



No Cost Barriers: Protective Orders in the Legal Aid system

***Survivors shouldn't have to pay
for their own protection***

ACKNOWLEDGEMENTS

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Overview

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project between Rape Crisis Scotland, JustRight Scotland and the University of Strathclyde Law Clinic, that provides free legal information, advice and representation to women affected by violence and abuse. The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice. The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers. Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence (GBV).

We recognise that people of any gender can be affected by abuse and violence. However, statistics¹ show that that these crimes are predominantly committed by men against women. Also, as the SWRC specifically supports women aged 16 and over, when we talk about victims/survivors in this response, we will generally refer to women. Despite this, we are aware – and do acknowledge – any person can be subjected to these crimes.



Summary

Scotland offers a number of civil protective orders that courts can put in place to safeguard victims of gender-based violence. These protective orders include; interdicts, Non-Harassment Orders and Exclusion Orders. However, navigating this system can be complicated for individuals. Unfortunately, many women who require the protection of these orders are unable to pursue legal action as they do not qualify for legal aid or cannot afford to pay the associated legal costs.

We specifically highlight the barriers faced by victims/survivors when seeking protective orders to prevent further abuse by their abuser. The issues outlined in this briefing paper apply to anyone in Scotland in need of protective orders and are not limited to clients of the Scottish Women's Rights Centre (the SWRC) and our particular funding model.

Through this paper, we recommend that in the interests of justice, protective orders cases should be exempt from means-testing for civil legal aid and that no contribution should be required. We also recommend that the process for demonstrating the 'merits' of a legal aid application for a protective order be reviewed to make this more accessible to those seeking protective orders.

The Context of Legal Aid Crisis

Since 1987, Scotland has had a system of legal aid that aims to ensure that people living in poverty and on low incomes can access justice.

Legal aid enables people to get advice, assistance, and representation from a solicitor if they could otherwise not afford it.

We strongly support that legal aid should be made available for victims/survivors of violence and abuse where they require to raise related legal proceedings. Survivors of domestic abuse often find themselves navigating multiple legal proceedings simultaneously - such as self-funding or self-representing in matters related to the dissolution of a relationship, child contact arrangements, financial disputes. This highlights the significant emotional and financial burdens they endure.

We are currently facing a legal aid crisis in Scotland.

The Scottish Legal Aid Board's (SLAB) 2023-24 report highlights significant declines in legal aid support. The total number of cases funded dropped to 134,900, a 1% decrease from last year and a sharp 29% decline from 191,256 cases in 2016-17.

Legal aid costs have risen 12% from last year, totalling £151.2 million, but this is only an 11% increase from 2016-17 levels, meaning that SLAB's budget is not keeping pace with inflation. Additionally, the number of law firms applying for legal aid funding fell to 596, down from 621 the previous year, signalling a continued decline in resources for legal assistance.

We have seen an increase in enquiries to our services from victims/survivors of GBV who are unable to find solicitors to take on their case under legal aid funding.

We have heard from our service users that they are having to contact anywhere between 30-50 solicitors to seek legal representation. We have seen a steady increase in the number of victims/survivors self-representing in civil cases due to the legal aid crisis and a decrease in solicitors willing to provide legal aid funded work, due to inadequate remuneration.

Where a victim/survivor is unable to secure a solicitor under legal aid they will either be required to consider privately funding their legal representation (often through borrowing money or taking loans which they cannot afford) or to self-represent.

Due to the complexity and length of these cases, legal fees are extremely high and can cause significant financial hardship for survivors.

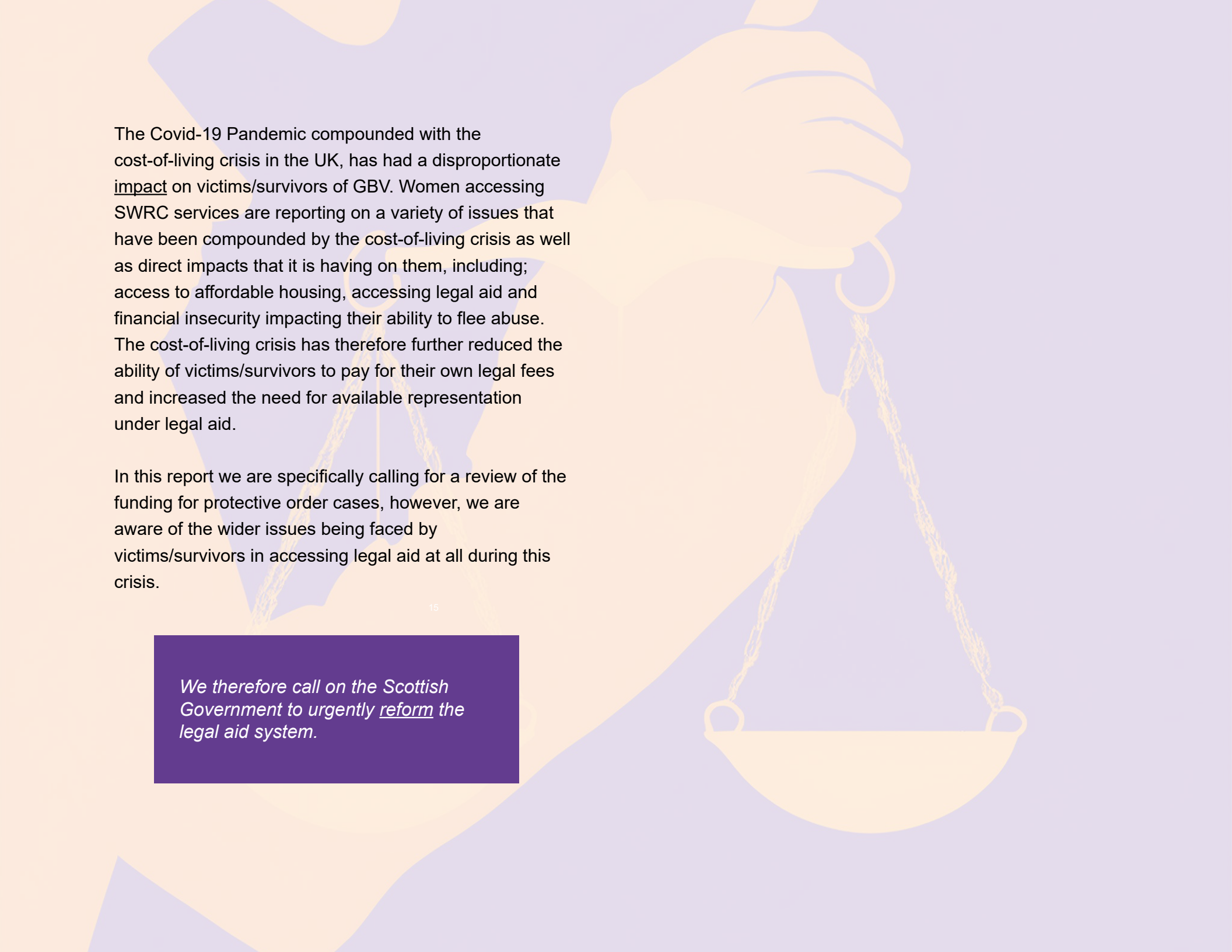
Private legal fees can be anywhere from £250-£350 per hour and with court actions lasting months survivors can be faced with bills mounting to £10,000+.

Perpetrators often use this as a way of perpetrating continued economic abuse (for e.g. in child contact and divorce cases where the perpetrator drags out proceedings as a means of continued coercive control and economic abuse).

Where a victim/survivor is unable to afford privately funded litigation costs, they are faced with self-representing, which can lead to re-traumatisation of victims/survivors. Moreover, the court system is often intimidating and almost impossible to navigate for someone without legal training, making self-representation a tough challenge.

Furthermore, the victim/survivor will be faced with representing themselves in front of their abuser.

Special measures can be requested in some cases although these are limited and are not always granted by the courts. Many victims/survivors are then being forced to enter into unfair settlement agreements or dropping the case altogether.

A stylized illustration in the background shows a hand holding a pair of scales of justice. The hand is rendered in a light yellow color, and the scales are also in yellow, with a chain connecting them. The background is a mix of light purple and light yellow washes.

The Covid-19 Pandemic compounded with the cost-of-living crisis in the UK, has had a disproportionate impact on victims/survivors of GBV. Women accessing SWRC services are reporting on a variety of issues that have been compounded by the cost-of-living crisis as well as direct impacts that it is having on them, including; access to affordable housing, accessing legal aid and financial insecurity impacting their ability to flee abuse. The cost-of-living crisis has therefore further reduced the ability of victims/survivors to pay for their own legal fees and increased the need for available representation under legal aid.

In this report we are specifically calling for a review of the funding for protective order cases, however, we are aware of the wider issues being faced by victims/survivors in accessing legal aid at all during this crisis.

We therefore call on the Scottish Government to urgently reform the legal aid system.

Case studies

The SWRC has been aware that there are issues faced by women seeking protective orders which are associated with legal aid funding for some time, as we receive a unique insight into the legal landscape for survivors of gender-based violence through our legal representation and outreach work. Indeed, we first raised this issue with the Scottish Government in our original briefing paper on this topic in December 2020.

We provide below an, all too familiar, example of when the legal aid system has failed a victim/survivor of abuse:



"Gillian"

Gillian left her abusive partner because she was in danger. She fled with her two children. Police Scotland recommended her to immediately seek protective orders. Criminal proceedings against the perpetrator were unsuccessful due to insufficient evidence. Gillian was therefore left unprotected from her abuser without bail conditions. When she contacted the SWRC, we were able to quickly progress her case through the civil court. That was suddenly halted when we encountered a legal aid issue.*

Gillian qualified for civil legal aid, although - due to her earnings – she was required to pay a considerable contribution towards her legal fees. Given the nature of this extremely sensitive case and her financial position following separation from her abuser, she was not in a financial position to make payment of the contribution, nor did she consider it fair that she required to pay for her own protection.

In line with SWRC's funding model, we were able to offer to cover the case under our project funds and therefore her civil legal aid application was withdrawn. To continue with the action for her protection, Gillian required to accept the expenses risk that she faced whilst not holding a legal aid certificate. We know this was only possible because of SWRC's legal centre's specific funding model.

But what would have happened without it? Gillian would not have been able to access justice and would likely have been unable to seek protective orders, putting her and her children's safety and wellbeing at risk. And if the proceeding had been for damages, the risk of expenses could have further prevented her from accessing justice.

Case studies

We are aware of the barriers as we have received numerous reports from both our SWRC outreach and through consultations with members of the SWRC solicitor Signposting Network. This is a network of solicitors who have completed our 2 Day Domestic Abuse & the Law [training course](#). Their [details](#) are published on the SWRC's website to improve survivors access to justice whereby women who are seeking a lawyer can find [solicitors](#) who have an awareness of GBV, trauma informed practice and the law in relation to domestic abuse. Through these consultations, we have found that there is not only a significant barrier to obtaining protective orders from the presence of means testing but also through the requirements to show the merits of the application and the effects of the legal aid crisis.

Solicitors reported to us that the 'high' test involved in demonstrating the merits of the case for a protective order, combined with the need to provide supporting documentation was onerous and time consuming. This combined with the effects of the legal aid crisis means that many solicitors who once provided legal aid work on protective orders are no longer doing so because fees do not cover their outgoings. For many firms, also affected by the cost-of-living crisis, this has required them to focus on private fee work.

Solicitors also reported that when working on protective order cases, and more generally in cases involving gender-based violence and abuse, due to the nature of these cases, more time and trauma informed practice is required. Unfortunately, due to the serious restrictions in legal aid, solicitors are not being recompensed sufficiently to do the work required in these cases. Furthermore, due to the extremely restrictive approach taken to legal aid accounts most of the work required in these complex cases goes unpaid. Solicitors report that they are unable to spend the necessary time with victims/survivors to ensure a trauma informed practice due to their mounting caseloads. This impacts their ability to work in a trauma informed way, impacting victims/survivors access to justice.

During our latest consultation which took place in Autumn 2024, solicitors from our Signposting Network made recommendations for improvement to the legal aid system in protective order cases. Specifically, calls were made for consideration to:

- Introduce a block fee in protective order cases which allows solicitors to apply to the Scottish Legal Aid Board (SLAB) for an uplift in fees to account for the additional and urgent work required in these cases. It is thought that such an uplift would incentivise solicitors to take on these cases under legal aid and would improve trauma informed practice as solicitors are able to dedicate time to victims/survivors and their cases;
- Simplify - should means testing remain, simplification of the means testing process would reduce both the time required by solicitors and the pressure on victims/survivors. Solicitors report that the completion of the Financial Eligibility Form 2 is burdensome and time intensive. Removing this process, or part of this process, would simplify and reduce costs involved. Furthermore, this would reduce the pressure placed on victims/survivors to provide extensive financial documentation;
- Request that the Scottish Legal Aid Board reviews eligibility limits in line with inflation. Solicitors also report that the eligibility limits in Advice and Assistance legal aid are restrictive and often victims/survivors are ineligible for this first stage of legal aid. Legal aid eligibility limits have not been increased for many years and have not been increased in line with inflation. Following the cost-of-living crisis, this has left a significant disparity between the eligibility limits and salaries. Even where victims/survivors qualify for civil legal aid, they often do not qualify for Advice and Assistance legal aid. This means that victims/survivors are being faced with paying for the initial stages of the process (including initial advice and applying for legal aid) or legal aid firms are being faced with working pro bono or restricting fees in these instances. We have heard that victims/survivors are sometimes being faced with bills of around £1,500-£3,000 for the work before the court action even begins.

During this consultation, solicitors reported that protective orders require an incredible amount of work upfront. Solicitors have to apply for emergency legal aid cover, prepare detailed court documents, make urgent evidence requests, attend urgent hearings, and justify everything in a post-service affidavit. Most of the work is crammed into the first two or three weeks - *“it’s immediate, it’s critical, and it demands full attention.”* Solicitors have told us that taking on these cases means *“clearing your schedule entirely,”* but there’s no time or funding to account for that level of work or urgency.

There’s also the emotional toll - leading to burnout, exhaustion, and vicarious trauma – which leaves those in the field feeling stretched to their limits, with little hope for improvement without urgent reform.

“I can vividly remember two women coming to me one afternoon – highlighted one of the solicitors - one needed a protective order, and the other needed help recovering her children. My heart sank. I didn’t have the time to manage two urgent legal aid applications, draft the writs, and arrange immediate hearings. But I couldn’t delay either case - protective orders are matters of safety, often involving life-or-death concerns. I had to drop everything else that day, knowing I’d be paid a pittance for my efforts.”

The reality is that solicitors are constantly asked to prioritise these emergencies over an already heavy caseload.

“It’s exhausting, and the lack of recognition or fair remuneration adds another layer of stress. If I could change anything, it would be to ensure proper funding, support, and recognition for the solicitors doing this vital work. We’re not just processing applications - we’re making sure women and children are safe. It’s not just about the legal process; it’s about removing the barriers to justice, for both the people we help and the professionals doing the work.”

We have seen this reflected in SWRC’s outreach work – we have seen a substantial rise in the number of women who are contacting our services because they cannot find a solicitor to provide legal aid. Our advocacy service has seen an increase in the need to support women to find legal representation, this involves phoning around solicitors and being turned away by many. We have also seen a rise in the number of women who are representing themselves in court in family actions. However, because of the nature of applying to the court for protective orders, many victims/survivors are not able to do this alone, nor should they. It is our opinion that protective orders are being drastically underused, and the removal of legal aid barriers would substantially improve the justice outcomes for women.

We would note that there are particular difficulties faced by women in rural and island areas where legal representation is sparse, but we now seeing widespread problems in all areas outside the central belt.

The impact of current policy

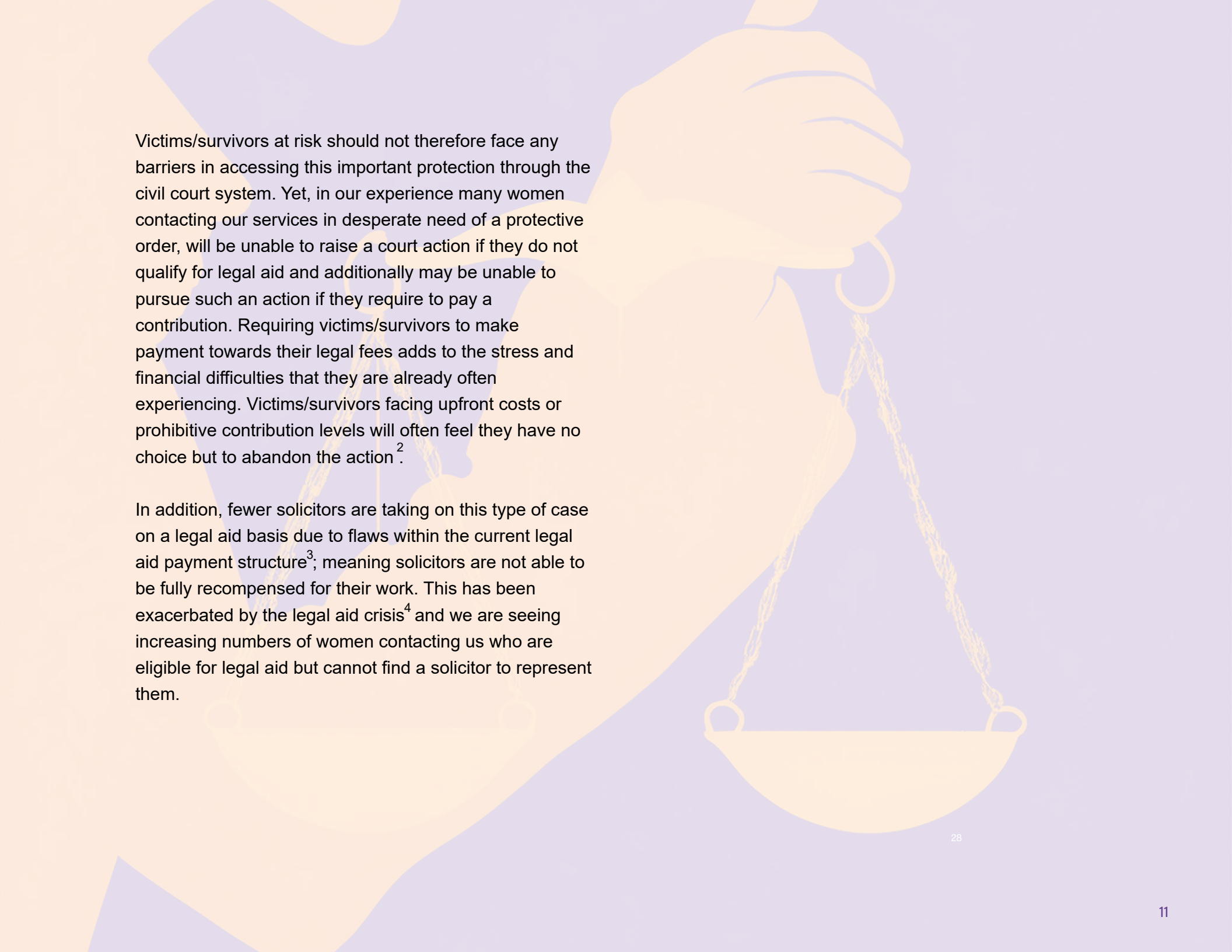
We find that many of the victims/survivors using our services have been told by the police to seek protection through the civil courts in addition to, or instead of, the criminal justice process. This is because, whilst protective conditions can be imposed through the criminal justice system in terms of bail conditions and criminal non-harassment orders, they do not always offer the right level of protection at the right time, leaving a protection and safety gap.

We are aware of the issues around the prosecution of domestic abuse due to insufficiency of evidence and failures in the investigation and prosecution. Furthermore, bail conditions can easily fall, and the duration of such protection will often be shorter. Criminal Non-Harassment Orders can only be put in place at the end of a successful prosecution in the criminal courts which has a higher evidential burden and is a process outside of the control of the person requiring protection.

Therefore, those in need of a protective order often feel they have no choice other than to raise an action in the civil courts. It is an important and often essential complementary tool to the protections available in the criminal justice process which is why the police recommend their use.

When victims/survivors of domestic abuse require a protective order, this is through no fault of their own. Protective order cases differ greatly from other family actions which have been raised to settle a disagreement. These cases arise only when a person is in desperate need of vital protection for the safety of themselves and/or their children.

When a protective order is required, following a period of abuse, harassment or stalking, the victims/survivors will often be going through a variety of additional challenging circumstances. Many will have just separated from their abusive partner and need to find alternative accommodation. Often their finances will be tied up in joint property and assets shared with their partner/ex-partner, and so they may appear to have more financial options available to them than they do. Their partner/ex-partner may have subjected them to financial abuse and accumulated substantial debts under the victim/survivor's name.

A stylized illustration in the background shows a hand holding a scale of justice. The hand is rendered in a light yellow color, and the scale is a simple, elegant design with a circular pan hanging from a chain. The background is a solid light purple color.

Victims/survivors at risk should not therefore face any barriers in accessing this important protection through the civil court system. Yet, in our experience many women contacting our services in desperate need of a protective order, will be unable to raise a court action if they do not qualify for legal aid and additionally may be unable to pursue such an action if they require to pay a contribution. Requiring victims/survivors to make payment towards their legal fees adds to the stress and financial difficulties that they are already often experiencing. Victims/survivors facing upfront costs or prohibitive contribution levels will often feel they have no choice but to abandon the action².

In addition, fewer solicitors are taking on this type of case on a legal aid basis due to flaws within the current legal aid payment structure³; meaning solicitors are not able to be fully recompensed for their work. This has been exacerbated by the legal aid crisis⁴ and we are seeing increasing numbers of women contacting us who are eligible for legal aid but cannot find a solicitor to represent them.

Recommendations / Proposed solutions

No victim/survivor of GBV should have to pay for their own protection, or that of their children. The process for obtaining legal aid should be straightforward and there should be less of a burden on solicitors to prove the merits of the case. We are aware from our work with victims/survivors that the current position discourages those experiencing abuse from taking the necessary steps to protect themselves from harm.

We consider that the legal aid position for protective order cases should mirror that of actions under the Mental Health (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000. Where applicants meet the merits test, there will be no means testing for those seeking orders for their own welfare in these cases. The logic here is that there should not be financial barriers preventing any order from being granted which is necessary to safeguard a person's welfare. This rationale should likewise be applied to protective order cases for victims/survivors of GBV.

Current civil legal aid provisions have made protective orders inaccessible for some victims/survivors of abuse,

leading to an imbalance between the access to justice afforded to the perpetrator and that available to the victim. This is unacceptable in a society which states that it will not tolerate GBV and has made significant commitments to eradicate all forms of violence against women and girls.

The delivery plan for Equally Safe, Scotland's strategy to eradicate violence against women and girls, recognises the concerns raised by stakeholders on the urgent need of legal aid reform, but includes no firm plans, simply stating that the Scottish Government *"will continue to engage with key stakeholders to inform and shape future legislative proposals in relation to the reform of legal aid."* Nonetheless, despite multiple commitments, the Programme for Government 2024 makes no mention of the urgent need to reform civil legal aid.

In 2016, The Scottish Government pledged to establish a First Minister's National Advisory Council on Women and Girls (NACWG)⁵ to help drive forward action to tackle gender inequality. The NACWG published their first set of recommendations in their 2018 report⁶.

This included the recommendation to *"improve access to justice for women and girls experiencing men's violence and the culture of violence against women and girls embedded in the fabric of Scottish society by"* various means including *"creating a world-leading process for complainers of sexual violence"* and to *"create a consistent and inclusive model to ensure that women experiencing domestic abuse have sufficient access to expert legal advice and legal aid."*⁷

Furthermore, the UK ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1986, committing to *"eliminate discrimination against women in all aspects of life and to protect, promote and fulfil the human rights of women under all circumstances."*⁸ The CEDAW Committee recognised in General Recommendation No. 35, 2017, that *"the prohibition of gender-based violence against women has evolved into a principle of customary international law, binding all States."*⁹

In the concluding observations of latest review of the UK, the CEDAW Committee expressed concern that changes in the legal aid system in England and Wales unduly restrict women's access to legal aid¹⁰.

The Committee urged the UK government to ensure *"effective access by women, in particular women victims of violence, to courts and tribunals,"* and *"to continuously assess the impact of the reforms of legal aid on the protection of women's rights."* Although these comments related specifically to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the UK's ratification of the Convention applies equally to Scotland, and these recommendations must be taken into account in the Scottish context also. The Committee also urged the UK to increase its efforts to protect women against all forms of violence, including domestic violence.



We propose that it is in the interests of justice to:

- remove financial eligibility tests in protective order cases - failing which, increase legal aid eligibility limits at least in line with inflation and remove the requirement for contributions in protective order cases;
- simplify the process of obtaining legal aid by streamlining processes and reducing supporting documentation required;
- introduce a block fee uplift in protective order cases on application by solicitors;
- seriously review the provision of legal aid services in this area; we are aware that the Civil Legal Assistance office in some areas take these types of cases, but more should be done to ensure there are sufficient numbers of solicitors providing this type of work in every area of Scotland, including rural and island areas.

Conclusion

The ongoing financial and procedural barriers within the legal aid system continue to impede access to protective orders for survivors of domestic abuse. Recent developments highlight the urgent need for reform to ensure that all individuals in need of protection can access justice without facing prohibitive costs. The proposed changes aim to remove these barriers, align with international commitments, and improve the outcomes and the safety of survivors of GBV and their children.

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- 1 <https://www.gov.scot/publications/women-justice-system/pages/7/>
- 2 Cavanagh, K., Connelly, C., Scoular, J., (2003), Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research), p.3, [ARCHIVED CONTENT] Evaluation of the Protection from Abuse (Scotland) Act 2001 - Research Findings (nrscotland.gov.uk)
- 3 Many solicitors will be unable or unwilling to take on protective order cases under legal aid due to the current 'block fee' system. Nearly all cases of this type require a large volume of work to be undertaken at the start of the case. They do not normally require proceeding to a full evidential hearing. The block fee system does not recognise the front-loaded nature of this type of case and therefore does not adequately recompense the work required by solicitors in these cases.
- 4 <https://www.justrightscotland.org.uk/wp-content/uploads/2024/06/24.06.11-Scottish-Court-fees-Consultation-JRS-HRCS-SALC.pdf>
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Scottish Women's Rights Centre

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