Legal advice and violence against women

Over the past 35 years Rights of Women has been providing women with free legal advice and information on a range of legal issues, including: family law and domestic violence; criminal law and sexual violence; and immigration and asylum law. Throughout that time the women who have contacted us have described a range of encounters with the civil and criminal justice systems. Central to those experiences has been legal aid.

We know that legal aid is a vital, lifesaving resource. 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 debts following relationship breakdown; deal with the family home; make arrangements for child contact and organise child maintenance. Women at risk of specific forms of violence that disproportionately affect black and minority ethnic and refugee and asylum-seeking women (such as forced marriage, dowry-related violence and female genital mutilation) may need additional specialist legal advice on these issues.

The provision of legal advice is a fundamental part of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). The UK has also committed to the provision of free or low-cost legal aid when it signed the Beijing Declaration, adopting the Beijing Platform for Action, at the Fourth World Conference on Women in 1995. As violence against women is both a cause and a consequence of women’s inequality, the ability to access free or low cost legal aid is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay for legal advice.

Our research

Following the opening of the Ministry of Justice (MOJ)’s consultation on the ‘reform’ of legal aid, Rights of Women decided to undertake research into the operation of the current legal aid scheme and the proposals to ensure that our response to the consultation was evidence-based and that our conclusions represented the views of the individual women and the professionals we work with. To do this we created three surveys on legal aid and access to justice which were available to complete on our website between 17th December 2010 and 31st January 2011. We developed specific surveys to capture the experiences of individual women; professionals who work on violence against women such as social workers and police officers; and legal professionals. In total just under 1,000 people responded to our surveys. What emerges from our research is a system of legal aid that is meeting the needs of some of the most vulnerable people in our society, as one of the individual women who responded said: ‘...legal aid is not only a necessary tool for victims of domestic violence, it is also a life saving tool both for women and children.’

Gender-based violence

Fifty-eight per cent of the individual women who responded to the survey had experienced violence. This ranged from domestic violence and harassment to childhood sexual abuse. Fifty-four per cent of these women did not report this violence to the police or seek the protection of the courts.

Women experiencing violence had a range of legal problems in a variety of areas of law, including in relation to children (24 per cent), divorce (33 per cent) and housing (24 per cent). Victims of gender-based violence, including domestic violence, need advice and representation on a range of legal issues if they are to obtain protection, not just domestic violence injunctions which accounted for just 14 per cent of respondents’ legal problems.

The MOJ’s 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, for example 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, for example, 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.

Legal aid: women demand their rights
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.

It is clear from our research that the evidential requirements proposed would leave the majority of women experiencing violence without protection as victims or survivors of domestic violence simply do not routinely report that violence to the police or apply to the civil courts for a protection order. The following case-study, provided by a legal professional who responded to our survey, exemplifies this:

‘One recent example was a young mother of two who had been brought through marriage from Pakistan to the UK. She was subject to frequent and extreme abuse from all members of the father’s family and the father, including verbal degradation, being hit, made to stay up all night as a punishment and burnt with hot oil. Her children were removed from her care by the family if she displeased them. Eventually she was made to live with the father’s sister, who orchestrated a gang rape of her. She eventually fled to a refuge. The family issued residence and contact applications. Ultimately the court accepted all of her allegations. There had been, however, no preceding injunction or criminal convictions.’

Self representation

The consultation proposes that where legal aid is no longer available, for example, in immigration or family cases that are removed from the scope of legal aid, individuals with legal problems should be able to represent themselves. However, in our research we found that:

89 per cent of individual women and 97 per cent of legal representatives thought that women experiencing violence would be unable to represent themselves;

Individual women were concerned about their safety and ability to understand proceedings, while legal professionals expressed concern about the complexity of proceedings and the ability of litigants in person to advocate for themselves adequately.

One professional who responded to the violence against women issue gave the following account of a woman who was unable to function when she saw the perpetrator of violence in court. This example is particularly interesting as it illustrates how the court process can be used to facilitate further abuse:

‘A woman was and still is being persecuted by her husband. He is representing himself and continually takes her to court and fires questions at her, the case has been going on for two years. She is an ethnic minority, living in vulnerable housing until the case is settled with a five year old daughter. She is highly intelligent and generally able to represent herself well, but in front of the perpetrator she becomes a wreck and is unable to string two coherent words together. I don’t believe under any circumstances she could represent herself and could certainly not afford to pay for representation.’

Mediation

Mediation is also being presented by the MOJ as an alternative to litigation in most family disputes; however, our research highlighted real problems with this approach:

66 per cent of individual women thought that mediation was not appropriate in domestic violence cases, in comparison with 70 per cent of legal professionals and 80 per cent of professionals who respond to violence against women. These figures suggest that the more that a person knows about violence against women, the less likely they are to believe mediation appropriate in domestic violence cases;

All respondents raised concerns about safety and the re-victimisation of the women concerned.

One legal professional shared an account of a case that
exemplifies many of the problems of using mediation in cases involving domestic violence: ‘The mother had felt bullied in mediation and agreed to contact with her violent ex-partner and daughter. With legal aid she was able to fight the case, prove the violence and obtain a domestic violence report and a CalCass report which showed that the ex-partner posed a significant risk of physical and emotional harm to her and that indirect contact was appropriate. Without legal aid she would still be at risk of physical harm. She would now be sent to mediation and that would not be appropriate. She was a victim of domestic abuse and she was not able to discuss the abuse for some time.’

**Areas of law removed from scope of legal aid**

All respondents to our surveys were concerned about the removal from the scope of legal aid of areas of law such as private family law, immigration law and welfare benefits and housing law.

- 97 per cent of professionals who respond to violence against women and 97.5 per cent of legal professionals thought that women experiencing violence would not be able to represent themselves if they had legal problems in other areas and that indirect contact was appropriate.
- Of most concern to these respondents was the removal of family, welfare benefits and immigration law from the scope of legal aid as these areas were identified as particularly complex.

The vulnerability of women experiencing domestic violence and their inability to represent themselves was summed up by one legal professional who gave this example of a woman who had been helped by legal aid in relation to an immigration law problem: ‘I recently represented an Iranian woman who was in the UK on a spousal visa. She was a victim of domestic violence and her marriage broke down. As a result she suffered Post Traumatic Stress Disorder, depression and anxiety. She was completely alone in the UK, save for her abusive husband. She called the police following an attack by her husband and was referred to the Citizens Advice Bureau for advice. CAB then referred her to a solicitor for assistance with her divorce proceedings. She was granted legal aid and they helped her gain access to her home and financial support while her divorce was going through. The same solicitors also dealt with her immigration appeal through legal aid when her husband informed the Home Office that the marriage had broken down and curtailed her leave. She was severely depressed and found it difficult to assist her lawyers prepare the appeal. She regularly broke down in tears and found the whole process extremely tiring and hopeless. If she was dealing with the matter herself, I am sure she would have given up.

**The telephone helpline**

The consultation suggests that many applicants would prefer to get advice over the telephone rather than in person and proposes setting up a telephone helpline as a single gateway for all civil legally aided advice. This proposal was roundly rejected by all respondents to our surveys:

- 68 per cent of individuals said that they would not feel confident speaking to an operator on a helpline about their legal problem; 93 per cent said they would prefer to speak to a solicitor or advisor in person;
- 77 per cent of professionals who respond to violence against women and 93 per cent of legal professionals thought that an operator on a helpline would not be able to identify and respond to violence against women;
- 79 per cent of professionals who respond to violence against women thought that the women they supported would not be able to fully understand and act on advice they received by telephone;
- 91 per cent of legal professionals thought that it was extremely important that vulnerable clients, such as those experiencing violence or those with disabilities, are able to get face-to-face, specialist, legal advice;
- 94 per cent of professionals who respond to violence against women thought that it was extremely important that women experiencing violence are able to get face-to-face, specialist, legal advice.

The majority of those who commented on this proposal in our surveys were concerned about the ability of women to disclose violence and other discrimination to someone unknown and possibly untrained, over the phone. As one respondent said: ‘Difficult to trust someone on phone with highly personal details such as sexual abuse.’

The ability of women to be able to use the helpline was also questioned by one individual woman respondent who said: ‘I maybe wouldn’t explain my situation properly whereas a solicitor asks you specific questions in order to assess your situation.’

**Other sources of advice**

Respondents who were unable to get legally aided advice and representation would either go, or refer their service-user to a law centre (60 per cent), Citizens Advice Bureaux (85 per cent), specialist organisations working against violence (70 per cent) or Rights of Women (56 per cent).

However, these sources of support are unlikely to be able to cope with increased demand for their services. Indeed, given the dependence on legal aid of Citizens Advice Bureaux and law centre practice, given the current financial situation, it is questionable whether these sources of advice and support will continue to be available at all. This will leave many with nowhere to go to get life-saving legal advice and representation.

**Legal aid, access to justice and international human rights law**

The right to a fair trial is set out in Article 6 of the ECHR which is incorporated into UK law through the Human Rights Act 1998 (HRA). The right to a fair trial and the ability of an individual to access a court and the protection of the law are fundamental human rights which are inextricably linked with the protection of other fundamental human rights, such as the right not to be subject to inhuman and degrading treatment under Article 3 ECHR and to respect for private and family life under Article 8 ECHR.

Often discussions about Article 6 and legal aid focus on the criminal law. However, the right to a fair trial and legal aid also apply to civil law issues, including areas such as family law. The European Court of Human Rights has determined that the ability to access legal aid is central to this right.

In the case of *Airey v Ireland* [1979] ECHR 3, the ECHR held that a failure to provide legal aid to enable a victim of domestic violence to get a judicial separation from her husband violated Article 6(1) of the ECHR. Importantly, in this case the European Court of Human Rights (ECtHR) articulated the important principle that the ECHR is not about ‘theoretical or illusory’ rights, but rather these rights must be ‘practical and effective’. In relation to Article 6, the Court said this principle ‘is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial’.

The Court recognised that while Article 6 does not require blanket access to legal aid for all civil cases, legal aid may nonetheless be required in certain circumstances to ensure the fairness of proceedings:

‘Article 6 para. 1... may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.’

Interestingly, the ECtHR rejected self-representation as a sufficient guarantee of Mrs Airey’s human rights:

‘The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer. The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that...’
are theoretical or illusory but rights that are practical and effective... It must therefore be ascertained whether Mrs Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.’

The Court went on to examine the proceedings and their complexity and concluded that it was ‘most improbable’ that someone in Mrs Airey’s position could effectively present her own case. Therefore in this case it was held that access to legal aid was required to ensure that Mrs Airey’s right to a fair trial was not infringed.

In Steel and Morris v UK [2005] ECHR 103, the Court acknowledged that restrictions can be placed on the right of access to the courts, provided that these are pursuing a legitimate aim and are proportionate. It therefore, may ‘be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings’. However, the Court also noted that legal aid was not required ‘as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary’. The Court set out several factors for determining whether a civil case requires legal aid in order to meet the standard of a fair trial set out in Article 6:

‘The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity represent him or herself effectively.’

The Court went on to examine the complexity of the relevant proceedings before concluding that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively and contributed to an unacceptable inequality of arms which violated Article 6 ECHR.

Rights of Women believes that it is clear from the case-law discussed that the right to a fair trial in civil cases requires legal aid be provided in complex cases that engage Convention rights. While the Court makes clear that the ability of an individual to represent themselves in simple and straightforward proceedings is sufficient to prevent a breach of their Article 6 rights, it is also clear that legal aid must be provided in cases that are complex, where legal aid is necessary to enable effective access to a court. In determining complexity, consideration has to be given not just to the relevant law and procedure, but also to the capacity of the individual concerned.

Conclusions

Rights of Women believes that the MOJ’s proposed changes are contrary to the UK’s domestic and international human rights obligations. In terms of our research, we believe that it is striking that these proposals commanded absolutely no support from any of our respondents. It is perhaps unsurprising that individual women and legal professionals would have concerns about proposals which would, if implemented, have significant negative consequences for them. What is interesting is that the proposals are rejected as unworkable by those who have no personal or professional interest in legal aid but who have unparalleled knowledge of legal aid as a tool for victims of violence: professionals who work on violence against women issues.

Catherine Briddick is the Senior Legal Officer for the organisation Rights of Women. The full research report, Women’s Access to Justice, can be downloaded free of charge from their website www.rightsofwomen.org.uk.