

# **Surviving Economic Abuse (SEA) response – Justice Select Committee inquiry into the Future of Legal Aid**

**October 2020**

## **Introduction and summary**

1. Surviving Economic Abuse (SEA) is the only charity in the UK dedicated to raising awareness of economic abuse and transforming responses to it. All our work is informed by Experts by Experience (EEG) – a group of women who speak about what they have gone through so that they can be a force for change. Our response to this call for evidence focuses specifically on our area of expertise which is economic abuse as a form of controlling or coercive behaviour within intimate partner relationships in the context of domestic abuse.
2. This response is endorsed by the following: Advance, Agenda (Alliance for Women & Girls at Risk), Beck Fitzgerald, Refuge, Respect, Women's Aid and Women's Budget Group.
3. Economic abuse occurs when a perpetrator controls (through restriction, exploitation and/or sabotage) how the victim-survivor acquires, uses and maintains money and finances, as well as the things that money can buy, such as accommodation, food, clothing and transportation. 95% of domestic abuse victims experience economic abuse<sup>1</sup>, and 60% are in debt as a result of it.<sup>2</sup>
4. Economic barriers to leaving can lead to women staying with an abusive partner for longer than they would want and so experiencing more harm as a result.<sup>3</sup> Further, lack of access to economic resources post-separation is the primary reason women return to an abusive partner<sup>4</sup> and makes the process of rebuilding an independent life harder.
5. SEA has found that the legal aid means test operates unfairly for victims of domestic abuse, by failing to take account of the abuse in the assessment of their means to determine eligibility. Victims could be assessed as failing the means tests due to money or assets which they appear to own, even though they are unable to access or control these due to abuse. They can also be unable in practice to pay the contributions that may be required under the current legal aid scheme for the same reasons. Lack of legal aid can be a serious impediment to women attempting to leave an abuser; any funds they have are crucial for them in regaining economic independence and stability and many have to channel these into paying for essential legal proceedings. This submission elaborates on these points, drawing from a survey of the EEG which SEA conducted earlier this year to find out about their experiences in accessing legal aid as well as from other areas of SEA's work.
6. SEA makes one overarching recommendation which we have called for throughout and which we believe is the only holistic response to the problems of access to legal aid for domestic abuse victims: that they be automatically exempt from the legal aid

means test. Training on economic abuse for those who implement the system is also vital so that they respond appropriately to victims. This submission makes clear why it is necessary to make this change so that victims of economic abuse are enabled to access the legal redress they need.

7. SEA's response will address those aspects of the Terms of Reference for this inquiry within the charity's expertise, and will therefore broadly cover the following:
  - How LASPO has affected access to justice and views on the post-implementation review;
  - The impact of Covid-19 on legal aid services and clients;
  - What the challenges are for legal aid over the next decade and what reforms are needed.

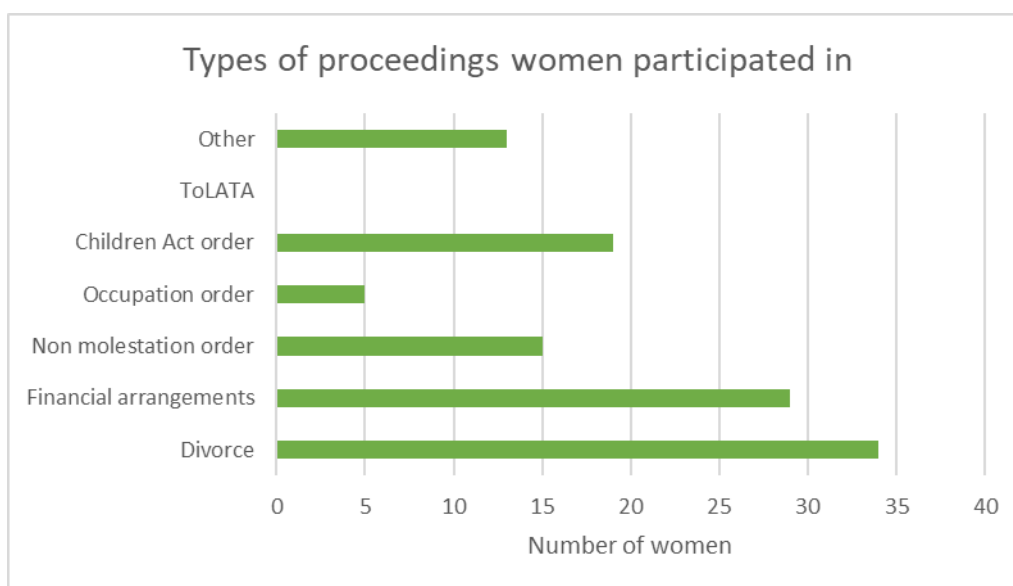
### **How LASPO has affected access to justice**

8. SEA's experience of working with victims of economic abuse demonstrates how the legal aid income and capital means tests under LASPO operates unfairly for such victims. This can happen in a number of ways:
  - Being assessed as failing the means tests due to money or assets which victims appear to own on paper, but which they are unable to access or control because of economic abuse and therefore cannot use to pay for legal assistance
  - Being assessed as failing the capital means test due to ownership of the family home which itself is or will be the subject matter of legal proceedings, and which therefore cannot be expected to be sold or used as equity to raise money for the legal proceedings
  - Being assessed as eligible for legal aid but being unable to afford the contributions required due to the impact of previous and/or continuing economic abuse.
9. According to the Crime Survey for England and Wales (CSEW) 2017-18, the largest group of victims of domestic abuse by housing tenure is those living in owner-occupied property.<sup>5</sup> Owner occupation represents 63% of households in England and Wales.<sup>6</sup> While we have found no statistics on what proportion of victims applying for legal aid are home-owners, the figures we have, coupled with the evidence of women for whom owning property has been a barrier to accessing legal aid, point to the capital test as a significant problem that needs to be addressed.
10. Domestic abuse victims fall into the category of those most vulnerable in terms of need for legal aid. If a person has insufficient means to pay for legal assistance and representation they are essentially left with three options: not pursuing or defending legal proceedings; taking them on as a litigant in person; or borrowing money to pay for legal assistance. All of these have particular and potentially severe implications for economic abuse survivors. Legal proceedings may be the only way to obtain redress for abuse which has often lasted many years, and also be crucial in ensuring custody of any children.

11. The 'inequality of arms' caused by lack of legal representation is particularly damaging in the context of domestic abuse: leaving the victim to navigate a complex legal system unrepresented as a litigant in person against a perpetrator frequently intent on continuing the abuse through whatever means possible, including the family courts, whether himself represented or as a litigant in person. The recent report by the expert panel following the Ministry of Justice consultation 'Assessing risk of harm to children and parents in private law children cases', looked at how effectively the family courts respond to allegations of domestic abuse in these cases.<sup>7</sup> The report found that the most important and frequently mentioned form of structural disadvantage was lack of access to legal representation, and that following the LASPO reforms most private law children cases now involve at least one litigant in person. The report highlights how the normal challenges facing a litigant in person is pronounced in domestic abuse cases, with victims of abuse reporting feeling 'powerless, confused, unsupported and excluded, which compounded the levels of anxiety, stress, fear and trauma they were already experiencing.' The report referred to the evidence by SEA to the consultation that victims needed legal advice and representation in order to rebut the presumption of parental involvement, which was a specific focus of the report.
12. The panel also made observations about the issues thrown up for victims by the legal aid means test, which are elaborated on further in this submission. It pointed out that this can penalise victims financially who may well have equity in a house or elsewhere but very limited available cash to afford legal representation, stating that: 'It can exacerbate economic abuse experienced by a victim if their assets are controlled by the abuser who blocks access to them.' The report mentioned submissions from victims who 're-mortgaged their home, declared bankruptcy and accrued considerable debt in an effort to have legal representation to prove their allegations of domestic abuse.' The report further highlights the difficulties for victims in evidencing abuse, particularly economic abuse, and the importance of legal representation in supporting them in bringing forward the required evidence.

#### Overall findings of SEA's survey

13. SEA's survey of EEG members explored their experiences of accessing legal aid and ran for two weeks in May and June 2020. In total, there were 43 unique participants.
14. The women who responded to the survey were involved in a variety of proceedings. For some, this involved multiple, parallel proceedings and some were involved in separate proceedings taking place at different times; for example, they had to return to court years after an initial application for a further matter. The most frequent court proceedings women had undertaken were divorce, with 34 out of 43 respondents (79%) involved in these, followed by financial arrangements (29 women). 13 responses were 'other', for example, proceedings that took place in another jurisdiction. However, some of the responses to this section mentioned non-molestation orders, Children Act orders and issues dealing with property, which looked like they could also have been captured under the specific headings provided. The survey responses did not lend themselves to a clear differentiation between those who did not access legal aid more generally (e.g. because they had been advised they would not be eligible) and those who did apply but were refused.



15. 38 out of 43 women who responded said that they had taken legal proceedings in the family court. Out of these, only 24 women stated that they applied for legal aid; five women (21%) applied for legal aid before April 2013 (when new regulations came into force following LASPO); 14 women (58%) after the regulations; three women made a combination of applications as proceedings spanned the time pre- and post-LASPO; and two selected 'other'. Of the women who applied, only eight were successful in accessing legal aid (33%).

#### The operation of the capital test

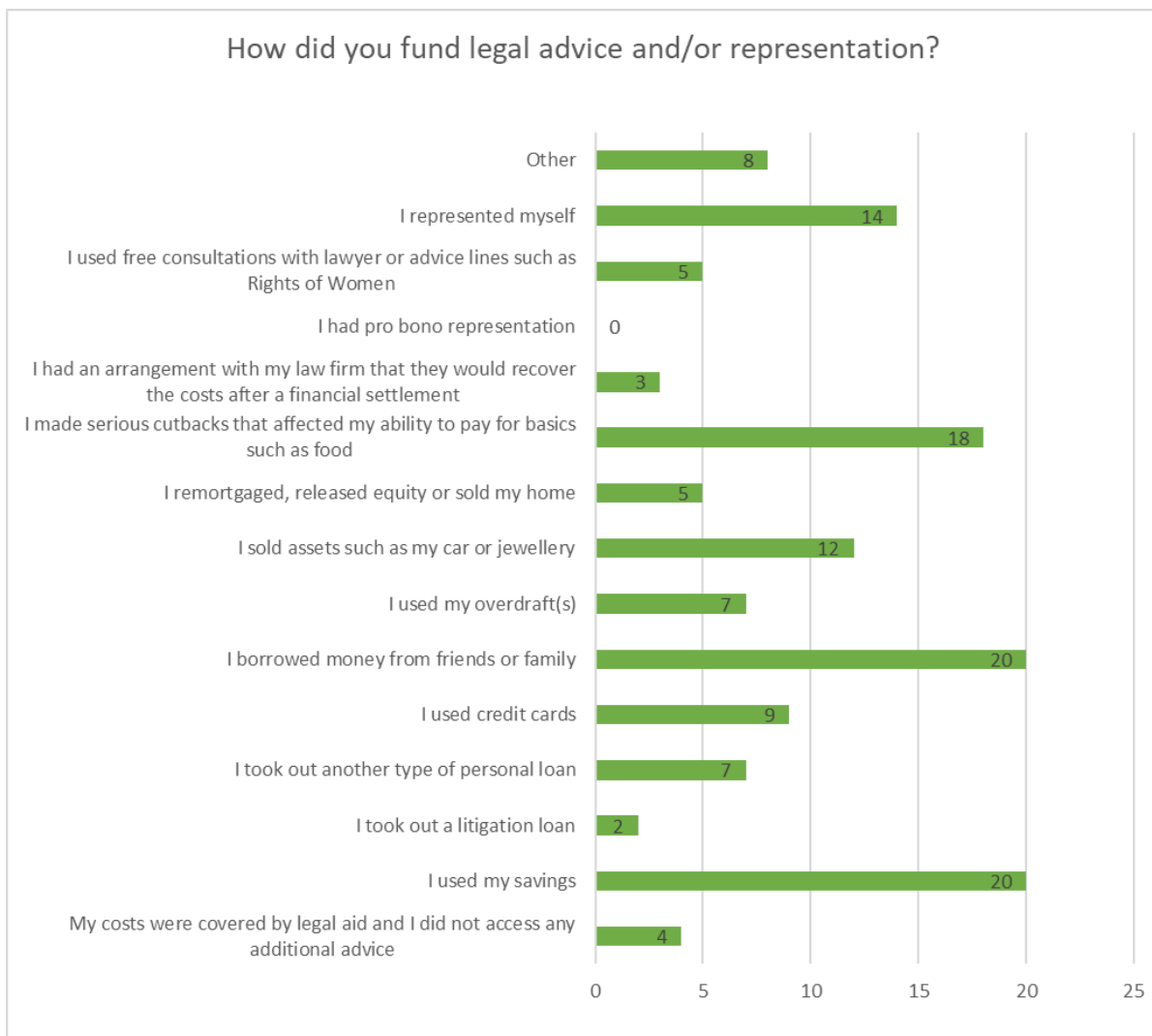
16. The legal aid capital means test is based on the assumption that applicants have the ability to liquidate assets. The assumption is erroneous for victims of economic abuse because of the nature of coercive control and therefore the context in which assets are held.
17. The survey by SEA found that the key barrier for victims to access legal aid is having the home they live in included in the assessment of capital for the purposes of the means test. Whether the home is jointly owned with the abuser or solely owned, this puts the victim in a situation where they are unable to access the capital as they are not able to compel the sale of the property nor borrow against it due to the perpetrator withholding consent. As one respondent said: 'The capital I had in the property was entirely notional.'
18. The fact that the means test does not account for the control that perpetrators have over a jointly owned property or marital home is clearly illustrated in the following statement by another respondent:

'Having a beneficial interest in a property should not count towards the legal aid means test for women who have been abused. In my case I was forced to leave my home and had no access to it. Because of this interest in a property I couldn't sell/access I didn't meet the threshold for legal aid, even though I had limited savings to pay for legal bills.'

19. With or without a perpetrator exerting control over how the property is dealt with, the capital test creates further unfairness in situations of domestic abuse when the legal proceedings concern the very property which is being assessed for the purpose of the test. There is the paradox of being expected to liquidate an asset that is the subject matter of the court proceedings. As a respondent to the survey put it:  
'Horrendous that I can't access this when I am at my most vulnerable as my assets were tied up in a house that we were in court over.'
20. It is clear that in these situations the victim cannot be expected to do anything in relation to the property (i.e. sell or mortgage) pending the conclusion of the proceedings for which legal representation is required.
21. In the survey, women cited a variety of barriers to being considered 'eligible' for legal aid and which highlight more broadly the need for the legal system to have a better understanding of and response to economic abuse. Before even making an application, one woman was advised that her application was out of scope, 11 women were advised not to apply due to the means test requirements, and four women found their experiences of abuse were not recognised by professionals. One woman said she did not apply for legal aid due to the statutory charge which would apply against her property. 16 women said that they had applied for legal aid and their applications were declined.
22. Those who said they were deemed 'ineligible' gave the following reasons (women were able to select more than one):
  - 15 women stated that they were deemed to be over the capital threshold.
  - Two women stated that they exceeded the income threshold.
  - Three women said they did not access legal aid due to having insufficient evidence of the abuse.
  - Two women stated that they never understood why they were refused.
  - Two stated 'other'.
23. In relation to the issue of contributions required even if an individual is deemed eligible for legal aid, research by the Law Society found that 20% of callers to the National Centre for Domestic Violence helpline who were eligible to apply for a domestic violence injunction were unable to proceed with their application because they could not afford the contributions towards their legal aid.<sup>8</sup>
24. We believe this is compelling evidence as to how the present system is not working for victims of economic abuse and, as a result, is impacting on their ability to decouple their finances and assets from the perpetrator and build economic safety. As such, we believe this must be urgently addressed.

### Increasing economic insecurity

25. The survey found a variety of ways in which victims tried to access legal advice and representation. We asked what women had to pay for out of their own pocket:
- 29 paid for advice outside of court
  - 25 paid for help filling in paperwork and/or writing statements and submissions
  - eight paid for representation during hearings
  - Other costs included meetings with barristers outside of court, counselling, accounting, actuarial work, surveying and court fees.
26. We asked women how they managed to pay for this. The most common responses were using savings (20 women) and borrowing money from friends and family (20 women); thus depleting an economic safety net and accruing informal debts. Many women also incurred formal debts, such as taking out loans, credit card debt and overdrafts (please see graph below). SEA believes this is of significant concern. Following economic abuse, women should be supported to build economic safety without penalty.



27. Very concerningly, 18 women stated they made serious cutbacks that affected their ability to pay for basics such as food. Additionally, in the case of one woman, her late parent used their life savings, while another who used settlement money from an accident, said:

'After the divorce I had to pay top ups for my carers from my universal credit [as all money had gone on legal bills]. I have had to give up the dream of having a wheelchair accessible vehicle as I can no longer afford the large deposit required by motability so my independence is limited.'

28. As this demonstrates, lack of access to legal aid compels domestic abuse victims to divert economic resources towards legal proceedings which would otherwise have been available for them to seek economic independence and rebuild their lives following the abuse. Yet, at present, victims are having to make impossibly difficult decisions in order to access justice, as highlighted by the quote above. Other aspects of the current legal aid scheme which deplete the economic resources victims rely on to restart their and their children's lives with economic independence, are the requirement to pay contributions; operation of the statutory charge; and recovery of legal aid provided from any financial settlement in the proceedings. These measures look on legal aid as a loan rather than a grant, thus adding to debts which a victim may already have accrued due to economic abuse, and be struggling to repay. While LASPO is based on the premise that people should generally be encouraged to use their own resources to fund legal proceedings, this clearly does not hold good in the case of this cohort of litigants for the reasons outlined.

### **Views on the post-implementation review of LASPO**

29. The post-implementation review of LASPO (PIR) contains evidence of the disproportionate impact of the legal aid eligibility changes on domestic abuse victims.<sup>9</sup> In assessing whether the civil and family eligibility changes met their objectives, the PIR acknowledges that while the changes have been successful in targeting legal aid at a smaller cohort of applicants, it was asserted in the evidence gathering phase that this cohort is smaller than the group of individuals believed to be in need. It goes on to say: 'However, further consideration is required to ensure that the means test continues to perform the function of serving to determine the allocation of public resources to those most in need in a fair manner.'<sup>10</sup>

30. More specifically on the capital test, it also recognises that evidence suggests that vulnerable individuals are no longer accessing, or being delayed access, to legal aid due to having to pass another aspect of the eligibility test.<sup>11</sup> The PIR cites extensively from research by the Law Society.<sup>12</sup> One of the client groups for which the research found 'difficult bordering on impossible to put a case forwards for funding' due to the eligibility criteria was women experiencing domestic abuse – where their share in the value of the family home made them ineligible, despite having no prospect of accessing this capital.<sup>13</sup>

31. The PIR also looks at the affordability of proceedings for those who exceed the capital threshold and are therefore ineligible for legal aid. The Law Society's research cited again here applies with even greater force to economic abuse victims due to their particular circumstances of coercive control. The report concluded that:

'accessing secured credit to cover the cost of bringing legal proceedings is feasible for persons with capital in property who have average or above average incomes coupled with average expenditure. Similarly, older home owners (those aged over 55) with sufficient equity in their home and regardless of their income, may find equity release to be a practical option. Some low income home owners, however, may find it difficult or even impossible to access 'standard' mortgage products as a result of the mandatory affordability checks employed by lenders.'<sup>14</sup>

32. In line with the findings of our survey, the PIR highlights the Law Society report's observation that these households may be able to turn to the sub-prime or adverse credit sector although 'the financial costs associated with this form of credit could place these households in a precarious financial position.'
33. The Law Society's research specifically on the impact of the contribution threshold for domestic abuse victims, which examines the data from callers to the National Centre for Domestic Violence helpline (mentioned above), is also cited in the PIR. It showed that 20% of the callers who were eligible to apply for a domestic violence injunction did not proceed with their application because they could not afford the contributions. Of this group, 16% could not afford to pay contributions triggered by their level of disposable income, while 4% could not afford the contributions due to their capital assets.<sup>15</sup>
34. The PIR also recognises that the LASPO Impact Assessment already identified that, if individuals are deterred from accessing legal aid due to inability to afford income contributions, they may resort to other ways to address their legal problems. These included representing themselves in court, where it was noted that this could impact case outcomes. Other examples included paying privately, resolving the problem out of court or not tackling the problem at all.<sup>16</sup> It is clear that in cases where domestic abuse or coercive control is a factor, these are all unsatisfactory solutions.
35. The PIR has looked at a wealth of evidence which clearly shows that denying legal aid to domestic abuse victims does not fulfil LASPO's objective of targeting legal aid to those who need it most. However, it does not provide a clear solution. For more detail it refers to the government's action plan on legal support, which commits to reviewing the means test and in particular to look at the capital thresholds for domestic abuse victims.<sup>17</sup> While this is welcome, SEA maintains that it does not go far enough and that the review should assess the impact of all aspects of the means test on victims, including the requirement and thresholds for contributions. The PIR also refers to the Domestic Abuse Bill as an alternative means of protection for victims. As the Domestic Abuse Bill is silent on legal aid means testing for victims however, this does not offer any solution.

### **The impact of Covid-19 on legal aid services and clients**

36. Covid-19 has exacerbated the situation with regard to access to legal aid for domestic abuse victims. This arises from a number of factors coming together during the pandemic. As women face greater periods of confinement in the home due to



lockdown and related measures to curb the pandemic, they are at greater risk from domestic abuse, as evidenced by the now well-documented increase in calls to domestic abuse helplines. Other pandemic-related changes such as the suspension on evictions by landlords could also have led to increase in need for protective orders through courts.

37. Changes to the way the justice system operates with courts moving to online hearings create further uncertainty about navigating the legal system, while access to pro bono services, such as do exist, is likely to narrow down due to pressures on legal services, with firms themselves impacted by Covid-19. It is notable that none of the respondents to the SEA survey had accessed pro bono representation (see above graph). SEA and others have raised elsewhere<sup>18</sup> how the family courts themselves are exploited by perpetrators as another arena for further economic abuse, particularly when domestic abuse victims are compelled to take on often complex legal proceedings as litigants in person due to failing the legal aid means test.
38. SEA is running a project to explore the needs of victims experiencing economic abuse during the pandemic. This includes a survey for victims which covers a number of areas of everyday life: finances; welfare benefits; child maintenance; housing and accommodation; employment and study; access to help and support; and access to economic resources. While legal aid was not specifically asked about several women raised problems with accessing legal support as seriously impacting their economic stability. This was due to a combination of factors including the financial impact of Covid-19 (for instance, rising household costs related to food etc. and a number of perpetrators halting child maintenance payment); either already being in or getting into (further) debt for legal costs; and the delays to court proceedings due to the pandemic. For example, one victim used a PPI payment for a non-molestation and occupation order, and still had to borrow further, which has now put her at risk from the person she borrowed from.
39. SEA has already raised some of these issues in our response to the Commons Home Affairs Committee inquiry into Home Office preparedness for Covid-19 in relation to 'Domestic abuse and risk of harm within the home'. The inquiry report in April 2020 made the welcome recommendation, backed by both the Domestic Abuse Commissioner and the Victims Commissioner, that the government should ensure that legal aid is granted automatically to domestic abuse victims in respect of any application for protection during the lockdown.<sup>19</sup> SEA believes this must be adopted and implemented.

### **The challenges for legal aid over the next decade and what reforms are needed**

40. SEA believes that the legal aid system must commit to enabling domestic abuse victims to get the legal assistance they need to live free from abuse and to rebuild their lives safely and independently. This must be fulfilled by providing free legal aid for these women. With the ramifications of the Covid-19 pandemic hitting domestic abuse victims particularly hard, and many facing narrowing down options for escaping abuse, the need for this to support victims to both leave and to build economic stability is only likely to become more apparent.

41. SEA has long called for domestic abuse victims to be exempt from the legal aid means test. We reiterate this call as a key reform that is becoming ever more urgent as victims can wait no longer. More generally, it is also vital that those implementing the system are trained in the dynamics of economic abuse so that the system can respond appropriately to victims.

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<sup>1</sup> <https://survivingeconomicabuse.org/report-finds-that-6-in-10-domestic-abuse-survivors-are-struggling-with-coerced-debt/>

<sup>2</sup> <https://survivingeconomicabuse.org/report-finds-that-6-in-10-domestic-abuse-survivors-are-struggling-with-coerced-debt/>

<sup>3</sup> Earlywhite, M. and Stohl, I. (2005) *In Our Shoes: The Next Steps*, Washington: State Coalition Against Domestic Violence

<sup>4</sup> ANZ/RMIT University (2016) *MoneyMinded Impact Report: The Role of Financial Education in a Family Violence Context*

<sup>5</sup> Office for National Statistics (2018), *Domestic abuse: findings from the Crime Survey for England and Wales: year ending March 2018*

<sup>6</sup> MHCLG, *English Housing Survey: Headline report, 2018-19*

<sup>7</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf)

<sup>8</sup> Law Society (2018), *Research into the impact of legal aid capital and contribution thresholds for victims of domestic violence*

<sup>9</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf), in particular Chapter 2.

<sup>10</sup> Post-implementation Review of Part 1 of LASPO, above, paragraph 721

<sup>11</sup> Post-implementation Review of Part 1 of LASPO, above, paragraph 725

<sup>12</sup> Law Society and BVA BDRRC. 2018. *Civil and criminal solicitors' views on LASPO*. See Annex 7, p12: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/>

<sup>13</sup> Post-implementation Review of Part 1 of LASPO, above, paragraph 728

<sup>14</sup> Law Society and Dr Lisa Whitehouse. 2018. *Report on the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold*; See Annex 6, p5: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/>

<sup>15</sup> Post-implementation Review of Part 1 of LASPO, above, paragraph 732

<sup>16</sup> Post-implementation Review of Part 1 of LASPO, above, paragraph 734

<sup>17</sup> Ministry of Justice, *Legal Support: The Way Ahead* (February 2019) - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf)

<sup>18</sup> SEA response to Ministry of Justice consultation 'Assessing the risks of harm to children and parents in private law children cases', August 2019

<sup>19</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmhaff/321/32102.htm>