



**domestic
abuse
commissioner**

Domestic Abuse Commissioner’s response to the Review of Civil Legal Aid Call for Evidence

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Role of the Domestic Abuse Commissioner

The Domestic Abuse Act 2021 established the Office of the Domestic Abuse Commissioner (DAC), to provide public leadership on domestic abuse issues, play a key role in overseeing and monitoring the provision of domestic abuse services in England and Wales and promote best practice, including in multi-agency working.¹

The role of the Commissioner is to encourage good practice in: preventing domestic abuse; identifying victims and survivors, and perpetrators of domestic abuse, as well as children affected by domestic abuse; and improving the protection and provision of support to people affected by domestic abuse from agencies and government.

Scope of the response

This response to the Call for Evidence is limited to the questions which are most relevant to the DAC's work, in particular, legal aid as it relates to the Family Court, which is fundamental to the family justice system's ability to safeguard children and adult victims and survivors of domestic abuse.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') introduced significant restrictions on legal aid funding for family law proceedings.

Since LASPO 2012, the understanding of domestic abuse has evolved considerably. The Domestic Abuse Act 2021 has clearly expressed parliamentary intention to better safeguard victims and survivors of domestic abuse. In doing so, the effects of domestic abuse have been propelled and have, rightly, been subjected to a spotlight.

Whilst legal aid is available in cases concerning domestic abuse, this eligibility 'safeguard' has not necessarily been as successful in its application as intended. Evidentiary thresholds, counter-intuitive criteria and restrictions on eligibility have obstructed many victims and survivors of domestic abuse from support which they should be able to access in order to protect themselves and their children.

The Domestic Abuse Act 2021 should further be heralded for section 3, which recognises that children who 'see(s) or hear(s), or experience the effects of, the abuse' are victims in their own right. It then follows that parents seeking to protect child victims of domestic abuse in family law proceedings, should be able to access legal aid in order to meet the intentions of section 3, given the vulnerability of child victims.

The review of civil legal aid is therefore timely, and legally necessary given the amplified duty held in relation to child victims of domestic abuse.

¹ Home Office (2022) [Domestic Abuse Statutory Guidance](#) p.128

This response will, therefore:

- a) make reference to the difficulties victims and survivors of domestic abuse face when attempting to access legal aid;
- b) assess the impact of wrongly being regarded as ineligible for legal aid due to evidentiary thresholds;
- c) consider the consequential and devastating impact of self-navigating the family justice system whilst also managing the ongoing impacts of domestic abuse; and
- d) consider ways in which the present system frustrates justice and also the efforts of legal aid firms who represent domestic abuse victims and survivors.

Due to the scope of this Call for Evidence, this submission focuses on the aspects which the Commissioner believes are most pertinent to victims and survivors of domestic abuse in the context of family law proceedings. The Office of the Domestic Abuse Commissioner would be pleased to discuss any of the responses provided in further detail upon request.

The Commissioner's overarching position on civil legal aid

The Commissioner is extremely encouraged to see that the Ministry of Justice is considering the efficacy of limiting civil legal aid and is focused on domestic abuse victims and survivors being able to access support and protection they are entitled to.

The Commissioner would like to impress that whilst legal aid should presently be available to all victims and survivors of domestic abuse, the reality is that applying for legal aid is unnecessarily complex and there are various hurdles individuals are expected to jump through at acutely stressful points in their lives. This has had considerable direct effect on adult victims and survivors, and enormous direct and indirect impact on child victims of domestic abuse. The Commissioner strongly asserts that an intimidating, unpredictable and demanding application process for legal aid deters victims and survivors from seeking protection from domestic abuse perpetrators.

Further, the present legal aid provisions are proving to disincentivise experienced legal counsel from undertaking legal aid work. In cases of domestic abuse, and especially coercively controlling behaviours, this deprives the family justice system of knowledge and experience to navigate cases relating to abuse. Low rates of pay (which have not increased since 1996 which represents a real-terms cut of 49.4% in fees to 2022)² in parallel with the demanding nature of cases mean that the family justice system does not incentivise experienced legal practitioners. The Commissioner notes with serious concern that in the last decade, the number of civil legal aid providers has nearly halved and the number of people self-representing in the Family Court has tripled.³

² The Law Society (January 2024) Civil Legal Aid Review: Providers actively leaving the sector <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/civil-legal-aid-review-providers-actively-leaving-the-sector>

³ The Law Society, Civil Legal Aid Review (February 2024) <https://www.lawsociety.org.uk/topics/legal-aid/civil-legal-aid-review>

There is a clear mismatch between the complex legal proceedings and the absence of uniform legal provision in the form of legal representation. England and Wales prides itself on a justice system which holds security, safety and equality at its forefront. However, the family justice system is hallmarked by delays, re-traumatization within legal proceedings and litigants in person who are overwhelmed and unfamiliar with the complexities of legal proceedings in the Family Court as a direct result of self-representing. Such cases require additional support from the court and the judiciary to ensure that the proceedings are not compromised.⁴ Litigants in person face self-navigating technical and complex areas of the law in efforts to protect themselves and their children without support from the state.

The effect of this is felt in resource and human terms: the judiciary and court staff sustain increased workloads in supporting unrepresented individuals through the family justice system. In parallel, the overwhelm experienced by litigants in person has been known to induce severe stress levels, in cases leading to long-lasting trauma due to an absence of trauma awareness in court proceedings.⁵ This has further undermined faith held in the Family Court, given stories which emerge and deter other victims and survivors from turning to it for protection.

The Family Court, domestic abuse and legal aid

Legal Aid should be available in all cases relating to domestic abuse and the evidentiary hurdles should be reconsidered to mitigate the risk of denying a victim of domestic abuse protection and support they are entitled to by law.

In the year 2023, there were over 52,000 private family law children cases in the Family Court in England and Wales, overseeing cases concerning in excess of 80,000 children.

Within these private family law cases, referred to as Section 8 (s 8) order applications, allegations of domestic abuse are increasingly common.⁶ The need to self-represent is especially challenging in domestic abuse cases, where a perpetrator may:

- a) deny abusive behaviour;
- b) continue to abuse and control the victim of domestic abuse with their conduct in relation to the proceedings; and
- c) attempt to accuse the victim of abusing them by misleading the court (thereby both exonerating themselves of abuse and continuing to abuse the victim).⁷

⁴ Re: Z (Prohibition on Cross-examination: No QLR [2024] EWFC 22 clearly demonstrates the challenges in judges undertaking cross-examination in Fact-Finding Hearings relating to domestic abuse. The judgment is in reference to litigants in person and the court's inability to secure a Qualified Legal Representative despite in excess of 120 attempts to do so.

⁵ Two Years Too Long (Women's Aid) (2022) <https://www.womensaid.org.uk/wp-content/uploads/2022/06/Two-Years-Too-Long-2022.pdf> pages 52-53

⁶ Small scale studies indicate 49-62% of child arrangement proceedings featuring domestic abuse: Ministry of Justice, 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' (June 2020) https://assets.publishing.service.gov.uk/media/5ef3dcade90e075c4e144bfd/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf

⁷ This strategy is commonly referred to as 'Deny, Attack, and Reverse Victim and Offender 'DARVO''.

It is crucial to note that child arrangement proceedings within the context of domestic abuse allegations require a high level of care, caution and expertise given the particular vulnerabilities of both adult and child victims and survivors of domestic abuse. Within this situation: domestic abuse must be ascertained in order to ensure that any child contact which the court orders is safe (if at all) for children and the protective / non-abusive parent.

The understanding of domestic abuse is therefore critical in the Family Court meeting its duty to safeguard victims and survivors of domestic abuse.

The Family Court has shown itself willing to consider its exploitation as a forum for ongoing abuse. Illustratively, in *Re H-N* [2021], the succinct judgment opened scope for post-separation control to be regarded as a matter of abuse, given:

‘...the overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court... because of the impact that such a finding may have on assessment of any risk involved in continuing contact’.

The Istanbul Convention, which the UK ratified in July 2022, and which came into force in November 2022 specifically requires states to take measures which ‘aim at avoiding secondary victimisation’ of domestic abuse victims and survivors (Article 18(3)). Further, the Istanbul Convention requires that family law proceedings which determine child arrangements ensure that domestic abuse is fully considered to safeguard all parties (Article 31).

Despite legal progression, both legislatively and within case law, the reality within the family courts is governed by the inconsistent presence of legal expertise in the Family Court, which sees serious ramifications.

Data and developments to support the Commissioner’s overarching position

The removal of state funding for many private family law cases was implemented in April 2013 and has had a significant effect on how family law cases have been conducted since. Between July and September 2022, 39% of family law proceedings in England and Wales saw both parties self-represent as litigants-in-person and without legal representation, an increase in 26% from the recorded period for January to March 2013, 13%.⁸ Relatedly, the proportion of cases with both parties being represented by legal professionals dropped from 41% in January to March 2013, to 18% in July to September 2022.⁹ The change seen in the pattern of legal representation is also demonstrated in private family law cases with at least one hearing where the proportion of parties with legal representation stood at 59% in 2012 compared to 28% in July to September 2022. This change to legal support has meant

⁸ ‘Family Court Statistics Quarterly: July to September 2022’ (GOV.UK) <<https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2022/family-court-statistics-quarterly-july-to-september-2022>> accessed 1 January 2024.

⁹ *ibid.*

that many parents self-navigate a complex legal system at acutely stressful times in their lives.

Given the prevalence of domestic abuse in family law cases¹⁰, the cuts to legal aid have naturally resulted in those without financial resources having to self-represent during complex proceedings. There is a substantial body of research to support the risks heightened in relation to protection and the re-traumatisation of self-representing in such proceedings.¹¹

The MoJ's own January 2024 survey showed that legal aid providers are unable to make a profit from legal aid work to the extent that providers will be forced to leave the sector in the medium term. This has significant implications for victims and survivors of domestic abuse and fewer avenues to pursue in order to realise their rights.¹²

Whilst the MoJ is fully aware of these results, the Commissioner would like to take serious note of the following:

- the majority of private practices reported not making a profit from their civil legal aid services;
- 40% said they will actively leave the sector over the next five years;
- 82% are dissatisfied with the fee system;
- 61% are unable to build a quality workforce; and
- 59% are dissatisfied with the way the Legal Aid Agency (LAA) makes decisions.

The Family Court and domestic abuse: achieving cultural change

The Domestic Abuse Commissioner laid her report in Parliament entitled *The Family Court and domestic abuse: achieving cultural change* (July 2023). The report makes clear that wholesale change is required in order for individual elements of the system to improve outcomes as a whole. As such, the Commissioner makes this submission in light of the need for cultural change, including addressing the minimisation of abuse which many victims and survivors of domestic abuse recount as particular points of re-traumatisation.

This response is therefore made in light of the overarching need to address the present adversarial and protracted approach to private family law proceedings. Changes to legal aid must be made in parallel with wider cultural changes for the Domestic Abuse Act 2021 to take proper effect.

¹⁰ Small scale studies indicate 49-62% of child arrangement proceedings featuring domestic abuse: Ministry of Justice (202) Harm Panel Report.

¹¹ Ministry of Justice, 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' (June 2020) https://assets.publishing.service.gov.uk/media/5ef3dcade90e075c4e144bfd/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf and Office of the Domestic Abuse Commissioner, *The Family Court and domestic abuse: achieving cultural change* (July 2023) https://domesticabusecommissioner.uk/wp-content/uploads/2023/10/DAC_Family-Court-Report_Oct-2023.pdf page 14

¹² Ministry of Justice (January 2024) Survey of civil legal aid providers in England and Wales <https://assets.publishing.service.gov.uk/media/65aa4068ed27ca000d27b28a/civil-legal-aid-providers-survey.pdf>

The Domestic Abuse Commissioner's recommendations

Against the backdrop of the above, the Commissioner recommends the following in legal proceedings where domestic abuse is alleged and / or established:

1. To remove the legal aid means test for all domestic abuse cases;
2. If this is not possible, income and capital thresholds must be increased to better reflect the current cost of living crisis and the rise in inflation;
3. Full revision, with a view to lowering, the evidentiary threshold for demonstrating domestic abuse in order to access domestic abuse – i.e.. a statement from a specialist domestic abuse service, police report or GP report;
4. Ensure adequate funding is in place for the provision of legal aid work. The Commissioner notes with concern that Legal Aid rates have not risen since 1996 and following LASPO, a 10% reduction was made to rates; and
5. Simplify and centralise the guidance on Legal Aid in order to establish a single webpage where only up to date guidance is available.

Given the nature of domestic abuse, and the particular risk it poses to victims and survivors, the Commissioner firmly believes that Legal Aid should be available in all matters where domestic abuse is alleged and / or established. In this vein, the Commissioner also asserts that legal aid should be available to all parties in proceedings. The Commissioner is aware of coercively controlling abusers who utilise the Family Court to perpetuate post-separation abuse in the form of stressful, protracted and costly proceedings. Ensuring representation for both parties is likely to curtail the use of the Family Court as an ongoing arena of coercion and ensures an 'equality of arms' which is consistent with Article 6, right to a fair trial, as contained within the Human Rights Act 1998.

All responses to this consultation should be read with this primary and overarching ambition in mind.

Domestic abuse as a central consideration

Whilst legal aid is considered to be vital in delivering justice to victims and survivors of domestic abuse, it will only be meaningful if all family law practitioners are abuse-informed and are required to undertake ongoing training which is supported by the expertise held by the domestic abuse sector.

Overarching questions

1.1 Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes in Family Law?

The overarching position of the Commissioner is clearly set out on pages 2-6 of this response.

The Commissioner further refers to her response to the Legal Aid Means Test Review Consultation from June 2022 to further assist with her position (**Annex 1**).

2. What are the civil legal aid issues that are specific to your local area? Please provide any specific evidence or data you have that supports your response.

The Domestic Abuse Commissioner holds her position in relation to England and Wales. This submission, therefore, makes reference to the national picture.

The Commissioner notes that in order to be eligible to undertake legal aid family law work, law firms must have a physical office. This is required in order for the Legal Aid Agency to contract with law firms and immediately places a substantial financial cost on firms. This is especially true in London, and further reinforced by the cost of living crisis and inflation.

As such, this requirement establishes a risk to victims and survivors in more rural areas of England and Wales due to Legal Aid ‘deserts’, as referenced by the Law Society’s own ‘legal aid deserts’ map which indicates the extent of the issue, and which is included in this submission as **Annex 2**.¹³ This worrying postcode lottery is unacceptable for victims and survivors of domestic abuse and must be mitigated as a matter of priority.

3. What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers? Please provide any specific evidence or data you have that supports your response.

The Commissioner hears from legal aid practitioners that the process of obtaining legal aid certificates for clients is complex, lengthy and administratively burdensome. Practitioners who are versed in complex areas of law have expressed their frustration at unpredictable outcomes to legal aid applications, often exacerbated by inconsistent treatment and evaluation of applications by caseworkers. This is likely to be due to extremely lengthy and confusing guidance.

¹³ Legal Aid Deserts, The Law Society (2024) <https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/>

Illustratively, the Lord Chancellor's guidance on certificated work is 119 pages long¹⁴ and the guidance on Controlled Work is 47 pages long.¹⁵ These documents are intimidating, especially overwhelming for those without legal backgrounds and extremely technical. Whilst simpler tools, including the passporting document, exist to assist legal aid practitioners with identifying eligibility of clients, the demand for legal aid dwarfs the supply, and individuals are forced to turn to their own research and approaches.

Further adding to the confusion is the presence of multiple guidance documents which are accessible online. Given these documents are undated, it is very possible that a victim or survivor of domestic abuse will read conflicting information on their eligibility for legal aid, adding to stress and overwhelm.

4. What potential risks and opportunities do you foresee in the future for civil legal aid:

- i) in general; and**
- ii) if no changes are made to the current system?**

Please provide any specific evidence or data you have that supports your response.

The limitations and challenges are two-fold:

1. Victims and survivors of domestic abuse are self-navigating complex legal proceedings whilst simultaneously dealing with the effects of abuse, in addition to caring for children; and
2. Legal Aid is drawing fewer and fewer practitioners due to the poor rates of remuneration and stressful nature of the work.

With respect to the ramifications on victims and survivors, the Commissioner's position on this has been set out on pages 2-7.

Turning to the diminishing pool of legal aid practitioners, the Commissioner understands that legal aid rates and the time-consuming nature of family law proceedings (i.e. lengthy bundles which require review for effective preparation) as outlined on pages 3-5 of this response.

Given the rates of pay poorly aligning with the work required given the complexities of the cases, the Commissioner understands that there are real challenges in instructing counsel in private family law cases. These are the types of cases likely to feature coercively controlling behaviours and in need of experienced counsel to assist with effective conclusion of cases.¹⁶ Chambers often offer pupils, and whilst this provides exposure to training barristers, it acts as a mechanism which means inexperienced

¹⁴ Legal Aid Agency (August 2023) 'Lord Chancellor's guidance on determining financial eligibility for certificated work, pages, 1-119.

¹⁵ Legal Aid Agency (September 2023), 'Lord Chancellor's guidance on determining financial eligibility for Controlled Work and Family Mediation, pages 1-47.

¹⁶ The Domestic Abuse Commissioner sits on an MoJ sub-group *Innovations and Efficiencies* to assist with this objective.

counsel conduct complex cases. These cases are especially onerous when dealing with a litigant in person who may continue their abuse and aggressive ways via junior barristers.

In relation to public family law cases, the workload is heavy and acts as a deterrent to young lawyers who will be at the outset of their careers. Complex, stressful and time-consuming cases are unlikely to appeal when coupled with extremely poor rates of pay.

Overall, the disincentivised nature of family law proceedings has, and will continue to have, a negative impact on children and adult victims and survivors of domestic abuse as legal knowledge and expertise in the Family Court is being compromised as a direct result of inadequate resource.

5. What do you think are the possible downstream benefits of civil legal aid? The term 'downstream benefits' is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation. Please provide any specific evidence or data you have that supports your response.

Proper support for families will increase safe, effective and child-centric outcomes. At present, family law proceedings are dealing with severe financial restraints which impact the experience of the family justice systems for users and compromise on opportunities to expeditiously address issues.

The family justice system is compromised as a result of under-funding and this has a direct effect on the human rights of those accessing it, in breach of international obligations such as the European Convention on Human Rights 1951, the United Nations Convention on the Rights of the Child 1989, and the Istanbul Convention 2011. The protection relating to victims and survivors of domestic abuse are coalesced in the Domestic Abuse Act 2021 which is pioneering legislation and if properly implemented, would see England and Wales as modelling best practice internationally. The inclusion of children as victims of domestic abuse in their own right who 'see[s] or hear[s], or experience[s] the effects of, the abuse,'¹⁷ the inclusion of post-separation abuse in the definition of domestic abuse¹⁸ (by way of amendment to the Serious Crime Act 2015)¹⁹ and implementing a range of measures to better recognise the trauma from psychological abuse.

¹⁷ Section 3, Domestic Abuse Act 2021.

¹⁸ Section 2(1) Domestic Abuse Act 2021.

¹⁹ Section 76, Serious Crime Act 2015.

Fees

6. What are your views on the incentives created by the structure of the current fee system?

The present fee system structure reflects legal aid rates which have not been revised for 10 years. As such, they are not reflective of inflation or the present cost of living crisis. As such, the work offered at these rates – whilst complex and relation to the fundamental rights of victims and survivors of domestic abuse - is unattractive to legal practitioners.

The detrimental impact of these rates has been addressed in question 4 of this submission.

6.1. Do you think these support the effective resolution of problems at the earliest point?

No. As mentioned above and in question 4, the legal aid rates of pay are too low to ensure experienced legal practitioners consider undertaking the complex work.

6.2. How could the system be structured better? Please provide any specific evidence or data you have that supports your response and any views or ideas you may have on other ways of payment or incentives.

The Commissioner has heard from practitioners on a range of issues. As mentioned in question 3 of this submission the guidance provided by the Lord Chancellor on legal aid work is incredibly complex and often has inconsistent results from Legal Aid Agency caseworkers. Overall, the system would benefit from being streamlined, simplified and administratively less cumbersome.

Career development and diversity

7. Is there anything in particular in civil legal aid that prevents practitioners with protected characteristics from starting and continuing their careers? If yes, how could this be addressed? Please provide any specific evidence or data you have that supports your response.

Given the low rates of pay, legal aid work is understood to be unattractive to many lawyers. However, this will be amplified in instances when young lawyers are from less secure socioeconomic backgrounds. This then has the consequential effect of less diversity in the Family Court, which is detrimental to the family justice system as well as victims and survivors from minority groups hallmarked by lower socioeconomic backgrounds.

8. How can the diversity of the profession be increased in legal aid practice, including ethnicity, disability, sex, age and socio-economic background? Please provide any specific evidence or data you have that supports your response.

The Family Court is a legal arena for society. All of society must, therefore, be reflective in the family justice system. At present, the stressful and poorly paid legal aid work does not form an attractive prospect to lawyers in a diverse manner. Please see answer above.

User needs

9. What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid? Please provide any specific evidence or data you have that supports your response.

10. What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs? Please provide any specific evidence or data you have that supports your response.

11. Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed? Please provide any specific evidence or data you have that supports your response.

For ease, the above three questions are answered together due to overlap.

It is recognised that legal aid is available for victims and survivors of domestic abuse.

Whilst access to legal aid remains in cases concerning domestic abuse, the evidentiary threshold has been criticised for being prohibitively restrictive – a further reflection of poor understanding of abuse which may not be ‘documented’ given social and cultural factors.

In some instances, victims and survivors can struggle to evidence their experiences of domestic abuse and are denied legal aid as a result. Some victims and survivors have been told that there is too much equity within their family homes and have been advised to sell those homes, in which their children also live, so that court protection can be pursued to safeguard the same children. This forces a survivor of abuse to self-litigate and goes against the provisions which state all victims of domestic abuse must be supported through the family justice system as a matter of law.

The Commissioner is also aware of victims and survivors who have contacted dozens of legal aid firms and have been unable to find a legal aid solicitor with capacity to take on their case. In these circumstances, individuals are forced to self-represent. This is likely to be as a result of legal aid firms closing and / or having reduced capacity due to legal aid demand exceeding supply.

It is also prudent to note that there are victims and survivors of domestic abuse who have been found to be ineligible for legal aid. The Legal Aid Agency requires statements from specific agencies, with specific wording, which constitute an additional barrier for victims and survivors. Victims and survivors must navigate these administrative demands, and produce the documents required. The onus on the victim and survivor to prove their eligibility is an obstacle to justice.

It is during the course of these proactive efforts to safeguard themselves and their children that they are met with the daunting and often contradictory sources online. It is at this point that the individual may experience overwhelm and a sense of being abandoned by the state which claims to prioritise safety. The overall outcome is fear, apprehension and experiences which lead victims and survivors to feel deeply disengaged from the family justice system. The Commissioner hears daily accounts of adult victims and survivors of domestic abuse being let down by the family justice system and attributes this, at least in part, to the strain on the court system in dealing with litigants in person who simply require more support to self-navigate. The onus on the court could be substantially alleviated by having properly trained, qualified and able legal practitioners to conduct cases.

12. How do you think that people receiving civil legal aid can be supported in cases where they have multiple or ‘clustered’ legal issues and some of these are outside of the scope of civil legal aid? Please provide any specific evidence or data you have that supports your response.

In order to streamline matters and to ensure consistency and support for a victim and survivor of domestic abuse, all legal matters would be kept within one firm, where possible, and supported by Legal Aid.

Use of Technology

15. Remote legal advice, for example advice given over the telephone or video call, can be beneficial for delivering civil legal aid advice. Please provide any specific evidence and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.

Providing advice remotely, so long as this is safe and appropriate to do so, is a means to increase efficiency in the family justice system.

It further allows victims and survivors to access their lawyer, which is likely to be a point of reassurance for them.

Concluding comments

It is vital to the provisions of the Domestic Abuse Act 2021 that victims and survivors have support and that this extends to and includes legal representation, which allows victims and survivors to be adequately safeguarded during family court proceedings, as well as assisting the family court justice system in functioning effectively.

I remain available to answer further questions.

A handwritten signature in black ink that reads "Nicole Jacobs". The signature is written in a cursive, flowing style.

Nicole Jacobs
Domestic Abuse Commissioner for England and Wales



Domestic Abuse Commissioner’s response to the Legal Aid Means Test Review Consultation

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About the Domestic Abuse Commissioner for England and Wales

The Domestic Abuse Act establishes in law the Office of the Domestic Abuse Commissioner, whose duty it is to provide public leadership on domestic abuse issues and play a key role in overseeing and monitoring the provision of domestic abuse services in England and Wales. The role of the Commissioner is to encourage good practice in preventing domestic abuse; to identify adult and child victims and survivors, as well as perpetrators of domestic abuse; and to improve the protection and provision of support to people affected by domestic abuse from agencies and government. The Commissioner also aims to ensure that victims and survivors of domestic abuse are not disproportionately impacted by measures implemented by statutory agencies.

Introduction

The Domestic Abuse Commissioner welcomes the opportunity to submit a written response to this consultation.

The Legal Aid Means Test Review provides the crucial opportunity for the Government to implement measures to ensure that all victims and survivors of domestic abuse have access to justice. The Domestic Abuse Commissioner believes that all victims and survivors of domestic abuse should be exempt from being means-tested for legal aid. Rather, where someone has experienced domestic abuse, they should automatically be granted state-funded legal support.

Ensuring that all victims and survivors of domestic abuse have access to legal support is a key priority for the Domestic Abuse Commissioner. Many victims and survivors who contact the Commissioner highlight concerns about not being able to obtain legal support due to being ineligible for legal aid despite being unable to afford the cost of private legal fees. Consequently, victims and survivors find themselves having to navigate the complex legal system as litigants-in-person without any additional support. Being a litigant-in-person can be particularly onerous for victims and survivors, who may be retraumatised as a result of undergoing proceedings where they are expected to litigate against their perpetrator.

Whilst the Commissioner recognises that many of the proposals in the Means Test Review demonstrate an improvement from the current arrangements, there is concern that the proposals do not go far enough in cases involving domestic abuse, with some measures set to disproportionately affect victims and survivors who are lone parents.²⁰ Further, in some cases, the requirement to provide additional evidence to support a means test application would not only prove burdensome for victims and survivors, but also create an additional burden to the public purse due to adding an additional layer of administration. With this in mind, the Commissioner submits that the most expedient approach would be to passport victims and survivors of domestic abuse through the legal aid system. The exemptions and qualifications that would be required in order for victims and survivors of domestic abuse to be acknowledged within the means test system would also be so administratively complex as to risk access to justice, as well as additional bureaucratic burden and cost to the taxpayer.

Key Recommendation:

- 1. Given the nature of domestic abuse, and the unique financial and legal pressures it puts on those subject to it, victims and survivors of domestic abuse should be exempt from the legal aid means test.**

All responses to this consultation should be read with this primary recommendation in mind.

Due to the breadth of the Legal Aid Means Test Review consultation, this response focuses on the proposals which the Commissioner believes to be most pertinent to victims and survivors of domestic abuse in relation to civil proceedings. The Office of

²⁰ Hirsch, D. (May 2022) More affordable justice: Proposals to reform the legal aid means tests and implications for living standards

the Domestic Abuse Commissioner would be pleased to discuss any of the responses provided in further detail upon request.

Consultation Response

Chapter 2 – Overarching proposals

Question 2: do you agree that we should continue to deduct actual rent and mortgage payments and childcare costs for the civil and criminal means assessments? Please state yes/no/maybe and provide reasons

Yes.

Housing and childcare costs can make up a large proportion of household expenditure for victims and survivors of domestic abuse. The full sum should be discounted due to the essential nature of such expenditure.

Question 6: do you agree with the proposal to deduct agreed repayments of priority debt and student loan repayments taken directly from salary or deducted as part of the applicant's tax return as part of the disposable income assessment for civil and criminal legal aid? Please state yes/no/maybe and provide reasons.

Maybe.

The recognition of debt repayments as part of the means test is a welcome step forward, as this is a key outgoing for many victims and survivors of domestic abuse who apply for legal aid. However, the Domestic Abuse Commissioner submits that all forms of debt should be deducted as part of the disposable income assessment, rather than just 'priority debt'.

When leaving an abusive relationship, many victims and survivors of domestic abuse may need to rely on unsecured debt such as payday loans and unsecured debt in order to make ends meet or to allow them to set up a new home. Repayment of such loans should be regarded as equally important, with default on the same being subject to enforcement by creditors and court result in legal action. There is no clear rationale as to why some debts are not regarded within the disposable income assessment even though repayment of all forms of debt same could substantially affect an individual's disposable income.

The Domestic Abuse Commissioner is concerned at the lack of consideration being given to victims and survivors of economic abuse as part of these proposals. 95% of victims and survivors of domestic abuse experience economic abuse, of whom 60% are coerced into taking out loans and credit by a perpetrator.²¹ This can often leave victims and survivors struggling with debt repayment over long periods of time even once they have left a relationship. Consequently, all forms of debt repayment should be deducted for victims and survivors of domestic abuse.

Conversely, the practicalities of evidencing all the debt which may be in the name of a victim or survivor of domestic abuse may be complex, on the basis that a perpetrator

²¹ Surviving Economic Abuse (October 2021) Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives p17

may take out a loan in the survivor's name without the survivor being aware of its existence, or because victims and survivors of economic abuse may not have access to joint bank accounts or loan statements. With this in mind, it would be in the best interests of victims and survivors to exempt them from the means test altogether.

Recommendation:

2. All forms of debt repayments should be deducted as part of the disposable income assessment for legal aid.

Chapter 3: Civil income thresholds, passporting and contributions

Question 10: do you agree with our proposal to remove housing benefit payments from the civil and criminal income disregards regulations? Please state yes/no/maybe and provide reasons

No.

The Domestic Abuse Commissioner is concerned that this proposal will disproportionately impact victims and survivors of domestic abuse who access accommodation-based services such as refuge accommodation, emergency housing or move-on support, as they will likely be in receipt of the highest levels of housing benefit. According to Refuge, the average cost of staying in refuge accommodation is £350 per week. This money would usually be paid directly to the service provider rather than being given to the survivor as form of income, yet it could easily result in a survivor being pushed over the income threshold for the purposes of the means test. Consequently, this could result in victims and survivors being penalised for leaving an abusive relationship and seeking accommodation support.

The current proposals are also likely to disproportionately impact victims and survivors of domestic abuse with children, particularly if they are lone parents and have multiple children. Lone parents can qualify for as much housing benefit as couples, which means that a lone parent with multiple children could be in receipt of the highest levels of housing benefit and this would be regarded as income for the purposes of the means test. In turn, this could result in an individual being pushed over the income threshold and not being eligible for legal aid even though they do not have the disposable income to spend on legal fees.

Further, these proposals could create large regional disparities with regard to legal aid eligibility, thus extending the postcode lottery of support available to victims and survivors of domestic abuse. Victims and survivors living in the South of England and in urban cities would be eligible to receive higher levels of housing benefit, with the provision in London ranging from £113.11 - £593.75 per week.²² This far exceeds the national average, which ranges from £79.97 – £252.09 per week.²³ Consequently, victims and survivors living in the south of England and cities would be more likely to go over the income threshold and be excluded from legal aid just by virtue of their housing benefit receipts.

²² Valuation Office Agency (January 2022) [Local Housing Allowance \(LHA\) rates applicable from April 2022 to March 2023](#)

²³ Ibid.

Question 13: do you agree with our proposal to raise the gross income threshold for civil legal aid for a single person to £34,950 per year? Please state yes/no/maybe and provide reasons.

Maybe.

The Domestic Abuse Commissioner welcomes the proposals to raise the gross income threshold, with this being a positive first step to ensuring that more victims and survivors of domestic abuse will be able to access legal aid.

However, it is submitted that prior to implementation, the £34,950 median income figure should be adjusted to reflect any changes to the median income which have taken place since 2020, when the figure is taken from, in order to avoid the threshold being out of date by the time the changes are implemented. It is further recommended that the Government should review this threshold figure annually to ensure that it is in line with national wage changes and inflation.

There is also concern that the increase in the threshold does not adequately reflect the affordability of obtaining private legal advice. In accordance with the Guideline Hourly Rates published by Her Majesty's Court and Tribunal Service (HMCTS), solicitors can charge between £177 and £512 per hour for legal advice and support,²⁴ with barristers being able to set their own rates to act as counsel in proceedings. Due to the complexity of cases involving allegations of domestic abuse, victims and survivors often need extensive legal support throughout the proceedings. Litigation can often be protracted and expensive, with survivors who have contacted the Domestic Abuse Commissioner reporting that they had to spend £30,000 - £40,000 on legal fees for their private family law proceedings.

The cost of litigation involving allegations of domestic abuse often extends far beyond the means of individuals who fall outside of the legal aid threshold, leaving victims and survivors with the choice between representing themselves as litigants in person against a perpetrator, or having to incur large amounts of debt in order to obtain legal representation. This is a highly onerous choice for victims and survivors to make and the Government should instead exempt all victims and survivors of domestic abuse from having to undergo the means test for civil proceedings.

Recommendations:

3. Prior to implementation, the median income figure should be adjusted to reflect changes since 2020.
4. The median income threshold figure should be adjusted annually to reflect national wage changes and inflation.
5. Victims and survivors of domestic abuse should be exempt from undergoing the means test and automatically be granted legal aid for civil proceedings.

Question 14: do you agree with our proposal to introduce a lower gross income threshold for civil legal help cases, with the threshold set at £946 per month? Please state yes/no/maybe and provide reasons

Maybe.

The Domestic Abuse Commissioner recognises that the introduction of a lower gross income threshold will reduce the administrative burden for applicants, caseworkers

²⁴ HMCTS (2021) [Solicitors' Guideline Hourly Rates](#)

and the Legal Aid Agency. However, it is submitted that the threshold should be increased to at least £12,500, in line with the personal tax allowance threshold. This is on the basis that if a person's income is low enough to exempt them from paying tax, they are unlikely to be able to afford to contribute towards legal proceedings.

Question 15: do you agree with our proposal to remove the £545 monthly cap on allowable housing costs for applicants for civil legal aid with no partner or children? Please state yes/no/maybe and provide reasons.

Yes.

The Domestic Abuse Commissioner supports the proposals to remove the monthly cap on allowing housing costs for applicants with no partner children. The current cap does not reflect the median costs of a studio flat or one bedroom flat, which stand at £595 and £675, respectively.²⁵ It is likely that the current cap disproportionately impacts victims and survivors of domestic abuse, who may be uncomfortable living in shared housing due to concerns regarding their personal safety after experiencing trauma.

Question 16: do you agree with our proposal to deduct actual Council Tax as part of the civil means assessment? Please state yes/no/maybe and provide reasons.

Yes.

Deducting Council Tax as part of the civil means assessment will provide a fairer assessment of a person's disposable income and the Domestic Abuse Commissioner welcomes the introduction of this measure.

Question 17: do you agree with our proposal to increase the work allowance in the civil legal aid means test to £66 per month? Please state yes/no/maybe and provide reasons.

Maybe.

Whilst the Commissioner welcomes the slight increase in the work allowance, it is submitted that the increase should be higher in order to better reflect the cost of key expenditure such as travel, on which the average household spends £354 per month.²⁶ Many victims and survivors of domestic abuse who leave their homes and local communities also find themselves moving further away from their workplaces for safety purposes. This can make their commutes longer and more expensive and it is submitted that the full cost of transport should be accounted for in the means test assessment.

Question 19: do you agree with our proposal to set the Cost of Living Allowance at £622 per month for an individual? Please state yes/no/maybe and provide reasons

Maybe.

²⁵ Office for National Statistics (2021) [Private rental market summary statistics in England: October 2020 to September 2021](#)

²⁶ Yurday, E. (March 2022) [Average UK Household Budget 2021](#)

The substantial increase in the Cost of Living Allowance is noted and warmly welcomed by the Domestic Abuse Commissioner. However, the Commissioner is concerned that the figures which are being relied upon in the Means Test Review are now outdated and do not account for the substantial increase to the cost of living which has taken place since 2019. During this time, the cost of essentials such as food and energy have increased significantly to create a cost of living crisis.

Whilst in 2019 the rate of inflation tracked by the Consumer Price Index was at 2%, in the 12 months to April 2022 it was calculated by the Bank of England to be at 9%.²⁷ The increase in the cost of living has been particularly burdensome for victims and survivors of domestic abuse with children, whom domestic abuse service providers have noted to be struggling to make ends meet.

Recommendations:

6. In order to ensure that the Cost of Living Allowance reflects the true cost of living, the sum should be recalculated prior to the implementation of the new allowance.
7. The Cost of Living Allowance should be re-assessed on an annual basis to account for changes to the cost of living.

Question 22: do you agree with our proposal to set allowances for dependents at £448 per month for each adult and child aged 14 or over, and £211 for each child under 14? Please state yes/no/maybe and provide reasons

No.

The proposed allowances for children aged above and below the ages of 14 fall substantially short of the estimated cost of raising children and should be increased. The reduction in the allowances for children aged under 14 from £307.64²⁸ to £211 is likely to disproportionately impact victims and survivors of domestic abuse with young children, particularly if they are lone parents. The reduction in the allowance for children aged under 14 does not reflect the cost of raising a child, with the Child Poverty Action Group estimating that the cost of raising a child between the ages of 0 – 14 gradually increasing from £96.55 to £157.55 per week, with the latter figure remaining static from the age of 11 until the child reaches the age of 17.²⁹

The allowance granted for children under the age of 14 in the review falls below the Universal Credit entitlement for a child, which is currently £290 for a first child and £244.58 for any subsequent children.³⁰ Further, it does not provide an additional allowance for a disabled child, which is accounted for by Universal Credit, which provides £132.89 or £414.88 for a disabled or severely disabled child.³¹

Recommendations:

8. The allowances for all dependents should be set at a consistent rate of £448 rather than being distinguished by the age of 14.
9. Alternatively, the entitlement for a child under the age of 14 should be brought in line with the Universal Credit entitlements.

²⁷ Hudson, P. (June 2022) [The Cost of Living Crisis](#), Institute for Government

²⁸ The Legal Aid Agency (April 22) [Keycard 58](#)

²⁹ Hirsch, D. and Lee, T. (December 2021) [The Cost of Raising a Child in 2021](#)

³⁰ Gov.uk [Universal Credit: What you'll get](#)

³¹ Ibid.

10. The Domestic Abuse Commissioner supports the recommendation made by the Public Law Project in their response to the Means Test Review Consultation that there should be an additional allowance for lone parents (equivalent to half the entitlement for an additional adult in the household).³²
11. Any allowances granted should be annually assessed to account for changes in inflation.

Question 23: do you agree with our proposal to not take into account the means of anyone providing temporary assistance to the applicant in the civil legal aid means assessment? Please state yes/no/maybe and provide reasons

Yes.

The Domestic Abuse Commissioner strongly supports this proposal. Many victims and survivors of domestic abuse rely on the temporary support of family or friends when leaving a relationship in order to help them get back on their feet. This proposal would ensure that victims and survivors are not wrongfully penalised for relying on temporary support.

Question 24: do you agree with our proposal to implement a £500 earnings threshold for applicants in receipt of UC who are currently passported through the income assessment for civil legal aid? Please state yes/no/maybe and provide reasons.

No.

The Domestic Abuse Commissioner is strongly opposed to this proposal. The requirement for individuals on Universal Credit earning over £500 to have to undergo a full means test assessment is unduly onerous when considering that individuals who receive Universal Credit are recipients of the same because their income is deemed insufficient to cover their basic living costs. This is particularly burdensome where an individual may be on a zero-hours contract and would therefore have a fluctuating income and would need varying levels of financial support to top up their income.

Further, including Universal Credit as income could lead to many victims and survivors being pushed over the £946 threshold and being required to contribute towards their legal costs, thus having to use state benefits designed to assist with the cost of living to pay for legal proceedings. This seems contrary to the purpose for which such benefits were designed.

The complexity of the assessment process could trigger survivors to withdraw from the process and not seek legal support as they may struggle to provide all the required evidence to support their application. Further, victims and survivors of domestic abuse who are seeking to leave their partners may be deterred from applying for legal aid as Universal Credit is paid jointly to a household rather than to individuals and so they would be jointly assessed with their partners and may fall above the threshold.

The £500 threshold could disproportionately impact Universal Credit recipients with multiple children, disabled children, or disabled adult dependents as the amount of Universal Credit they receive would be higher and would therefore push them above the threshold. This would disproportionately impact lone parents. The Commissioner is further concerned by the finding in the Ministry of Justice's Equalities Assessment

³² Public Law Project (2022) Briefing on the Legal Aid Means Test Review consultation (Civil proposals)

that women would be more likely to be detrimentally impacted by these proposals than men and the lack of mitigation for this issue.³³

It is unlikely that the administrative burden of requiring individuals earning over £500 to undergo a full means test rather than automatically passporting them will act as a cost-saving measure, as the Legal Aid Agency would have to carry out far more work to assess all of the applications and look at all the payments being made to an individual. Studying all the evidence which would have to be provided would require far more time and resources than passporting recipients.

Further, the administrative burden that this proposal would impose on practitioners could put them off from doing legal aid work and reduce access to legal support. Currently, all of the eligibility work and assistance with applying for legal aid which is carried out by practitioners is unpaid even though it is an extremely time consuming and bureaucratic process. Adding an extra layer of assessment rather than passporting would deter practitioners from taking on legal aid cases, particularly where it appears that someone may be on the border of the threshold. In turn, this would perpetuate existing issues around legal aid deserts, whereby there is a lack of legal aid lawyers to take on cases in certain regions.

Recommendations:

12. Universal Credit should continue to be passported for the purpose of the legal aid means test.
13. Provisions should be made to ensure that victims and survivors of domestic abuse are passported so that they do not have any joint Universal Credit receipts with the perpetrator assessed as part of the means test.
14. The Ministry of Justice should consider how best to mitigate the equalities implications of this measure prior to its implementation.

Question 27: do you agree with our proposal to use a tiered model approach (40%/60%/80%) to determine the monthly income contribution? Please state yes/no/maybe and provide reasons

Maybe.

Whilst the Domestic Abuse Commissioner welcomes the increase in the contribution thresholds proposed by the tiered approach, there are concerns that the thresholds for contribution are still too low and may still price victims and survivors out of justice. As noted by the Public Law Project in their response to this Review, the requirement to contribute towards their legal aid costs prevents many victims and survivors of domestic abuse from accessing legal aid.³⁴ This is also reflected in feedback received from victims and survivors by the Domestic Abuse Commissioner.

There is research which demonstrates that victims and survivors of domestic abuse are disproportionately impacted by the requirement to contribute towards their legal aid costs, with research by the Law Society finding that one in five victims and survivors of domestic abuse were unable to proceed with a domestic violence injunction application as they were unable to afford the legal aid contributions.³⁵ Further, Surviving Economic Abuse found that the requirement to pay towards

³³ Ministry of Justice (March 2022) [Equalities Assessment: Legal Aid Means Test Review](#), p.15

³⁴ Public Law Project (2022) Briefing on the Legal Aid Means Test Review consultation (Civil proposals)

³⁵ The Law Society (2018) [Research into the impact of the legal aid capital and contribution thresholds for victims of domestic violence](#)

contributions acted as a deterrent to victims and survivors seeking legal representation as survivors feared it would compromise their long-term financial stability.³⁶ This is problematic as the requirement to contribute towards legal aid fees is acting as a deterrent to seeking legal protection for victims and survivors of domestic abuse, leaving them vulnerable to further harm.

Though the use of a tiered model reflects a progressive approach, the amount which individuals contribute still forms a significant portion of an individual's income, particularly if they are lone parents with multiple children. In worked example 2 of this proposal in the Means Test Review document, Applicant 2 is expected to spend almost a fifth (19%) of his limited disposable income on legal fees every month,³⁷ which is an extensive financial commitment for an individual with limited means. It is further noted that the requirement to repay these costs within two years can be quite burdensome for individuals with limited means.

Recommendations:

15. Victims and survivors of domestic abuse should be exempt from having to contribute towards legal aid fees.
16. Alternatively, there should be a mechanism to allow victims and survivors to apply for a repayment extension to allow them to split the costs over a longer period of time in order to allow them to make smaller monthly repayments.

Chapter 4: Civil capital thresholds, disregards and passporting

Question 29: do you agree with our proposal to increase the lower capital threshold to £7,000 and the upper capital threshold to £11,000? Please state yes/no/maybe and provide reasons

Maybe.

Though the increase in the capital thresholds is a positive step, the Domestic Abuse Commissioner submits that these proposals do not go far enough. Victims and survivors of domestic abuse should be exempt from the capital test on the basis that many victims and survivors who experience economic abuse are unable to access capital which they may share with the perpetrator because the perpetrator has restricted access to their financial resources. This means that whilst victims and survivors may have capital in their name, they are unable to use this to pay for legal proceedings and yet would still be prevented from accessing legal aid and in turn, legal support.³⁸

Further, many victims and survivors of domestic abuse who have access to their capital require this in order to leave relationships and be able to set up a new home, as well as having to rely on their capital in the event that they have to leave their jobs as a result of the abuse. Victims and survivors should therefore not be required to spend their capital on legal proceedings, when often, it can be their only source of financial stability.

³⁶ Surviving Economic Abuse (October 2021) [Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives](#)

³⁷ Ministry of Justice (March 2022) *Legal Aid Means Test Review*, p.55

³⁸ Surviving Economic Abuse (October 2021) [Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives](#)

As noted by the Public Law Project in their submission, the thresholds should be amended to reflect the affordability of privately paying for legal proceedings, rather than being based on household expenditure if victims and survivors are going to be deemed eligible to afford the same on the basis of these thresholds.³⁹

Recommendations:

17. Victims and survivors of domestic abuse should be exempt from having their capital included as part of the legal aid means test assessment.
18. The Ministry of Justice should adjust these figures based on the average cost of funding private litigation and guideline hourly rates rather than on average household expenditure.

Question 30: do you agree with our proposal to increase the equity disregard from £100,000 to £185,000? Please state yes/no/maybe and provide reasons

Maybe.

Whilst it is acknowledged that the increase in the equity disregard is positive, the Domestic Abuse Commissioner remains concerned at the expectation that victims and survivors should sell their properties or borrow against their properties in order to be able to fund legal proceedings. Victims and survivors of domestic abuse may be unable to borrow against their properties due to not being in work or because their credit may be poor as a result of economic abuse.⁴⁰ Domestic Abuse Commissioner has received several items of correspondence from survivors stating that they have been excluded from legal aid due to owning a property but have consequently had to represent themselves due to being on Universal Credit and not having the means to afford private legal representation.

As noted in Professor Donald Hirsch's report, *'Priced out of justice? Means testing legal aid and making ends meet'*, borrowing against a property is an incredibly difficult process, with equity release generally only being available for being aged over 55, with the equity release process taking between six to twelve weeks.⁴¹ This would result in victims and survivors seeking emergency orders, such as Occupation Orders from being unable to fund legal support for these matters.

The requirement to borrow against a property is particularly counterintuitive with regard to private family law child arrangement proceedings. In such proceedings, the ability to provide a stable home is one of the criteria sought by the court when considering whom should be a child's primary carer. By forcing individuals to borrow against their property or register high-interest charges which could impact their ability to keep their property, victims and survivors would be acting against the best interest of the children. Victims and survivors going through private family law proceedings should therefore be exempted from the capital test and be passported through the gateway.

19. Victims and survivors of domestic abuse going through private law child arrangement proceedings should have all the value of their equity disregarded on the basis that applying a charge on their properties could impact the outcome of their proceedings.

³⁹ Public Law Project (2022) Briefing on the Legal Aid Means Test Review consultation (Civil proposals)

⁴⁰ Surviving Economic Abuse (October 2021) [Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives](#)

⁴¹ Hirsch, D. (2019) [Priced Out of Justice? Means Testing Legal Aid and Making Ends Meet](#), p.37

Question 31: do you agree with our proposal to amend the means test so that where a victim has temporarily left their home, the equity disregard should be applied? Please state yes/no/maybe and provide reasons

Yes.

Victims and survivors who have left their homes should not be penalised for having equity in a property in which they no longer reside. The Commissioner wholly supports this proposal.

Question 32: do you agree with our proposal to remove the £100,000 cap on the disregard for assets which are the Subject Matter of Dispute? Please state yes/no/maybe and provide reasons

Yes.

The Domestic Abuse Commissioner supports this proposal on the basis that many victims and survivors find themselves in vexatious disputes over assets brought by perpetrators and they are unable to use these assets to fund legal support.

However, the Commissioner is concerned by proposals to continue applying a statutory charge to these cases. The statutory charge is attached to the asset in question for the purpose of requiring individuals to pay back all the legal aid which they received. This means that if a victim and survivor of domestic abuse wins the proceedings, they would be expected to repay the full cost of the legal aid, whereas the opposing party would not be subject to the same requirement if they also received legal aid. This is particularly onerous, as the charge accrues an interest of 8% per year. Consequently, this would leave victims and survivors in a much worse off position than if they paid private rates in the long term.

Question 33: would you support creating a new mandatory disregard in relation to inaccessible capital, and introducing a charging system to recoup legal costs in these cases? Do you think a waiver should apply (that is, do you think there are any cases in which we should not apply such a charge), and if so in what circumstances should it apply?

No.

The Domestic Abuse Commissioner opposes the proposals to introduce a charging system to recoup legal costs and supports the submissions made by the Public Law Project⁴² and Rights of Women⁴³ with regard to these proposals.

The ability to register charges and restrictions on property could be subject to exploitation by perpetrators who wish to bring vexatious litigation against their former partners who own the family home. This is on the basis that a new charge would have to be registered against the property every time new proceedings were commenced, the cost of which would then accrue an interest rate of 8 per cent annually. With consideration to how protracted and expensive some proceedings, such as private family law proceedings involving allegations of domestic abuse can be, the value of the property could be extensively depleted by the time of sale, thus making the asset worthless in value.

⁴² Public Law Project (2022) Briefing on the Legal Aid Means Test Review consultation (Civil proposals)

⁴³ Rights of Women (2022) Consultation on the Legal Aid Means Test Review p.21

Question 37: do you agree with our proposal to create a discretionary disregard for benefit and child maintenance back payments from the capital assessment? Please state yes/no/maybe and provide reasons

Yes.

The Domestic Abuse Commissioner supports this proposal and believes that they could go further through making the disregard for child maintenance back payments mandatory. Many victims and survivors who write to the Commissioner have reported struggling to obtain child maintenance payments from perpetrators for extended periods of time and later only being able to obtain back payment via a court order. Whilst this can come in the form of a large lump sum, it should not be regarded as capital, particularly as many victims and survivors would have had to incur debts in order to support their children and the money which they receive will go towards childcare costs rather than being disposable income.

Question 39: do you agree with our proposal to reintroduce capital passporting for non-homeowners in receipt of passporting benefits through the capital assessment for civil legal aid? Please state yes/no/maybe and provide reasons.

Yes.

The Domestic Abuse Commissioner support the reintroduction of capital passporting for non-homeowners and believes that the proposals should go further in order to include homeowners in receipt of passporting benefits, as well as all homeowners in receipt of Universal Credit.

As noted in the response to question 30, victims and survivors of domestic abuse who own their homes but are in receipt of benefits struggle to access the value of their capital due to being prevented from borrowing against their assets due to their low incomes.

Passporting all individuals on benefits regardless of capital would also help reduce the administrative burden on the Legal Aid Agency when assessing applications and help to streamline the legal process for applicants and their caseworkers.

Chapter 5: Immigration and asylum, under 18s and non-means tested cases

Question 40: do you agree with our proposal to align the immigration representation Upper Tribunal capital threshold (currently £3,000) with those usually used for civil legal aid – namely a lower threshold of £7,000 and an upper threshold of £11,000? Please state yes/no/maybe and provide reasons

Question 42: do you agree with our proposal to increase the immigration representation First-tier Tribunal capital threshold from £3,000 to £11,000? Please state yes/no/maybe and provide reasons

Questions 40 and 42 are answered together for brevity.

Yes.

The Domestic Abuse Commissioner supports the proposals to increase the capital threshold for First-Tier and Upper Tribunal immigration proceedings in line with civil proceedings. However as noted in the response to question 29, above, victims and survivors of domestic abuse should be exempt from the capital test, as they should not be required to use their savings to fund legal proceedings.

Question 41: do you agree with our proposal to remove the exemptions on the payment of income and capital contributions for immigration and asylum representation in the Upper Tribunal, replacing them with the new proposed income and capital thresholds for civil legal aid? Please state yes/no/maybe and provide reasons.

No.

Many victims and survivors of domestic abuse who are undergoing immigration proceedings do not have recourse to public funds and may also be ineligible or restricted in the number of hours which they are allowed to work in the United Kingdom. This means that many migrant victims and survivors have limited sources of income and this should not be further restricted by requiring them to pay contributions towards representation in the Upper Tribunal. Administratively, it would be easier to navigate this if all applicants with no recourse to public funds were passported through the legal aid application process.

In the event that this proposal is implemented, it is submitted that victims and survivors of domestic abuse should be exempt, as per the response to questions 40 and 42 of this consultation.

Wider recommendations

20. Hardship reviews

The Domestic Abuse Commissioner supports the proposals put forward by Rights of Women and the Public Law Project for the introduction of hardship reviews for civil proceedings in order to allow for individuals who are ineligible for legal aid but have only fallen through the system for technical reasons and cannot afford to pay for legal support to have their applications reviewed by the Independent Funding Adjudicator. This mechanism already exists for criminal legal aid and would provide a crucial safeguard for many vulnerable victim and survivors of domestic abuse seeking legal support.

21. Procedural and operational simplicity

As the proposed measures are implemented, it will be crucial for the Ministry of Justice and the Legal Aid Agency to ensure that the legal aid system is procedurally and operationally easy to navigate. Many of the proposals have the prospect of causing additional confusion as to discretionary disregards and changes to passporting. It will therefore be important for there to be clear guidance published as to how any new disregards, exemptions and passporting restrictions will function in practice in order to avoid confusion or applicants having their applications turned down due to simple errors in their forms.

The Commissioner is further concerned that the new proposals impose far more extensive evidentiary requirements, which will be more difficult for victims and survivors of domestic abuse to meet if they have left their home without all their belongings or had been subject to economic abuse and therefore no access to joint bank accounts or utility bills. The complexity of providing supplementary evidence to support legal aid applications is a further reason as to why victims and survivors of domestic abuse should be exempted from undergoing these processes.

ANNEX 2

