

House of Commons Home Affairs Select Committee Inquiry into Domestic Abuse

Submission from Rights of Women

Rights of Women [Established 1975] specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women.

By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

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

Before answering the specific questions asked in the consultation 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.

Introduction

We have made a detailed submission to the Government's consultation on the Domestic Abuse Bill (the Bill) in May 2018¹. Rather than reiterate points made in that submission, we have decided to concentrate our response to this inquiry on access to legal aid for women survivors, as this underpins access to justice and therefore transforming the response to survivors of domestic abuse.

Legal aid was not a specific area of enquiry under the Government consultation, despite its relevance and ability to impact on the success of a wide range of measures that are proposed as inclusions in the Bill. For example:

- Improving the response of statutory agencies to domestic abuse hinges on the ability of individuals to hold institutions to account and challenge bad decisions by authorities so their practice improves. This ability is reliant on access to legal aid.
- Improving the response to victims facing multiple barriers. A common scenario we observe at Rights of Women that demonstrates the pertinence of access to legal aid in relation to this and the point above is around access to welfare benefits for migrant women survivors. An incorrect decision about entitlement can leave a woman effectively trapped in an abusive relationship as she lacks the financial means to leave or can result in her being denied access to a refuge.
- Keeping victims safe via the proposed introduction of Domestic Abuse Protection Orders (DAPOs) that can be applied for through the family courts. Current limitations on access to legal aid in relation to domestic abuse injunctions could result in survivors continuing to face direct cross-examination by perpetrators in proceedings related to DAPOs. Also, given the suggestion that positive requirements may be placed on DAPOs, which include prohibiting a perpetrator's liberty, we do not see how legal representation through the availability of legal aid would not be

¹ <http://rightsofwomen.org.uk/wp-content/uploads/2018/05/Response-to-DA-Bill-consultation-from-ROW-FINAL.pdf>

necessary to protect the human rights of the person alleged to have committed domestic abuse. This could result, potentially, in perpetrators receiving legal aid and survivors representing themselves, which of course could increase the risk of harm to survivors.

Legal aid is a crucial component of access to justice for survivors of domestic abuse. We recommend that the Select Committee Inquiry prioritise legal aid as an area of specific enquiry that ultimately must be addressed comprehensively so other measures within the Bill can be effective.

What are the key difficulties encountered by victims of domestic abuse in the justice system, and in particular in the family courts?

Legal aid and access to justice

Despite Government obligations under International human rights conventions² to provide free or low-cost legal aid to afford women access to justice when they are at risk of or have experienced violence, there are endemic problems in this area that undermine access to justice and have repercussions across the justice system which are particularly stark in the family court system.

Between January and September 2017, Ministry of Justice research showed that 3,234 victims of domestic abuse had no legal representation in at least one hearing, 147% more than for the same period in 2012.

In addition to the above, the dramatic rise in the number of unrepresented parties in the family courts has created further opportunities for abusers to perpetuate abuse. This is done, for example, by cross-examining the survivors, by making repeated applications to force the survivor to engage with him, or by using child contact arrangements to control or intimidate the survivor.

Domestic Violence legal aid gateway for private family law cases

As a result of our successful judicial review (on appeal) of the Domestic Violence (DV) Legal Aid Gateway for private family law matters in 2016, *The Queen (on application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice*, the list of gateway evidence that the Legal Aid Agency will accept has been expanded as of January 2018. The purpose of this is to widen access to legal aid as the previous list of evidence was too restrictive and resulted in approximately 40% of survivors being unable to satisfy the criteria³.

Whilst we appreciate that the changes have only just come into force and it may be too early to take a view on their impact yet, we are concerned that the most recent set of statistics published by the

² The Beijing Platform for Action, signed by the UK Government in 1995, requires states to provide ‘free or low cost legal aid’ to women who have experienced violence under Strategic Objective D.1, Para 125 (a). General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to which the UK is a State party requires States to “ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary, to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate”

³ <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>

Legal Aid Agency⁴ show a significant decrease in the number of applications granted legal aid under the Domestic Violence gateway compared to the total volume of applications received. From October to December 2017, 2211 applications were received and 1860 applications were successfully granted (an 84% success rate) whereas for January to March 2018, 2703 applications were received and 2054 successfully granted (a 76% success rate). We are mindful that these statistics have only just been published and therefore may be adjusted over time, however we would have expected an increase in the rate of successful applications.

We recommend the Select Committee inquiry continues to look at these statistics in detail and delves into the reasons for any drop in the rate of successful applications as ultimately this may indicate that the Legal Aid Agency's decision making or the revised gateway evidence list may be falling short of what it should be and is failing survivors.

Legal aid eligibility assessments

The ability of an individual to access justice is severely undermined by the means test for civil legal aid and this can have specific and damaging repercussions in cases involving domestic abuse. Ample evidence exists demonstrating that the calculations applied are unrealistic including in our detailed submission to the [Bach Commission](#)⁵. The impact of this is that those on a low income are frequently assessed as being ineligible, or able to make a contribution, which in reality they cannot afford.

*"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"*⁶

We recommend that the means test should be fully revised to make it fair to avoid the anomalies that exist currently, for example with the capital test in relation to the inclusion of the home. We know from our work that for many women survivors of abuse, their home is often the only capital they have. For a woman on low or no income, her choices are either to sell the home (making herself and her children, where relevant, homeless) to pay for legal fees, face her abuser alone in court or withdraw from the legal process. For a woman who jointly owns a property with a partner who is also the perpetrator of abuse in her case, the idea that this capital is accessible completely overlooks the probability that this shared asset will be used by the abuser to further their control including economic abuse against the victim.

The recently released [Government Research](#), which informed the changes to the Domestic Violence Gateway, contains detailed survey and focus group data that supports this picture. The research shows that problems with the means test were raised by practitioners and survivors alike and that of

⁴ <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>

⁵ <http://rightsofwomen.org.uk/wp-content/uploads/2016/05/Evidence-to-Bach-Commission-on-access-to-justice-28-April-2016.pdf>

⁶ Comments by women responding to a Rights of Women's survey about legal aid. See full report: <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>

the survivors who raised it as an issue in the focus groups, all those who failed the means test stated they were unable to afford to pay for representation, with a number of them having to represent themselves.

Recent research conducted by Loughborough University and the Law Society⁷ shows means testing of legal aid is set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living.

We would urge the Select Committee to consider whether the means test should be completely revised to ensure that those survivors who genuinely cannot afford to pay privately do not fall through the gaps, and whether it may be advisable for a discretionary power to waive the evidence of means requirements for survivors of violence.

Cross examination by perpetrators

There has been a significant increase in unrepresented parties in the Family Court since the introduction of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which has led to a rise in cross-examination of victims of domestic violence by unrepresented perpetrators.

A great deal has been written on the consequences of allowing women survivors to be cross-examined by perpetrators ranging from the increased opportunity for perpetrators to continue their abuse and intimidation through this process (particularly relevant where coercive and controlling behaviour is involved) to retraumatisation of victims.⁸

The Government accepts that the cross-examination of victims of domestic violence in the Family Court is unacceptable and had intended to legislate to improve the situation via the Prison and Courts Bill. This fell with the dissolution of parliament ahead of the general election in 2017 but has been re-introduced in the form of the Courts Bill which does not address the problem of cross-examination in the Family Court. The Government committed to prohibiting this cross-examination in either the Courts Bill or the Domestic Abuse Bill whichever was earlier. The Select Committee inquiry should therefore keep this in mind and be pressing for accountability in relation to this promise and for its inclusion in the Domestic Abuse Bill if it is ultimately not dealt with within the Courts Bill. In the criminal courts, there is a system in place through which a legal aid solicitor is appointed to conduct cross-examination on behalf of a defendant in cases of domestic violence. This should be replicated in the family courts at the earliest opportunity.

Other issues

Rights of Women is concerned that the Family Court process as a whole from mediation, court proceedings, and what happens after court proceedings, are not safe for survivors of domestic violence. Whilst these issues are not the focus of our response to this inquiry, it is worth noting that our research report with CWASU: [Picking up the pieces: domestic violence and child contact](#)⁹ looks

⁷ <https://www.lawsociety.org.uk/news/documents/priced-out-of-justice-report/>

⁸ For example: Picking up the Pieces, Rights of Women, 2012 http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking_Up_the_Pieces_Report-2012l.pdf and “What about my right not to be abused?” Domestic abuse, human rights and the family courts, Women’s Aid, 2018 <https://www.womensaid.org.uk/research-and-publications/domestic-abuse-human-rights-and-the-family-courts/>

⁹ http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking_Up_the_Pieces_Report-2012l.pdf

at women's journeys before, during, and after contact proceedings (now referred to as child arrangement proceedings). Section 5 of the report explores:

- the impact of being cross-examined by the abuser
- lack of women's safety at court: 74% of women had concerns about their safety in court. They reported lack of facilities to separate them from the perpetrator in the court building enabled him to continue abuse and harassment
- the difficulties in raising domestic violence in court, and being heard
- lack of fact finding hearings to consider allegations of domestic violence, and the potential limitations of fact finding hearings
- lack of legal advice and good representation
- uneven judicial awareness of domestic violence

94% of the women and professionals who responded to our survey agreed that some perpetrators of domestic violence use contact proceedings (now child arrangements proceedings) to exert power and control over the victim. Women often describe to us their fears that they will not be believed, that they will not be safe and that their children will not be safe before, during and after court proceedings.

A more recent report by Women's Aid and Queen Mary University London highlights similar and related concerns¹⁰.

¹⁰ [Birchall, J. and Choudhry, S. \(2018\) "What about my right not to be abused?" Domestic abuse, human rights and the family courts, Bristol: Women's Aid.](#)