



**INDEPENDENT
STRATEGIC REVIEW OF
LEGAL AID
CALL FOR EVIDENCE**

**Submission by Scottish
Women's Aid May 2017**

Introduction

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working to end domestic abuse.

We play a vital role in campaigning and lobbying for effective responses to domestic abuse and provide advice, information, training and publications to our 36 member groups and to a wide variety of stakeholders. Our members are local Women's Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need and an appropriate response from the civil and criminal justice systems.

Foreword

SWA welcomes the opportunity to comment on the important issues raised in this consultation and we have set out our observations below.

Domestic abuse has serious and long-lasting consequences for the health and well-being of women, children and young people. It is an assault on women and children's human rights. The extent to which women and children have access to justice, and legal support in particular, when experiencing domestic abuse is, in our view, an indicator of the society's commitment to women's and children's human rights.

Seeking safety from an abusive partner often leaves women in poverty, official and informal. Because financial dependence and abuse are critical tools for controlling women and constraining their routes to liberty and safety, it is against all the tenets of justice that this situation should be further exacerbated by the need to pay to get protection. Women find themselves with a set of unpalatable choices: seek protection through the courts and court poverty, go into debt to pay for access to justice, or eschew civil protection as just one more financial burden that is impossible to meet. For years now, we have received a consistent message from our services in Scotland: women cannot routinely access appropriate legal advice and support and experience service-generated harm and re-victimisation from the legal system.

Women, children and young people experiencing domestic abuse should receive the specialist legal advice and support they need, at the time they need it. They should be confident of getting protection against their abuser from all actors in the justice system.

Ultimately, this system change will help Scotland to move towards adopting a model based on the principles of:

- Earlier intervention
- Reduced revictimisation
- Opportunities for recovery
- Improved confidence in public justice
- Reduced cost.

Commentary

We note that the Review wishes to address four broad questions around the shared values and ethos that should underpin legal aid services, organisational arrangements, how legal aid services can achieve positive outcomes for and with the people of Scotland and what this service should look like. In their Annual Report for 2015-16,¹ the Scottish Legal Aid Board (“SLAB”) states that *The purpose of legal aid is to provide access to justice for those people who are unable to pay for it on their own. It can deliver life changing assistance to people in need, ensuring that human and social rights are protected and enforceable.*”

In our view, difficulties in accessing legal protection, for women, within the wider context of domestic abuse and discrimination against women have, in effect, acted as a warrant for this abuse. Women’s poverty has a considerable impact on their ability to pay for legal services. They may have little or no access to “household” income or assets. It is also acknowledged that women’s earnings are, less than men and that they are also more likely to be in lower paid or part-time employment. Solicitors tell us that the main reason for woman not taking up offers of legal aid, and the most problematic issue for them is contribution levels. Leaving an abusive partner often leaves women in financial hardship, which adds another level of disadvantage and a barrier to accessing justice.

Women fleeing domestic abuse are in a difficult transitional period, being in a situation where they are attempting to leave behind arduous and dangerous circumstances and rebuild their lives.

A positive outcome for women, children and young people experiencing domestic abuse is, particularly for women, access to solicitors who are informed, aware, and sympathetic and who will provide targeted and appropriate legal services to address their complex and, often urgent, legal needs. However, there is no consistent, specific legal service dedicated to women affected by domestic abuse across Scotland, a gap which amounts to unmet, legal need.

For women, children, and young people experiencing domestic abuse seeking protection through the civil courts, a reformed and representative system facilitating and encouraging access to justice requires adequate local availability of solicitors practising family law who also provide advice and assistance and civil legal aid. This would be achieved by the provision of free legal services for all women, children and young people experiencing domestic abuse, with no means and merit test and no qualification on accessing this for women. The service would be delivered via either embedded solicitors “attached” to, or working in, our network of local Women’s Aid groups, or dedicated solicitors within an approved legal firm.

Mediation, ADR, Family Group Counselling and out-of-court agreements are often offered as successful alternatives, both in outcome and financially for SLAB and the parties. We would take this opportunity to emphatically emphasise that in relation to domestic abuse, these are not appropriate alternatives, or indeed, pathways for women, children and young people experiencing domestic abuse to access justice. They do not offer equality of arms or equal participation and only serve to reinforce the power imbalance inherent in domestic abuse; they are often dangerous as well.

Similarly, digital and online innovations which allow parties to jointly agree separation terms or child contact and residence agreements, such as the Dutch Rechtwijzer, should be approached with caution and analysed with an appropriate gender lens. While we fully support women seeking to take control of their lives and the processes

¹ http://www.slab.org.uk/common/documents/Annual_report_2015_2016/Annual_Report_and_Accounts.pdf

around them, such facilities are often unsafe and present opportunities for women to be coerced into making manifestly unsafe agreements.

The current system and financial issues for women

Women's access to justice is a long-standing issue. In 1998, we wrote in response to the consultation paper *Access to Justice: Beyond the year 2000...* *"Research which resulted in the national strategy initiatives found, amongst other findings, that access to civil legal aid was the biggest issue preventing abused women from gaining access to solicitors' services and the legal process."*

In our response to the Justice Committee's Review of Legal Aid in 2001, viz... *"It is the experience of both Scottish Women's Aid and those solicitors to whom women using our service are routinely referred for advice on the matters referred to above, that ineligibility resulting from income and contribution levels are the two most common factors disbaring women from accessing legal aid and, consequently, the right to justice....It is, therefore, inequitable that the concerns they have over raising court proceedings for their protection be compounded by an anxiety that they will be denied justice, as a consequence either of the level or nature of their income, or unaffordable contribution levels."*

Sadly, almost 20 years later, access to legal services has not improved for women and children.

Domestic abuse and "Dispute resolution" as a precursor to a grant of civil legal aid

Issues with civil cases involving child contact, residence and/or Parental Responsibilities and Rights ("PRRs") form probably the most frequent reason that a woman, a worker in a local Women's Aid group, or a partner agency contacts SWA for information and/or support. SWA currently operates the National Domestic Abuse and Forced Marriage Helpline in Scotland, and from March to December 2016 we received 261 calls from women with questions or concerns about legal issues. Concerns about child custody/contact matters were the biggest issue highlighted by callers.

SLAB currently is restricting provision of civil legal aid in these cases generally. Applicants are now being required to detail the steps they have made to resolve the "disputed" matter by negotiation. This framing of contact in the context of domestic abuse as a "dispute" reveals a profound misunderstanding of the dynamics of domestic abuse and leads to significant system-generated risk. There is also an emphasis on the need to engage in mediation but with a caveat around using this in relation to domestic abuse. There is no evidence that solicitors heed the caveat.

SLAB has also introduced an additional test where they consider *"what a private fee paying client of moderate means would do if faced with the same set of circumstances...."* This ignores the fact that women are entering into civil actions for reasons involving their own and their child's safety and welfare. We know of cases where women have been refused civil legal aid in connection with a child contact case involving domestic abuse because *"...On the basis of the information provided it has not been demonstrated that a private client of moderate means in these circumstances would incur the cost of litigation."*

Women entering into civil actions relating to contact where domestic abuse is an issue do not do so lightly; they are aware of the gravity of the decision to involve the courts and the often inappropriate scrutiny of their own and their children's lives that

ensues. Given the scale of domestic abuse-related crime reported to Police Scotland (almost 60,000 police reports in 2015), how and on what basis can the State determine whether or not a private client would use their own money to raise a court action to protect them from abuse?

Ultimately, in being denied access to civil legal aid, women and children experiencing domestic abuse are being asked to sacrifice their human right of access to justice, safety and security. The costs of this failure to protect, which go far beyond simply financial and budgetary considerations, are borne not only by women and children, but by society as a whole and challenge the Scottish Government's commitment towards addressing domestic abuse.

The current system and availability of lawyers providing legal aid

Under the Legal Services (Scotland) 2010 Act, introduced on 1 April 2011, SLAB was given a new general function of monitoring the availability and accessibility of legal services, services provided by solicitors and advocates, in Scotland, including by reference to any relevant factor relating particularly to rural or urban areas. Under this duty, SLAB has previously examined the availability of legal services in relation to domestic abuse: the findings are outlined in SLAB's [second](#) report in 2013 (see pages 30-35) and [third](#) report in 2014 (see pages 20-22) on the monitoring duty to Scottish Ministers.

While SLAB's finding only looked at the availability of legal services, we tried to capture information on the quality of the service; we have been contacted by groups expressing concern about the quality of services being provided and there is an issue around solicitors whose main area of practice was not family law but criminal or conveyancing conducting family law cases, which is far from ideal. Although the number of firms registering as offering civil legal aid do not appear, according to SLAB, to have declined significantly, this does not reflect the actual number offering to provide services under legal aid and firms can, and do, pick and choose whether they will provide civil legal aid for certain types of case.

The current arrangements for remunerating solicitors runs the risk of firms declining to carry out this business, with the resultant reduction in available firms, a matter of concern in rural communities where women experiencing domestic abuse may have to travel distances to access such a solicitor.

As a contribution to our partnership work with SLAB under their Access to Justice Reference Group, at the end of 2013, SWA collected information from 292 women and six children using the services of our local Women's Aid groups across Scotland to identify types of legal issues arising for them. We also surveyed the source of this support and information, which included legal advice and representation from solicitors and how solicitors' services were paid for.

The survey identified at least 13 different legal issues on which women and children sought advice, the most prevalent being various aspects of proceedings relating to PRRs and children, as we have mentioned above, divorce and separation and protective orders; most respondents required support with two or more of these issues. The provision of civil legal aid was an important support mechanism enabling women to access legal advice and representation on these matters and for each type of legal issue, more than half of the service users used Legal Aid or Advice Assistance to cover solicitors' fees. The information gathered also reflected barriers to accessing civil legal aid and issues with representation that we have discussed elsewhere in this paper and we would be happy to discuss this further with the Review.

“Domestic abuse” competency

“Competency” of legal representation is also an issue in relation to domestic abuse. It is fair to say that while the straightforward availability of solicitors providing Advice and Assistance and Civil Legal Aid funding are high on the list of issues for women seeking redress through the civil courts, these are inextricably linked in with the necessity of finding a solicitor who is aware of the dynamics of domestic abuse, does not approach it as a “civil dispute”, particularly in relation to contact, residence and PRRs, and will provide appropriate representation.

The Law Society of Scotland operates a specialist accreditation scheme, established in 1990 and registered specialists in family law are required to fulfill specific criteria requirements. However, no specific degree of participation in formal training is required before registration or as part of CPD. Experience is the sole qualification in terms of knowledge and application of the law and expertise around domestic abuse is confined to family law proceedings and is stated as experience of “*proceedings in relation to domestic abuse.*”

However, expertise in participating in such proceedings and having a knowledge of the law does not equate to having a thorough, accurate and appropriate understanding of how domestic abuse is impacting on their client and how it brought them to seek help from the legal practitioner, an understanding that must extend to how domestic abuse will impact on their own engagement with the civil law and how it works against them, particularly in attitudes around PRRs, contact and residence and protective orders.

SWA has been contacted many, many times over the last 10 years by women and our local member groups expressing concern about **some** solicitors’ attitudes, particularly in relation to contact, residence, and PRRs. Clearly, while informed and supportive practice exists, a significant number of solicitors still fail to appreciate that domestic abuse is not a “civil dispute” that can be treated in the same way as other family law cases. A solicitor’s failure to conduct a case in an informed fashion and to represent women and children’s interests appropriately allows abusers to use the system against women and presents a highly flawed story to the court.

Every solicitor and firm wishing to provide children’s legal assistance must both be entered on the Children’s Legal Assistance Register established and maintained by SLAB. To be entered, and retained, on the Register, firms and solicitors must conform to the terms of a Code of Practice, which requires that they are able to demonstrate they have certain prescribed competencies required to represent their at children’s hearings and/or in any associated court proceedings before the sheriff, sheriff principal and/or Court of Session, set out in a Code of Conduct. If there is no registration, then a solicitor is prohibited by SLAB from providing children’s legal assistance and a registered solicitor will be expected to maintain these key competencies and be able to demonstrate this when called upon by the Board to do so.

From the 9th February 2015, all applicants for legal aid in a contact/residence action are being sent a letter by SLAB which “reminds” the applicant that the solicitor has a duty to advise SLAB if the solicitor “believes” that the client is asking the solicitor to have the case “*run unreasonably.*” The letter further directs that the client should be “*reducing areas of dispute*” using mediation and negotiating/agreeing as much as possible. Apart from undermining women, this unfortunately gives weight to the perception held by some sheriffs and solicitors that the perpetration of domestic abuse against the woman has no bearing on the abuser’s ability to parent.

Unfortunately, given the fact that some sheriffs and solicitors conflate domestic abuse with “family disputes” and consider women’s attempts to minimise a perpetrator’s contact with children as unreasonable rather than protective, we have grave concerns that this approach will have adverse effects on women. Indeed, we are aware that women have had their grant of legal aid stopped under this regulation because they have not, for obvious reasons, been willing to follow a solicitor’s uninformed direction that they should “resolve the dispute” via mediation.

Local Women’s Aid groups provide support and advice to a high standard around accessing and navigating housing, tenancy, eviction, benefits, and other third sector organisations can assist in relation to debt. However, there are some cases where legal assistance in these areas will still be required and it is important that these areas of law, as well as the more obvious family and immigration law matters, remain in scope as work qualifying for civil legal aid support, in whatever configuration this is eventually delivered.

Cost implications of “domestic- abuse competent solicitors” funded through legal aid versus costs of domestic abuse.

The Scottish Government noted in their “**Safer Lives, Changed Lives: A Shared Approach to Tackling Violence Against Women in Scotland.**”² “*Violence against women is unacceptable and a violation of human rights, but it is also a major drain on the public purse and the economy. In addition to the human and emotional costs there are costs to the criminal and civil justice system, health service, social services and housing. Difficult though it is to quantify, a study in 2004 conducted for the UK Government’s Women and Equality Unit by Sylvia Walby*²⁵ *estimated that the cost of domestic abuse in England and Wales was £23 billion. The cost to the public purse of violence against women is estimated to be almost double this figure at £40 billion (A study by Jarvinen et al in 2008 New Philanthropy Capital Report - Violence against women: Hard knock life). Given the Scottish population is roughly 10% that of England, this indicates that some £2.3 billion could be the cost to the Scottish public purse of domestic abuse and £4 billion the cost of violence against women.*”

By “cost” we mean public services such as health, housing, criminal justice, lost employment, and the emotional impact on those experiencing domestic abuse and their families. Spending on prevention and on effective services to support women, children and young people offsets these costs. These figures were revised in 2009 to demonstrate how effective responses and access to appropriate services and support could, in fact, reduce this cost. Nonetheless, the revised figure for England and Wales was approximately £16 billion and again, in terms of Scotland, this equates to around £1.6 billion.

Any costs incurred through providing these dedicated solicitors will, in turn, pay dividends in reducing the long-term cost of domestic abuse, hopefully, through a reduction in repeat offending by abusers and other costs such as re-housing, child protection and health costs. Costs of provision will also be balanced by the fact that that applications and grants for civil legal assistance (advice and assistance and civil legal aid), cases paid to solicitors and cost to the taxpayer have all fallen since 2011-12³. There is the potential for savings arising from reductions in civil court time if these courts were not dealing with breaches, and a potential reduction in police having to attend repeat call-outs for breach of interdict, if the abuser is under the

² Scottish Government, Safer Lives: Changed Lives (2009) <http://scotland.gov.uk/Publications/2009/06/02153519/0>

³ http://www.slab.org.uk/common/documents/Annual_report_2015_2016/Key_Stats.pdf

control of the criminal justice system, both of which could be offset against any increase.

However, there are other overwhelming legal, financial, and ethical, human rights arguments for implementation of these proposals, primarily the benefits derived in allowing women, children and young people greater and easier access to protective orders, coupled with the creation of more effective and robust protective orders, which greatly outweigh any potential cost issues. Access to justice is a human right and accords with the notion that the state has a 'positive obligation' to protect its citizens from threat to their safety. If the protection which the state has an obligation to offer is compromised, by the denial of legal aid, then this contravenes human rights legislation.

International treaty obligations relating to legal aid and access to justice

The UN Committee on the Elimination of Discrimination against Women (CEDAW) urged the UK to ensure effective access by women, in particular women victims of violence, to courts and tribunals and to continuously assess the impact of the reforms of legal aid on the protection of women's rights⁴.

The UN also observed "*Protection from domestic violence and the right to a life free from violence should be a principle not only in legislation on violence against women but also in all relevant areas of family and divorce law. ...Legal aid, including independent legal advice, are critical components of complainants/survivors' access to, and understanding of, the legal system and the remedies to which they are entitled. Legal representation has proven to increase the likelihood of a positive outcome for the complainant/survivor in the legal process.*"⁵

Similarly, the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence ("Istanbul convention) states at Article 57 "*Legal aid -Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.*"⁶

Scottish Government's human rights obligations on access to justice

We would contend that the Scottish Government has obligations under Articles 2, 3, 6 and 8 of the European Convention on Human Rights, as integrated into Scots Law by the Scotland Act 1998, and enshrined in the UK Human Rights Act. . States have a positive obligation to act to protect citizens from violent and abusive behaviour under Articles 3 and 8. Therefore, it can clearly be argued that if the State fails to allow a women and children access to orders around PRRs or a protective order, which she needs to prevent her being "*subjected to torture or to inhuman or degrading treatment or punishment*" and to ensure that she has "*the right to respect for her private and family life, her home and her correspondence,*" because of her inability to pay or a lack of suitable legal representation then the State is in breach of Articles 3 and 8.

- **Article 2 - Right to life- "Everyone's right to life shall be protected by law"**

This Article stipulates that the State has a duty to act where there is risk to a person's life. It places an obligation on the State, not only in preventing the State's

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<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslDcROIUTvLRFDjh6%2fx1pWB8bSIKfa34XmmlN3IG11hwWhiFqrEprJHQfoipZTwnVkhDALmzaR6qCkIPapM2exTMh89SX7GUOJHbH%2bN8Qg9U>
(Handbook for legislation on violence against women ; United Nations; Department of Economic and Social Affairs; Division for the Advancement of Women; New York; 2009)

<http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

⁶<https://rm.coe.int/168046031c>

intentional and unlawful taking of life, but also in terms of taking appropriate steps to safeguard the lives of those within its jurisdiction; in other word, it demonstrates the positive obligation incumbent on the state. The interpretation of this obligation can extend to the complete waiving of means testing for civil legal aid in relation to a person securing legal representation for protection against domestic abuser. The case of **Opuz v Turkey (2009) ECHR 33401/02 (9 June 2009)** was the first time that the European Court of Human rights ruled over a state for failing to protect a woman from domestic abuse and the decision set a precedent, throughout Europe, for governments to protect in cases involving domestic abuse. A further important case relating to the operation of this Article is **Osman v United Kingdom (2000) 29 E.H.R.R. 245** and see also **Paul and Audrey Edwards v United Kingdom (Application No 4647/99) March 14 2002**

- **Article 3 - No one shall be subjected to torture or to inhuman or degrading treatment or punishment."**

With regard to the State's responsibility under this Article, case law in this area has shown that it can cover acts perpetrated by the State itself or situations involving persons in private, and can apply either sanctions against perpetrating behaviour in breach of the Article or impose positive responsibilities in terms of the State's responsibility to protect. - see **Ireland v United Kingdom (1979-80) 2 E.H.R.R. 25,** and **E v United Kingdom 2003 36 E.H.R.R. 31.** Therefore, in terms of the relevance of Article 3 in the argument for the provision of free legal representation for those experiencing domestic abuse, if a woman, child or young person is experiencing domestic abuse, they are, therefore, being "*subjected to torture or to inhuman or degrading treatment or punishment*", despite the fact that this behaviour is being perpetrated by a private individual. Consequently, the State does, indeed, have a positive duty to take steps to protect the woman, children and young people and prevent that treatment.

- **Article 6- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.**

A precedent was set by the decision in **Airey v Ireland (1979-80) 2 E.H.R.R. 305** in relation to State's duties to facilitate access to justice under Article 6 of the European Convention on Human Rights. The courts stated that there was a positive duty on a country to facilitate access to justice, including the provision of legal aid, where the legal complexities would mean that a litigant would not be able to present their own case effectively, or where the country's laws require that a person is represented by a lawyer, viz at paragraph 22 of the judgement. See also **Ashingdane v United Kingdom (1985) 7 E.H.R.R. 528** and **Steel and Morris v United Kingdom (2005) 41 E.H.R.R. 22,**

- **Article 8 -Everyone has the right to respect for his private and family life, his home and his correspondence-**

It has been considered that Article 8 and Article 3 work together and in such a way as to offer protection and impose a positive duty to act where this obligation under Article 3 alone might not apply. See **X and Y v The Netherlands (1986) 8 E.H.R.R. 235;** **Connors v United Kingdom (2005) 40 E.H.R.R. 9,** where it was held that a breach of Article 8 had occurred because legal procedures in existence were not sufficient to protect the appellants' right to respect for a home; **T.P. and K.M. v. the United Kingdom (application no. 28945/95).** *the first applicant was not provided with a proper, fair or adequate opportunity to participate in the decision-making procedures following the removal of the second applicant as an emergency measure;*; **The Sunday Times v United Kingdom (1979) 2 EHRR 245;** - The

wording in Article 8 explaining that the right must be exercised "*in accordance with the/prescribed by, law*" has also been held to mean that the citizen must have adequate access to the law in question-

In summary, States have a positive obligation to act to protect citizens from violent and abusive behaviour under Articles 3 and 8. Therefore, it can clearly be argued that if the State fails to allow women and children access to court orders such as protective orders or child contact orders, which she and her children need to prevent them being "*subjected to torture or to inhuman or degrading treatment or punishment*" and to ensure that she has "*the right to respect for her private and family life, her home and her correspondence*", then the State is in breach of Articles 3 and 8.