

**Bristol Fawcett's response to the consultation 'Proposals for the Reform of Legal Aid in England and Wales'**

Bristol Fawcett are responding to the Ministry of Justice's proposals to reform legal aid. In our view, the proposals, if implemented, will have a devastating effect on women's ability to access justice, and on vulnerable people generally.

**Introduction: Bristol Fawcett**

Bristol Fawcett is a local organisation whose members support the aims of the national Fawcett Society. The Fawcett Society is a long-standing national organisation that campaigns for equality between women and men in the UK on such issues as equal pay and pensions, and access to justice. The Fawcett vision is of a society where women and men are equal partners in the home, at work and in public life.

Bristol Fawcett members are volunteers who are active in the vibrant local campaign for gender equality, and work at a local level to:

- raise awareness of Fawcett and the work that Fawcett does;
- campaign and lobby to improve policy and services for women and girls, both locally and nationally;
- bring an informed gender equality perspective to local decision making bodies.

Our response to this consultation is not motivated by personal or organisational gain. We are responding because of the devastating effect these changes will have on women, both locally and across the UK. These changes will particularly affect those who are vulnerable – both women and men – but the impact will fall predominantly on women and other marginalised groups (such as disabled people, members of Black and minority ethnic communities, and refugees and asylum seekers) because of their lower incomes and restricted access to resources. Figures from the Community Legal Service also show that more women than men apply for civil legal aid.

**Summary**

Legal aid enables women (and men) who cannot afford to pay for legal advice and representation to end a violent or abusive relationship and get protection from the civil courts; access welfare benefits and housing support to which they are entitled; protect their children from violence or abuse – which may mean applying for a residence order; and resolve any immigration law problems that they have.

**Bristol Fawcett oppose the proposed changes because**

- they are **discriminatory and will reinforce inequality**;
- they will put women at **greater risk of violence** by making it harder for them to leave their relationships;
- they will also make it much harder to resolve issues relating to their children, such as residence and contact;
- they will remove an important **check to abuses of power and incompetence**: legal aid is essential to enable individuals to challenge decisions taken by those in positions of power, but will now not be available;
- they **breach the Human Rights Act 1998 (HRA)** because the ability to access legal advice and representation is a vital part of the right to a fair trial; and this may lead to violations of other fundamental rights protected under the HRA.

Bristol Fawcett are also concerned that the Ministry of Justice has not paid due regard to its obligations under section 6 of the HRA. Section 6 imposes a clear duty on all public bodies, including

the Ministry of Justice, not to infringe any of the rights it guarantees. This duty clearly applies to the formulation of policy to ensure that policies are not developed which, if implemented, would breach the rights protected in the HRA 1998.

**Question 1: Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme?**

We **agree** that all the types of case identified should remain in scope.

The consultation states that some issues and areas of law, like asylum and domestic violence, will remain in scope. However, we have considerable concerns about how the consultation proposes to achieve this.

## **Family law**

### **1. The definition of domestic violence**

The consultation document and accompanying press releases state that domestic violence will remain in scope under the proposed changes to the scope of legal aid. However, because of the way domestic violence is defined in this document, as well as the limitations on the kinds of cases that are seen as domestic violence related, this is simply **not** the case.

Paragraphs 4.64-4.68 of the consultation show that the focus of the reforms is on protecting victims from “**physical harm**” only. Physical harm is just one form that domestic violence may take. The current Home Office and Association of Chief Police Officers (ACPO) definition of domestic violence recognises this and in line with international standards, defines domestic violence as:

“any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”

This definition is also used by the Crown Prosecution Service, the Ministry of Justice and the UK Border Agency.<sup>1</sup>

It is widely recognised that psychological, financial and emotional abuse are all serious forms of domestic violence that can have devastating and long-term consequences for those who experience it. For example, in the recent Supreme Court case of *Yemshaw* [2011]<sup>2</sup>, Lord Brown stated that: “It has long been known that psychological abuse within a domestic context can cause at least as much long-term harm to the victim (most commonly the woman) as physical abuse.” This case concerned a woman who experienced verbal, emotional and financial abuse from her husband and sought assistance from her local authority to obtain housing as someone who was unintentionally homeless as a result of domestic violence under sections 175 and 177 of the Housing Act 1996. The validity of differentiating between physical violence and other forms of domestic violence was conclusively rejected in this case. Previous case law also recognised the devastating consequences of non-physical violence; e.g. in the case of *R. v Ireland; R v Burstow* [1997]<sup>3</sup>, which concerned the harassment of a woman by telephone calls, the House of Lords ruled that if a woman suffered a

<sup>1</sup> See the CPS’ *Policy for Prosecuting Cases of Domestic Violence* (2010), the Ministry of Justice’s *A Guide to Civil Remedies and Criminal Sanctions* (February 2003, updated March 2007; and the UKBA’s *Victims of Domestic Violence: Requirements for Settlement Applications* and the IDI *Chapter 8, Section 4, Victims of Domestic Violence*.

<sup>2</sup> *Yemshaw (Appellant) v London Borough of Hounslow (Respondent)* [2011] UKSC 3, paragraph 48.

<sup>3</sup> *R v Ireland; R v Burstow* [1997] 4 All E.R. 225

psychiatric illness because of the telephone calls she had received, she would have suffered “bodily harm”.

The harm caused by non-physical forms of violence and domestic violence have also long been recognised by the criminal law. Section 8 of the Public Order Act 1986 makes clear that a range of behaviours falling short of physical contact with a person can be considered violent. Putting someone in fear of violence<sup>4</sup>, harassment<sup>5</sup> and making a threat to kill<sup>6</sup> are all serious criminal offences notwithstanding the fact that they do not involve a perpetrator using actual physical violence against a victim.

## **2. What kinds of applications are seen as domestic violence related?**

Whilst the consultation document proposes that legal aid will remain available for women to obtain domestic violence injunctions (non-molestation and occupation orders), it proposes that legal aid for **related domestic violence issues**, such as financial relief (separating finances following divorce) and private child law (to resolve issues like child contact and residence) will only be available “**where there is an ongoing risk of physical harm**”. This means that not all victims of domestic violence will be able to protect themselves and their families from all forms of violence contrary to what the consultation suggests.

The consultation document proposes that legal aid to resolve family law matters (other than to obtain domestic violence injunctions) will only be available in domestic violence cases where the victim meets one of the following requirements:

- where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant (e.g. an application for an injunction) **or** has funded such proceedings within the last 12 months **and** an order was made, arising from the same relationship;
- where there are ongoing privately-funded (or self-represented) domestic violence (or forced marriage) proceedings (e.g. an application for a protection order), **or** where there have been such proceedings in the last 12 months **and** an order was made, arising from the same relationship;
- where there is a non-molestation order, forced marriage protection order or other protective injunction **in place** against the applicant’s ex-partner (or, in the case of forced marriage, against any other person);
- where the applicant’s partner has been **convicted** of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).

### **Bristol Fawcett are very concerned about these proposals.**

We believe that

- legal aid should be available to women who experience **any form of domestic violence**, not just physical violence;
- in addition, the eligibility requirements are much too restrictive and do not capture the experiences of women and the reality of domestic violence, whether physical or otherwise.

Legal aid not only enables a woman to protect herself from violence through the use of injunctions, it also enables her to leave a violent relationship and protect her children from abuse.

The proposed eligibility requirements are much too restrictive and will leave more women and children at risk of violence and domestic homicide; and/or force them to represent themselves in proceedings involving the perpetrator of abuse. Such proceedings could include applications for residence of

<sup>4</sup> Section 4 of the Protection from Harassment Act 1997

<sup>5</sup> Section 2 of the Protection from Harassment Act 1997

<sup>6</sup> Section 16 of the Offences Against the Person Act 1861

children, or investigating the safety and appropriateness of contact with an allegedly abusive parent. The 2008 ACPO guidance on investigating domestic abuse identifies psychological and emotional abuse and child contact disputes as risk factors for both physical violence and domestic homicide.<sup>7</sup>

**Even if it were accepted that the focus should be on protecting women from physical violence only** (which we do not accept for the reasons given above), **women would not be able to get legal aid for related family law proceedings when the perpetrator of the physical violence:**

- had been **given a caution** for an offence relating to domestic violence (and therefore has accepted criminal responsibility for his behaviour);
- had been given a **harassment warning**;
- was being **investigated or prosecuted for a criminal offence**.

It does not make sense to create a system where the victim would be entitled to legal aid for related family law proceedings if the perpetrator of domestic violence had been convicted of assault occasioning actual bodily harm, but would be denied legal aid and have to represent herself if the perpetrator had been cautioned for the same offence (because he accepted responsibility for his behaviour and did not have a criminal record).

The requirements are also problematic for a number of other reasons. Many women experiencing violence, even physical violence, neither report that violence to the police nor seek an injunction from the family courts. This is for a variety of reasons. Many women do not have faith in the criminal or civil justice system or fear that if they did report the violence or apply for an injunction, the violence they were experiencing would escalate.

In particular, women whose immigration status is insecure may not know their rights in the UK, or have been told by the perpetrator of violence that they are not entitled to support. Consequently, they may feel that it is safer to go into a women's refuge or relocate to another part of the country.

Women who, for whatever reason, choose not to use the criminal or civil justice systems to get protection from violence should not be disadvantaged for this.

To ensure that resources are targeted at those who are in most need, if requirements are to be used to determine who should receive legal aid for related family law proceedings, other forms of evidence should be accepted; for example, a statement from the woman herself about the violence she has experienced; evidence from a health professional about the impact of abuse on her physical or mental health; or a referral from a specialist domestic or sexual violence support organisation.

An additional complication relates to child abuse and eligibility for legal aid. If a child discloses to their parent that they have experienced violence or abuse it may be reported to the police. However, criminal prosecutions are less likely in child abuse cases than for other offences because of the challenges of using children, particularly young children, as witnesses. Whilst some women may use domestic violence injunctions to protect a child from physical or sexual abuse, it is much more likely that a woman will contact social services for support. If a child is suffering from physical or sexual abuse at home, social services often advise the non-abusive parent to seek a residence order and prohibited steps order to protect their child. If a parent is unable to take these steps to protect her child (because she is no longer able to get free legal advice and representation) the local authority may have a legal obligation to initiate child protection proceedings. The requirements set out above do not address this situation at all. The inability of women to obtain legal aid to take private law proceedings to protect their children from violence, neglect or abuse will result in:

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<sup>7</sup> *Guidance on investigating domestic abuse 2008*, ACPO / NPIA, page 35 onwards  
[www.acpo.police.uk/asp/policies/Data/Domestic\\_Abuse\\_2008.pdf](http://www.acpo.police.uk/asp/policies/Data/Domestic_Abuse_2008.pdf).

- children being placed at risk of further abuse;
- an increase in the number of child protection proceedings and all the costs associated with them;
- an increase in the number of children who are separately represented in private child law proceedings.

### **Re-victimisation at court**

Legal aid does not appear to be available in domestic violence cases for those against whom a protection order is sought (i.e. the alleged perpetrator). Removing legal aid from perpetrators in these cases will increase the number of women who are faced with questioning in court from the perpetrator of abuse (rather than from their legal representative). This could involve a perpetrator cross-examining a woman in detail on her account of the physical or sexual violence she has experienced – thus exacerbating and repeating her victimisation.

**Bristol Fawcett believe that legal aid should be available for those against whom a domestic violence injunction is sought, at least for court hearings, to ensure that women are not re-victimised in this way.**

### **The position of cohabittees**

Under the proposals, applications under section 14 of the Trustees of Land and Appointment of Trustees Act 1996 (TOLATA) will not be funded by legal aid even when someone meets the above criteria in relation to domestic violence. Section 14 TOLATA enables someone who has an interest in a property (for example, a cohabitee who has made financial contributions to it) to apply to the court for an order setting out the nature and extent of their interest. This is important for cohabittees who need to deal with their property following relationship breakdown. By not making legal aid available to cohabittees experiencing violence to enable them to resolve issues in relation to their property, the consultation is proposing to discriminate against those who choose not to marry or enter into a civil partnership.

The Committee on the Elimination of Discrimination against Women has already expressed its concerns about the “lack of specific regulations safeguarding the property rights of women in de facto unions” and the economic consequences of separation on cohabiting women and has requested that the Government includes the results of research into this issue in its next report to the Committee.<sup>8</sup> This is also an issue that has recently been addressed by Sir Nicholas Wall, President of the Family Division of the High Court. However, legislation to this effect has not yet been introduced.

We believe that discriminating against cohabittees in the way proposed is unacceptable and that cohabittees who are experiencing domestic violence and seek to end their relationship should get as much assistance to do so as is given to married couples or those in a civil partnership.

### **Mediation in private family matters**

One of the reasons given in the consultation for removing family law from the scope of legal aid is that the government believes that most couples should reach their own agreements about property and children if their relationship breaks down.

We believe that legal aid for legal advice and representation is necessary if mediation is to be a meaningful option for couples following relationship breakdown. For example, in relation to financial arrangements following relationship breakdown, individuals who want to resolve their dispute through mediation need legal advice on their entitlement, assistance getting disclosure and advice on any

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<sup>8</sup> See paragraphs 290 and 291 of the Concluding observations of UK’s fifth and sixth period reports of the Committee on the Elimination of Discrimination against Women CEDAW/C/UK/CO/6.

settlement proposals made. Legal aid is also necessary to turn any agreement reached in mediation into a binding legal agreement that can be enforced. While mediation is a valuable tool for couples whose relationship breaks down, it is not a substitute for the provision of legal advice and representation.

The consultation states that mediation will be retained to encourage out of court solutions and that “This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is present, we intend to offer support through family mediation, as some couples may still be able to obtain value from the mediation process.”<sup>9</sup>

**We believe that mediation is not appropriate in any case involving domestic violence because:**

- it will place the victim at further risk of violence or abuse;
- it gives the perpetrator the opportunity to continue to have contact with the victim;
- it causes re-victimisation;
- victims may feel unable to take part fully in mediation because they still fear the perpetrator;
- victims may be put under pressure by the perpetrator to agree to an arrangement or settlement that is not in their best interests.

**Asylum**

The consultation states that asylum cases will remain within the scope of legal aid. A claim for asylum includes:

- a claim for protection under the 1951 UN Convention and 1967 Protocol relating to the Status of Refugees;
- where there is serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict;<sup>10</sup> and,
- a claim for protection under Article 3 of the European Convention on Human Rights (ECHR).

Those who make a successful claim for protection and are given either Refugee Leave or Humanitarian Protection may apply for their family members, who may be living in situations of considerable danger in the country the applicant fled, to join them in the UK. Whilst these cases relate to the rights of refugees, they are currently classed as immigration cases and it is therefore proposed that legal aid will no longer be available to enable family reunion in these cases to take place.

**We believe that it is vital that family reunion cases are classed as asylum cases and that legal aid remains available to:**

- enable families separated by human rights violations to be reunited; and,
- ensure the safety of family members who may remain in considerable danger in the refugee's country of origin.

Family reunion is particularly important for women who may be:

- particularly vulnerable to persecution and violence if they are left in their country of origin alone following the flight of their husband. Women in this situation may be persecuted because of their association with someone who has applied for asylum in the UK or may be stigmatised because they are a separated spouse. In many countries and cultures it is not acceptable for women to live alone and women in this situation may be harassed or singled out for ill-treatment.
- Alternatively, women who have claimed protection in the UK may have had to leave children in order to escape persecution or other serious harm. It is vital for the physical and mental health and wellbeing of the woman and her children that they are reunited as soon as possible.

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<sup>9</sup> See para 4.70 of the consultation.

<sup>10</sup> Article 15(c) of the EU Qualification Directive

The importance of family reunion was recognised in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, to which the UK is a signatory.

Enabling family reunion also has considerable benefits for the UK as it promotes integration. The Council of Europe has recognised that family reunion and the residence rights that go with it are important elements which assist the integration of new migrants<sup>11</sup> while the preamble to the EU family reunification directive makes a similar point:

“Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.”<sup>12</sup>

**Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party?**

Bristol Fawcett do **not agree** with the proposal to give courts the powers to make interim lump sum orders against a party who has the means to fund the costs of representation for the benefit of the other party, if it is introduced as a substitute for legally aided advice and representation.

The making of such a lump sum order at the time that assets are divided would deplete the assets available to both parties on separation. Unlike the statutory charge (where money to repay legal costs is taken from a property at a time in the future when it is sold) **a lump sum order will remove assets at the time that they are divided reducing the amount available for families to re-house when the finances of both parties are likely to be under considerable pressure.** Given the limited assets of many separating couples, it may simply be impossible for any money to be released to pay for legal advice and representation; hence the individuals concerned being eligible for legal aid in the first place. The ability of one party to make an application for such a lump sum order against the other is also likely to increase acrimony, reducing the chances of couples reaching an agreement. Adding a further complication to the law in this area will also increase the time proceedings take to resolve.

It is also difficult to see how an applicant representing herself in financial relief proceedings (because legal aid is no longer available to her) will know that she can apply for a lump sum or be able to apply for it.

**Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme?**

Bristol Fawcett **do not agree** with the proposals to exclude the following types of case and proceedings from the scope of legal aid:

- Asylum support
- Clinical negligence
- Compensation from the Criminal Injuries Compensation Authority
- Debt
- Education
- Employment

<sup>11</sup> Recommendation (2002) 4 of the Committee of Ministers to member states on the legal status of persons admitted for family reunification (Adopted by the Committee of Ministers on 26 March 2002 at the 790th meeting of the Ministers' Deputies).

<sup>12</sup> EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, October 3, 2003, p.12-18, Preamble no. 4.

- Family law (financial relief and private child law)
- Proceedings before the Higher Courts
- Housing
- Immigration
- Welfare benefits

Women's economic inequality means that women are less likely to be able to pay privately for advice and representation. As violence against women is both a cause and a consequence of women's inequality, the ability to access free or low cost legal advice is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay privately for legal advice. Figures from the Community Legal Service confirm this analysis by showing that more women than men apply for civil legal aid. Women will therefore be disproportionately affected by these proposals, a position which is discriminatory and unacceptable. Women who experience multiple forms of discrimination, such as disabled women, lesbians, and those from minority ethnic communities are likely to be particularly disadvantaged. Any changes that are made to the legal aid scheme should not compound the disadvantage already faced by the poorest and most vulnerable in society.

The women's voluntary and community sector works with some of the most marginalised, economically disadvantaged and vulnerable women in society. These women frequently have a range of needs, including legal issues. Women's organisations provide specialist services in relation to a number of issues, including domestic and sexual violence, immigration and asylum, welfare benefits and employment and training. The sector has a breadth of experience and knowledge, is resourceful and skilled and provides high quality and appropriate services. However, the loss of legal aid for the women that these organisations serve will have a devastating impact on their lives (for reasons set out below). This in turn will increase the burden on the women's organisations that support them.

The women's sector is already under-funded and financially vulnerable.<sup>13</sup> The current financial climate has exacerbated this vulnerability and many women's organisations are currently in a funding crisis. For example, Devon County Council recently announced a cut of 100% of the region's domestic and sexual violence services. This loss can only compound the loss of the award winning Devon Law Centre.<sup>14</sup> In this context, women's organisations will simply not be in a position to "step into the breach" and provide services which mitigate the impact of any loss of legal aid. Indeed, as the Devon example shows, women currently risk losing specialist services from women's organisations and legal advice and representation from legal aid providers.

The consultation seems to suggest that some of the increasing cost of legal aid is caused by individuals going to court too readily and being less inclined to resolve disputes themselves. A similar argument in the consultation seems to be that people should take responsibility for their situation and that this does not involve bringing legal proceedings. The evidence, however, contradicts this analysis. Figures from the Public Legal Education Network indicate that **people are already reluctant to bring proceedings because of the complexity of the law and a lack of reliable information about the law and their legal rights.**<sup>15</sup> Research from 2007<sup>16</sup> shows that in the vast majority of child contact

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<sup>13</sup> *Why Women Only?*, Women's Resource Centre, 2007, [www.wrc.org.uk/resources/wrcs\\_research\\_and\\_reports/why\\_women\\_only.aspx](http://www.wrc.org.uk/resources/wrcs_research_and_reports/why_women_only.aspx).

<sup>14</sup> [www.devonlawcentre.org.uk](http://www.devonlawcentre.org.uk)

<sup>15</sup> *Knowledge, capability and the experience of rights problems*, Nigel Balmer et al, Public Legal Education Network, March 2010 [www.plenet.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf](http://www.plenet.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf).

<sup>16</sup> *Omnibus Survey Report No. 38: Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey*, produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D) (2008) (Office for National Statistics).



cases, contact is agreed informally between parents. This shows that applying to the court is a last resort in cases where agreement is not possible because, for example, there has been domestic violence, child abuse or neglect. In such a situation, being a responsible parent will involve making an application to the court. Similarly the fact that in 2008 73% of ancillary relief orders made were by consent<sup>17</sup> shows that people are taking responsibility for their financial affairs. It is, therefore, simply not the case that public funds are being wasted in unnecessary proceedings. Removing legal aid will make it harder, not easier, for people to resolve their problems or take responsibility for their situation because it will remove the sources of advice and support that facilitate and enable agreement.

Finally, expecting litigants to represent themselves before courts and tribunals in complex areas of law raises profound human rights concerns.

### **Employment**

Bristol Fawcett strongly disagree with removing this area of law from the scope of legal aid. Women experience systematic discrimination in the work place. In addition to being discriminated against in relation to remuneration, women also face discrimination in relation to pregnancy and child care. In relation to pregnancy and work for example, in 2005 the Equal Opportunities Commission (EOC) estimated that 30,000 women lose their jobs each year as a result of being pregnant<sup>18</sup> while research conducted by the EOC in 2003 found that 25% of employers asked could not refer to a single statutory entitlement for pregnant women.<sup>19</sup> The same study found that nearly 25% of women who made an employment tribunal claim had been dismissed within hours of telling their employer they were pregnant while one in five women returning from maternity leave were given lower grade jobs. While we welcome the fact that legal help is being retained in discrimination cases, we are concerned that removing legal aid for other employment cases will result in a decrease in the number of advice providers and employees being unable to find information and advice on their rights.

Pregnancy and maternity rights are a complex area of law and will often involve issues of general employment law as well as discrimination; for example, a woman who is dismissed because of pregnancy will often have a claim for unfair dismissal and discrimination on the grounds of pregnancy. As women are more likely to work in sectors which are not unionised, they are less likely to be able to get legal advice and representation on employment law issues from other advice providers.

Removing employment law from the scope of legal aid will also prevent those who are in domestic servitude, including victims of trafficking, from challenging their working conditions or recovering wages. Such a position is contrary to the UK's obligations under Articles 12 and 15 of the Council of Europe Convention on Action against Trafficking in Human Beings<sup>20</sup> which require states to provide legal advice and information to victims and free legal aid to enable them to seek redress for the harm they have experienced.

Sexual harassment is a form of violence against women that requires positive state action. We believe that this involves providing representation as well as advice on sexual harassment and employment law issues.

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<sup>17</sup> See page 59 of the consultation.

<sup>18</sup> *Greater Expectations: Final Report of EOC investigation into discrimination against new and expectant mothers in the workplace*, Equal Opportunities Commission, June 2005, as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

<sup>19</sup> *Pregnancy Discrimination at Work: A Review* Equal Opportunities Commission (2004), Equal Opportunities Commission, Manchester, as cited in *Statistics about women in the UK*, Women's Resource Centre, October 2010.

<sup>20</sup> *Council of Europe Treaty Series - No. 197* see

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>.

### **Family law: financial relief**

Bristol Fawcett strongly disagree with removing this area of law from the scope of legal aid for the following reasons:

- The long-term financial impact of separation on women is substantial. Separated / divorced women have a poverty rate of 27%, almost three times that of their former husbands.<sup>21</sup> Without advice and representation on financial entitlement on separation this gap will increase. The Committee on the Elimination of Discrimination against Women has also expressed its concerns about the economic consequences of divorce and has requested that the Government includes the results of research into this issue in its next report to the Committee.<sup>22</sup>
- Women are more likely to access public funding for divorce and financial relief so this cut will have a disproportionate negative impact on women. Women are also more likely to be the financially weaker party in a divorce and, if these proposals are introduced, there is an increased chance that women may agree to financial settlements which they would not have agreed to had they had the benefit of legal advice. Women's position will be further disadvantaged by the fact that men are more likely to be in the financially stronger position and, are therefore, more likely to be able to pay for legal advice privately.
- It is not the case that couples are going to court too readily to deal with these issues. The fact that in 2008 73% of ancillary relief orders made were by consent<sup>23</sup> shows that people are taking responsibility for their financial affairs. Removing legal aid will make it harder for them to do so.
- Mediation goes alongside legal proceedings; individuals still need advice on settlement and to turn an agreement reached in mediation into a legally binding settlement. Legal aid for advice and representation is necessary to facilitate mediation and assist couples reach agreement.
- Mediation is not appropriate where there has been emotional / financial abuse (see above).
- Financial relief is an extremely complex area of law. It is not reasonable to expect people to represent themselves.
- Increasing numbers of litigants in person will prolong cases and increase costs.
- Self-representation is not appropriate in domestic violence cases. The requirements that have to be met by a victim of domestic violence in order to be able to get legal aid for related financial relief proceedings are much too restrictive (see above in our answer to question 1). Women often don't identify behaviour they are experiencing as abusive until they get legal advice on a related issue, such as divorce and financial relief.
- It is not possible for all couples to reach agreement and a party who is reasonable should not be disadvantaged by the behaviour of the person from whom they are separating. We consider that legal aid is necessary in cases where agreement is not possible because of the unreasonable, controlling or abusive behaviour of one party. For example, we are concerned that financial relief proceedings may be used to maintain financial control by a perpetrator of violence.

### **Family law: private children matters**

Bristol Fawcett strongly disagree with removing this area of law from the scope of legal aid for the following reasons:

- Women's economic inequality means they are less likely to be able to pay privately for advice and representation. No other sources of free or low cost legal advice and representation for these proceedings are available.

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<sup>21</sup> 'Marital splits and income changes over the longer term' Stephen P. Jenkins, Institute for Social and Economic Research University of Essex, Feb 2008. The report can be read here [www.iser.essex.ac.uk/publications/working-papers/iser/2008-07.pdf](http://www.iser.essex.ac.uk/publications/working-papers/iser/2008-07.pdf).

<sup>22</sup> See paragraphs 290 and 291 of the Concluding observations of UK's fifth and sixth period reports of the Committee on the Elimination of Discrimination against Women CEDAW/C/UK/CO/6.

<sup>23</sup> See page 59 of the consultation.

- Private children law is a complex and sensitive area of law which engages Article 8 ECHR and involves the best interests of children. Schedule 1 applications for women who are not married but need financial provision for children are also extremely complex.
- An increase in litigants in person on both sides will delay proceedings, increase court costs, increase acrimony between the parties and result in prolonged uncertainty for children (see further below).
- Research from 2007<sup>24</sup> shows that in the vast majority of cases contact is agreed informally between parents. This shows that applying to the court is a last resort in cases where agreement is not possible, because for example, there has been domestic violence, child abuse or neglect.
- Mediation goes alongside legal proceedings; individuals still need advice on the types of contact available, parental responsibility and issues like shared parenting in order to reach an agreement. Legal aid for advice and representation is therefore necessary to facilitate mediation and assist couples to reach an agreement.
- Mediation is not appropriate where there has been domestic violence (see above).
- Self-representation is not appropriate in domestic violence cases. The requirements that have to be met by a victim of domestic violence in order to be able to get legal aid for related private child law proceedings are much too restrictive (see above, in our answer to question 1). Women often don't identify behaviour they are experiencing as abusive until they get legal advice on a related issue e.g. child contact.
- The proposals, if implemented, would facilitate the re-victimisation of victims of domestic violence. Even if the victim is legally aided the perpetrator will not be. This will increase the number of cases where the perpetrator cross-examines the victim personally, something that will be particularly distressing in finding of fact hearings (which are designed to determine whether violence occurred).
- It is not possible for all couples to reach agreement and a party who is reasonable should not be disadvantaged by the behaviour of the person from whom they are separating. Perpetrators of violence often issue private child law proceedings as a way of maintaining contact with their former partner and continuing the violence or abuse. Legal aid is necessary in cases where agreement is not possible because of the unreasonable, controlling or abusive behaviour of one party.
- Without proper legal advice and representation, women may feel forced to accept contact and / or residence solutions which are unsafe. Evidence suggests that this is already happening.<sup>25</sup> It will only increase if the proposals are implemented.
- The domestic violence requirements do not allow legal aid to be given in other cases that raise serious safety concerns e.g. where:
  - o social services advise a parent to seek a residence order or Prohibited Steps Order because of safeguarding issues;
  - o a child alleges physical / sexual abuse.The ability of non-abusive parents to protect their children from harm will be reduced resulting in increased child protection proceedings.
- Women who are in prison will be unable to take part in private law proceedings that relate to their children. Again this could result in local authorities having to bring child protection proceedings

<sup>24</sup> *Omnibus Survey Report No. 38: Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey*, produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D) (2008) (Office for National Statistics).

<sup>25</sup> See Women's Aid report '*Twenty-nine Child Homicides: Lessons still to be learnt on domestic violence and child protection*' (Jan 2004) and Lord Justice Wall's report to the President of the Family Division on the outcome of his review of five cases where children had been murdered by their fathers in contact where there had been judicial involvement (Feb 2006). Both of these reports highlighted cases where mothers who had experienced domestic violence had agreed to contact. A number of reasons were put forward for this including the 'routinisation' of violence and effect of pressure to reach an agreement.

where women are unable to resolve family law issues themselves. Self-representation is not an option in these cases, nor will be paying privately for advice.

- There will be an increase in the separate representation of children under rule 9.5 because unrepresented parents will be less able to effectively advocate on behalf of their children.
- While legal aid will remain available in international child abduction cases, it will not for child abduction in the UK so women will be unable to protect their children from abduction (e.g. by applying for an emergency residence order or Prohibited Steps Order), find abducted children or have them returned to them. This will have cost implications for both the police and local authorities.

### **Higher courts: Court of Appeal, Supreme Court and references to the European Court of Justice**

Bristol Fawcett strongly disagree with removing this area of law from the scope of legal aid for the following reasons:

- It is difficult to envisage a case that went to this level that did not involve a complex legal issue (it is only possible to go to the Court of Appeal on a child law issue where the appeal raises an important point of principal or law, or there is some other compelling reason for it to be heard). Private child law, financial relief, housing, employment and immigration cases that go to the Court of Appeal are extremely complex; it is not feasible to expect people to represent themselves at this level of hearing even if there are no vulnerability issues.
- To access the Court of Appeal or higher courts you have to go through permission proceedings and meet specific legal tests. How could a litigant in person without legal expertise do this?
- Increased numbers of applications and cases involving litigants in person will increase the financial burden on the higher courts.

### **Housing**

We strongly disagree with removing this area of law from the scope of legal aid for the following reasons:

- The demographics of local authority and social housing mean that those affected by this change are more likely to be disabled or socially excluded in another way. As with the other changes, it is the most vulnerable who will be unable to access advice and assistance.
- What will be the position of women who are seeking a transfer because of domestic violence or harassment? This is another area where victims of domestic violence will be put at risk if the proposed changes are implemented.
- Pressure on other advice providers during the current economic situation and following the implementation of changes to housing benefit mean that alternative sources of advice and support will not be available.
- By not dealing with the issue when it arises the case is more likely to end up resulting in possession proceedings (for which legal aid is available) or in an application to the local authority. This is costly and inefficient.

### **Immigration**

We strongly disagree with removing this area of law from the scope of legal aid. Immigration cases are often extremely complex and involve fundamental human rights issues. We are therefore very concerned about proposals for individuals to represent themselves in such proceedings.

In relation to cases involving Article 8 ECHR (the right to private and family life) we consider the high number of cases that have reached the House of Lords<sup>26</sup> evidence of the complexity of the legal issues involved and the inability of applicants to represent themselves in such proceedings. Similarly, we are concerned about the potential for individuals to represent themselves in immigration cases when UK Border Agency (UKBA) policies and regulations often don't reflect the correct legal position.  
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We consider that all victims of domestic violence should be able to get legal aid to secure protection in the UK. Cases under the domestic violence rule (para 289 of the Immigration Rules), regulation 10 of the 2006 EEA regulations<sup>28</sup>, or that raise domestic violence or gender-based violence issues all raise the same issues as asylum cases (e.g. risk of physical harm, vulnerability, trauma, inability to self represent or pay privately etc). The removal of legal aid for domestic violence rule cases will have considerable implications for the operation of the Sojourner Project<sup>29</sup>, and also to the Government's commitment to implementing a long term solution to the problems faced by women experiencing domestic violence who have no recourse to public funds.

We also disagree with this proposal for the following reasons:

- Removing immigration law from the scope of legal aid will have consequences for trafficked women contrary to the UK's obligations under Articles 12 and 15 of the Council of Europe Convention on Action against Trafficking in Human Beings<sup>30</sup> which require states to provide legal advice and information to victims and free legal aid to enable them to seek redress for the harm they have experienced.
- Removing legal aid for immigration cases will lead to a considerable increase in the number of asylum applications as people have no other option to seek advice and protection in the UK.
- One of the justifications given in the consultation document for removing legal aid from immigration cases is that immigration cases involve people's personal choice. Whilst this might be true for some groups of migrants e.g. those who work or study in the UK for short periods of time, it is not the case for victims of domestic violence or in cases where the UKBA decides to remove someone who has family life in the UK and has been living here for a considerable amount of time.
- Costs in legal aid for immigration cases will have increased over recent years because of an avalanche of legislation in this area. In immigration there have been Acts of Parliament in 1993, 1996, 1999, 2002, 2005, 2006, 2007, 2008 and 2009. Significant changes have also been made in the form of regulations and changes to the Immigration Rules, many of which have been introduced hastily, are poorly reasoned and have been successfully challenged in the courts.<sup>31</sup> Instead of penalising litigants, we recommend that the Ministry of Justice should assess what savings could be made by the UKBA by, for example, improving quality of policy formation.

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<sup>26</sup> See for example *Huang and Kashmiri v SSHD* [2007] UKHL 11, *E B Kosovo (FC) (Appellant) v SSHD* [2008] UKHL 41; *Chikwamba v SSSH* [2008] UKHL 4; *Beoku Betts v SSHD* [2008] UKHL 39; *AL Serbia v SSHD*; and *R (Rudi) v SSHD* [2008] UKHL 42.

<sup>27</sup> For example, the relevant UKBA regulations have still not been changed following the European Court of Justice's decision in *Metock* which was decided in June 2008.

<sup>28</sup> The Immigration (European Economic Area) Regulations 2006

<sup>29</sup> The Sojourner Project is a pilot scheme run by Eaves Housing and funded by the Home Office, to co-ordinate support, accommodation and subsistence for women and their dependents with no recourse to public funds, who entered the UK on a spousal or partner visa and are eligible to apply for Indefinite Leave to Remain (ILR) under the Domestic Violence Rule.

<sup>30</sup> *Council of Europe Treaty Series - No. 197 see*

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>.

<sup>31</sup> See for example the case of *Diego Andres Aguilar Quila v SSHD* [2010] EWCA Civ 1482 following the raising of the marriage age to 21.

- Richard Thomas, Chair of the Administrative Justice and Tribunals Council, suggests that the success rate on appeal in immigration cases was 48%.<sup>32</sup> Research carried out by Asylum Aid in 2010 also found that 50% of refusals of women's asylum claims were overturned when subjected to independent scrutiny at Tribunal level.<sup>33</sup> We consider that improvements to the quality of decision making would reduce the number of appeals and make considerable savings for both for the UKBA and the Ministry of Justice.
- Legal aid costs are also increased by the failure of the UKBA to follow the law. For example, following the case of ZO (Somalia) [2009]<sup>34</sup> (which concerned permission to work for certain asylum-seekers) the failure of the UK to implement the judgement resulted in applicants having to issue judicial review proceedings in order to enforce it. It is estimated that between 200 and 300 judicial review claims were issued that would have been unnecessary had the UKBA implemented the judgement properly and in a timely fashion.
- Whilst we welcome the Ministry of Justice's recognition that legal aid is necessary for those in immigration detention, we are concerned that it does not make sense to retain legal aid for someone who needs assistance challenging their detention but not to deal with the underlying immigration law problem that may have resulted in their detention.
- Furthermore, whilst we welcome the Ministry of Justice's recognition that legal aid should remain available for judicial review proceedings, it is unclear who will be in a position to do this work if there are no legal aid contracts for immigration work and / or there is a significant reduction in the number of immigration law legal aid providers.
- Legal aid providers who do immigration law are, rightly, highly regulated to ensure the quality of advice and representation given. To give immigration advice in the course of a business "whether or not for profit", an advisor must be a solicitor, barrister, or regulated by the Office of the Immigration Services Commissioner.<sup>35</sup> To give legal aided immigration advice, advisors must be accredited by the Law Society's Immigration and Asylum Accreditation Scheme.
- Women experiencing violence, and other vulnerable migrants who are unable to get legally aided advice, may be exploited by unscrupulous advisors. It was recognition of problems with some immigration advisors that resulted in the creation of the current regulatory framework.

An individual involved in immigration proceedings is pitted against the UKBA (rather than another unrepresented individual). The disparity in resources between an unrepresented litigant (who may not speak English or have a support network) and a government department are considerable and could lead to substantive inequality. Similarly, what will happen when an appellant with an immigration law issue succeeds before the First-Tier Tribunal but the Home Office appeals against the decision? It is unfair to expect individuals to pay privately for representation or represent themselves when it is the UKBA who is appealing a decision.

If legal aid is no longer available for immigration cases it is unclear where people who are unable to pay privately for advice will go and how the quality of advice will be ensured. The consultation document does not identify any other sources of immigration advice for those who are unable to pay for it privately. Not-for-profit organisations are unlikely to be able to step in as they will not be able to meet the regulatory requirements or secure the necessary funding. MPs surgeries will be the only place remaining where individuals may be able to go for immigration advice.

## Welfare benefits

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<sup>32</sup> November 2010, as quoted in the initial consultation response of the Immigration Lawyers Practitioners Association available at [www.ilpa.org.uk](http://www.ilpa.org.uk).

<sup>33</sup> *Unsustainable: the quality of initial decision-making in women's asylum claims*, Asylum Aid, January 2011 [www.asylumaid.org.uk/pages/html](http://www.asylumaid.org.uk/pages/html).

<sup>34</sup> ZO (Somalia) [2009] EWCA Civ 442

<sup>35</sup> Section 84 of the Immigration and Asylum Act 1999

Bristol Fawcett strongly disagree with removing this area of law from the scope of legal aid for the following reasons:

- Welfare benefits law can be very complex, and also relate to other issues (such as immigration and therefore the right to claim benefits).
- As with debt cases, a failure to resolve welfare benefits problems when they arise will lead to a 'snowballing' of issues that will lead to increased costs elsewhere (e.g. because people approach their local authority or become eligible for advice because their home is at risk).
- As disability benefit is one of the benefits for which legal aid will no longer be available, individuals in need of welfare benefits are more likely to have physical or mental health problems or learning difficulties than the rest of the population. It is not reasonable to expect those with mental health problems or learning difficulties to complete the necessary appeal forms and represent themselves.
- The success rate on appeal in social security appeals was 41%.<sup>36</sup> This means that in 41% of cases the decision maker got it wrong. Applicants should not be affected by poor quality decision making. If savings are to be found in this area it could be done by improving the quality of decision making.
- 20% of CABx and 55% of Law Centres have legal aid contracts to advise the public on issues including debt and welfare benefits. The proposed changes will lead to a loss of these vital sources of community advice as other sources of funding for these providers, for example, from local government, are also being cut. Where will people go for advice when there are no legal aid law firms, CABx and Law Centres?

**Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases?**

Bristol Fawcett **do not agree** with the Government's proposals to introduce a new scheme for "excluded cases". We would also like to emphasise that the UK's obligations under the ECHR are domestic legal obligations which create duties for all public authorities, including the Ministry of Justice. Legal aid has to be provided in certain types of cases if the UK is to meet its domestic obligations under the HRA and its international obligations under the ECHR and the Council of Europe Convention on Action against Trafficking in Human Beings. There may also be other public interest reasons why legal representation for some types of cases, (for example, at inquests) should be available. However, we believe that none of these cases should be considered "exceptional", and should instead be dealt with within the normal scope of legal aid.

The right to a fair trial is fundamental to the rule of law and has a long tradition in this country's constitutional history. This right is set out in Article 6 of the ECHR (set out below). Whilst the ECHR is an international legal agreement, it is important to remember that most of the rights set out in the ECHR, including Article 6, have been made enforceable in UK law through the Human Rights Act 1998 (HRA).

Importantly, under section 6 of the HRA all public authorities (including central government departments) are under a duty not to infringe people's Convention rights. This duty extends to everything that public authorities do, including decisions about policy development and

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<sup>36</sup> November 2010, as quoted in the initial consultation response of the Immigration Lawyers Practitioners Association available at [www.ilpa.org.uk](http://www.ilpa.org.uk).

implementation, such as “reforms” to the legal aid system. This section 6 HRA duty is important because it focuses on the need for the state to ensure prevention rather than cure. This means making decisions, policies and laws which consider people's right from the start, rather than only providing a remedy once those rights have been engaged. This is particularly important in the context of legal aid because the impact of the proposals will be to significantly reduce the number of people able to access legal advice and representation which would enable them to seek legal remedies for the infringement of their rights.

It is our contention that the legal aid proposals fail to consider adequately the government's obligations under the HRA, and that the proposals risk infringing the ECHR rights protected under the HRA, particularly the rights of women who are vulnerable, marginalised or experiencing disadvantage.

We believe that the Ministry of Justice proposals restricting access to legal aid deal with complex areas of law and risk breaching the right to a fair trial in relation to rights protected under the HRA/ECHR. This includes the right to respect for private and family life (Article 8, ECHR) which protect people's physical and mental well-being, set minimum standards of treatment by the state and which recognise when people are vulnerable, disadvantaged and/or are dependent on the state.

It is our submission that a number of the areas of law that the Ministry of Justice proposes to remove from the scope of legal aid engage Convention rights and these areas are so complex that legal aid must be provided in order for the UK to meet its obligations under the HRA and the ECHR. Further, noting the duty on the government under section 6 HRA to respect people's Convention rights in decisions, policies and laws, we believe that the government should practice prevention rather than cure and bring these areas of back into the scope of the legal aid scheme rather than seeking to adopt a case-by-case approach which focuses on exceptions.

At a practical level, opting for an “exceptions” approach will be time consuming, costly and open to legal challenge. At a principled level, it is important to bring these areas of law back within the scope of legal aid because the reforms in question will limit the ability of people to access the legal advice and representation which would enable them to challenge infringements of their rights in the courts. The implementation of an “exceptional” cases scheme in the manner suggested is therefore unacceptable both in theory and in practice.

**Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.**

Bristol Fawcett are extremely concerned that the consultation misrepresents research carried out for the Department of Constitutional Affairs by Professor Richard Moorhead and Mark Sefton<sup>37</sup> to conclude that there was not a significant difference between cases carried out by someone representing themselves and cases where clients were represented<sup>38</sup>. The research actually found that:

- unrepresented parties in cases were common under the current legal aid system but that obsessive/difficult litigants were only a very small minority of those involved;
- many parties were unrepresented because they were ineligible for legal aid and unable to afford legal representation;
- although some litigants in person were able to access some advice and assistance this was only on an *ad hoc* basis;

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<sup>37</sup> *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Professor R Moorhead and M Sefton, Department for Constitutional Affairs (2005), <http://www.familieslink.co.uk/download/july07/DCA%20view%20of%20LIPs.pdf>.

<sup>38</sup> See paragraphs 4.266 onwards of the consultation.



- some unrepresented litigants were vulnerable (e.g. because of a mental health problem or disability);
- the legal issues at stake were significant for litigants concerned;
- the level of participation of unrepresented litigants was at a lower intensity than participation by represented parties;
- unrepresented litigants participated less in proceedings but made more mistakes, struggling with law and procedure, and there was evidence of prejudice to their interests;
- there was some evidence to suggest that cases involving unrepresented litigants took longer and were less likely to be settled.

An increased number of litigants in person will also have time and cost implications for the court system, as the late Mr Justice Hodge, when giving evidence to the Constitutional Affairs Committee explained:

“The AIT and its judges, whenever they have been asked, have always said that we value representation and we want as many people to be legally represented as possible, and whenever we discuss these matters with the Legal Services Commission, which we do periodically, that is entirely what we say....—the change in representation has been very much driven by the Legal Services Commission’s worries about the total cost of their budget rather than anything to do with us.”

Mr Justice Collins, giving evidence in the same proceedings also commented on the problems faced by judges in dealing properly with litigants in person stating:

“it makes it more difficult to give proper consideration when you do not have the evidence out before you in the form that it ought to be put.”<sup>39</sup>

We therefore believe that the evidence actually shows that being unrepresented has significant negative consequences for the individuals involved and that settlement and efficiency in legal proceedings is best promoted by giving individuals access to legal advice and representation.

### **The Community Legal Advice Telephone Helpline**

- **Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?**
- **Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel?**
- **Question 9: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?**
- **Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?**
- **Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?**

Bristol Fawcett **do not agree** that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice. Nor do we agree that specialist advice should be offered through this Community Legal Advice helpline in all categories of law, and that in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel.

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<sup>39</sup> Oral evidence taken by Constitutional Affairs Committee on 21 March 2006, [www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm](http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm).

Whilst we welcome the introduction of such a helpline, this should be in addition to the ability of an individual to seek face-to-face advice. We strongly oppose its establishment as a single gateway to civil legal advice. Face-to-face advice should be available to anyone who wants it, in line with Government reforms to other areas of the public sector (which aim to increase choice and diversity.)

The use of a helpline to determine access to legal advice and representation raises a number of issues. While telephone services are useful in reaching some client groups, a generic service of this nature will fail to meet the needs of many of those who are vulnerable. For example –

- What provision will be made for those without access to a telephone?
- How will asylum-seekers or those with an insecure immigration status be able to access advice and representation (particularly if English is not their first language)?
- How are children, (for example, separated children seeking asylum in the UK) expected to use the helpline?
- How likely is it that a woman experiencing domestic or sexual violence will be able to disclose this to an operator (who may well be male)?
- How can someone who is not legally trained reliably identify whether or not a client needs specialist legal advice?

For all of these reasons, it is vital that individuals can still seek advice and support directly from a specialist provider.

We are particularly concerned about the effects of the helpline on women experiencing violence. What training will operators have in violence against women issues? How will operators identify cases where abuse is happening? The woman herself may not identify her experience as abusive or violent. What safeguards would be put in place to ensure that emergency advice is available? What about those who are unable to make a call in private? If a woman did contact the helpline and disclose that she was experiencing violence it is not clear how she would be referred to a specialist advice service. Will referrals be made to specialist solicitors (e.g. in relation to issues like domestic violence, forced marriage or international child abduction)? How will these services be procured? What are the costs of a procurement round of this kind?

Finally, we reject the idea that there is evidence that people want a helpline rather than the ability to contact an advisor directly. In our experience, those seeking publicly funded legal advice and representation want choice in how they access it. Reducing choice in this area is contrary to Government reforms to other areas of the public sector, such as education and healthcare.

### **Financial Eligibility**

- **Questions 12-23 which propose changes to reduce the number of people who are financially eligible for legal aid, including for those who are in receipt of welfare benefits.**

**Bristol Fawcett do not agree with any proposals that make it more difficult for those on a low income to qualify for legal aid.**

Women's ability to obtain and benefit from their legal rights and remedies is dependent upon their ability to access legal information, advice and representation. Women experiencing violence may need advice on how they can protect themselves from violence by seeking non-molestation or occupation orders; how to divide joint assets and joint debts following relationship breakdown; deal with the family home; make arrangements for child contact and residence and organise and maintain child maintenance. Women at risk of specific forms of violence against women that disproportionately affect BME women (such as forced marriage, dowry-related violence and female genital mutilation) may

need specialist legal advice on these issues in addition to the issues outlined above. As violence against women is both a cause and a consequence of women's inequality, the ability to access free or low cost legal advice is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay privately for legal advice (see above for statistics on women's unequal pay and women's poverty). Figures from the Community Legal Service confirm this analysis by showing that more women than men apply for civil legal aid. For example, in 2005/2006 62.2% of 154,153 applications for civil representation in family matters were made by women (and 37.8% by men).<sup>40</sup> Any further reductions in the number of people who are eligible for legal aid will disproportionately affect women, and in particular women on low incomes and women who share more than one protected characteristic, contrary to government commitments and policy on gender equality.

### Civil Remuneration

- **Question 31: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees?**
- **Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases?**
- **Question 34: Do you agree with the proposal to codify the rates paid to barristers as sent out in Table 5, subject to a further 10% reduction?**
- **Question 37: Do you agree with the proposals to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases?**

Our answer to these questions are based not on any personal or organisation gain but because of the effects that we believe the proposals would have on the availability of solicitors and legal advice agencies able to take on legally aided civil and family cases, and hence the severe negative impact on vulnerable clients.

Bristol Fawcett **do not agree** with the proposals to:

- reduce all fees paid in civil and family matters by 10%;
- cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases;
- codify the rates paid to barristers as sent out in Table 5, subject to a further 10% reduction; or
- cap and set criteria for enhancements to hourly rates payable to solicitors in family cases.

As set out above in relation to financial eligibility, women's ability to obtain and benefit from their legal rights and remedies is dependent upon their ability to access legal information, advice and representation. However, despite evidence of the considerable need for quality legal advice and representation providers, research published in 2005 indicated that the number of solicitors' firms and advice agencies undertaking publicly funded family law work had gone down by 25% over a four-year period.<sup>41</sup>

Women with an insecure immigration status face multiple forms of discrimination that places them at greater risk of experiencing violence and which may prevent them from accessing life-saving services. However, as with the availability of legal aided family law advice, despite the demonstrable need for advice and representation there has been a considerable reduction in the number of solicitors' firms and advice agencies undertaking publicly funded immigration and asylum work. In relation to immigration and asylum law, where concern has been raised about the quality of advice and representation, it is of particular concern that high-quality providers, including those in the not-for-profit sector, have had to stop doing publicly funded work. For example, Refugee and Migrant Justice (formerly the Refugee Legal Centre) went into administration earlier in 2010 and the award winning

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<sup>40</sup> Legal Services Commission, Equalities Annual Report 2005/6, published June 2007.

<sup>41</sup> Department of Constitutional Affairs, A Fairer Deal for Legal Aid, July 2005.

Devon Law Centre has closed (resulting in a situation where those in Plymouth now have to go as far afield as Bristol to find legal representation).<sup>42</sup> In the Dover ports area, no providers have been given asylum and immigration legal aid contracts.

We believe that the current levels of remuneration have already resulted in a reduction in the number of providers, and that this is preventing women and other vulnerable groups from having access to justice. We are concerned that the proposals to reduce levels of remuneration even further threaten the very existence of the legal aid scheme; without any providers to advise and represent people, it will not matter which areas of law remain in scope or how financial eligibility is calculated.

### Alternative sources of funding

- **Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme?**
- **Question 44: Do you agree that the amount recovered should be set as a percentage of general damages?**

Bristol Fawcett **do not agree** with the proposal to introduce a Supplementary Legal Aid Scheme; nor do we agree that the amount recovered should be set as a percentage of general damages.

We believe that the costs of providing and administering legal aid should be reduced by improving the quality of Government decisions (for example, decisions on eligibility for welfare benefits or in relation to asylum and immigration law). In addition, by properly carrying out legal aid impact assessments when new legislation is proposed, the costs to the legal aid budget of any changes in the law will be known and considered in advance of those changes being made. For example, in relation to the UKBA, in 2009<sup>43</sup> 48% of immigration appeals succeeded. This means that in 48% of cases the UKBA made the wrong decision, a statistic which reveals staggering incompetence and which has considerable implications for the legal aid budget and court time. Recent research carried out by Asylum Aid found a similar level of poor quality decision making in relation to women's asylum claims<sup>44</sup>. Under these circumstances consideration needs to be given to making the UKBA financially responsible for the consequences of its poor quality decision-making.

Similar arguments can be made in relation to the implementation of changes to the Immigration Rules, regulations and policies which are poorly thought out and hastily drafted. This logic can also be applied to other areas of government decision making that raise concerns, such as in relation to welfare benefits.

### Impact Assessments

- **Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?**
- **Question 50: Do you agree that we correctly identified the extent of the impacts under these proposals?**
- **Question 51: Are there forms of mitigation in relation to client impacts that we have not considered?**

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<sup>42</sup> <http://www.devonlawcentre.org.uk/>

<sup>43</sup> Control of Immigration, Statistics, United Kingdom see <http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf>

<sup>44</sup> *Unsustainable: the quality of initial decision-making in women's asylum claims*, Asylum Aid, January 2011 [www.asylumaid.org.uk/pages/.html](http://www.asylumaid.org.uk/pages/.html).

Bristol Fawcett **do not agree** that the Ministry of Justice has correctly identified the range or extent of impacts that these proposals will have.

We believe that the impact assessments do not adequately reflect the impact that these reforms would have on those who are vulnerable, such as women experiencing violence and disabled people. It is because of the disproportionately negative effects that these proposals will have on some of the most disadvantaged and vulnerable people in our society that we are opposing them.

**The Ministry of Justice is reminded of the existing gender, race and disability duties and the new Public Sector Equality Duty that will come into force in April 2011. In order to meet both existing and upcoming equalities legislation, the proposals in relation to legal aid must be considered in light of the need to pay due regard to equality issues.**

Under Section 149 of the Equality Act 2010, the Ministry of Justice must, in the exercise of its functions, have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Equality Act 2010 makes clear that having “due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”

The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

**It is our submission that these proposals, if implemented, will entrench and exacerbate the disadvantage faced by women, in all spheres of life.** As has been outlined, we are very concerned in general terms about the disproportionate adverse impact that these proposals would have on women’s access to justice and effective remedies (because the statistics show that women are more likely to apply and need civil legal aid). We consider that the proposals will entrench women’s inequality in key areas, where Government has identified a need to promote gender equality and challenge disadvantage. In particular, the proposals will undermine efforts to combat violence against women in all its forms (see in particular our responses to questions 1 in particular on family law; 3 on immigration and 7 on the helpline); undermine efforts to promote women’s equality in employment (see our response to question 1 on employment); and widen the economic inequality between women and men.

We are especially concerned that the proposals will have particularly adverse and disproportionate impact on women who share more than one protected characteristic. In relation to disability, it is our contention that individuals suffering from a disability will be disproportionately affected by proposed cuts to advice on debt and welfare benefits (see our response to question 3 on welfare benefits). The Ministry of Justice in its own impact assessments has highlighted how “disabled people comprise a



higher share of the present client base of civil legal aid recipients in this category than of the total population.” As has been conceded by the Ministry of Justice in its own impact assessments, there is a lack of sufficient and reliable disaggregated data concerning the legal aid client group, and this is particularly true of data on race and disability. In the absence of efforts to collect or identify reliable data concerning legal aid client groups for each of the protected characteristics, we do not consider that a meaningful equality impact assessment has been conducted.

Bristol Fawcett  
10<sup>th</sup> February 2011