

Submission to the Independent Review of the Regulation of Legal Services

Response from Scottish Women's Aid March 2018

ABOUT

Scottish Women's Aid (SWA) is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

BACKGROUND

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

Women's access to justice is a long-standing issue and ensuring access to civil law proceedings is a significant part of how the UK should ensure it meets the obligations agreed to by ratifying the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1986. Enabling protection from domestic abuse is a crucial part of States' human rights obligations towards women, children and young people. Domestic abuse has serious and long-lasting consequences for women and children's health and well-being and is an assault on their human rights.

The extent to which women and children do or do not have access to justice, and legal support in particular, when experiencing domestic abuse is, in our view, an indicator of the society's commitment to women's and children's human rights. The costs of this failure to protect, which go far beyond simply financial and budgetary considerations, are borne by not only women and children.

Women, children and young people experiencing domestic abuse must have adequate access to local solicitors providing specialist legal advice and support they need, at the time they need it. However, for years now, we have been receiving a

consistent message from our services in Scotland: women, children and young people cannot routinely access appropriate, informed and domestic abuse- competent legal advice and support, and experience service-generated harm and re-victimisation from the legal system. This includes inaccurate advice about their rights in opposing applications for child contact/ residence made by an abusive partner, or being told not to mention domestic abuse in such proceedings or before the sheriff.

We have previously submitted a written response to the earlier Independent Strategic Review of publicly funded legal assistance in Scotland. There are many parallels between the issues we raised there in relation to the provision of legal aid services, and those discussed in this consultation around regulation and provision of legal services, as reflected in our response below.

COMMENTARY

What should a regulatory system for 21st century legal services in Scotland look like, including: considerations around entry and qualifications, activities undertaken, setting standards, monitoring compliance & making complaints?

Firstly, we note that the Review identified a lack of an evidence base around consumer experience of legal services in Scotland and is currently commissioning a qualitative study on consumers' attitudes and experiences.

The Review also identified "*...a number of key challenges are emerging from the available information*" and these are very much reflected in the experience of women, children and young people experiencing domestic abuse, namely:

- Ability, as consumers to access legal services, and, therefore, to also access justice, is not consistent, as we explain below
- Lack of information on services they are purchasing, including cost and quality
- Not enough objective information to choose between different providers of services, or to identify which providers are right for their issues
- Lack of awareness of consumer protection should things go wrong
- Failure to engage vulnerable women and children in debates about the provision of legal services, regulation of providers, or feedback mechanisms for consumers
- Perception of solicitors and other providers of legal services not being as well monitored as other sectors

- A need to get a better response from the complaints and redress system. Women do experience what the Review calls “*referral fatigue (being referred backwards and forwards between the various regulatory/disciplinary bodies)*” and have commented on the length of time taken to process and resolve complaints.

We would agree that women and children are obliged to rely on third-party recommendation to find a solicitor and have no routine way of assessing and comparing whether a firm as a whole, or a particular practitioner therein, has a solid understanding, not simply a general “awareness” of domestic abuse, in relation to the legal issue in question. This covers that firm/solicitor’s experience in dealing with domestic abuse-related civil cases, their success in dealing with these issues, and how that firm/solicitor’s services compare to other firms and practitioners in the same locality.

However, the issue is not as simple as merely being able to choose freely from a wide pool of appropriate and expert practitioners. Often there is a basic lack of provision, with possibly only one or two local firms within a realistic travel catchment area. For women, children, and young people experiencing domestic abuse seeking protection through the civil courts, a positive outcome would be a reformed and representative system, facilitating and encouraging access to justice. A system capable of providing them with targeted and appropriate legal services to address their complex and, often urgent, legal needs requires, firstly, an adequate, local availability of solicitors practicing family law, who also provide Advice and Assistance and civil legal aid. In addition, these solicitors must be aware, sympathetic, demonstrate an understanding of the gendered dynamics of domestic abuse and be able to best advise and represent both women and children.

Mediation, ADR, Family Group Counselling and out-of-court agreements are often offered as successful alternatives. However, these are not appropriate alternatives, or indeed, pathways for women, children and young people experiencing domestic abuse to access justice. They do not offer equality of arms or equal participation, and only serve to reinforce the power imbalance inherent in domestic abuse; they are often dangerous as well.

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

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

However, there is no consistent, specific legal service dedicated to women affected by domestic abuse across Scotland, a gap that amounts to unmet, legal need. This can be addressed by the provision of free legal services for all women, children and young people experiencing domestic abuse. The service would be delivered via either embedded solicitor “attached” to, or working in, our network of local Women’s Aid groups, or dedicated solicitors within an approved legal firm.

Do you have any comments about the consumer, provider or public interest in the current regulatory framework?

In terms of “quality assurance”, as we have commented above, it is difficult for women and children to compare a service and assess “like-for-like”. The most expensive service is not necessarily either the most appropriate or skilled and it is not clear how women are currently able, if at all, to assess practitioners’ expertise in relation to domestic abuse and ensure a practitioner is actually skilled in the services they are delivering. This raises particular difficulties where “generalist” practitioners, predominantly in rural areas, are providing the available services or legal professionals practicing outside their skill set, for instance, conveyancing or criminal practitioners who have switched to offering services in relation to family law issues.

“Competency” of legal representation is an issue in relation to domestic abuse.

It is fair to say that, while the straightforward availability of solicitors providing Advice and Assistance and Civil Legal Aid funding is high on the list of issues for women seeking redress through the civil courts, this is not the sole issue. It is inextricably linked in with the necessity of finding a solicitor who is aware of the dynamics of domestic abuse; this means that the solicitor should not approach the issue as a “civil dispute”, particularly in relation to actions involving contact, residence and Parental Responsibilities and Rights (“PRRs”) and will provide appropriate representation.

The Law Society of Scotland operates a specialist accreditation scheme, established in 1990, and registered specialists in family law are required to fulfil specific specialism criteria. This requires that *“Applicants should demonstrate a high level of knowledge and experience in the area of Family Law. The application should include evidence that the applicant has been engaged in a broad spectrum of practice in the Family Law field throughout the five year period under review, which requires a specific expertise in eight separate areas, including “Proceedings in*

relation to domestic abuse” <https://www.lawscot.org.uk/members/career-growth/specialisms/>

However, no specific degree of participation in formal training is required before registration or as part of CPD. Experience is the sole qualification in terms of knowledge and application of the law, and expertise around domestic abuse is confined to family law proceedings. It is not at all clear what constitutes a “*high level of knowledge*” in relation to domestic-abuse related proceedings, the source of that “knowledge”, specifically whether it comes from an expert and appropriate foundation and how that “knowledge” is actually tested.

Women in our services tell us that family law specialists often demonstrate little or no understanding of domestic abuse. SWA is routinely contacted by women and our local member groups expressing concern about solicitors’ attitudes, particularly in relation to contact, residence and PRRs. Although informed and supportive practice clearly exists, a significant number of solicitors still fail to appreciate that domestic abuse is not a “civil dispute” that can be treated in the same way as other family law cases, and advise women that they should “resolve the dispute” via mediation. The framing of contact in the context of domestic abuse as a “*dispute*” reveals a profound misunderstanding of the dynamics of domestic abuse and leads to significant system-generated risk. Unfortunately, the direction of policy travel in relation to civil “dispute” resolution, coupled with SLAB requirements around this, not only undermine women, but also give weight to the perception held by some sheriffs and solicitors that mediation is acceptable and that the perpetration of domestic abuse against the woman has no bearing on the abuser’s ability to parent.

A solicitor’s failure to conduct a case in an informed fashion and to represent women and children’s interests appropriately allows abusers to use the system against women and presents a highly flawed story to the court. Every solicitor and firm providing family law services, particularly actions involving children, must be able to display the appropriate competencies, particularly where they are providing services under the auspices of Civil Legal Aid funding and SLAB could do more to ensure that certain prescribed competencies have been undertaken.

3. Do you have any comments about transparency and accountability in the current regulatory framework?

4. Do you have any comments about flexibility and proportionality in the current regulatory framework?

In relation to complaints against solicitors and members of the Faculty of Advocates, the SLCC provides a gateway function in receiving and filtering all claims of professional misconduct and inadequate professional services. However, before the SLCC becomes involved, the client must first take the complaint to the legal firm or Faculty of Advocate's Client Relation Partner and if they are not satisfied by that response, the next step is to contact the SLCC.

We routinely hear accounts of practitioners' failing to follow instructions or ignoring them, specifically around child contact and the use of the provisions in section 11 (7A) - (7E) relating to domestic abuse, as well as failing to properly advise women of their options, including insistence on undertaking inappropriate mediation.

Often women simply do not have the energy to pursue a complaint because they are still engaged in the court process or ongoing difficulties with court-ordered contact arrangements and their children's safety and security is their first priority. They may have had difficulties in securing a lawyer in the first instance and do not want to "rock the boat" by making a complaint against them for fear of the solicitor withdrawing from acting, which might disrupt the proceedings, often to their prejudice and detriment. Similarly, women may fear that by making a complaint, they will be labelled "difficult" and therefore other practitioners will be unwilling to take on their case, a particular issue in small and/or rural communities. Women have raised the issue about having to complain to the Client Relations Manager and the difficulties this brings in dealing with small practices and sole practitioners.

The process for dealing with legal complaints is plainly complicated and confusing, a matter clearly highlighted in the article "*Ineligibility – an open and shut case?*"¹ There is a need for clarity and reform, given the delays in complaints being processed which will take anything between six to ten months to resolve, during which period, women still have to work with the solicitor or try to find a replacement.

The SLCC's Consumer Panel has identified participation as an issue, with a need for the SLCC to become better at engaging with "consumers" of legal services.

¹ <http://www.journalonline.co.uk/Magazine/62-3/1022966.aspx>

Consumers must have more of a voice in the complaints process and direct contact between consumers of legal services and the SLCC is necessary. Part of this engagement necessitates commissioning research into the nature of complaints against legal professionals, identifying who does and does not complain, barriers to consumers making complaints and the reasoning behind them, for instance whether this is down to reluctance, timing and/or personal issues. It must also identify under-represented sectors of society, for instance, as referred to in other studies, women, people with disabilities, those whose first language is not English, BME consumers and children.

We would also recommend the Children and Young People's Commissioner Scotland is consulted as a matter of urgency, to identify and resolve any barriers preventing children from accessing appropriate legal representation and participating in issues impacting on them.

The SLCC's Demographics Yearbook for 2016-17 records an ongoing pattern of under-reporting from women, not unsurprising given the issues we have raised above, a trend that "*...has been noticed by other complaint handling schemes.*"²

The Yearbook goes on to note that awareness of the right to make a complaint "*... appears to vary depending on various demographic factors, most notably gender and socio-economic background...Of those surveyed, those in the most deprived socio-economic areas were least likely to be aware of their right to make a complaint about a solicitor to an independent organisation. Just 53% of those in the most deprived socio-economic areas were aware of their right compared to 70% of those in the least deprived areas...*" an important statistic in the light of how economic poverty occasioned by domestic abuse impacts on women's participation in society and space for action.

Certainly, consumer vulnerability needs more consideration in terms of their ability to exercise the right to complain and thus seek improvement in services. The Legal Services Consumer Panel of England and Wales booklet on consumer vulnerability is of relevance in considering this issue, as is the SLCC Consumer Panel response to the SLCC Strategy consultation.³

² <https://www.scottishlegalcomplaints.org.uk/media/75407/demographics-booklet-2016-2017.pdf>

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<http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Guide%20to%20consumer%20vulnerability%20014%20final.pdf>; https://www.scottishlegalcomplaints.org.uk/media/64960/slcc_consumer_panel_response.pdf

5. What have been your experiences of coming into contact with legal services in Scotland? How could the experience be improved?

6. Are there any regulation issues you wish to comment about in relation to specific types of justiciable problem e.g. employment, consumer or family disputes?

As mentioned above, cases regulating child contact, residence and PRRs are by far the biggest civil legal issue for women, children and young people experiencing domestic abuse. It is these cases, in which failures of representation feature most commonly and have the most acute, detrimental impact. SWA currently operates Scotland's Domestic Abuse and Forced Marriage Helpline and calls from women with questions or concerns about child custody/contact matters are by far the biggest issue highlighted by callers.

"Domestic abuse" competence is a particular issue concerning legal professionals acting as Officers of the court, namely Safeguarders, Curators, but most frequently, Child Welfare Reporters ("CWRs"). Despite the introduction in 2015 of Court Rules intended to regulate the appointment and functions of CWRs, women continue to voice concerns around deficiencies in how the CWRs conduct their investigatory and reporting functions. This is, undoubtedly, due to the continuing lack of any regulatory and governance scheme for appointing CWRs, as well as a complete absence of any dedicated training programme for those currently carrying out this role or future appointees.

Women have expressed concern and frustration at the "*crass understanding of domestic abuse*", "*lack of understanding around perpetrator issues*" and a "*dismissive attitude towards children's testimonies*" despite the fact that children's right to express their views, and that these views must be factored into decision – making processes involving children, is enshrined in the Children (Scotland) Act 1995. A demonstrable absence of "*pertinent qualifications bar their law qualifications*" is a frequent observation, evidenced by lack of understanding of the dynamics and impact of domestic abuse particularly of coercive controlling behaviours, and a failure to give any consideration to the perpetrator's criminal offending history and thus, the risk they pose to women and children. No apparent competencies or knowledge around taking evidence from children, their developmental stages or psychological development was another issue. All of this, combined with an absence of supportive engagement with women and children during the preparation of the Child Welfare Report distresses women deeply, and

has the unacceptable outcome of children being forced into unsafe contact with perpetrators of domestic abuse.

Due to routinely experiencing the production of poor quality Reports, women have questioned whether CWRs' fees represent "value for money", particularly where the taxpayer is meeting the cost through Civil Legal Aid, given the not insignificant sums charged to the public purse.

, commenting that that the courts and SLAB have a "duty of care" to ensure that CWRs are properly qualified and trained.

In summary, given the numbers appointed to produce Reports in proceedings related to child contact, there is an urgent and acute issue around the lack of training relating to domestic abuse for Child Welfare Reporters. This issue has been ongoing for some time despite recommendations for training being supported by the Scottish Government and swift action is needed to progress this and address the gap in expertise.

The Review also touches on "in-house" practitioners and we would briefly comment it is obviously crucial that COPFS legal practitioners continue to receive training around domestic abuse, particularly given the advent of the new offence. It is important that this training is robustly maintained and that HMIPS monitor training policy, practice, compliance and support for victims and witnesses.

The extent of training around domestic abuse available to, or accessed by, local authority "in house" lawyers, is not known but we would argue that this should routinely be part of their ongoing CPD. Local authorities must be able to respond appropriately to women and children's needs and understand their duties and obligations around service provision, housing, social work intervention in relation to domestic abuse, and be prepared to use their powers to apply for forced marriage protection orders

Finally, in relation to criminal practitioners, to improve the experiences of women, children and young people as complainers and witnesses when they are questioned before the courts, it is important that the reforms proposed by the Evidence and Procedure Review around the treatment of victims and witnesses be progressed without delay.

What innovations or barriers to innovation within legal services or their regulation would you wish to highlight?

Providing an appropriate response, particularly through the dedicated solicitors we have mentioned above would pay dividends in reducing the long-term cost of domestic abuse. By “cost”, we mean public services such as health, housing, criminal justice, lost employment, the emotional impact on those experiencing domestic abuse and their families and hopefully, also through a reduction in repeat offending by abusers.

Spending on prevention and on effective services to support women, children and young people offsets these costs. However, there are other overwhelming legal, financial ethical, most importantly, human rights arguments for implementation of these proposals; primarily the benefits derived in allowing women, children and young people wider and easier access to protective orders, and creating effective and robust orders, which greatly outweigh any potential cost issues.