

Consultation on SLAB's approach to financial eligibility assessment - December 2021



Response from Scottish Women's Aid

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 34 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.

Introduction

Our headline comment regarding this review is that it tinkers with the financial eligibility criteria while failing to address the much more important question—whether to eliminate entirely the means test in domestic abuse cases to reflect the realities of domestic abuse and coercive control and the almost certain role that economic abuse plays in obscuring any analysis of ability to pay.

Poverty in Scotland is gendered. Women are more likely to be living in poverty than men, and women find it harder to escape poverty and are more likely to experience persistent poverty than men¹.

This plays a significant part in domestic abuse; 89% of women experience financial abuse, as an aspect of coercive control, when experiencing domestic abuse².

Evidence from our services and our Helpline as well as from sister organisations ASSIST and Victim Support Scotland demonstrate the many ways in which the civil legal system is being used by perpetrators as a form of economic abuse against women. Perpetrators continue to exercise coercive controlling behaviours, including economic abuse, post-separation, particularly through civil court proceedings.

Where women can access civil legal aid funding, they are paying substantial sums they can ill-afford as private clients to secure services to protect themselves and their children and are even being asked to make large "deposits" to secure services. Women have spoken of the risks to their and their children's safety through being unable to access legal representation, particularly in proceedings where they were obliged to represent themselves in court against expert legal professionals appointed by the perpetrator.

The current SLAB test for civil legal aid fails to account for the economic realities faced by women experiencing domestic abuse and does not recognise the fact that

¹ <https://www.closesthegap.org.uk/content/resources/Working-Paper-22---Gender-Pay-Gap-Statistics-2021.pdf>
<https://www.closesthegap.org.uk/content/resources/1---Women-work-and-poverty-what-you-need-to-know.pdf>

² <https://www.refuge.org.uk/wp-content/uploads/2020/10/Know-Economic-Abuse-Report-2020.pdf>
<https://www.scottishwomensrightscentre.org.uk/resources/Economic-Abuse-final.pdf>
https://www.improvementservice.org.uk/_data/assets/pdf_file/0018/9423/nicola-sharp-jeffs-16days-presentation.pdf
<https://www.refuge.org.uk/files/Money-Matters.pdf>
<https://www.refuge.org.uk/files/Whats-yours-is-mine-Full-Report.pdf>

economic abuse is part of the behaviours perpetrated against women, contributes to the abuse as recognised in the Domestic Abuse (Scotland) Act 2018. Research from England and Wales into legal aid eligibility for domestic abuse victim-survivors details that 95% experience economic abuse, with the result that they do not have control of assets and/or income. While this specifically relates to accessing legal aid under the different system in place in England and Wales, the key findings nonetheless resonate and reflect the experiences of women in Scotland.³

In addition, survivors (and the staff who support them) are finding it increasingly difficult to find, and retain the services of a solicitor who offers legal aid services, especially in rural areas. That is an unsurmountable matter before they even approach completing the necessary SLAB paperwork for civil legal aid applications. If the perpetrator has engaged the only locally available solicitor, then women are effectively denied access to information and legal representation.

There is a particular issue around lack of access to solicitors who provide family law services in relation to property/financial claims, under not only Civil Legal Aid but particularly under Advice and Assistance. While this is not specifically part of this review, we felt there was merit in commenting on the issue of an increasingly dwindling supply of lawyers offering SLAB funded Advice and Assistance- related work other than on a private client basis, an apparent consequence of the process being involved and lengthy in relation to payment and that the payment rates are insufficient. Women are required to pay solicitors for significant amounts of pre-court, advice and assistance work to allow them to even get as far as making an application for Civil Legal Aid. Non-eligibility for Advice and Assistance, because of the much lower Advice and Assistance financial eligibility thresholds, excludes many women from accessing this support other than through the private client route, causing financial hardship.

In short, the current legal aid policy and does not support women, protect their right of access to justice or engage the state's duty to protect. SWA's position is that women, children and young people experiencing domestic abuse should have free access to appropriate legal support—a recommendation accepted by the Scottish Government in its response to the Scottish Government Working Group *Report "Improving housing outcomes for women and children experiencing domestic abuse"*⁴. The specific recommendation, on page 40, is "*The Scottish Government should ensure that women and children who experience domestic abuse are able to easily access free domestic abuse-competent legal advice and representation.*" All the recommendations in the report have been accepted by the Scottish Government.

However, until that is achieved, exempting survivors of domestic abuse from the legal aid means test would be a first step in ensuring women can access the legal support and representation needed to secure protection for themselves and their children from abusive partners.

General comments on the legal aid process

Seeking assistance and/or moving into refuge is daunting for women. They have so many difficult, additional concerns that the civil legal aid application process simply presents another hurdle for them to overcome. Workers have commented on the time needed to explain the nature of legal aid and the intricacies of legal aid application, entitlement, etc. to women and the pressure to have forms submitted timeously. "*Going through the forms*" can be a particular challenge for women with

³ <https://survivingeconomicabuse.org/wp-content/uploads/2021/10/Denied-justice-October-2021.pdf>

⁴ <https://womensaid.scot/wp-content/uploads/2020/12/Improving-Housing-Outcomes-for-Women-and-Children-Experiencing-Domestic-Abuse-Report.pdf>

poor mental health as a consequence of domestic abuse. Similarly, there are issues around language skills and communications for women from other jurisdictions, or who do not have English as a first language

Women may not be able to find, or take the necessary paperwork with them when fleeing the abuser and invariably, the perpetrator will not provide to her the necessary paperwork required to support an application, meaning that women have to incur the costs and delay of contacting the relevant organisations to obtain copies.

There is also some confusion about the services that solicitors registered to provide civil legal aid provide under the scheme. Women are being advised that the solicitor “*can’t deal with the case under legal aid*” and it is not clear whether women do not meet the eligibility tests, in particular the financial eligibility test, or whether the solicitor is declining to take on particular cases or work under legal aid funding. Solicitors have also declined to undertake cases involving property because of the “*clawback*” provisions, even where the woman is not living in the house. Another issue raised refers to the process whereby an opponent can object to the other party’s application for civil legal aid and women not being given adequate notice of the right to object. All of these require action and clarification.

We would urge SLAB to undertake an EQHRIA in relation to the eligibility assessment criteria and the financial criteria in particular as there are general Equality considerations across all proposals that must be taken into account.

Comments on consultation questions

The Regulations define period of computation for assessing disposable income as the period of 12 months following from the date of the application for legal aid, or such other period of 12 months as in the particular circumstances of any case the Board may consider to be appropriate

Question 1 -Do you have evidence of any adverse impacts of our current assessment of computation period? (Please describe this evidence and the kind of impact it is.) Question 2 -Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to computation period?

- Women and workers have commented that the process allows perpetrators applying for civil legal aid to hide assets and income
- This must take into account women who are earning over the threshold but are essentially living in what is referred to as “in-work poverty” due to their having to service substantial debt repayments, which are a consequence of the abuse, or have other high day-to-day living costs.

The Regulations require SLAB to consider whether another person’s resources should be included in the assessment of means alongside the applicant’s in deciding if the applicant qualifies for civil legal aid and how much, if any, they can afford to contribute towards the cost of their legal services

Question 3

Do you have evidence of any adverse impacts of our current assessment of whether to aggregate or not? (Please describe this evidence and the kind of impact it is.)

Question 4 -Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to aggregation?

In terms of adverse impact of aggregation, the Women’s Aid network has noted instances where income of a woman’s new partner was aggregated with her own,

despite both incomes being separate, in relation to a child contact action as a consequence of domestic abuse.

The woman was still paying off debts incurred during the relationship with the abuser in addition to her new and current household and personal outgoings; she was essentially burdened with two lots of debt as a consequence of the abuse and could not afford to pay for the action without access to civil legal aid. In the circumstances, it appears not appropriate to aggregate her income with that of her new partner. Comment has also been made on the similar impact of women's resources being aggregated with children where children have applied for legal aid.

SLAB consider disposable capital to be the amount of capital available to an individual, excluding any items or amounts of capital necessary to the applicant's day to day life, such as their home, general furniture and clothing. We must disregard certain sources of capital and make allowances for some capital saved in order to assess what is available to the applicant. In the circumstances of an individual case, they have discretion to disregard an amount of capital

Question 5 -Do you have evidence of any adverse impacts of our current assessment of disposable capital? (Please describe this evidence and the kind of impact it is.)

Question 6 -Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to disposable capital?

The regulations require SLAB to disregard certain sources of income, such as some benefits but they must also assess any other income sources and determine whether they should be included. SLAB have discretion to disregard income if they consider it reasonable to do so, having regard to the nature of the income or the circumstances of the case

Question 7 -Do you have evidence of any adverse impacts of our current assessment of sources of income? (Please describe this evidence and the kind of impact it is.)

Question 8 -Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to sources of income?

In response to these four questions, there is a need for clarity on what constitutes an asset, whether income is accessible and "asset liquidity, referred to as "trapped capital.

- Women have been rendered ineligible for legal aid due to the assessment of their capital where, in fact, they were not actually able to access these assets to fund proceedings, for instance because abusers or other family members did not allow women to use or borrow against a jointly held asset, such as the family home.
- Women from abroad who have funds or property overseas have been advised that they are ineligible for civil legal aid because of this, despite the fact that they are unable to access the funds or realise the property or take any income from it.
- Shares in businesses may not be capable of realization and it can take many years to disentangle women's financial affairs from those of the perpetrator and/or family members, that is even if the woman is eventually able to obtain her financial share from either party, after which she would also be required to refund any legal aid she had received.
- The property the woman lives in could be owned by her in-laws although it is the family/husband's home. Women cannot evidence that the husband or family actually owns the asset and it is not her property.

- Where cars are purchased under PCP finance agreements, the terms of the loan means that the woman does not actually own the car and cannot sell it either so not really “her asset”.
- Disposable capital was also sometimes difficult to value, particularly property and there was uncertainty as to whether potentially valuable items as cars, or personal jewellery should be declared

Women have commented that money and/or costs awarded to women by courts from legal actions involving the perpetrator is often impossible to obtain or can take years to be paid to them.

SLAB should give greater consideration as to whether women, do in fact, have free, unhindered access to what appears to be personal and/or joint income and/or other assets, particularly whether they are able to realise such assets or free capital tied up in capital assets. “Trapped capital” should always be disregarded and if any doubt SLAB should use their discretion to disregard capital in these circumstances.

Costs an applicant incurs for the following shall be deducted: housing costs work related costs .maintenance payments. Outside of these specific areas, the regulations give SLAB a broad discretion to allow reasonable amounts in the assessment of disposable income in relation to any other matters for which an applicant must provide. The proposed change would be achieved by introducing a range of standard allowances and a personal allowance for the applicant, which together reflect the average costs of living for households of various sizes in the United Kingdom, using tools evidenced and managed externally to us. This would mean – for instance – a standard allowance for the costs generally expected to be incurred by a two-parent family plus two children family, and so on. In order to make this change SLAB would also be changing the way we use their discretionary powers when assessing certain costs an individual may incur, as the approach they are proposing would replace the current need for an assessment specific to their individual circumstance

Question 9-What are your views on the proposal being considered to introduce standard allowances that reflect average costs of living into our means assessment?

Question 10-Do you have evidence to indicate that a change from individualised assessment of certain costs to standard allowances set to cover a wider range of costs may result in any unintended adverse consequences?

- **Question 11 -Can you identify additional benefits or risks to either retaining the individualised assessment option or the standard allowance option?**
- **Question 12 -What types of circumstances, expenditures, goods and services do you think should be considered reasonable to make an allowance for when determining disposable income?**
- **Question 13 -Are there any circumstances, expenditures, goods and services you do not think should be considered reasonable to make an allowance for when determining disposable income?**
- **Question 14 -If we were to move to a standard allowance structure, what model/s for constructing the allowances do you think might be appropriate?**
- **Question 15 -Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change option to introduce standard allowances?**

As we have stated above, women find the process quite intrusive; they are already required to disclose much information about their lives and circumstances to various organisations and bodies when defending themselves against the perpetrator.

Survivors are often retraumatized by responses to disclosures—disbelief, minimizing danger and harm, victim blaming in its many forms, and they find the legal aid application process adds another layer of administration and difficulty. Women find it intrusive having to list all of their debt, and explaining the nature of the debts and the circumstances under which they arose to third parties can be embarrassing and demeaning. Women do not necessarily disclose, or are in a position to disclose debt.

Adopting the use of standard allowances is unlikely to assist women experiencing domestic abuse and may, in fact, have unintended adverse consequence for them, as emphasised by the Women's Aid workers who advised that "One size doesn't necessarily fit all and there are no *"standard expenditure and allowances"* for women experiencing domestic abuse."

The question is what these "standard allowances" would cover, and how they would be set to cover the variation in the cost of living in urban and rural areas, particularly housing costs, including rental and mortgage costs, across the country. Also, these would require frequent review and adjustment.

More importantly, a standardized approach is unlikely to accommodate the different circumstances experienced by women. Currently, it is possible for all circumstances to be taken into account, supported by the discretion that SLAB has. Streamlining and standardizing, and, more importantly, removing the "broad discretion" afforded to SLAB by the Regulations "*...to allow reasonable amounts in the assessment of disposable income in relation to any other matters for which an applicant must provide...and allowing an assessment specific to individual circumstances...*" is likely to be detrimental to women experiencing domestic abuse because their debts do not fit into the "standard" categories.

Examples of this include.

- "informal debt" where this is disclosed by women. By this we mean where women have resorted to moneylenders and "loan sharks" and for various reasons, including their safety, are not in a position to declare the principal debt sum and invariable high "interest charges" to SLAB as a debt. Similarly, women are reluctant to disclose borrowing and loans from family and friends, some of which may have been borrowed to finance earlier or different legal action against the perpetrator e.g. Woman borrowed £40,000 from her parents to defend a contempt of court action.
- coerced debt, where perpetrators have forced women into taking on debts, loans, etc, which benefit the perpetrator and through which he has accessed funds and assets to which the woman does not have access although the debt is in her name.
- school fees for children in public schools where women are left to meet these costs because the perpetrator stops contributing as part of economic abuse. It is not clear whether the proposal would cover such expenses.

The example given in the question is "*This would mean – for instance – a standard allowance for the costs generally expected to be incurred by a two-parent family plus two children family, and so on.*" However, due to the nature of domestic abuse, economic abuse in particular, a woman on her own, or with children, could have costs well in excess of those calculated for a single person or parent. Workers commented that they have supported women with professional careers and a good income but who are also "*... loaded with debt that the perpetrator has incurred and are dealing with this all on their own...*"

More transparency around SLAB decision making is needed and for women experiencing domestic abuse, this means a realistic and informed assessment of their circumstance. SLAB *“have to look at where the debt has come from, that it is a consequence of the relationship and the woman is stuck with paying it all off by the perp as he won’t service the debts.”*

We would urge greater consideration of the possible unforeseen consequences of this proposal in relation to women experiencing domestic abuse for the reasons outlined above.

SLAB defines housing expenses for householders as including: Rent or mortgage; Council tax and water charges; Building and contents insurance ;Repairs and maintenance incurred during computation period that are not simply aesthetic upgrades to the household but for health and safety purposes. For a householder who is not paying their housing costs, SLAB will not make a deduction for those expenses, unless the debt incurred by non-payment is being met – that is, where the applicant has housing cost arrears and is repaying those, SLAB will deduct whatever amount is being repaid. This approach seeks to accurately reflect the actual financial circumstance specific to the individual at the point at which they applied for legal aid. They recommend amending their policy so that housing costs an applicant is liable for but not paying, and therefore is incurring a priority debt⁵ for, shall be deducted from disposable income total

- **Question 16**
- **What are your views on the proposed change to allow housing costs that an applicant is liable for but not paying to be deducted from the disposable income total?**
- **Question 17**
- **Do you have evidence to indicate this change to our housing policy may be unnecessary or result in any unintended adverse consequences?**
- **Question 18**
- **Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change to our housing policy?**

SWA support this and consider that this is a positive proposal in that the assessment would cover not only the cost of housing that women are actually paying but also other housing costs that they are still liable to pay.

SLAB is required by the regulations to deduct expenses related to an applicant’s employment, where their employment consists wholly or in part of a wage or salary. SLAB recommend amending their policy on what can be considered a travel cost for work purposes so that instead of deducting the actual costs associated with running and maintaining a vehicle used to travel to work, we would instead deduct the HMRC standard rate of 45p per mile for an applicant’s travel to work. Payment of travel costs where the applicant takes public transport to work would not change and this would remain a deduction based on actual costs of that travel.

Question 19

What are your views on the proposed change to deduct the HMRC standard rate of 45p per mile for an applicant’s travel to work?

⁵ Priority debts are debts that can cause you particularly serious problems if you don’t do anything about them.

Question 20

Do you have evidence to indicate this change to our travel to work policy may be unnecessary or result in any unintended adverse consequences?

Question 21

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change to our travel to work policy?

We are unsure as to whether this would benefit women using their own transport who live in rural areas, particularly the Highlands and Island, where public transport is not readily accessible or close by; those whose location and/or work pattern mean that use of public transport is not convenient and where the cost of public transport is not affordable.