

Shailesh Vara MP  
Parliamentary Under Secretary of State for Justice  
Ministry of Justice  
102 Petty France  
London  
SW1H 9AJ

9 June 2014

Dear Minister

### **Family legal aid**

We are writing on behalf of our respective organisations which collectively represent over 9,000 family law practitioners.

Over one year on from the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), we would welcome the opportunity to discuss with you what steps your department is taking to review and address the practical impact of the family legal aid provisions.

We are grateful for the ongoing dialogue with your department in relation to family mediation, but you should also be aware of the most recent feedback from the members of our respective organisations on some of the other most significant impacts of the reforms to date on families and the courts.

All our members work with families and children on a day to day basis, both in and outside of the family courts, and there are some recurring themes among their experiences of the operation and consequences of LASPO. Resolution surveyed its members from 24 March to 17 April 2014 about their experience of LASPO on the ground, the results of which we reference in this letter. FLBA members, who tend to be instructed in some of the most difficult cases coming before the family courts, have provided the attached evidence schedule with examples of real cases highlighting many of the issues raised below. ALC members report similar experiences.

### **Most disadvantaged litigants**

Our members are most concerned about the following categories of family litigants:

- parents with learning disabilities or mental health issues lack a voice in proceedings due to the difficulties for those without capacity who rely on the Official Solicitor for representation, but who are deprived of such representation as they are not granted even exceptional funding for it;
- parents faced with an application for a child arrangements or special guardianship order made by the other parent or members of extended family supported and sometimes funded by local authorities, in respect of which the parents are now unlikely to secure private family legal aid. Had the local authority made an application for a care order then non-merits and

means tested legal aid would have been available and the child separately represented - the issues are essentially the same.

- Victims of very serious violence, suffered more than two years before the making of a private family law application and where any relevant criminal conviction is spent, who have to deal directly with their abuser in the conduct of litigation and/or be cross examined by the perpetrator.

### **Sufferers of domestic abuse**

In our members' experience, the eligibility and evidential requirements have not provided sufficient and flexible access to legal aid for domestic violence sufferers.

Many of our members are committed to helping people navigate the prescribed evidence requirements, but sufferers are not entitled under the legal aid scheme to tailored support. As you will know, there is no payment for legal aid providers for work done in support of successful applications for private family legal aid in relation to domestic abuse screening - some victims do not recognise that they are victims of abuse - and gateway evidence gathering.

In Resolution's recent member survey:

- Almost half of those who responded said none of the people who contact their practice already know about the domestic violence evidence requirement before they contact them. If they do, it seems they have usually contacted other solicitors first, or are already supported by a domestic violence support service.
- Almost half reported that over 50% of people asked to gather the required evidence did not return at all. Of those who do provide the required evidence, it generally takes more than a week or even more than a month for them to obtain it.

Whilst we welcome the changes introduced from 22 April 2014 and the government's commitment to keep the requirements under review, it will be vital to assess whether the additional forms of evidence in fact increase access for victims to the protective help they need, given the under-reporting of domestic abuse and police approach to charging. The changes have not addressed all the obstacles faced by potential legal aid applicants to date:

- Inability to afford charges made by GPs of up to £75 to provide evidence. It is not at all clear that the changes intended to mitigate charges will make legal aid more accessible.
- The change allowing evidence from a domestic violence support service, but only where an individual has been referred to them by a health professional, may make little difference in practice in some regions. An accessible gateway should include letters from refuges confirming outreach support. For example, some refuges won't take in older male children; and evidence from Independent Domestic Violence Advocates, statutory bodies and registered charities working with victims who often co-ordinate with refuges and other support services and are in a position to independently confirm certain matters.
- Local difficulties in obtaining evidence from the police and without delay, with the police sometimes advising victims to access a solicitor to obtain proof of a conviction or caution.
- It is virtually impossible to establish non-physical abuse with any of the documentary evidence included in the regulations.
- The lack of discretion and flexibility around the 24-month cut off period, for example where a sufferer did not have the confidence to disclose to authorities at all, or to any of those included in the regulations, or where a former abusive partner seeks contact more than two years after the making of a non-molestation order or after a conviction is spent. The fact that violence occurred more than 24 months previously does not negate the risk, including

in circumstances where the victim moved to a different address and the perpetrator has just found out where the victim is living.

### **Exceptional Funding**

The almost non-existent number of family cases granted such funding is well documented. It appears that either the bar has been set too high by the Lord Chancellor's Exceptional Funding Guidance and/or the LAA is taking a highly restrictive approach to granting funding or setting any precedents for funding. We believe that many of our members simply haven't been in a position to resource and risk the making of applications (to the quality they would wish), when refusal is almost inevitable, refusals are relevant for contract audit purposes and they will only be paid for successful applications.

The approach to exceptional funding must be revisited to make provision for family cases which may have serious consequences for parents and/or their children. The present criteria do not appear sufficiently to take into account the problems that a sufferer of domestic violence (without the prescribed evidence to demonstrate that domestic violence is a feature of the case) would have in engaging in negotiation, mediation and/or litigation with a perpetrator about a divorce or unresolved matrimonial finances where, for example, the relevant injunction was more than two years old and/or no contact with a child has been ordered due to domestic and/or child abuse.

We are also concerned that exceptional funding is providing no representation for at least some of those facing essentially public law applications relating to contact with children in care or applications to discharge care orders. It also means that families seeking to protect children from harm but who are unable to satisfy the prescribed gateway requirements cannot access legal advice or representation.

The rights of litigants under Articles 6 and 8 of the ECHR are being breached regularly in the courts, an outcome that section 10 was intended to prevent.

### **Impact on the family courts**

The evidence from Resolution's recent member survey summarises our shared concerns:

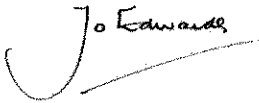
- Almost 70% who responded said that, when they act for a party in family proceedings where one or more of the other parties are a litigant in person, family court resources have to be diverted, for example, using a fact-finding hearing in lieu of unfunded drug or alcohol testing. Complex fact finding hearings will be impossible for unrepresented parties to deal with adequately.
- 80% of respondents said that the legal or legal aid costs of the represented party increase when one or more litigants in person are involved in a case.
- Almost all members who responded said that there is less constructive dialogue between and outside court hearings. This must work against constructive negotiation and settlement before final hearing. Members of the FLBA also report that negotiating solutions or even narrowing issues is unlikely to be successful. Some litigants in person will not talk to the other party's legal representative at all, even when encouraged to do so by the judge.
- Almost 95% said that the case takes longer than it could do.
- Almost 70% said final decisions have to be made by the court without necessary expert evidence.

Ultimately, we are of course concerned for those children denied contact with their parents over long periods for a child due to delay, or even more importantly, losing contact with a parent who just gives up.

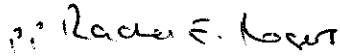
We suspect that many of these findings are not the government's intended outcome, and would welcome the opportunity to identify ways in which the most vulnerable can still access legal services whilst maintaining value for money for the taxpayer.

We would therefore like to meet with you to discuss these and other issues in more detail, and will be in touch with your office soon to arrange a date for such a meeting.

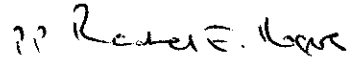
Yours



Jo Edwards  
Chair, Resolution



Maud Davis  
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Lawyers for Children



Susan Jacklin QC  
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Copy to Simon Hughes MP, Minister of State for Justice  
Sir James Munby, President of the Family Division