



**Response to Independent Review of Administrative Law (IRAL)
Call for Evidence:**

Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

October 2020

About Rights of Women

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

Rights of Women's consultation response

Before answering the specific questions asked in the consultation we would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills and experience.

Throughout this response we draw on our own experience of judicial review as an organisation, which demonstrates the important and positive role it has played in enabling greater access to justice for women in England and Wales experiencing, or at risk of, the many forms of **Violence Against Women and Girls**. We support the submission made to this Call for Evidence provided by the **Public Law Project** and have quoted and cited from that submission to emphasise the key points we wish to make in relation to our own experience.

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

1.1 Positive impact on governance due to successful judicial review

In addressing this question, Rights of Women would draw attention to the positive outcomes for Government, and with it society, achieved through the judicial review process. This is demonstrated by our case *The Queen (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice*.¹

The changes made by Government following the outcome of this case have potentially saved the lives of thousands of women facing domestic abuse or violence.

We provide a short background to the context and importance of us bringing this case and explain the changes that have resulted from it:

Rights of Women had standing in this successful judicial review (on appeal) in 2016, brought on our behalf by the Public Law Project, in relation to the 'Domestic Violence Legal Aid Gateway'² in private family law cases.

The majority of private family law matters were taken out of scope for legal aid by the *Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012*. However, an exception called the 'Domestic Violence Legal Aid Gateway' was made for victims of domestic violence due to being vulnerable to increased risk when facing the perpetrator in legal processes.

Access to the gateway was dependent on the victim's ability to supply evidence that met the criteria of a narrowly prescribed list set out in regulation 33 of the *Civil Legal Aid (Procedure) Regulations 2012*, all of which had to satisfy a limitation of being no more than two years old.

As a women's legal advice charity that provides free legal advice via telephone advice lines to around 2000 women across England and Wales every year, we saw first-hand the devastating effects of the narrowness of the evidence list. Our daily contact with women victims on our advice lines after the changes came into force quickly showed they were struggling to obtain the required evidence and therefore could not obtain legal aid.

From 2013 to 2015 we collated evidence from victims via surveys in partnership with Women's Aid Federation of England and Welsh Women's Aid that consistently demonstrated that around 40% of women victims were being denied access to legal aid as result of narrowness of the list and that consequences of this included being unable to exit abusive relationships, facing severe debt or being forced to represent

¹ [2016] EWCA Civ 91, available at: <https://www.judiciary.uk/judgments/rights-for-women-vs-lord-chancellor-judgment/>

² For further information about the Domestic Violence see <https://www.gov.uk/legal-aid/domestic-abuse-or-violence>

themselves against their abuser in court. For example, one woman who was a victim of domestic abuse responded to one of our surveys saying:

“I am unable to keep my children safe because I was financially abused by my husband to the point where I have no money to pay a solicitor properly. The changes to legal aid have ensured that my husband is able to financially abuse me into a position I cannot escape from and he has the full backing of the state.”

The judgment in the case found the two-year time limit to be unlawful and ruled that the Ministry of Justice broaden the list of acceptable forms of evidence to ensure survivors of financial abuse can apply.

The judgment refers to examples of the *“many situations in which victims of domestic violence find themselves at the receiving end of legal proceedings not merely more than 24 months after incidents of domestic violence have occurred but more than 24 months after it is practical to obtain the kind of verification required by regulation 33”*³. Examples given of where incidents of domestic abuse may have been more than 24 months previous included commonplace circumstances such as where the perpetrator may have been in prison, an injunction may have been in place or the victim was securing the safety of herself and children first. It also noted that the evidence list placed victims of coercive control at a disadvantage because *“the verifications required by regulation 33 are much more easily satisfied where there has been physical abuse than where there has been psychological or emotional abuse.”*⁴

It then goes on to state:

*“This is a formidable catalogue of areas of domestic violence not reached by a statute whose purpose is to reach just such cases”*⁵

Post Judicial Review

Following the judgment, the Ministry of Justice took the positive step of reviewing all the domestic violence evidence criteria for access to private family law legal aid. They carried out an in-depth review over one-year and produced a research report of their findings.⁶ This response was not a requirement imposed by the judgment and it is commendable of Government to have taken on board the serious issues preventing access to justice raised by the judicial review, and for taking this step following the judgment.

The Government announced the proposed changes in December 2017, stating:

³ Point 43, *R (Rights of Women) v Secretary of State for Justice* [2016] EWCA Civ 91
<https://www.judiciary.uk/judgments/rights-for-women-vs-lord-chancellor-judgment/>

⁴ Ibid.

⁵ Point 44, Ibid.

⁶ *Research investigating the domestic violence evidential requirements for legal aid in private family disputes*, Farai Syposz, Ministry of Justice [2017]
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domestic-violence-legal-aid-research-report.pdf

“The range of documents accepted as evidence of abuse will be widened to include statements from domestic violence support organisations and housing support officers... The move represents the latest step to protect and support victims of domestic abuse.”⁷

Additionally, Justice Minister, Dominic Raab, stated:

“We have listened to victims’ groups and carefully reviewed the criteria for legal aid for victims of domestic abuse in family cases.

“These changes make sure that vulnerable women and children get legal support so their voice is properly heard in court.”⁸

The replacement regulations came into force on 8th January 2018. Since the law change, successful applications for domestic violence legal aid granted by the Legal Aid Agency have increased significantly, indicating that the new regulations have been successful in widening access to legal aid to domestic abuse victims as intended. It should not be underestimated what this represents in terms of potentially saving the lives of thousands of women and their children. Overall there has been a 233% increase from 2013-14 where 3109 applications were granted to 2019-20 when 10,340 applications were granted.⁹

We would also like to draw the panel’s attention to other positive outcomes resulting from this judicial review. Since the outcome in 2016 we and other key stakeholders in the case have met regularly with the Ministry of Justice as independent experts in a critical-friend capacity, to provide feedback and input into their research project and implementation of changes. This collaborative approach has been welcomed by all parties and we are pleased that the meetings still occur, albeit less regularly now since the pandemic, to look together at the impact of the changes on successful applications to the gateway and to consider relevant wider policy issues. We believe this is a perfect example of how judicial review ultimately assists progress towards good governance.

1.2 Positive impact on ensuring people are treated fairly through prospect of judicial review

In addition to the example above, we would like to provide one of a number of examples our organisation has where the prospect of judicial review has assisted in securing accountability in relation to women domestic abuse victims, ensuring they are treated fairly and promoting the rule of law and good governance.

⁷ See press release <https://www.gov.uk/government/news/more-legal-aid-support-for-victims-of-domestic-violence>

⁸ Ibid.

⁹ *Legal aid statistics quarterly: April to June 2020*, Ministry of Justice, published September 2020
<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2020>

During 2017-19 we carried out a research project¹⁰ with women victims of the many forms of VAWG about the effectiveness of the legal aid Exceptional Case Funding (ECF) Scheme. We supported 24 women who needed to make ECF applications and monitored the response of the Legal Aid Agency in relation to whether it was meeting its publicised timeframes for responding to cases. The case study of Janice¹¹ below demonstrates the powerful impact of issuing a letter before claim, in enabling a victim to receive her entitlements. Please note that as a domestic abuse victim she should have been able to access legal aid via the Domestic Violence Legal Aid Gateway, but her case was before the changes to the evidence criteria in January 2018:

Janice, a victim of emotional and psychological abuse by her ex-partner and father of her child, needed legal aid for representation as the respondent at a child arrangement hearing in late November 2017. These proceedings that had been brought by her abuser.

Her Exceptional Case Funding (ECF) application was submitted 17 working days before the hearing and urgent consideration was requested. An urgent response was necessary in order to not only to actually guarantee representation at the hearing but to provide the legal aid provider time to understand and prepare for the case.

The Legal Aid Agency's (LAA's) online guidance at the time to individual applicants stated that applications are usually processed within 20 working days and if the LAA agrees a case is urgent, they will prioritise it and make a decision within 5 working days.

The LAA did not acknowledge the application and did not inform us whether they would treat the application as urgent.

Five working days after the application was submitted we contacted the ECF team by email repeating the urgency in the case and requesting a decision that day. We received no reply.

The next day, 6 working days after submitting the application, we sent a further email to the ECF team reiterating our request for an urgent decision based on the imminent hearing. We also attempted to contact the LAA by telephone but were unable to get through due to a problem with the LAA's telephone lines. The LAA responded to our email on the same day requesting a case reference number. The email stated that they had been unable to locate the client within their CCMS system. CCMS is the system used by legal aid providers to submit applications for funding, it cannot be used by individual applicants for ECF. We responded on the same day, stating that we did not have a reference number as

¹⁰ Accessible or beyond reach? Navigating the Exceptional Case Funding Scheme without a lawyer, Rights of Women, February 2019 <https://rightsofwomen.org.uk/wp-content/uploads/2019/02/Accessible-or-beyond-reach.pdf>

¹¹ This case study is fully anonymised in accordance with best practice to prevent identification of any individual; this includes use of pseudonyms and the removal or alteration of any other personally identifiable factors.

we had not received any correspondence from the LAA. We also explained that we were not a legal aid provider and that we were assisting the client to make the ECF application. We further provided the applicant's name, address, date of birth and national insurance number, and the date and time of the submitted application. No response to this email was received.

We called the LAA's customer services team 7 working days after submission of the ECF application to enquire about the status of the application. We were informed that there was no one in the ECF team to speak to us. We left our contact details requesting an update from the ECF team as a matter of urgency. On the same day a caseworker from the ECF team emailed us requesting the name of the client and the "ECF tracker reference". We responded that same day stating again that we had not received any reference and providing the client's details. The ECF team responded requesting that we forward the original email we had sent submitting the application. We were unable to do this immediately as the staff member who had sent the email was out of the office, however we were able to confirm the exact time that the email had been sent. The ECF team finally responded stating that the application had been identified, and asking "is there any urgency of the application? E.g. Hearing date. If not, then we aim to make a decision by 1 December 2017."

We responded to confirm it was urgent, stating again that there was an imminent hearing and requesting a decision by close of business on the same day. The ECF team then informed us that the application had been marked as urgent and that a caseworker would be allocated "in due course". The email also stated that they could not guarantee when a decision would be made. When no response was received by the end of the day, we referred the case to the Public Law Project to judicially review the unreasonable delay.

On the 8th working day after submission, the Public Law Project sent a letter before action to the LAA asking for a decision by 5pm of the same day failing which judicial review proceedings would be issued. The ECF team contacted us that day requesting further documents. They acknowledged the imminent hearing and requested further information within three working days to enable them to decide on the application. We responded to the LAA on the same day forwarding the additional requested documents. The LAA acknowledged receipt of the information the following day, 9 working days after submission, and confirmed a decision would be made as soon as possible and by 5pm the next day.

10 working days after submission of the urgent application, we received a letter from the LAA granting exceptional case funding. No reasons were ever given for the delay.

As this case demonstrates, without access to the judicial review process Janice's ECF application assessment may have been delayed even further leaving her with the prospect of representing herself against her abuser in court.

1.3 Our overall position on judicial review

The issues raised in 1.1 and 1.2 above serve as examples of some of the reasons why we believe the judicial review process is so important. Rights of Women also supports the response to this question given within the Public Law Project's submission to this Call for Evidence. We would particularly highlight the following points made within that submission that summarises our overarching view:

Judicial review is an essential part of a just and well-functioning democracy. In judicial review, the courts and the executive are “engaged in a common enterprise”, a “partnership based on a common aim”: “the maintenance of the highest standards of public administration” and “the public interest in upholding the rule of law.”¹²

Judicial review serves at least three constitutional purposes. First, it helps ensure that people are treated fairly and in accordance with law... Second, judicial review is “central to the rule of law.”¹³... Third, judicial review promotes good governance.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Yes. An important improvement that would strengthen judicial review would be addressing the inherent and well-established problems associated with the civil legal aid means test.

The current system unfairly penalises many women victims of domestic abuse and prevents a level playing field in access to legal aid, enforcement of their rights and therefore equal access to judicial review. We take this opportunity to draw attention to our previous consultation responses which address more fully many of the issues represented by the means test.¹⁴

¹² R v Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941 at 945; R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin) at [20].

¹³ Rt Hon Lord Justice Jackson, Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (July 2017) 126.

¹⁴ See: Rights of Women (2018). *Submission to the Government Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*. Available at: <https://rightsofwomen.org.uk/wp-content/uploads/2018/10/Submission-LASPO-PIR-final-Sept-2018.pdf> and Rights of Women (2018). *Evidence for Joint Committee on Human Rights Inquiry into: Human Rights: attitudes to enforcement*. Available at: <https://rightsofwomen.org.uk/wp-content/uploads/2018/03/Evidence-for-Joint-Committee-on-Human-Rights-Inquiry-into-Human-Rights-enforcement.pdf>

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

We believe it is positive and helpful to reflect on how judicial review could be made more accessible.

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence.

We share their evidence-based view that codification would create a series of problems that would ultimately result in a confused system. A similar approach has had unintended consequences in other jurisdictions and we should learn valuable lessons from this. In our view the lesson learnt is that this would create more, rather than less, barriers to access to justice for our women beneficiaries which could have life-threatening consequences if it impedes a swift and efficient approach.

As an organisation with 45-year track record of empowering women to access the law we would point to the benefits of the tried and tested approach we use in our service delivery in answering this question. We strengthen women's access to the law both through provision of specialist legal advice and legal education tools. Feedback from the women who use our service shows this approach is highly effective.

Improvements to accessibility and clarity of judicial review would be better served and enacted through similar channels that provide certainty in achieving these aims: investment in public legal education alongside ensuring access to legal advice.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

We do not agree that certain decisions should not be subject to judicial review.

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence. We would particularly highlight the following paragraph made within that submission that summarises our view:

In sum, given the confused foundation of the exercise, the exceptional nature and low frequency of controversial decisions relating to the prerogative, the practical difficulties involved in reform, the contextual nature of the judiciary's existing approach, and the danger in cutting off an aspect of executive decision-making from judicial oversight altogether, trying to exclude certain decisions or powers (whether prerogative or otherwise) from the ambit of judicial review would be fruitless at best and dangerous at worst.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

In response to points i) and iii) we believe it is sufficiently clear.

In answering this, we would emphasise that we are not public law specialists and that our view is therefore particularly important in providing a perspective on this question from a number of different perspectives that can view the process from the 'outside' to a certain degree:

Firstly, as a legal advice charity, with experience of judicial review including appealing to the Court of Appeal, we found the process accessible, navigable and clear. This was enabled and consolidated by access to specialist legal advice from the Public Law Project.

The team at Rights of Women involved in the decision-making process for the judicial review we brought as claimants included both legally-qualified and non-legally qualified people across our staff and Board team. Again, we would reflect that the process was sufficiently clear to enable the confident involvement of the laypeople stakeholders within our organisation. We would point to the benefits of legal education and access to specialist legal advice in enabling this engagement.

Secondly, as a legal advice charity providing advice to the public, we find that there is sufficient clarity around the current process for our legal advice staff to explain this to the women who call us for advice on their options. Again, this reflects the point we make above, that accessibility is best facilitated through access to legal advice.

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

We would be strongly opposed to any reduction in the time limits, which are already short.

The women we support often struggle to meet current timeframes for a variety of reasons, such as being unable to access advice or find a legal representative. Additionally, minoritised women are more likely to struggle to access advice and representation, so any reduction in time frame would impact on them particularly. It is likely to frustrate their access to justice even further should time limits be reduced which will have a series of negative consequences.

For examples of potential negative consequences, Rights of Women refers to the comprehensive list within the response to this question given within the Public Law Project's submission to this Call for Evidence.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

7.1 Risk of costs in our judicial review on the Domestic Violence Legal Aid Gateway

Reflecting on the process we went through when bringing our own judicial review case in relation to the Domestic Violence legal aid gateway, we did not view as lenient either the risk of costs at the levels they were set or the understood likelihood of facing them had we been unsuccessful.

On the contrary, both these factors posed such a potential risk to the future of our charity that we had to seek and guarantee support from outside of our organisation before proceeding with our case. Our charity could have faced closure, had it lost and faced these costs alone, which indicates how severe the current regime is.

With the benefit of hindsight, and with reference to current statistics on access via the reformed Domestic Violence legal aid gateway, it is clear that our case was valid and has widened access to victims.

It should be sobering and alarming to realise that one of the oldest, most established charities in England and Wales providing the unreplicated vital service of free legal advice to women subject to Violence Against Women and Girls had to contend with the very real risk of financial penalties that could lead to closure and withdrawal of all our vital services in deciding to bring this case due to potential costs. It should be pointed out that the Government, in defending against our claim, did not face this cliff edge due to cost risks.

We agree with the Public Law Project who state: *PLP is not aware of any evidence showing that the rules regarding costs in judicial reviews are too lenient on unsuccessful parties or applied too leniently in the courts.*

7.2 Risk of costs we face as interveners

In introducing this issue, we refer to the Terms of Reference which “invite the panel to consider whether reforms to streamline judicial review are necessary “in particular.... (g) on costs and interveners”.

We have applied to be interveners in a number of cases in recent years, including the *Owens v Owens*¹⁵ case at appeal stage. In this case, Tini Owens (the appellant) was being refused a divorce by her husband Hugh Owens (the respondent) and was appealing a refusal to allow her to divorce rather than being trapped in a marriage she did not wish to be in. The case raised the issue of there being no right to a no-fault divorce under current legislation. Rights of Women had a unique and substantial body of recent evidence from women callers to our advice lines that it could supply to the court that demonstrated the specific damaging impacts of current divorce legislation on women seeking to exit abusive marriages. Our application to intervene was rejected by the court.

Setting aside any views the panel may have on whether it agrees with our decision to apply to intervene, we would ask you to consider the severity of cost liability issues and the risk our organisation had to take simply to try and provide what it considered useful and unique evidence about the impact of no-fault divorce on domestic abuse victims. Yet again, we had to contend with the risk of steep financial costs and therefore the potential risk of closure in raising these issues.

It should be noted that since this case the Government has now allowed no-fault divorce through the Divorce, Dissolution and Separation Act 2020 (c. 11) and stated in its press release:

*It will also stop one partner contesting a divorce if the other wants one – which in some cases has allowed domestic abusers to exercise further coercive control over their victim.*¹⁶

We have found the risk of costs as a potential intervener in this and other cases to be extremely prohibitive and think it is a great shame that they act as a deterrent to raising valuable information that the courts and Government would benefit from being made aware of.

¹⁵ [2018] UKSC 41, on appeal from: [2017] EWCA Civ 182

¹⁶ Government press release, 7 Jan 2020 <https://www.gov.uk/government/news/divorce-blame-game-to-end>

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the IRAL SECRETARIAT Page 8 of 12 panel? How are unmeritorious claims currently treated? Should they be treated differently?

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence. We too are unaware of any evidence regarding unnecessary judicial reviews.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

Rights of Women supports the response to this question given within the Public Law Project's submission to this Call for Evidence.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

Yes, we have experience of litigation where issues of standing have arisen. Based on our experience and understanding of public interest standing we do not think the rules are treated too leniently by the courts.

We had public interest standing in our Judicial Review case in relation to the challenge outlined above concerning the domestic violence legal aid gateway.

Our organisation took the issue of standing very seriously before proceeding and considered the courts application of the rules to be appropriate and sensible. The reasons we applied for standing demonstrate how important it is for organisations to be able to do this:

i) Despite being prepared to support any woman victim who wished to bring the case in her own name, none of the victims we worked with who were affected by the measures giving rise to the challenge were/felt able to do so, particularly given the possibility of financial risks. Organisations such as ours are often better placed to bring a challenge in terms of resources and organisational resilience.

ii) Our case related to a lack of access to legal aid for domestic abuse victims to provide protections for them in private family law proceedings which had arisen out of abusive relationships. It posed grave ethical challenges to place the burden of bringing a case on a woman who had already experienced domestic abuse and may have had terrible experiences in a court room facing her abuser already (due to not having legally aided representation) to then be expected to attend court and give evidence in a judicial review case.

iii) Any individual woman domestic abuse victim bringing the case in her name may have risked her identity or that of her children (if she had any) being revealed in the public domain. Even where processes are used to provide anonymity, the possibility of inadvertent 'jigsaw' identification always remains. This could have put both her life and their lives at further risk from the abuser. Furthermore, this may have been something she wished to avoid for herself and her family for a variety of reasons such a stigmatisation and not being able to move on from her experiences.

iv) The potential period of time for the legal proceedings to be completed was lengthy and this placed a severe undertaking emotionally and psychologically on any potential woman victim bringing the case at a time when recovery from trauma is paramount in order to move forward with her life. This concern was borne out by our proceedings, which did indeed take years.

In our view, had we not been able to have public interest standing the case may never have been brought. As demonstrated in our answers to previous questions that cite the evidence-base of how many victims of domestic abuse have been able to rightfully access legal aid as a result of this case, it is clear, that this case was meritorious and has served the public interest and aided Government to assist victims of domestic abuse as intended.

Rights of Women

26 October 2020