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To cite this article: Kayliegh Richardson & Ana Kate Speed (2023) Smoke and mirrors? Regulation 12 and access to legal aid for victims of domestic abuse, *Journal of Social Welfare and Family Law*, 45:3, 249-264, DOI: [10.1080/09649069.2023.2243148](https://doi.org/10.1080/09649069.2023.2243148)

To link to this article: <https://doi.org/10.1080/09649069.2023.2243148>



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Published online: 07 Aug 2023.



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Smoke and mirrors? Regulation 12 and access to legal aid for victims of domestic abuse

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ABSTRACT

Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was introduced the number of unrepresented victims of domestic abuse in applications for protective injunctions, has increased. Studies consistently point to the strict legal aid means criteria as the reason behind this, however, there is a paucity of literature challenging why this is the case, given that provision is made within Regulation 12 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 for the financial eligibility thresholds to be waived in applications for a protective order. Drawing on a survey of 24 legal professionals and information provided by the Legal Aid Agency (LAA) following Freedom of Information Act requests, this article seeks to address this gap in the literature and examine the value of Regulation 12. Findings indicate that the limited use of Regulation 12 can be attributed to a weak understanding amongst legal aid practitioners about its existence, concerns amongst practitioners about not being remunerated for work completed on files and an absence of clear guidance for the Director as to the use of the discretion. The findings are timely as the means test being considered by the ongoing Legal Aid Review.

KEYWORDS

family court; legal aid; access to justice; domestic abuse

Introduction

It is well documented that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has adversely affected the ability of victims of domestic abuse to secure legal advice and representation in protective order proceedings, notwithstanding that these proceedings remain within the scope of legal aid (Organ and Sigafos 2018, Speed 2021). Demonstrating the reliance on legal aid in proceedings of this type, the family court statistics show that in 2020 there were approximately 30,687 applications for non-molestation orders and occupation orders (Ministry of Justice 2021). Of these applicants, 20,135 received legal aid (Ministry of Justice 2021). Research suggests that victims who can neither secure legal aid nor afford to pay privately for legal services adopt a range of strategies to secure assistance, including borrowing money from family and friends to fund support, crowdfunding, or prioritising which cases to allocate any limited financial resources to (Speed and

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Richardson 2022). Most commonly however, they act as litigants in person with family court statistics charting an upward trend since LASPO was introduced in April 2013. Whilst in 2012, 16.6% of applicants for a non-molestation order or occupation order were unrepresented in at least one hearing, this increased to 19.4% in 2013, 23.8% in 2014, 21.5% in 2015, 26.7% in 2016, 28.9% in 2017, 33.8% in 2018 and 34.2% in 2019 (Ministry of Justice and National Statistics 2022).

Previous research has concluded that many victims turn to self-representation after being assessed as ineligible for legal aid following a review of their means – a test which, broadly, requires applicants to have a gross monthly income below £2,657, disposable income below £733 and capital of less than £8,000 (Trinder *et al.* 2014, Surviving Economic Abuse 2021, Speed and Richardson 2022). Research has also shown that the absence of legal representation can have a detrimental impact on a victim's ability to navigate the family courts, present their case and in turn obtain the protection they require (Durfee 2009, Amnesty International 2016, Choudhry and Herring 2017, Speed and Richardson 2022). Although changes were implemented in 2021 to simplify the application forms and provide a template witness statement in form FL401T, Durfee (2009) found that even with 'victim friendly' procedures and forms, 'individuals without legal representation are significantly less likely to have their requests for protection orders granted' (p.7). Victims of domestic abuse can be particularly disadvantaged by the refusal to award legal aid because they are often involved in multiple family court proceedings arising from the abusive relationship (Speed and Richardson 2022).

As the above research indicates, scholars have considered the issue of self-representation from the perspective of victim safety, wellbeing and the impact on potential outcomes. However, there is a paucity of literature challenging why this status quo exists at all, given Regulation 12 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 provides the Director of the Legal Aid Agency (LAA) with a discretion to waive the financial eligibility thresholds in applications for protective orders, in cases where they consider it equitable. Whilst there are some limitations to the provision, in that victims may still be required to make a financial contribution to their legal costs and they would not also be eligible for legal aid in any interrelated proceedings arising out of the relationship, the regulation is clearly a valuable tool for those who otherwise would be ineligible because their income or capital exceeds the usual thresholds. The paucity of literature in this area, at a time where need for such support is at its greatest, is therefore surprising. This is compounded by the fact that whilst Regulation 12 is a product of LASPO, the waiver has existed in some form since the Access to Justice Act 1999 and The Community Legal Service (Financial) Regulations 2000.

By drawing on data obtained from a survey of 24 legal professionals and information obtained from Freedom of Information Act requests made to the LAA, this article seeks to address this gap in the literature and examine the use and value of Regulation 12. The findings indicate that the limited use of Regulation 12 can be attributed to a weak understanding amongst solicitors about the existence of Regulation 12, financial concerns within law firms about not being remunerated by the LAA for work completed on files (where the financial eligibility criteria are not disapplied) and an absence of clear guidance for the Director as to the use of their discretion. The conclusions are timely in

suggesting there is a need for reform in this area to better support victims, as this is currently being considered by the ongoing Legal Aid Means Test Review.

Methodology

An online questionnaire was designed to elicit the views of family law practitioners working in firms with a legal aid contract in England and Wales. The study received ethical approval from Northumbria University. A request to participate in the study was sent by email to all law firms listed on the LAA 'Directory of legal aid providers' spreadsheet (Legal Aid Agency 2022). Only firms listed within the spreadsheet as having a family law legal aid contract were contacted. Email addresses are not included on the LAA spreadsheet but were obtained either through the firms' official websites or through the Solicitors Regulation Authority or Law Society listed contact details. In total, 886 individual firms were contacted. Individual responses from legal practitioners were sought, rather than a collective firm response. This may mean that multiple responses were received from the same law firm/legal aid provider, although as the authors did not require respondents to confirm their names and/or the name of the law firms for whom they work, this is not clear from the data. The authors recognised that different practitioners within a firm may take different approaches to legal aid applications, rather than there being a consistent firm wide approach. It is also possible that practitioners may have worked at a number of different legal aid firms and may therefore have varied experiences of applying for legal aid over the course of their careers. The survey questions were therefore deliberately phrased to ask about their specific individual experiences, rather than a collective law firm response. In any event, the authors consider it unlikely that most responses came from a handful of firms, due to the geographical spread of the participants which is discussed in more detail below. Further, a number of different concerns amongst practitioners about the use of Regulation 12 emerged from the data indicating that, even if there were multiple responses from the same firm, not all practitioners necessarily shared the same experience of this provision. The authors received an automated response email from 12 of the email addresses indicating that the email could not be delivered. This was either due to the email address not being recognised or the email being blocked as suspected spam. In total, the email was therefore received by 874 organisations. In addition, the authors sent out a general call to organisations on Twitter. It is impossible to say how many, if any, additional organisations/practitioners this will have reached.

The questionnaire was hosted by Online Surveys, launching on 8 September 2022 and remaining open for completion until 14 October 2022. Closed and open questions were included to generate both quantitative and qualitative data. Broadly, the questions covered clients' eligibility for legal aid, the respondents' knowledge and experience of requesting or being offered the Regulation 12 waiver and whether any changes are required to Regulation 12 to make the waiver more attractive to clients and law firms. Free text boxes were incorporated into the questionnaire design at regular intervals to allow for explanations to be provided and responses not previously envisaged by the researchers to be recorded (Denzin and Lincoln 1998, Rahman 2017). The use of open-ended questions also served as an important mechanism to test the respondents'

understanding of the objectives of the questions. Whilst a pilot study did not precede the survey, there were various safeguards to ensure the clarity of the questions, including that the survey was designed by the authors who are both family law solicitors with experience of making legal aid applications and that the questions were reviewed and approved by an ethics committee.

Valid responses were received from 24 legal practitioners. Whilst this is a low response rate, there was a spread of responses from across England and Wales, with nine responses from the North East, one from the North West, six from the Midlands, eight from the South East, four from the South West and three from Wales. The ability to allow for quick responses from across a broad geographical area was the primary reason for utilising questionnaires (Wright 2005). The respondents had experience representing victims of domestic abuse across a wide range of protective order proceedings, including applications for non-molestation orders, occupation orders, female genital mutilation (FGM) protection orders and forced marriage protection orders – all of which are covered by the Regulation 12 provision. A number of factors are likely to have contributed to the low response rate, including the survey not being disseminated to relevant practitioners and time pressures faced by solicitors (Richardson *et al.* 2021). It is also possible, however, that the low response rate supports the authors' finding that there is a low level of knowledge amongst practitioners of Regulation 12. This relates to Cavusgil and Kirk's (1998) argument that participants are more likely to engage in research if they have 'expertise' in the relevant field. Expertise relates to 'the degree of fit between the respondent's knowledge and the objectives of the researcher' (p.1171). They note that 'the targeting of respondents with relevant expertise will result in higher response rates since uninformed recipients are less likely to respond owing to their lack of qualifications' (p.1175). Despite targeting family law practitioners, the authors recognise that there will be a variation in knowledge about Regulation 12 owing to the fact that it is a niche provision, some practitioners will not conduct protective order applications and others will not process their own funding applications for legal aid. Accordingly, it is possible that the respondents to this study were more likely to be aware of Regulation 12 than those who chose not to complete the survey.

As noted above, the survey was not preceded by a pilot study. Research by van Teijlingen and Hundley (2001) however acknowledges that

although pilot study findings may offer some indication of the likely size of the response rate in the main survey, they cannot guarantee this because they do not have a statistical foundation and are nearly always based on small numbers. (p.2).

It is the authors' position that a pilot study would not necessarily have led to changes being made to the study which would have improved the response rate. This is particularly true when considering that the number of respondents is in line with other research carried out into the accessibility of discrete aspects of family legal aid for victims of domestic abuse. For example, Marshall and Rourke (2022) sought to examine the accessibility of the trapped capital exemption following changes to the law after the Judgment in *R (GR) v Director of Legal Aid Casework* (2020) EWHC 3140 (*Admin*). Their questionnaire, which was available for completion for the same length of time as in the present study, received 30 responses, including 24 responses from legal aid practitioners. They note – and the same is true of the present study – that 'although the responses are

not representative of the overall population, they are indicative of important perspectives within the legal aid sector and the nature of the problems arising in these cases' (p.14). It is a recognised limitation of the study that due to resource limitations the authors were not able to engage with individuals who have lived experiences of seeking or securing the Regulation 12 waiver and this is an area where further research would be valuable.

A request for information was also sent to the LAA under the Freedom of Information Act 2000 (FOIA). This Act enables information to be requested from a public authority (in this case the LAA). An FOI request was submitted to the LAA on 29 September 2022, requesting the following information:

1. An annual breakdown from 2013–2021 of:
 - (a) how many times the waiver was granted;
 - (b) the type of protective injunction proceedings the waiver was granted for;
 - (c) in how many of those cases, the request for the waiver to be granted came from a legal aid practitioner compared to how many times the Director of the LAA utilised his/her discretion to award the fee waiver notwithstanding that a request had not been made for this.
2. The same information set out above, for the period between 2007 and 2012 in relation to the waiver under the Access to Justice Act 1999.
3. Clarification of what factor(s) influence the Director's decision to utilise their discretion to award the means assessment waiver (both under the old regime and new regime) and for a copy of any guidance that exists for the Director in relation to utilising this discretion, should any such guidance exist.

Academics such as Bessant (2014) and Murray (2012) have noted the benefit of FOI requests in research due to a public authority's legislative obligation to provide a response. Under s1(1) FOIA, a public authority receiving a request must respond to confirm whether they hold the information requested and, if so, provide it. Public authorities are also obliged to respond to requests 'promptly and in any event not later than the twentieth working day following the date of receipt' (FOIA, section 10). There are, however, a number of exceptions to the legislative obligation which are set out within Part II of FOIA, one of which is that the information is accessible to the applicant by other means (section 21). An FOI request was necessary in this study because statistics about the use of the Regulation 12 waiver are not included within the government published legal aid statistics. The capacity to secure otherwise inaccessible data is one of the reasons why the use of FOI requests within academic research has become 'an emerging social science research approach' (Murray 2012).

The initial FOI request was rejected by the LAA on 25 October 2022 under the exception set out in section 12(1) FOIA, which states that a public authority is not obliged 'to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit'. The LAA confirmed that they did hold some of the information requested but the time that would need to be spent by the LAA to provide this information would exceed the cost limit set out by central government of '£600'. They further explained:

To isolate the information requested during the time period specified the (LAA) would need to manually audit every case to ascertain whether the domestic violence waiver had been applied. The LAA processes thousands of civil legal aid applications every year. As such the LAA considers that the cost of manually auditing the files over the specified time period would far exceed the appropriate limit. Consequently, we are not obliged to comply with your request.

They suggested that a refined FOI request be submitted. On 26 October 2022, an amended FOI request was submitted to the LAA asking for the data for 2021 only. This request was again rejected under section 12(1) FOIA by the LAA on 11 November 2022. The problems experienced by the authors in obtaining data from the LAA reveal a difficulty in the way that legal aid data is collected, given any request for information about the number of cases in which a discrete provision was sought or granted could be refused on this basis. Similar difficulties were encountered by Marshall and Rourke (2022), whose two FOI requests about the number of cases in which trapped capital was raised and granted were similarly refused under section 12(1) FOIA. Whilst it is a limitation of this data that the authors are not able to draw conclusions about the number of cases in which legal aid is sought on the basis of Regulation 12 but not granted, like Marshall and Rourke (2022) we are able to ‘draw some conclusions about the uneven application of the rules’ around Regulation 12 ‘due to their discretionary nature and the resulting gaps in accessibility of legal aid’ (p.14).

A separate FOI request was submitted to the LAA on 2 November 2022 asking them to ‘confirm what factor(s) influence the Director’s decision to utilise their discretion to award the means assessment waiver’ and to provide ‘a copy of any guidance that exists for the Director in relation to utilising this discretion (should any such guidance exist)’. This request was rejected by the LAA under section 21, on the basis that the information was publicly accessible. The LAA referred the authors to section 2.6 paragraph 2 of The Lord Chancellor’s Guidance on Determining Financial Eligibility for Certificated Work and section 1.6 paragraph 2 of Means Assessment Guidance (Legal Aid Agency 2021b). Those documents set out that a waiver exists under Regulation 12 but do not set out any further information about what factors/criteria the Director of the LAA considers when deciding whether to apply the waiver. The researchers therefore appealed the rejection of the FOI request on 15 November 2022. The LAA responded on 16 November 2022 to confirm that the documents referred to are the ‘*only guidance that references the discretion the Legal Aid Agency (LAA) holds*’ and that they ‘*do not hold any further internal guidance*’.

Findings and discussion

Income or capital exceeding the permitted thresholds are the most common reasons for an individual failing to meet the means test criteria and therefore having to rely on the waiver. However, the waiver is only required by a minority of victims.

The waiver is only required where an individual would otherwise be turned down for legal aid due to the means test assessment. Respondents were therefore asked about their experience of what percentage of prospective clients seeking advice about a protective order in the family courts are refused legal aid because they do not satisfy the legal aid

means assessment. The majority of respondents reported that this happened in less than 25% of protective injunction cases that they dealt with. This finding is consistent with the family court statistics considered in the introduction which show that since LASPO, the highest rates of litigants in person in protective order proceedings (in at least one hearing) was 34% (Ministry of Justice 2021). This indicates that whilst a minority of victims of domestic abuse will need recourse to the Regulation 12 waiver, there is still value in its existence.

The data indicate that for those victims who do not satisfy the means test, both the income threshold and capital threshold remain problematic. A common reason stated by the respondents for prospective clients being refused legal aid was because their income exceeded the income threshold or their capital exceeded the capital threshold. This is in line with previous research (Organ and Sigafoos 2018, Marshall and Rourke 2022, Speed and Richardson 2022) and supports the contention that there is a need for an uplift in the relevant thresholds which have not changed since 2009. A less common reason cited by the respondents for prospective clients satisfying the legal aid test – although linked to the capital thresholds – was clients having capital trapped in assets. Trapped capital refers to the situation where equity is typically available in a home or asset that the applicant owns or part owns but this cannot in reality be accessed, for example because the other owner is preventing a sale. In theory, this should no longer be an issue following the ruling in *R (GR) v Director of Legal Aid Casework* 2020) EWHC 3140 (Admin). The judgment in that case made clear that the LAA may exercise its discretion under Regulation 31(b) of the Civil Legal Aid Regulations 2013 to award a nil value to such property. Regulation 31 provides that

insofar as any resource of a capital nature does not consist of money, its value must be taken to be (a) the amount which that resource would realise if sold; or (b) the value assessed in such other manner as appears to the Director to be equitable.

Similarities can be drawn between Regulation 31(b) and Regulation 12 in that they both allow the Director of the LAA to exercise their discretion to grant legal aid where a strict interpretation of the legal aid means test would lead to an otherwise unfair result. Whilst Regulation 12 can only be used where an application is being made for a protective injunction, Regulation 31(b) can be used in a wider range of proceedings, meaning that it may be of benefit in interrelated proceedings such as Children Act applications. In contrast to Regulation 12 however, Regulation 31(b) only affords discretion in relation to the capital stage of the means test and therefore cannot assist where unfairness arises due to a strict interpretation of the income stage. Recent research by Marshall and Rourke (2022) has indicated that, whilst the GR case has had a positive impact in providing clarification on the use of Regulation 31(b), individuals with trapped capital may still find it difficult to access legal aid. Some of the reasons for this mirror the findings of this study and comparisons with Regulation 31 will therefore be discussed in more detail in the sections below.

Following research by Hirsch (2018) which addressed the difficulties that individuals can experience in passing the means test, the government announced that they would be reviewing the test as part of their Legal Support Action Plan. They stated an intention to make amendments to the means test which would benefit victims of domestic abuse (Ministry of Justice 2022). One way in which they propose to do this

is by not including ‘disputed property’ within the capital stage of the means test. Currently only the equity in an applicant’s ‘main residence’ can be disregarded as part of the legal aid assessment. However, it is proposed as part of the review that ‘where a domestic abuse victim has temporarily left their home but intends to return in the near future, or once it is safe to do so, the equity disregard should be applied’ (Ibid, para 237). This is a crucial change for victims of domestic abuse who may have fled the family home and for whom it may be unsafe to return until an injunction is in place. However, it will not apply where they have sought alternative accommodation and have no intention of returning (Ibid, para 238). This assumes that a victim’s intentions will be clear at the time of making a legal aid application. A victim applying for an injunction may be doing so fairly quickly after deciding to leave a relationship, which may have been initiated by a traumatic event such as an incident of physical abuse. Expecting a victim to be clear in their intentions at this point is unrealistic, especially without first receiving legal advice to indicate what those options are. Expecting these intentions to be set out in a legal aid application to fund that advice is arguably putting the cart before the horse. The Ministry of Justice is also proposing that property is automatically disregarded if it is the subject matter of the dispute (Ministry of Justice 2022, para 241). Currently, only equity of up to £100,000 is disregarded in properties of this type but it is proposed under the review that this cap be removed. This builds on changes to the legal aid regulations in 2020 which removed a similar cap on the amount of mortgage on a property which could be disregarded (The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020, Regulation 2(4)).

Whilst the above changes may make it easier for victims of domestic abuse to pass the means test, in turn reducing the need to rely on the Regulation 12 waiver, not all the proposals set out as part of the review have been so positive. In particular, those relating to the income stage of the means test have come under criticism from organisations responding to the consultation. For example, amendments are suggested to the benefits which can ‘passport’ an individual through the legal aid means test. Currently, individuals in receipt of Universal Credit will automatically pass the means test. However, the Ministry of Justice proposes implementing an earnings cap so only those who are in receipt of Universal Credit and earning less than £500 gross per month will be passported through the income stage. This proposal has been strongly opposed by Rights of Women (2022) and The Law Society (2022). The Law Society (2022) has raised concerns about the additional risk this cap could place on victims of domestic abuse who share Universal Credit with an abusive partner, if they are expected to access their Universal Credit Journal to prove eligibility. Gathering evidence of income and/or benefits can be a major barrier for victims of domestic abuse in seeking legal aid. One respondent to this study noted that ‘*failure to provide information in respect of income*’ was a common reason why victims of domestic abuse are unable to satisfy the means test but that ‘*this is often because they are traumatised and out of the home at which financial information can be obtained*’. Rights of Women (2022) also identifies that victims of economic abuse may be further disadvantaged by the proposed changes in that they may not even have access to the Universal Credit payments if they have not been split between them and their abusive partner.

Additionally, the Ministry of Justice (2022, para 137) is proposing that housing benefit should be included within the means test as gross income. Its justification for this change is that it is also suggesting amendments to the gross income assessment to take into account different household compositions (Ministry of Justice 2022, paras 136–138). The Law Society (2022) has cautioned that this change could negatively impact people with disabilities who may have higher housing costs due to them requiring a spare room to accommodate a carer. It has also argued that the change will negatively impact lone parents whose ‘housing costs relative to the make-up of their household will be higher’ (The Law Society 2022, p. 10). The potential for this new approach to disadvantage lone parent families is of particular concern to domestic abuse organisations given that many victims of domestic abuse seeking court interventions will be lone parents (Rights of Women 2022). Rights of Women (2022) has also highlighted that including housing benefit within the gross income assessment could negatively impact victims of domestic abuse who require that benefit to pay for refuge accommodation. It points out that including this benefit as gross income may mean that victims fail the assessment at the initial gross income stage without progressing on to the disposable income test, which considers how that income is actually being spent. Both The Law Society (2022) and Rights of Women (2022) recommend keeping the assessment as it currently is with housing benefit not being included within the gross income calculation but instead being considered as part of the disposable income calculation by deducting rent paid net of housing benefit.

In an effort to ensure that disposable income is in fact ‘accessible’, the Ministry of Justice is proposing changes to the means test assessment so that pension contributions (of up to 5%), student loan repayments and payments towards priority debts are deducted as part of the assessment. A number of the respondents in the present study indicated that disposable income exceeding the threshold was a common reason why individuals did not pass the means test, supporting the need for amendments to the assessment. However, some organisations have argued that the proposed changes do not go far enough and that other non-priority debts should be considered as part of the assessment, particularly in domestic abuse cases (The Law Society 2022, Rights of Women 2022). This would benefit victims of economic abuse who may have had debts run up in their names by an abusive partner and who may be unable to afford legal fees or legal aid contributions whilst at the same time repaying those debts (Surviving Economic Abuse 2021, Speed and Richardson 2022).

Whilst the proposals set out in the review have potential to reduce the number of individuals being rejected due to the capital thresholds, the proposed changes to the income assessment need to be reconsidered, otherwise this will continue to be a common reason why victims of domestic abuse are unable to pass the means test. The changes discussed in this section indicate, however, that even with the proposed reform to family legal aid, there will be an ongoing need for the Regulation 12 waiver in the long term, underpinning the importance of this research.

Regulation 12 is an underutilised provision both because some legal aid solicitors are not familiar with the provision and because there is a lack of transparency about when the Director of LAA will exercise their discretion to use the Regulation 12 waiver.

The means test review is still ongoing, with the consultation stage having concluded in June 2022. In the meantime, of crucial importance is what happens in those cases where the applicant is unable to secure legal aid due to not passing the means assessment. The experience of the majority of the respondents was that the LAA will refuse the application and decline funding without considering the waiver. Only two of the respondents had experienced the LAA offering the waiver without this having to be specifically requested, with one respondent noting *'we have never needed to request the waiver – it has always been offered'*. There is therefore some inconsistency in experiences but the onus in most cases appears to be on the legal representative to request this waiver, rather than the LAA automatically considering it.

If the onus does fall on the provider to request the waiver, then more needs to be done to improve awareness as a number of respondents were not aware of Regulation 12 and would therefore not have known that it was possible to apply for this. Marshall and Rourke (2022) identified a similar lack of awareness of the Regulation 31(b) discretionary test, with a third of the respondents to their survey indicating that they had only found out about it as a result of being sent the survey. What is even more concerning is their finding that some LAA caseworkers also did not appear to be aware of discretion, with a number of practitioners reporting that clients had been provided with inaccurate advice when contacting the LAA directly to check their potential eligibility (Marshall and Rourke 2022). This means that there will be individuals who are being advised that they are not eligible for legal aid by providers and/or LAA caseworkers when in fact they may be if the discretion under either Regulation 12 or Regulation 31(b) is used. It is therefore clear that further training is required for both legal aid providers and LAA caseworkers on the complex legal aid tests and the discretionary powers available to them.

Only six of the respondents had made a request to the LAA for the waiver to be applied. Of those respondents, there was a fairly even split between those who said it was commonly granted and those who experienced their requests being rejected. When asked what factors they believed influenced the LAA's decision to grant or not grant the waiver, most said they did not know. One respondent noted, *'frankly I don't know, there is no consistency with the LAA approach'*. This is unsurprising given that there is no clear written guidance on when the waiver will and will not be applied, as confirmed by the LAA in their response to the FOI request. The LAA also does not maintain accessible data on how many cases involved the waiver being applied each year. As discussed above, similar FOI requests were made by Marshall and Rourke (2022) in their review of the Regulation 31(b) discretion. Unlike with Regulation 12, there is some published guidance for practitioners on the use of the Regulation 31(b) although Marshall and Rourke argue that it is 'limited' and 'does not provide enough information for [practitioners] to be able to identify where someone with trapped capital should receive a discretionary grant of legal aid' (p.5). In recognition of this finding in the present study, the authors support the

recommendations put forward by Marshall and Rourke (2022) that clear written guidance should be produced about when the discretion will and will not be exercised (including example case studies) and that the LAA takes steps to improve the way it monitors data so that statistics can be published on the number of cases in which discretion is exercised. This would make the process more transparent and consistent for all involved and may in turn lead to more requests for the waiver being sought. An alternative approach, supported by the respondents in this study, would be for the LAA to consider the waiver in every funding application where a protective order is sought.

The results of the questionnaire indicate a reluctance by some providers to apply for the Regulation 12 waiver without a guarantee of the outcome, or at least further clarity on when the waiver will be applied. One respondent noted '*generally we would not apply for legal aid unless we had evidence (domestic abuse letter from police, doctor, woman's refuge etc) and knew whether the client was financially eligible or not*'. This is a somewhat problematic approach because the Regulation 12 provision was not being considered as an option by this practitioner nor was the LAA being given an opportunity to volunteer the waiver as the case would not be drawn to their attention in the first instance. More generally, however, respondents acknowledged that they had not made a request for the waiver to be used because they did not want to incur costs by using their delegated authority and risk the LAA subsequently refusing to exercise its discretion to award the waiver. Delegated authority refers to work carried out under the Civil Legal Aid (Merits Criteria) Regulations 2013 and the Civil Legal Aid (Procedure) Regulations 2012 where a provider can assess their client for legal aid and grant them immediate emergency representation where steps need to be taken urgently such as in a domestic abuse injunction case. The legal aid assessment is then reviewed retrospectively by the LAA at a later date to check that funding has been awarded correctly. It is only possible to use backdating powers where applications are made as soon as reasonably practicable, the LAA is satisfied that it was in the interests of justice for the services to be carried out before the date of determination and the services could not have been carried out as controlled work. If legal aid has not been awarded correctly then the LAA can overturn the provider's decision and claim any money awarded back. When asked what changes are required to make Regulation 12 more attractive, one respondent said '*I think the LAA need to say that they will waive it. Not that it is up to their discretion*'. Another respondent said that they '*need to be covered for the work done under an emergency certificate*' whilst another said they needed '*certainty of payment*'. Marshall and Rourke (2022) identified similar findings in their research. In addition, the participants in Marshall and Rourke's study expressed a concern about the impact this could have on their firm's key performance indicators, which in turn may lead to their firm losing their legal aid contract. Marshall and Rourke (2022) argue that this could add to the legal aid advice deserts which already exist in many areas of England and Wales. Whilst this was not an issue raised by the respondents in the present study, it could equally apply where a provider is using delegated authority in the hope that the LAA will agree to exercise the Regulation 12 waiver.

A reluctance by a provider to use their delegated authority can lead to a significant delay in legal aid being granted. This delay is exacerbated by the 'culture of refusal' identified by Marshall and Rourke (2022, p. 29), with practitioners in their study reporting having to make repeated applications and appeals before legal aid is eventually granted. In the context of Regulation 12, this is particularly concerning as previous

research has highlighted that victims who do not secure legal aid commonly take no action to secure protective orders or otherwise resolve their legal issues through the family courts (Durfee 2009, Speed 2021, 2022). Frequently, injunctions will be sought at the time of separation which is shown to be the most dangerous point for a victim of domestic abuse and a time when abusive conduct can escalate (Humphreys and Thiara 2003, Speed and Richardson 2022). As well as leaving a victim in an unsafe state of limbo, this delay could also jeopardise their likelihood of success in their application. This is because the family court will expect them to explain any delay in applying and may conclude that they have managed to keep themselves safe in the interim period without court intervention, and therefore no order is required (Speed and Richardson 2022), something which is particularly relevant following the recent Judgment of (DS v AC 2023) EWFC 46. Many of the respondents cited the urgency of applying for protection as a reason why they will not apply for the waiver, with one noting *'it takes too long to be determined by the LAA'*, again highlighting the fact that victims often cannot afford to delay their court applications in order to wait for the LAA to reach a decision.

Rights of Women (2022) has recommended that 'providers are remunerated for the time they spend assessing means' (p.4). Whilst this may encourage providers to take on cases and make applications for legal aid, including potentially applying for the waiver to be provided, it would not allow for work to be completed on an emergency basis, meaning applications would still be delayed. The authors would therefore go further and recommend that any urgent steps taken to apply for emergency family court protection are automatically covered by legal aid without the requirement for a means test. Whether legal aid should continue beyond that can then be determined by the LAA. Given that work under delegated powers cannot exceed £2,500, this would not impose an unnecessarily high financial burden on the public purse. Alternatively, where an application is submitted for funding for an emergency protective order, the LAA could fast-track decision making, so that decisions are made within a much shorter period of time. The capacity of the LAA to reach such decisions within an appropriate timescale however is doubtful given the LAA no longer operates an out of hours service and currently 85% of applications for civil legal aid take up to 20 working days to be processed (Legal Aid Agency 2021a).

The level of financial contributions that individuals are being asked to make means that legal aid is unaffordable even when the waiver is exercised

Where the Regulation 12 waiver is applied, a victim may still be asked to make a financial contribution to their legal aid costs. This is because section 2.6 paragraph 2 of The Lord Chancellor's Guidance on Determining Financial Eligibility for Certificated Work provides that 'any contribution from income or capital which is applicable under the regulations cannot be waived' (Legal Aid Agency 2021b). Contributions will therefore arise where the individual's disposable income exceeds £315 per month and will apply to all assessed disposable income above £311 per month, meaning contributions are not limited to the previously waived upper disposable income threshold (£733 per month) for such cases. Similarly, an individual whose disposable capital exceeds £3,000 is required to pay a contribution of either the capital exceeding the sum or the likely maximum costs of the funded service, whichever is the lesser (Legal Aid Agency 2021a).

Many of the respondents agreed that the action their client would then take in the face of being granted the waiver would depend on their financial position and the amount of the contribution. Some recognised that their clients would commonly proceed to instruct them on reduced private rates instead of paying the contribution to legal aid. The fact that reduced private rates are more palatable than legal aid contributions is an indicator that the contributions are being set at too high a level. This mirrors findings by Hirsch (2018) which found that contributions were being ‘set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living’. One respondent to this study explained that:

The size of the contribution is the most common problem. It is often a capital issue and the amount required far exceeds what the costs of the proceeding will be and yet the clients have to pay the full amount and wait for proceedings to conclude to get the money back.

The Law Society (2022) voiced very similar concerns in its response to the Means Test Review consultation, stating that ‘the level of contributions payable may be equal to or exceed [the client’s] legal costs’ (p. 22). It also noted;

Any contribution can be so far in excess of the legal aid fixed fee that it becomes pointless as the client can be asked for a very high contribution. This therefore does not fulfil the policy aim of ensuring that the vulnerable individuals experiencing the type of cases these waivers apply to have access to legal aid to ensure they obtain the protection they need. (p. 22)

Rights of Women (2022) also supports this view in their own response to the review, stating:

The experiences we hear on our family law advice line indicate that contributions are a barrier to accessing legal support. The discretion to waive income and capital thresholds to enable survivors to apply for domestic abuse injunctions is rarely used, because the contributions are too high and unaffordable for survivors. (p. 17)

What makes this more concerning is if it then leads victims to not pursue an application at all. The Law Society (2018) found that

one in five (20%) of the 2,026 callers to the NCDV helpline who were eligible to apply for a domestic violence injunction were not able to proceed with their application because they could not afford the contributions towards their legal aid (p. 2).

Similarly, a number of the respondents in this study said that the most common action taken by clients if they are asked to make a financial contribution would be to not proceed with instructing them. It is not clear whether those clients then went on to represent themselves or abandoned their applications altogether; however the literature considered in this article indicates that both approaches are commonly adopted and neither is without issue for victims. Acknowledging the barriers caused by financial contributions, one respondent to this study suggested that ‘*the size of the contribution should be relative to the likely costs or payable in tranches if proceedings are extensive*’. Another respondent suggested that contributions should be removed altogether, whilst others simply thought there needed to be more ‘*certainty about contribution*’.

Whilst the Legal Aid Means Test Review does promise to amend the financial contributions payable (Ministry of Justice 2022, para 16), the Law Society (2022) and Hirsch (2022) have pointed out that the proposals are based on expenditure

benchmarks in 2019. They therefore do not take into account the current cost-of-living crisis and the expected 20% rise in inflation between 2019 and 2026 (Hirsch 2022). The Law Society (2022) has raised concerns that this will particularly disadvantage single parent families and therefore supports a proposal put forward by Hirsch (2022) that an allowance should be allocated to lone parents when the means test is conducted to adjust for this additional expenditure. Without a fairer way of assessing disposable income, the method for calculating affordable contributions is meaningless.

Conclusions and recommendations

The Regulation 12 waiver is only required due to the unfairness that can sometimes arise from a strict application of the legal aid means test. Positive amendments to the capital stage of the means test are being proposed under the means test review. The disposable income test, however, still does not reflect the reality of an individual's 'accessible income' and needs to be urgently revised. The Law Society is of the view that the proposals set out in the review do not go far enough to protect victims of domestic abuse and has suggested that applications for legal aid in protective injunction proceedings should be non-means tested (2022). This would mean that there would no longer be a requirement for a Regulation 12 waiver because there would be no financial eligibility test applied in those cases. The authors would support this proposal which would prevent the delay in obtaining crucial protection that some victims are currently experiencing due to the overly onerous legal aid application process.

If the government is not willing to consider such significant reform however, then the data from this study suggest that there is a need for greater awareness of the Regulation 12 waiver amongst practitioners to support its use and value. In particular, greater information is required about whether practitioners need to apply for the waiver or whether it will be considered automatically by the LAA in every application. Further, clear written guidance and training is required both to support practitioners to make appropriate applications for the waiver, and to ensure consistent and transparent decision making by LAA caseworkers. Reform to the contributions potentially payable may also make the waiver more attractive to victims, in cases where it is offered. Finally, in light of the difficulties that researchers encounter in securing data from the LAA through FOI requests, the LAA should consider amending their data collection practices allowing for large amounts of data about more discrete specialised provisions to be obtained without significant cost. Without this transparency, the LAA's use of Regulation 12 and other discretionary measures is potentially nothing but smoke and mirrors.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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