does accept applications are urgent and has an unreliable system for early identification of urgent cases.

While we have experienced considerable difficulties with the urgent case procedure in representing individual applicants, there is an additional issue affecting only legal aid provider applicants, that merits highlighting. That is the LAA’s suggestion that providers can work at their own financial risk while waiting for a decision from the LAA. We are aware of this practice through our professional networks with legal aid providers and our own Case study 3 at page 53 above illustrates this. The LAA’s expectation of the goodwill of legal aid providers who feel compelled to perform work they have no guarantee of being paid for in order to protect the best interests of their clients and comply with their obligations to the court is placing an

⁶⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf

unacceptable burden onto providers.

5.8.6 Barriers to effective communication after applications are submitted

With no route to speak directly with the ECF team, the only point of access for us, individual applicants and legal aid providers is to telephone the LAA's general customer services team. The customer services team is never able to independently resolve a query and its role is to act as a 'go-between', taking information and queries from callers and passing them to the ECF team for response. The ECF team rarely answers its phone when the customer services team call it and therefore queries are rarely answered in real time. Instead the ECF team receive messages from the customer service team about the nature of the caller's query and their contact details for a response. The caller is not given any guarantee that they will receive a response and indeed half of all our queries made this way were not responded to.

While email correspondence can be sent directly to the ECF team on their 'contactECC' email address, our experience was that attempts to raise queries exclusively by email after an application were ignored. We only ever had successful communication by email with the ECF team after a call was logged with the customer services team.

Over the course of the project, we developed knowledge which allowed us to approach communication with the LAA strategically including diarising dates to chase, calling the customer services team and noting details of any timeframes or commitments made the conversation, diarising dates to chase again in the absence of a response to our query, making further calls and 'doubling up' with emails if necessary. It goes without saying that this chasing used our caseworker's time and that it would be entirely unpaid work for legal aid providers in the same situation.

Inexperienced direct applicants would likely fare far worse. Direct applicants with limited or no English would find this an insurmountable barrier as the customer services team does not have access to interpreting services and is an English only point of contact.

5.8.7 No immigration applications were refused ECF

All of the 18 applications we submitted for ECF were granted.

The MOJ statistics confirm that of 254 individual applications determined in the immigration category, 170 were granted and of 1246 provider applications determined in the immigration category, 884 were granted. Combined, this represents a grant rate of 70%.

While the grant rate for immigration ECF applications was 70% last year, it does not follow that 30% of the applications failed to meet the threshold for ECF. The remaining 30% of determinations is made up of refusals on a variety of grounds

including 'means' (i.e. financial eligibility) and 'merits' (i.e. the standard merits criteria that applies to all legal aid) as well as rejections on grounds including the application being 'incomplete' or the matter being 'in scope' of legal aid already. In fact, close analysis of the statistics reveal that only 91 out of the 1500 immigration determinations made by the ECF team in 2017/18 were refused on 'ECF merits' grounds i.e. for failing to meet the threshold for ECF. This is a mere 6% of determinations made by the team.

With only 6% of all immigration applications failing to meet the threshold for ECF last year, the economic case for operating an ECF scheme for immigration cases engaging human rights or EU rights must be proven by the Government taking into account the operational costs of processing the applications.

5.8.8 Challenges after ECF is granted

Individual applicants granted ECF receive a letter from the LAA. The letter tells individuals that they now need to find a 'Provider with an Immigration Legal Aid Contract' to deal with their case. Unhelpfully, the standard letter makes no suggestion how this could be achieved. One obvious improvement to this standard letter, would be for the LAA to give information about the legal aid provider search engine available on the gov.uk website. Our experience is that this search engine is sadly out of date – when we contacted a firm in Yorkshire listed on gov.uk as having an immigration legal aid contract the firm informed us they hadn't done legal aid work for two years.

We made referrals to legal aid providers for most of our clients. In most cases we had to refer to multiple providers before one accepted the case. 1 in 6 of our referrals were received no response at all. More than 1 in 3 of our referrals were rejected on 'capacity' grounds i.e. the legal aid provider told us they were too busy to take the case on.

The LAA's standard ECF grant letter goes on to tell individual applicants that once a legal aid provider is found, the provider should *'complete and sign/date the CW1 form, complete and sign/date the CIVECF1 form, then send a copy of these forms to the Exceptional Case Funding Team, together with a copy of this determination letter. The Provider should notify us that they are acting in the matter so that we can update our records with their details.'* We understood this to be an administrative matter of completing specific 'provider' sections of the original forms and returning them to the LAA so that work could commence immediately. Unfortunately, our understanding is far from that of legal aid providers, some of whom believe they are required to complete the same CIVECF1 form and means / merits forms all over again and await another decision before they can commence work on the case, others complete the 'provider' sections of the original forms and await another decision before commencing work. The LAA has not helped providers by issuing rather unclear guidance in its ECF Provider Pack:

"If you are instructed to apply for funding in circumstances where the client has

made a direct application a fully completed application, including the relevant provider details and certifications, must be submitted as described in section 5. Any letter to a Direct Applicant from the ECF Team should be supplied with the application. It will be particularly important to describe any change of circumstances or new facts and to identify any additional documents that are being provided with the application. If the client has a letter confirming that exceptional case funding is granted subject to location of a provider it is important to note that exceptional case funding may be withdrawn where the information on the application submitted by the provider is materially different as to the facts, merits, likely benefit or likely costs.”

This apparent requirement on individual applicants to apply twice is onerous, causes further unnecessary delays in the commencement of the case and acts as a deterrent to legal aid providers already overwhelmed by LAA administrative burdens.

6. Comments on the LASPO Post-Implementation Review (PIR) Process

LASPO is a pivotal piece of legislation in relation to the existence of access to justice in England and Wales. As such, the LASPO PIR is of critical significance in reviewing the success or not of this experimental piece of legislation.

We offer some constructive comments about the LASPO PIR process itself as we believe it is essential for Government to understand when a process falls short of what it should be, hinders its own purpose and where lessons could be learnt about improvement. In short, our comments are:

Delays to the PIR

The original Government commitment for the timeframe for the review was that it would be held within 5 years of implementation of LASPO 2012. We are concerned that delays to this process will result in delays to any necessary changes to LASPO itself to ensure it is attaining its remit of providing access to justice for those that need it. Inevitably this delay has a human cost and will be felt hardest by those in need of legal aid who are ineligible and/or divested of access to justice by the current system, but who may be in the future, as result of the changes that result from this process.

Transparency about the PIR process

It is in the public interest to be clear about consultative processes from the outset to make them accessible and accountable including details of timeframes, how decisions are being made and who is involved. It is also essential to building trust in the process itself. We are disappointed that the process was not clearly explained at the outset and there has been limited information in the public domain about how it is working. For example, we note there was a PIR consultative group meeting called by the MOJ on Family Justice in April 2018, which sought initial evidence on issues including 'the impact of the evidence requirements on victims of domestic violence and providers'. Considering we are unique in having brought a successful case against the Government in relation to this very matter in 2016 and have, since this time, sat on an expert advisory group providing support as a critical friend to the MOJ around what changes are needed, we find it worrying that our expertise was not called upon during this discussion. We are concerned other organisations with specialist knowledge and insight have been excluded from these panels and that no information has been shared in the public domain about what was recorded at the meetings. There has also been no formal route to question or challenge how these consultative groups were formed. For us to devote time and energy to this process we expect there to sufficient evidence that the process will be robust and worthwhile; this has not been the case.

Resourcing of the PIR

We are concerned that too little resourcing has been directed to this process. In particular it is clear that Government has not devoted resources to collating datasets

and has instead asked already over-stretched service providers to provide data evidence. Whilst we will do our best to do so for free to Government and at a cost to ourselves we recognise this is an avoidable weakness in this process.

Annex 1:

Proposed Amendments to Statutory Instrument: Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulation 2017

On 7 September 2018 Rights of Women (ROW) submitted the following concerns and proposed amendments to the Ministry of Justice (MOJ):

1. Amended Regulation 42(1)(k)

(i) The new Regulation 42(1)(k)(iii) provides the power to withdraw funding where 'without notice' orders have been obtained but later set aside. This causes great concern without notice orders are a key measure to keep victims safe in domestic violence cases. This was not the case previously where a 'without notice' protective injunction could be used as evidence even if it was set aside at a later hearing. There are many reasons why the court may set aside a 'without notice' order where there has been domestic violence in the relationship including, for example, where the victim's circumstances may have changed. We are concerned that the "setting aside" of an order does not necessarily mean that the court has made any findings and that where victims are initially unrepresented, they may agree to this to avoid having to go through a difficult contested hearing where they may face being cross-examined directly by the perpetrator, without realising the consequences for their ability to obtain funding in other proceedings.

(ii) The new Regulation 42(1)(k)(vi) gives the DLAC the power to withdraw funding on receipt of a letter from a public authority which confirms that there has not been domestic violence or that the applicant was not at risk of domestic violence. Rights of Women is extremely concerned by this. This power only applies where the evidence has been provided by a housing authority or domestic violence support service. The only circumstance under which we could envisage this being appropriate would be where a housing authority had fallen into error in preparing the evidence in the first place. But the inclusion of this power as it applies to domestic violence support services lacks any recognition or understanding of the fact that domestic violence support services are the most appropriate organisations to assess risk and provide evidence that someone is the victim of or at risk from domestic violence. As the experts, it is insulting that their professional opinion can be undermined by a non-expert public authority.

2. Schedule 1: Paragraphs 14 and 15

(i) *Currently reads:*

14. A letter from an independent domestic violence advisor confirming that they are providing support to A.
15. A letter from an independent sexual violence advisor confirming that they are providing support to A relating to sexual violence by B.

Proposed amendments:

(ii) The MOJ has helpfully confirmed that the LAA will accept letters from both independent advisors *and* advocates under these provisions. However, this may not be obvious to the public and to avoid confusion we suggest the term ‘advocate’ is added to the provisions on independent domestic violence advisors (IDVAs) and independent sexual violence advisors (ISVAs).

(iii) The current wording of the provisions excludes survivors who have previously received support from IDVAs and ISVAs and are no longer receiving the support. This was not, as far as we are aware, the intention when the Regulation was introduced.

(iv) We suggest the paragraphs 14 and 15 should read as follows:

14. *A letter from an independent domestic violence advisor or independent domestic violence advocate confirming that they are providing or have provided support to A.*

15. *A letter from an independent sexual violence advisor or independent sexual violence advocate confirming that they are providing or have provided support to A relating to sexual violence by B.*

3. Schedule 1: Paragraph 17

(i) *Currently reads:*

17. Letter from organisation providing domestic violence support services
- (2) The letter must confirm that it—
- (a) is situated in England and Wales;
 - (b) has been operating for an uninterrupted period of six months or more; and
 - (c) provided A with support in relation to A’s needs as a victim, or person at risk, of domestic violence.
- (3) The letter must contain –
- (a) a statement to the effect that, in the reasonable professional judgement of the author the letter, A is, or is at risk of being, a victim of domestic violence;
 - (b) a description of specific matters relied upon to support that judgement;
 - (c) a description of the support provided to A; and
 - (d) a statement of the reasons why A needed that support.

Proposed amendments:

(ii) This provision is geographically restricted to England and Wales. This unnecessarily excludes survivors who flee England and Wales and seek support in Scotland and Northern Ireland. ROW has been made aware of instances where women have found it difficult to provide the necessary evidence as a result of this geographical restriction. None of the other provisions in Schedule 1 restrict services

to England and Wales only, and if there is a geographical restriction it is to the United Kingdom. Currently, a woman who is refused a refuge place in Scotland could access legal aid by replying on Schedule 1 paragraph 18, but if she is admitted to a refuge in Scotland then she would not be able to rely on this as evidence of domestic violence. We suggest that 17(2)(a) be amended to “is situated in the United Kingdom”.

(iii) The criteria that must be met under this schedule are overly onerous and unnecessary and require a significant amount of staff time. They significantly contrast to the criteria for IDVAs and ISVAs (Schedule 1(14) and Schedule 1(15) 4 respectively) which simply and appropriately require a letter confirming that they are providing support to the applicant.

(iv) There is no reason why the criteria should vary so widely. All frontline staff, whether IDVAs, ISVAs, outreach workers or refuge workers are specialist domestic violence workers and a letter that they are providing support ought to be sufficient for all types of workers.

(v) The onerous requirements of this provision make it more likely that evidence will be rejected by the LAA as they do not contain the correct form of wording or the extent of information required by the Regulation. This, in turn, adds to delays and increased workloads for LAA caseworkers.

(vi) the paragraph should therefore read:

(1) A letter from an organisation providing domestic violence support services.

(2) The letter must confirm that it—

(a) is situated in the United Kingdom;

(b) has been operating for an uninterrupted period of six months or more; and

(c) provided A with support in relation to A’s needs as a victim, or person at risk, of domestic violence.

(3) The letter must contain a statement to the effect that, in the reasonable professional judgment of the author of the letter, A is, or is at risk of being, a victim of domestic violence.

4. Schedule 1: Paragraph 18

(i) *Currently reads:*

18. A letter or report from an organisation providing domestic violence support services in the United Kingdom confirming—
(a) that a person with whom B is or was in a family relationship was refused admission to a refuge;
(b) the date on which they were refused admission to the refuge; and
(c) they sought admission to the refuge because of allegations of domestic violence by B.

(ii) The information that refuges are required to provide for those who have been refused admission has changed following the commencement of the

Regulation. Previously, refugees were not required to provide the information in 18.(a) or (c). These changes are welcomed as they enable applicants to rely on evidence that any partner or ex-partner of the perpetrator was refused admission to a refuge.

(iii) Our concern is that there may be some women who obtained letters before 8th January 2018 which comply with the previous regulations but do not contain the information in Schedule 1, 18.(a) or (c). It may be overly onerous to return to the refuge to request a new letter or impossible if the refuge has since closed. ROW seeks confirmation that letters dated before 8th January 2018 which confirm that the applicant was refused admission to a refuge due to insufficient accommodation and the date she was refused will be accepted.

5. **Schedule 1: Omission of letter from a refuge as evidence of domestic abuse**

(i) The MOJ has informed ROW that a letter confirming admission to a refuge [previously regulation 33(2) (j) of the Civil Legal Aid (Procedure) Regulations 2012] was purposefully omitted from Schedule 1 as it would be covered by paragraph 17: a letter from an organisation providing domestic violence support services. We submit that letters confirming admission to refuges should be reinstated (without the 24 month time-limit). Forcing survivors who are admitted to refuges to rely on paragraph 17 has made it harder for them to access legal aid. The amount of information services are required to provide under paragraph 17 are much more onerous than that which was required under original regulation 33(2) (j) of the Civil Legal Aid (Procedure) Regulations 2012.

(ii) We are also concerned that letters dated before 8th January 2018 which comply with Civil Legal Aid (Procedure) (Amendment) Regulations 2016 and confirm that the Applicant was admitted to a refuge, the dates of admission and that she was admitted due to allegations of domestic violence will now no longer be accepted. It may be overly onerous to return to the refuge to request a new letter or impossible if the refuge has since closed.

6. **Schedule 1: Paragraph 20**

(i) *Currently reads:*

20. A letter from the Secretary of State for the Home Department confirming that A has been granted leave to remain in the United Kingdom under paragraph 289B of the Immigration Rules

Proposed amendments:

(i) As noted by Rights of Women in the meeting on 12 December 2017 this is incorrect and outdated as Rule 289B provided Indefinite Leave to Remain (ILR) for

victims of domestic violence only until July 2012. This was then replaced by Appendix FM of the immigration rules. It can't possibly be the case that the MOJ's intention was to exclude migrant women applying after July 2012 therefore the SI must be changed.

(ii) Rights of Women further points out that amending this point to refer to both 289B and Appendix FM will still not be sufficient to cover all eventualities under which a migrant woman might be granted leave to remain in the UK as a victim of domestic abuse or future-proof this point. Currently, it is possible for the Home Office to grant leave to remain outside the rules.

(iii) The paragraph should therefore read:

(20) A letter from the Secretary of State for the Home Department confirming that A has been granted leave to remain in the United Kingdom as a victim of domestic violence.

(iv) The above rephrasing includes leave granted under the old rules, the current rules, outside the rules and will remain applicable if the rules are changed in the future. Rights of Women understands that "leave to remain" includes both indefinite leave and limited leave (see section 3 Immigration Act 1971) so it is not necessary for a distinction to be made. However, it would be sensible to include it in the definitions section of the SI.