



Stakeholder Submission to the Review of the Civil Legal Aid Scheme

February 2023

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights, including economic, social and cultural rights. FLAC operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information, and runs a nationwide network of legal advice clinics where volunteer lawyers provide basic free legal advice.

As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community. FLAC also operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic.

FLAC makes policy recommendations to a variety of bodies, including to Oireachtas Committees and international human rights bodies. This includes recommendations that are derived from the learning and experience of FLAC's work as an Independent Law Centre.

FLAC operates the public interest law project PILA (Public Interest Law Alliance) that runs a *pro bono* referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting *pro bono*.

FLAC is a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

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Introduction

FLAC welcomes the opportunity to make a stakeholder submission to the Review of the Civil Legal Aid system. FLAC was established in 1969 to campaign for comprehensive legal aid and to provide legal assistance to people of limited means. FLAC's experience in this area continues from its foundation, to its membership of the Pringle Committee all the way to its campaign (together with over 45 civil society groups) for the first comprehensive review of the Civil Legal Aid system and its membership of the present Review Group.

We regard this as is a golden opportunity for fundamental Civil Legal Aid reform and the reimagining of public legal assistance.

Our vision is not about making some minor adjustments to the current restrictive system. It is of the creation of a new Legal Assistance Authority which aims to equip disadvantaged individuals and communities with four basic tools:

- Awareness of rights and entitlements,
- Awareness of ways to avoid or resolve legal problems in a timely way,
- Ability to effectively use court and non-court dispute resolution systems,
- The ability to effectively participate in the resolution process to achieve just outcomes.

FLAC's vision is based in our experience over the last 50 plus years of providing different forms of public legal assistance, including through:

- our hugely oversubscribed telephone information line, which provides legal information to over 12,000 people each year;
- our pre-Covid network of legal advice clinics, all around the country where volunteer lawyers provided basic free legal advice to approx. 12,000 people each year in 75 centres;
- PILA's *pro bono* referral scheme which facilitates community and voluntary groups getting legal assistance from private practitioners acting *pro bono*,
- specialised Traveller Legal Service, Roma Clinic, LGBTQI Service and work undertaking public interest litigation as an independent law centre;
- the training of lay advocates and providing second tier advice to MABS and Citizens Information Centres;
- research and policy work, including on unmet legal need.

Our vision is of a new public legal assistance body that is principles-based, with access to justice as its overarching aim and with an explicit preventative justice function. This would involve early legal advice, public legal education, advocacy, training and intervention to address problems before they escalate and which can prevent cases going to court:

- It is user-led, which brings services to where individuals and communities are, (using human-centred design).
- It is outcome-focused and has timely resolution as its goal and views litigation as a last resort.
- It is based on domestic and international human rights and equality standards and is poverty-proofed.
- It regularly measures unmet legal need and legal capabilities among low income and disadvantaged individuals and communities and uses targeted outreach approaches to meet their needs.
- It adopts best practice, is innovative and flexible, and able to coordinate legal assistance services with other aspects of the legal assistance community like the information and advocacy functions of the Citizens Information Board, the Workplace Relations Commission and IHREC.
- It provides joined-up services and works in a coordinated way in healthcare, welfare and community settings.
- It establishes, operates or supports a range of properly resourced legal assistance models such as a telephone information line, a network of community law centres in disadvantaged areas, specialised legal services, and a panel of highly trained lawyers. It has the capacity to train lay advocates, staff of community and voluntary NGOs, and Citizens Information Centres.
- It uses technology to maximise accessibility, while ensuring that persons who cannot access such technology are not excluded.
- It is sufficiently flexible to work with and harness the potential of the growing, more structured *pro bono* culture, and clinical legal education programmes in universities.

Executive Summary & Recommendations

Chapter 1 of this submission charts the development of the current scheme of Civil Legal Aid in Ireland, including the development of the law in relation to the scheme, and then provides an overview of the current scheme of Civil Legal Aid. It then seeks to place the scheme in context by reference to the development of Independent Law Centres in Ireland during the latter half of the twentieth century, as well as by reference to the broader access to justice landscape. Finally, it discusses known & unknown Unmet Legal Need in Ireland.

Chapter 2 sets out the Civil Legal Aid principles which FLAC has identified. These principles inform this submission and should also inform the work of the Review Group and underpin any new scheme of public legal assistance. These are:

1. Access to Justice & the Rule of Law;
2. Equality, Human Rights & Poverty-Proofing;
3. Measuring Unmet Legal Need & Putting the User at the Heart of the System;
4. Best Practice.

Chapter 3 sets out the potentially far-reaching human rights and equality standards and obligations regarding legal aid and access to justice. Subsequent chapters examine the implications of these standards (and the other principles set out in chapter 2).

Chapter 4 considers the scope of the scheme and tension between blanket exclusions and Ireland's human rights obligations. **Chapter 5** considers the means test and **chapter 6** the merits test – with both highlighting best practice in relation to such criteria and the case (under human rights and equality law) for building an overarching discretion into criteria for granting civil legal aid. **Chapter 7** discusses the quality, accessibility and administration of the Civil Legal Aid System – drawing from human rights and equality standards, FLAC's experience and best practice in each area.

Chapter 8 examines the broader topics of civil legal aid legislation and infrastructure. It proposes the establishment of a new public Legal Assistance Authority which takes a rights-based, person-centred and outcome-focussed approach to civil legal aid. **Chapter 9** discusses the functions which that new body should carry out, and **chapter 10** discusses the role of other State Bodies in promoting access to justice with a focus on IHREC, the WRC and the Citizens Information Board.

Finally, **chapter 11** examines the rationale for – and potential of – FLAC's proposed new approach to civil legal aid through the lens of four areas of law where FLAC has particular expertise and experience: Social Welfare, Equality, Housing, and Credit & Debt.

Civil Legal Aid Principles

The following principles should underpin the new scheme of public legal assistance: **Access to Justice; a User-Centred approach; Best Practice; and Equality, Human Rights and Poverty-Proofing.**

The recognition of the fundamental right of access to justice and the link between access to justice and poverty, social inclusion, health outcomes and the rule of law should underpin the work of the Review Group.

The Review Group should propose a new Legal Assistance Authority with an overarching access to justice mandate, and all necessary ancillary powers and functions to achieve this. Further, the Review Group should recommend that this new body is resourced appropriately in order to achieve its aims.

Unmet Legal Need

The lack of knowledge in relation to unmet legal need is a significant obstacle to creating a user-centred system of public legal assistance. There is no definitive knowledge of the extent of unmet legal need in Ireland:

- The Department of Justice and/or the Review Group should engage in a legal needs analysis as matter of urgency.
- The Review Group must proactively engage with groups and individuals experiencing poverty, disadvantage and discrimination about the possibility of fundamental reform, to ensure evidence-based and user-led policy recommendations and solutions.
- The new Legal Assistance Authority should carry out research on an ongoing basis into unmet legal need, and legal capabilities to ensure evidence led approaches to the design and delivery of services and in order to prioritise and target resources.
- The regular measurement of unmet legal need among people living in poverty and deprivation should be a function of the new body.
- The Legal Assistance Authority should establish indicators of access to justice derived from legal needs surveys.

Human-Centred Design

- The Review Group should use the human-centred design approach, identify a number of vulnerable individual and group personas, and map out how those personas will be able to receive the whole range of legal assistance under a new public legal assistance system.
- The new Legal Assistance Authority should use this human-centred design approach on an ongoing basis.

Best Practice

The Review Group should research, identify and make recommendations based on best practice models, in particular but not limited to:

- The provision of early legal advice and assistance to vulnerable and hard to reach groups and individuals.
- Best practice models of community and public legal education.
- Best practice models of means and merits tests.
- Best practice models of delivery of legal assistance.

The Review Group should proactively engage with the Independent Law Centres and analyse these alternative models of legal assistance from a best practice perspective.

The new Legal Assistance Authority should be required to identify and engage in best practice delivery of public legal assistance.

Equality, Human Rights and Poverty-Proofing

The Review Group should research and identify the equality, human rights and poverty-proofing standards and obligations that apply in relation to a legal aid system, and these standards should guide the work and recommendations of the Review Group.

The Public Sector Equality and Human Rights Duty should be a core consideration in the review of the legal aid system, and should inform the work of the Review Group and its recommendations. The Review Group should have regard to what is required by the State from a human rights and equality perspective in the provision of public legal assistance.

In its consultation process, the Group should seek to engage directly with individuals and groups who come within the discriminatory grounds in the equality legislation and people living in poverty and extreme poverty.

The Review Group should outline in future reports how it has complied with the Public Sector Equality and Human Rights Duty.

Public Legal Assistance Law and Infrastructure

Mapping of current Public Legal Assistance infrastructure

The Review Group should undertake an initial proper and comprehensive mapping of all forms of public legal assistance (provided by statutory and non-statutory bodies, such as the Citizens Information Board, the Workplace Relations Commission, IHREC) - including legal information, advocacy, legal advice, and legal representation. The mapping exercise should extend to the Independent Law Centres, all of whom receive some public funding.

A New Public Legal Assistance Authority

A shift to a rights-based, person-centred and outcome-focussed approach to legal assistance needs to be reflected in the legislation governing the system of civil legal assistance, as well as the body which oversees the system (including its membership, mandate, powers and functions).

The Review Group should recommend:

- The introduction of a new legislative framework which adopts a holistic and preventative approach to access to justice (rather than the current narrow, prescriptive and technical conception of legal aid).
- That legislation should create a body with an overarching access to justice function and mandate. Access to justice should be defined in a manner which explicitly acknowledges the links between that right and the promotion of social inclusion, combatting poverty, promoting equality, and the enjoyment of other fundamental rights.
- Given that the term 'legal aid' has become almost synonymous with the provision of legal representation alone, the new body should be referred to as a public Legal Assistance Authority (to better reflect the full range of the functions it should carry out).
- The functions of the Legal Assistance Authority should include the provision of, or ensuring the provision of:
 - Legal Information.
 - Public Legal Education.
 - Legal Advice.
 - Advocacy & Advocacy Training.
 - Legal Representation.
 - Research and Law Reform.

Objectives and Principles of the Legal Assistance Authority

As well as including its overarching access to justice aim, the legislation establishing the Legal Assistance Authority should clearly articulate the objectives and the principles that should guide it in carrying out its functions. These should include:

- A User-Centred approach utilising Human-Centred Design.
- Effectiveness.
- Integration, Collaboration & Co-operation.
- Flexibility & Innovation.
- Following Best Practice in carrying out its functions in accordance with its mandate, objectives and the other principles which inform its work.
- Accessibility.
- Fairness.
- The Promotion of Equality, Human Rights & the Elimination of Discrimination.
- The Promotion of Social Inclusion.
- Efficiency & Timeliness.

Coordination and Collaboration

The Legal Assistance Authority must be empowered to co-ordinate and collaborate with **other bodies, including State Bodies, public services, community organisations and NGOs**, in providing and/or ensuring the provision of legal assistance. It should also be concerned with ensuring an integrated approach to the provision of legal assistance services (such as through **Health Justice Partnerships**). These matters should be provided for in legislation.

The Legal Assistance Authority should coordinate and engage with the **Law Society of Ireland and the Bar Council of Ireland** to develop *pro bono* within the legal profession to maximise the added value potential of *pro bono* to complement public legal assistance. The Review Group (and subsequently the new Legal Assistance Authority) should engage with the Law Society of Ireland and the Bar Council of Ireland in relation to the establishment of a Committee to develop *pro bono* within the legal profession working with existing *pro bono* structures, such as **PILA, Pro Bono Pledge Ireland, the Voluntary Assistance Scheme (VAS)**, in order to facilitate better coordination.

Given the potential of university law clinics to be part of the legal advice infrastructure, the Review group and the new Legal Assistance Authority should engage with **third level educational institutions, the King's Inns and the Law Society of Ireland** in relation to the development of:

- access to justice and legal aid and an experiential component as a core subject on the legal education curriculum;
- Clinical Legal Education programmes in third level educational institutions along the lines of the Traveller Equality and Justice Project in UCC, the Ulster University Law Clinic and the Law Society Street Law Clinic.

Innovation and Flexibility

The new civil legal aid legislation must ensure that the Legal Assistance Authority may provide legal assistance services in innovative and flexible ways (for example, in collaboration with other bodies. In this regard, the legislation should not be drafted in an unnecessarily prescriptive manner and should afford the Legal Assistance Authority scope to exercise its functions as it sees fit and in accordance with its mandate, principles and objectives.

Independence and Membership

The new Legal Assistance Authority should be independent. Its membership should be appointed in a transparent and independent manner. In addition to members with knowledge of public interest, legal aid, human rights and equality law, the membership of that Authority should include representatives of relevant NGOs and civil society organisations, and users and potential users of the Legal Assistance Authority, especially people living in poverty and disadvantage.

Forms of Public Legal Assistance

Preventative Justice Services

The Legal Assistance Authority must be mandated to provide Preventative Justice Services, and have Legal Information, Public Legal Education, Legal Advice, Early Legal Intervention, Advocacy, and Training functions. This must involve the provision of preventative legal services for hard-to-reach groups informed by international best practice.

The Legal Assistance Authority should also ensure the provision of (or resourcing of) legal information officers in the Courts Services, NGOs, family resources centres and health centres, prisons, residential institutions such as hospitals and nursing homes, and public libraries.

Provision of information should include information and awareness-raising in relation to environmental rights, including awareness of the right to information contained in the Aarhus Convention and the means through which it may be vindicated.

Preventative justice can also be achieved through a comprehensive well-resourced network of community law centres and specialised law centres.

Mediation may have a significant preventative justice role and there is significant scope for the expansion of free mediation services beyond family, employment and equality matters. Any expansion of mediation, however, must not be viewed as an alternative to other preventative justice measures or the resourcing of legal aid or the Courts. It must also be accompanied by measures to ensure the availability of legal advice to parties involved in mediation before and during the mediation process.

Training and Advocacy

The Legal Assistance Authority should provide legal and advocacy training for representatives of NGOs, Trade Unions and community organisations to ensure that lay advocates may provide advocacy and representation in straightforward cases heard by bodies such as the Social Welfare Appeals Office and WRC. Such advocates should also have access to appropriate referral mechanisms for legal advice and representation in more complex cases.

Legal Representation

Legal Representation should be provided through a nationwide network of Community Law Centres, specialised and dedicated legal services, and private practitioner panels.

Research

In addition to research and analysis in relation to unmet legal need and the efficacy of its services, the Legal Assistance Authority should be mandated to conduct research in relation to access to justice more generally and to make law reform proposals where appropriate. This research, and law reform proposals arising from it, should be informed by the experience of the Authority in providing legal services and should focus on law reform which would prevent legal issues arising to begin with or escalating (for example proposals in relation to the quality of first instance decision-making and the availability of accessible tribunals).

Human Rights & Equality Standards and Obligations

All forms of legal services provided by the Legal Assistance Authority should comply with the relevant equality, human rights, accessibility, quality and fairness standards and obligations.

In accordance with the case-law of the European Court of Human Rights and the Court of Justice of the European Union, the question of whether legal aid is necessary for a fair hearing must be determined on a case-by-case basis and the relevant body is obliged to take into account the specific circumstances of each applicant under the established criteria. A requirement to provide legal aid will depend on factors such as:

- The importance of what is at stake for the applicant;
- The vulnerability of the applicant;
- The emotional involvement of the applicant, which impedes the degree of objectivity required by advocacy in court;
- The complexity of the relevant law or procedure;
- The need to establish facts through expert evidence and the examination of witnesses;
- The applicant's capacity to represent him or herself effectively;
- The existence of a statutory requirement to have legal representation;
- Where initiating or defending legal proceedings would otherwise be prohibitively expensive.

These principles, which are binding on the State, raise serious questions in relation to elements of the current scheme of civil legal scheme in Ireland, including: its limited scope and use of blanket exemptions; the means test; and the merits test. The State's human rights and equality obligations are also relevant to:

- forms and procedures for applying for legal aid and appeal mechanisms against refusals of legal aid;
- the quality of the legal aid;
- the collection of appropriate data.

Scope & Exclusions

The Review Group should recommend that:

- Any new scheme of civil legal aid in Ireland does not include any blanket exemptions in respect of the forum in which a case is heard, or by reference to the subject matter/area of law.
- Any new scheme of civil legal aid must not exclude cases in the public interest or test cases. Further, there should be no blanket exemption for cases on behalf of groups, including in environmental matters.

Means Tests

The Review Group should recommend that:

- A means test should not apply in certain circumstances, such as – in line with international best practice – for those in receipt of means-tested social welfare payments, in child protection cases (or cases where the welfare of a child is concerned), in urgent cases such as where there is a risk of homelessness, eviction, deportation or other serious consequences for the applicant should legal aid not be granted, or in cases where there is the risk of an imminent withdrawal of a social welfare payment.
- Where a means test is applied, it should be flexible and give decision-makers an overarching discretion to grant legal aid by reference to the individual circumstances in line with the principles of European law. Such a system should be informed by international best practice in Australia and Canada.
- In circumstances where a means test does apply, the income threshold should be adjusted in line with inflation and poverty-proofed. FLAC has previously recommended that financial eligibility criteria be measured annually (at minimum) against national poverty proofing standards and for the publication of the underlying analysis by the Department of Justice.
- Additionally, certain assets and incomes should not be included in calculations for disposable capital and disposable income: for example, where the inclusion of applicants' homes or land in a calculation essentially forces them to choose between legal aid or having a place to live or ability to earn a living.
- Drawing from the Insolvency Service of Ireland model, a means test (if applied) should allow for reasonable living expenses and any contributions levied must allow for a reasonable standard of living. It should also have regard to:
 - Measures and indicators of poverty set out in government policy publications on poverty and social inclusion;
 - Official statistics and surveys related to household income and expenditure published by the central statistics office;
 - The Consumer Price Index or an equivalent index;
 - Differences in the size and composition of households and the differing needs of persons;
 - Regional differences such as higher rental costs in urban areas and higher transport costs in rural areas.
- Any means test should be applied in a manner which is responsive to applicants'

ability to evidence their financial situation in accordance with the Council of Europe Guidelines.

- Any means test should be assessed, in the first instance, on the basis of a short, simple and accessible form.

Merits Tests

The Review Group should recommend:

- Greater transparency in law and practice in relation to any merits test.
- A merits test should not be applied in all cases (such as matters of extreme urgency or where the importance of the matter is manifestly evident). If it is applied, it should be flexible and give decision-makers an overarching discretion to grant legal aid by reference to the individual circumstances by reference to the principle of European law.
- Any merits test should only exclude cases which are manifestly ill-founded (per the decisions of the ECtHR).

Quality, Accessibility & Administration of the Civil Legal Aid System

The Review Group should recommend that:

- Civil legal aid legislation provides for thorough and sustained quality assurance mechanisms in respect of the legal aid system and legal assistance provided.
- Legislation should also provide for an efficient and thorough mechanism for the investigation and resolution of complaints in relation to the provision of legal assistance.
- The system of civil legal aid, and legal aid legislation, should provide for mechanisms to ensure sufficient specialization of lawyers dealing with specific categories of cases and continuous professional development and training.
- The criteria for the appointment of a legal aid lawyer should clearly state the timeline within which an applicant will receive a response regarding their application. There must be adequate time for the preparation of a client's case in the case of a successful application, and sufficient time to lodge an appeal in the case of a rejected application.
- Applicants seeking civil legal aid should be accorded the right to exercise their wishes in appointing their legal representative within reason.
- The legal aid system must be sufficiently staffed and resourced and lawyers must be adequately remunerated.
- Legal aid legislation must provide for thorough data collection, including legal needs surveys specifically relating to the legal aid system which can inform assessments of

its quality and effectiveness.

- Private practitioner schemes should include the use of ‘closed’ panels where participation in regular training is required.

The principles of equality and non-discrimination should inform the design of the system of civil legal aid – in particular in ensuring the system’s accessibility for all groups who enjoy the protection of the equality legislation. The Review should recommend that:

- Information about the legal aid system should be accessible to all groups and targeted measures should be put in place to ensure all groups protected under the equality legislation and those experiencing poverty and disadvantage are aware of the availability of public legal assistance. This should be mandated by civil legal aid legislation.
- Application forms for legal aid should be as short and simple as possible, and, where necessary, adapted to the needs of particular groups. Applications should be available in hard copy, as well as online, and assistance should be available in applying for legal aid. Requirements to provide specific documentation should be applied flexibly, especially for those experiencing poverty, homelessness or with literacy or language issues.
- Civil Legal Aid legislation must ensure that the system of legal aid has capacity to take into account and provide for the specific needs of vulnerable and marginalised groups, as well as groups protected under the equality legislation. To maintain the programme’s capacity to provide for the special needs of the vulnerable groups, there should be continuous professional development of legal aid lawyers, especially regarding their training needs and developing their capacities. There should also be continuous engagement with all groups protected under the equality legislation.

The administration of the system of civil legal aid should be consistent with Ireland’s international human rights obligations as well as the principles of natural and constitutional justice. The Review Group should recommend:

- Civil legal aid regulations should provide for a review mechanism for decisions regarding entitlement to legal aid, as well as an independent and accessible appeals mechanism. Legislation should provide for time limits for the determination of reviews and appeals with regard to the circumstances of specific cases.
- Legislation should expressly provide for fair procedures in the conduct of reviews and appeals including a right to reasons and to the information on which decisions were based (such as counsel’s opinion) and a right to an oral hearing on appeal.

The Role of Other State Bodies

The Citizens Information Board

Civil Legal Aid legislation and the Comhairle Act 2000 should mandate coordination between the Citizens Information Board (CIB) and the Legal Assistance Authority in the areas of information, advice, public education and advocacy. Legislation and policy should also facilitate practical collaboration between the CIB and Legal Assistance Authority as regards the manner in which they provide their services through initiatives such as co-location. The Comhairle Act 2000 should be amended to specifically mandate the CIB to provide information in an accessible manner.

The Comhairle Act 2000 should be amended to specifically mandate the Citizens Information Board to provide information, advice and advocacy in relation to legal rights (in areas such as social welfare, employment, discrimination and housing), as well as a public legal education function. This should provide, if necessary, that the CIB is empowered to collaborate with bodies such as the Legal Assistance Authority in carrying out this function.

Civil Legal Aid legislation should require the Legal Assistance Authority to perform an advocacy and legal training role in respect of Citizens Information Services (CIS) advocates, the creation of referral pathways from the CIB to the Legal Assistance Authority in cases requiring legal services, and a mechanism for the provision of second-tier legal support to the CIB in respect of specific issues and cases.

IHREC

IHREC's training function under the IHREC Act 2014 should mandate the provision of advocacy training in relation to equality law – including, if necessary, provisions allowing IHREC to collaborate with bodies such as the CIB, the Legal Assistance Authority, Trade Unions and Civil Society Organisations in carrying out this function.

The legislation concerning the functions of the Legal Assistance Authority, the Citizens Information Board, IHREC and the Workplace Relations Commission should allow for collaboration between the bodies in relation to the provision of legal information, advice, education, training and representation in the context of equality law.

The Workplace Relations Commission

The Review Group should recommend that: Section 11 of the Workplace Relations Act 2015 should be amended to allow the WRC to provide information in relation to equality law and discrimination complaints (in addition to their existing information function in relation to employment law).

1. Civil Legal Aid & Access to Justice in Ireland

This chapter charts the development of the current scheme of Civil Legal Aid in Ireland, including the development of the law in relation to the scheme. It then provides an overview of the current scheme of Civil Legal Aid.

It then seeks to place the scheme in context by reference to the development of Independent Law Centres in Ireland during the latter half of the twentieth century, as well as by reference to the broader access to justice landscape in Ireland.

1.1. Civil Legal Aid in Ireland: A History

1.1.1. The Pringle Report

During the 1970s FLAC campaigned for a comprehensive scheme of civil legal aid and advice. The official response was slow, and it was only when the students threatened to close their own voluntary clinics that the government established the Committee on Civil Legal Aid and Advice, chaired by Mr Justice Pringle, in July 1974.¹ Prior to this, the State only provided civil legal aid in habeas corpus proceedings, a measure which was introduced in 1967.

The Committee's terms of reference included *"to advise on the introduction at an early date of a comprehensive scheme of legal aid and advise on civil matters and to recommend on the form, nature and administration of the scheme and on the legislation necessary to establish it and ... pending the introduction of a fully comprehensive scheme ... to develop as a matter of urgency a system of legal advice centres and legal aid in certain categories of cases and ... to estimate the cost of the scheme proposed."*²

In December 1977, the Committee on Civil Legal Aid and Advice furnished its Report to the Minister for Justice (the "Pringle Report"). The Pringle Report considered that there were four factors which appeared to deter low income individuals from availing of legal services:

1. the belief that the cost will be beyond their reach;
2. lack of knowledge of the types of service and doubt about the relevance to their problems of the services of solicitors, citing a view that solicitors' work related more to the legal difficulties of the better off (i.e. property rights rather than welfare rights);
3. a "psychological barrier" between socially deprived clients and solicitors which presents both with immediate communications difficulties; and,

¹ The Committee included a FLAC nominee, Brian Gallagher.

² Report of the Committee on Civil Legal Aid and Advice, chaired by Mr Justice Pringle, ("the Pringle Report"), December 1977.

4. difficulty in reaching solicitors' offices, particularly in Dublin where they were generally situated in the central business area.³

In brief, the majority of the Committee advocated the implementation of a comprehensive scheme of civil legal aid and advice administered by a Legal Aid Board independent of, but with representatives from, the legal profession. In addition to administering the scheme, it was proposed that the Board would also have responsibility for research and review of legal services, for educating the public as to their legal rights, and for evaluating the results of its own work. The Pringle Report ultimately concluded that there was a need for a comprehensive civil legal aid scheme providing advice and assistance as well as advocacy in both courts and tribunals, and further that legal advice and assistance in civil matters should be available in relation to all types of legal problems. The Report recommended the introduction of a means test, a financial contribution from those who could afford it, and a merits test based on "reasonableness". It also recommended that, in addition to community law centres, legal aid be offered by barristers and solicitors in private practice and that legal aid and advice should be coordinated with other social services.⁴ The recommendations of this majority report were never adopted.

The Committee stated that it did not consider any particular category of case (i.e. area of law) to be more deserving of inclusion in a scheme than any other,⁵ and recommended that, if there was to be an interim scheme in advance of adopting the proposed comprehensive scheme, that scheme should be modelled on the comprehensive scheme suggested, but on a more limited scale. Under the interim scheme, Community Law Centres and legal advice centres should be set up at the earliest possible date. The interim scheme might differ from the comprehensive scheme in that legal aid might be confined to certain categories of cases which should include family law cases, landlord and tenant cases, and consumer protection cases. The Committee was clear in its view that the suggestion of an interim scheme should not distract from the proposal of a comprehensive scheme to be introduced at the earliest possible opportunity, and noted the prioritisation of family law within an interim scheme as being a recognition of the sensitivity of family law matters as well as the importance of child welfare concerns.

Eleven months after the publication of the Pringle Report, the State found itself in front of the European Court of Human Rights defending the claim of Ms Josie Airey, who was seeking a judicial separation, that Ireland's failure to provide her with legal aid amounted to a violation

³ The Pringle Report, pp. 38-39

⁴ Ibid.

⁵ ibid 2.7.1

of her rights under the ECHR. The Court ultimately ruled in favour of Ms Airey in the landmark judgment but not before the Government gave a commitment to introduce legal aid in the area of family law.⁶ It should be noted that the initiative to introduce a limited form of civil legal aid was in response to the *Airey* case and FLAC commentary regarding provision of services, rather than a move to recognise a need for civil legal aid provision for those that could not otherwise afford to access services privately.

1.1.2. Non-Statutory Civil Legal Aid Scheme

In response to the Pringle Report and to the *Airey* case, the Minister for Justice introduced the non-statutory Scheme of Civil Legal Aid and Advice in 1979. The Scheme operated on an administrative basis until the introduction of the Civil Legal Aid Act 1995. During this time, the Legal Aid Board was established as the administrative body to oversee the civil legal aid scheme. It was geared solely to provide legal advice and, where appropriate, legal representation in individual cases. There was no research or education function. The Pringle Report's recommendation to establish community law centres was rejected and instead the Legal Aid Board opted for full time salaried staff through law centres with no community involvement, and part-time clinics. The scheme of civil legal aid and advice was very restrictive with a range of areas of law excluded from its operation. There were numerous exemptions and exclusions. For example, tribunals were excluded. It was not even comprehensive in providing a service model of legal aid. For much of its existence it was underfunded to such an extent that much of the country did not have access to the scheme's law centres and, even where centres did exist, there were invariably lengthy lists for appointments.⁷

In 1992, FLAC joined with other organisations to form the Civil Legal Aid Alliance, which worked towards a legislative basis for the civil legal aid scheme. This was met with success three years later with the passing of the 1995 Act.⁸

1.2. Legislative Development

The civil legal aid scheme in Ireland is established in legislation under the provisions of the Civil Legal Aid Act 1995 (the "1995 Act") and operates according to the various regulations made under the 1995 Act. The main Regulations are the Civil Legal Aid Regulations 1996,

⁶ *Airey v Ireland*, no. 6289/73, 9 October 1979.

⁷ For a detailed analysis of the scheme see further *Access to Legal Services in Social Inclusion and the Legal System*, Gerry Whyte, second edition

⁸ Free Legal Advice Centres, History, available at: <https://www.flac.ie/about/history/> (accessed 1 February 2023).

which were amended by the Civil Legal Aid Regulations 2002 and by the Civil Legal Aid Regulations 2006.⁹

The long title to the Civil Legal Aid Act 1995 describes it as “An Act to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases”.

The Legal Aid Board was established under section 3 of the 1995 Act.¹⁰ The primary function of the Board is “to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act, and a family mediation service”.¹¹ In addition, the Board shall, to such extent and in such manner as it considers appropriate, disseminate, for the benefit of those for whom its services are made available, information in relation to those services and their availability.¹² Since 2011, the Legal Aid Board provides family mediation services and has become responsible for administration of a number of *ad hoc* legal aid schemes for criminal matters.¹³ There is no community legal education or research function.

The 1995 Act distinguishes between legal advice and legal aid. Section 25 defines legal advice as:

“....any oral or written advice given by a solicitor of the Board or by a solicitor or barrister engaged by the Board for that purpose under section 11-

- a. on the application of the law of the State to any particular circumstances which have arisen in relation to the person seeking the advice, and
- b. as to any steps which that person might appropriately take having regard to the application of the law of the State to those circumstances,

⁹ Civil Legal Aid Regulations 1996 - 2002, Civil Legal Aid Act 1995 as amended 01-01-19, S.I. No. 272/2016 Civil Legal Aid Regulation, Civil Legal Aid Act, 1995, S.I. No 272/1996, the Civil Legal Aid Act, 1995, (Commencement Order), 1996, S.I. No 273/1996 Civil Legal Aid Regulations, 1996, S.I. No 8/2002 Civil Legal Aid Regulations, 2002, S.I. No 460/2006 Civil Legal Aid Regulations, 2006, S.I. No 81/2017 Civil Legal Aid (International Protection Appeals Tribunal) Order 2017, S.I. No 346/2013 Civil Legal Aid Regulations, 2013, Civil Law (Miscellaneous Provisions) Act, 2008, Children Act, 1997, Sex Offenders Act, 2001, Criminal Law (Sexual Offences) Amendment Act, 2007.

¹⁰ The Board was established on 11 October 1996: Civil Legal Aid Act, 1995 (Commencement) Order 1996 (SI No 272/1996).

¹¹ Civil Legal Aid Act 1995, section 5(1), as amended by section 54 of the Civil Law (Miscellaneous Provisions) Act 2011.

¹² Civil Legal Aid Act 1995, section 5(2).

¹³ Garda Station Legal Advice Revised Scheme (since 2011); Legal Aid – Custody Issues Scheme (formerly titled the Attorney General’s Scheme) (since 2012); Criminal Assets Bureau (CAB) – Ad-hoc Legal Aid Scheme (since 2014). Available at: <https://www.legalaidboard.ie/en/our-services/criminal-legal-aid/> (accessed 1 February 2023).

and includes any assistance given by such a solicitor or barrister, to any person in taking any such steps as are referred to in paragraph (b), whether by assisting a person in taking any such steps on his or her own behalf or taking any such steps (other than the institution or conduct, including defence, of civil proceedings) on the person's behalf.”

Legal aid is defined in section 27 as “representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under section 11, in any civil proceedings to which this section applies or at an inquest under Part III of the Coroners Act 1962, and includes all such assistance as is usually given by a solicitor or barrister, as the case may be, in contemplation of, ancillary to or in connection with, such proceedings or inquest, and whether for the purposes of arriving at or giving effect to any settlement in proceedings or otherwise.”¹⁴

The detailed rules governing the granting of legal aid are set out in the Civil Legal Aid Regulations 1996-2021. These Regulations make provision for applications for legal advice and for legal aid, the appeals procedures for the review of decisions, and the assessment of financial eligibility for legal aid and advice.¹⁵

The Civil Legal Aid Regulations 1996-2021¹⁶ provide that, in order to obtain legal aid, it is necessary to be granted a legal aid certificate, as such assistance necessitates a more significant financial commitment on the part of the Legal Aid Board than advice.¹⁷

The Civil Legal Aid Regulations 2002 amended the 1996 Regulations to, *inter alia*, increase the financial eligibility and contributions thresholds and set out the value in euro.¹⁸

The Civil Legal Aid Regulations 2006 amended the 1996 Regulations to provide for a further increase of the financial eligibility thresholds relating to disposable income and altered the required contributions.¹⁹

The Civil Legal Aid Regulations 2013 amended the 1996 Regulations to revise the financial eligibility threshold relating to disposable capital, the permitted adjustments to disposable income and the maximum income contributions. The 2013 Regulations also inserted

¹⁴ Civil Legal Aid Act 1995, section 27(1), as amended by section 25 of Courts and Civil Law (Miscellaneous Provisions) Act 2013.

¹⁵ A consolidated version of the Civil Legal Aid Regulations 1996-2021 is found on the website of the Legal Aid Board.

¹⁶ Civil Legal Aid Regulations 1996 (S.I. No. 273/1996)

¹⁷ Civil Legal Aid Regulations 1996-2021, Reg. 5

¹⁸ Civil Legal Aid Regulations 2002 (S.I. No. 8/2002)

¹⁹ Civil Legal Aid Regulations 2006 (S.I. No. 460/2006)

Regulation 21(11) which provides that no contribution shall be payable in relation to applications relating solely to the defence of proceeding under the Child Care Act 1991 and Regulation 21(12) which capped the contribution to be paid by an asylum seeker at €10.²⁰

The Civil Legal Aid Regulations 2016 amended the 1996 Regulations to enable the Board to provide legal advice, without reference to the applicant's financial resources, if the applicant is unable to pay their debts in full as they fall due, is in arrears on a loan secured on the home in which they normally reside, or has been served proceedings for possession of said home or is at risk of losing that home. The 2016 Regulations also increased the Board's scope to provide legal aid without reference to financial resources to include applicants unable to pay debts in full and the application relates to certain provisions of the Personal Insolvency Act 2012. Regulation 21(13) was also amended to provide that no contribution shall be payable by an applicant who has been granted legal advice or legal aid without reference to his or her financial resources.²¹

In 2016, the non-statutory Abhaile Scheme was established to provide legal services for insolvent persons in danger of having their home repossessed.²²

In response to complaints from international human rights bodies and a campaign by FLAC, the Civil Legal Aid Regulations 2017 amended the 1996 Regulations to insert Regulation 21(14) which provides that no contribution shall be payable by an applicant where the subject matter of the application relates solely to proceedings in the District Court (or on appeal from the District Court to the Circuit Court) where the only remedy sought by the Applicant in those proceedings is an order pursuant to the Domestic Violence Act 1996.²³

The Civil Legal Aid Regulations 2021 amended the 1996 Regulations to enable the Board to provide legal aid, without reference to the applicant's financial resources, if the legal aid to be provided to the applicant relates to the Stardust inquest.²⁴

Council Directive 2002/8/EC was introduced in 2003 to facilitate access to legal aid in cross-border disputes, by laying down certain minimum common standards relating to legal aid in such disputes.²⁵ This directive provides an entitlement for an individual living in Ireland with a dispute in another EU jurisdiction to obtain legal advice and legal aid for it, or similarly, for a

²⁰ Civil Legal Aid Regulations 2013 (S.I. No. 346/2013).

²¹ Civil Legal Aid Regulations 2016 (S.I. No. 272/2016).

²² Legal Aid Board, Annual Report 2021, p. 34.

²³ Civil Legal Aid Regulations 2017 (S.I. No. 626/2017).

²⁴ Civil Legal Aid Regulations 2021 (S.I. No. 248/2021).

²⁵ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

person living in another EU Member State to obtain legal aid for a dispute being litigated in the Irish courts on similar terms to an individual living here.²⁶

The Assisted Decision-Making (Capacity) Act 2015²⁷ and the Assisted Decision-Making (Capacity) (Amendment) Act 2022,²⁸ when commenced, will amend the 1995 Act to provide that a party to an application, or to any other proceedings, under Part 5 and Part 6 of the Assisted Decision-Making (Capacity) Act 2015 shall qualify for legal advice under section 26(3) of the 1995 Act. The 2022 Act will also amend the criteria for obtaining legal aid where the proceedings concern such an application or where the applicant is a ward.

Legal aid is currently available to patients within the meaning of the Mental Health Act 2001. The Mental Health Commission is responsible for providing and administering a scheme of legal aid for those who are detained, in relation to their detention.²⁹ The Assisted Decision-Making (Capacity) Act 2015, when commenced, will amend section 28(5) of the 1995 Act to provide that the Legal Aid Board shall grant legal aid certificates to a patient, within the meaning of the Mental Health Act 2001, for the purpose of providing that person with legal representation before a tribunal in proceedings under that Act.³⁰

In 2021, following the tabling of a Private Member's Bill in Seanad Éireann, the Civil Legal Aid (Exclusion of Value of Free or Partly Free Board) (Amendment) Bill 2021, the Legal Aid Board stated it would no longer treat Housing Assistance Payment - paid to landlords - as a form of income of the purposes of determining financial eligibility for civil legal aid.³¹

In *Friends of the Irish Environment CLG v The Legal Aid Board*,³² the High Court dismissed the applicant's claim that the term "person" in the 1995 Act should be interpreted to include a legal person such as the applicant. In coming to this decision, the High Court considered the 1995 Act in detail and provided a comprehensive overview of the statutory framework.³³ The

²⁶ Legal Aid Board, Legal Aid in the European Union, available at: <https://www.legalaidboard.ie/en/our-services/legal-aid-services/legal-aid-in-other-eu-member-states/> (accessed on 1 February 2023).

²⁷ The Assisted Decision-Making (Capacity) Act 2015, section 52.

²⁸ Assisted Decision-Making (Capacity) (Amendment) Act 2022, section 48.

²⁹ Mental Health Act 2001, section 33(c).

³⁰ The Assisted Decision-Making (Capacity) Act 2015, section 52.

³¹ Letter to Gary Gannon TD, 23rd July 2020 RE: Treatment of Housing Assistance Payment for financial assessment purposes, from Legal Aid Board circulated to members of the Legal Aid Board External Consultative Panel by email 15th September 2020.

³² [2020] IEHC 454.

³³ *ibid*, paras. 9-22.

subsequent decision of the Court of Appeal in that case is discussed in chapter 3 of this submission.

1.3. Current Legal Aid Scheme

1.3.1. Functions

Like the preceding non-statutory scheme, there is no community involvement or educational or research role for the Legal Aid Board under the 1995 Act.

Civil legal aid and advice is currently provided primarily through a network of law centres by solicitors employed by the Board and a panel of solicitors in private practice. The Board now uses the services of private practitioners in Circuit Court cases concerning divorce or separation, in District Court cases concerning domestic violence, custody, access, guardianship or maintenance, in cases going before the Refugee Appeals Tribunal, and in cases under the Garda Station Advice Revised Scheme, the Legal Aid - Custody Issues Scheme and the Criminal Assets Bureau Ad-hoc Legal Aid Scheme. There are 34 full-time and 3 part-time law centres.³⁴ The Board also operates seventeen mediation family offices alongside its civil legal aid services. Several law centres in Dublin, Cork and Galway also include an international protection speciality and there are also dedicated units in Dublin dealing with personal injury and/or medical negligence cases, and cases involving children at risk. The Board has recently established a Traveller legal service. The Board also operates a specialised Refugee Documentation Centre.

1.3.2. Scope of the Current Scheme

Section 24 of the 1995 Act provides for the general criteria for the grant of legal aid and advice and establishes that a person shall not be granted legal aid or advice unless:

a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense,

and

a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.³⁵

Section 24A then provides that a person shall not be granted legal aid or advice in relation to an inquest under Part III of the Coroners Act 1962 unless a request for legal aid or advice, or

³⁴ Legal Aid Board, Annual Report 2021, p. 8.

³⁵ Civil Legal Aid Act 1995, section 24.

both, has been made by a coroner to the Board pursuant to section 60 of that Act in respect of the person.³⁶

There are certain areas where a person will be granted legal advice notwithstanding any other provision of the Act, namely where persons are complainants in a prosecution for sexual offences, including rape, aggravated sexual assault and incest,³⁷ and alleged victims of human trafficking.³⁸

Similarly, in child abduction cases arising on foot of the Child Abduction and Enforcement of Custody Orders Act 1991, the Board grants legal aid to the parent from whom the children have been taken regardless of their means and without requiring a financial contribution.³⁹

In cases seeking to recover maintenance on foot of a foreign Maintenance Order, the maintenance creditor is generally granted legal aid automatically to enable steps to be taken to enforce the Order.⁴⁰

A legal aid certificate will also be granted to a complainant for the purpose of them being represented in an application in section 4A of the Criminal Law (Rape) Act 1981⁴¹ or to an accused in connection with a cross-examination referred to in section 14C of the Criminal Evidence Act 1992⁴², or in respect of an application under section 19A of the Criminal Evidence Act 1992⁴³ or to a party in connection with a cross-examination under section 16 of the Domestic Violence Act 2018.⁴⁴

Legal aid is available for the representation of persons seeking International Protection before the International Protection Appeals Tribunal pursuant to section 27(2)(b).⁴⁵

Section 26 sets out the criteria for obtaining legal advice. Tribunal cases (with the exception of appeals from decisions on applications for asylum) continue to be excluded from the scope

³⁶ Civil Legal Aid Act 1995, section 24A, as inserted by section 35 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

³⁷ Civil Legal Aid Act 1995, section 26(3A), as inserted by section 78 of Civil Law (Miscellaneous Provisions) Act 2008.

³⁸ Civil Legal Aid Act 1995, section 26(3B), as inserted by section 3 of Civil Law (Miscellaneous Provisions) Act 2011.

³⁹ Civil Legal Aid Act 1995, section 28(b).

⁴⁰ Ibid, section 28(c).

⁴¹ Ibid, section 28(5A), as inserted by section 35 of the Sex Offenders Act 2001.

⁴² Ibid, section 28(5B), as inserted by Criminal Law (Sexual Offences) Act 2017.

⁴³ Ibid, section 28(5C), as inserted by Criminal Law (Sexual Offences) Act 2017.

⁴⁴ Ibid, section 28(5D), as inserted by section 46 of the Domestic Violence Act 2018.

⁴⁵ Civil Legal Aid (International Protection Appeals Tribunal) Order 2017 (S.I. No. 81/2017).

of the Legal Aid Board. Section 28(9)(a) provides that legal aid will not be granted in respect of specified “designated matters” which are listed as follows:

- i. defamation;
- ii. disputes concerning rights and interests in or over land;
- iii. civil matters within the jurisdiction of the District Court (Small Claims Procedure) Rules, 1993;
- iv. licensing;
- v. conveyancing;
- vi. election petitions;
- vii. a matter as respects which the application for legal aid is made in a representative, fiduciary or official capacity and the Board, having regard to any source from which the applicant is or may be entitled to be indemnified in respect of the costs of the proceedings concerned and any resources of the persons who would be likely to benefit from a successful outcome of the proceedings for the applicant, is of opinion that legal aid should not be granted;
- viii. a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;
- ix. any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.

However, section 28(9)(c) identifies certain matters where a legal aid certificate will be granted although they fall within the designated matters. For example, despite disputes concerning rights and interests in or over land and conveyancing being designated matters, legal aid may be granted in respect of proceedings *inter alia*: under the Landlord and Tenant Acts insofar as they relate to residential property; the Family Home Protection Act 1976; the Family Law Act 1981; or disputes between spouses as to property,⁴⁶ or as to property between persons who are or had been living together as man and wife, or who have or had agreed to marry;⁴⁷ or where the subject matter of the dispute is the applicant's home and the applicant suffers from an infirmity of body or mind, or may have been subjected to duress, undue influence or fraud and the refusal would cause hardship;⁴⁸ or where a grant of representation is at issue and a

⁴⁶ Civil Legal Aid Act 1995, section 28(9)(c)(i).

⁴⁷ *Ibid*, section 28(9)(c)(ii).

⁴⁸ *Ibid*, section 28(9)(c)(iii).

refusal to grant legal aid would cause hardship to the applicant.⁴⁹ Similarly, despite licensing being a designated matter, legal aid may be provided where the grant of the licence would cause hardship.⁵⁰

1.3.3. Means Test

Section 29 sets out the financial eligibility threshold and provides that, subject to the Act, a person shall not qualify for legal aid or advice unless (a) he or she satisfies the requirements in respect of financial eligibility, including those requirements in the Civil Legal Aid Regulations 1996-2021, and (b) pays to the Board a contribution towards the cost of providing the legal aid or advice.⁵¹ The Board may waive that contribution on the ground that a failure to do so would cause undue hardship to the applicant.⁵²

Regulation 13 of the Civil Legal Aid Regulations 1996-2021 provides that an applicant's financial eligibility and contribution payable shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital.⁵³ Regulations 13(3) and (4) set out the current financial threshold limits as being a disposable income exceeding €18,000 per annum and disposable capital exceeding €100,000 respectively.

Disposable income is defined in Regulation 16(1) as gross income in accordance with the Regulations less various allowances in respect of dependants, mortgage, childcare, tax, and certain allowances and benefits. There is also a requirement that the value of the individual's capital assets, apart from their home, does not exceed a certain amount.

Section 29(6) provides that certain negative consequences flow insofar as the availability of legal aid or amount of contribution payable is concerned if, in the opinion of the Board, "the behaviour of the person applying for or in receipt of legal aid or advice is such that the costs of providing the legal aid or advice concerned are likely to be increased unnecessarily."

Regulation 17 of the 1996-2021 Regulations outlines the maximum income contribution and Regulation 21 establishes the criteria for the contribution payable.

Section 33 sets out the costs recoverable by or on behalf of a person in receipt of legal aid or advice and entitles the Board to certain money or property. Section 33(8) provides that the Board may waive such rights to the extent that the money or property consists of a house or portion thereof, a periodical or lump sum payment of maintenance, the first €2,500 of moneys

⁴⁹ Ibid, section 28(9)(c)(iv).

⁵⁰ Ibid, section 28(9)(c)(v).

⁵¹ Ibid, section 29(1).

⁵² Ibid, section 29(2)(b).

⁵³ Applies *ibid*, section 29(3).

payable by way of arrears of maintenance or by way of arrears or lump sum under various Acts including Social Welfare Acts, Health Acts, Unfair Dismissals Act, and Anti-Discrimination Acts. Section 33(8)(b) provides that the Board may waive any right to any money or other property if not to do so would be likely to create hardship for the recipient of legal aid or advice.

1.3.4 Merits Test

To obtain a legal aid certificate, in addition to meeting the general requirements under section 24, the financial requirements under section 29 and the Regulations, an applicant must meet certain additional requirements regarding the likelihood of success, the reasonableness for instituting, defending, or, being a party to, the proceedings and the reasonableness of granting aid.⁵⁴ However, even if an applicant does not meet the criteria, a legal aid certificate may be granted to a person in certain circumstances including where the State is, by virtue of an international instrument, under an obligation to provide civil legal aid to the person, notwithstanding any other provision of the Act.⁵⁵ The relevant provisions set out in section 28(5) have been discussed in more detail above.

1.4. Context: Other Models of providing Legal Services - The Development & Operation of Independent Law Centres

FLAC is an Independent Law Centre⁵⁶, providing legal services (advice, advocacy and representation) to members of the public within the structure of an NGO with the overall objective of ensuring that there is access to justice for all. Accordingly, FLAC, along with other independent law centres, has a role in the provision of legal assistance to individuals on a non-statutory basis and provides a contrasting model of provision to the current Legal Aid Board model.

In addition to FLAC, there are six other Independent Law Centres, operating in different ways, all of which receive some level of public funding. These are:

- The two Community Law Centres, Community Law and Mediation (which is a community law centre in Coolock and which opened a second centre in Limerick), and Ballymun Community Law Centre.
- The four specialist Independent Law Centres which focus on particular areas of law: Mercy Law Resource Centre (with its focus on homelessness), the Immigrant Council of Ireland and the Irish Refugee Council (both of which operate independent law centres), and Tranparency.ie (which operates a

⁵⁴ Ibid, section 28(2).

⁵⁵ Ibid, section 28(5).

⁵⁶ S.I. No. 103/2006 - The Solicitors Acts, 1954 to 2002 (Independent Law Centres) Regulations, 2006.

helpline and legal advice clinic).

The Independent Law Centres regularly provide legal assistance, especially to groups and individuals living in poverty and disadvantage. They also regularly provide legal assistance that is not usually provided by the Legal Aid Board. They provide contrasting models of provision to the current Legal Aid Board model, and their objectives in service provision and scope/fields of work should be examined in detail.

It is also worth noting that a number of other non-law centre NGOs such as Children's Rights Alliance and NASC provide specific legal support services for their service-users based on needs within the communities they work with.

1.4.1. Development of FLAC and Independent Law Centres

In his book *Social Inclusion and the Legal System*, Professor Whyte provides an in-depth analysis of access to legal services in Ireland, and the impact this has on promoting social inclusion.⁵⁷ He considers the current system of Civil Legal Aid and the emergence of independent or non-statutory law centres.

Professor Whyte distinguishes between “service” models of legal aid and “strategic” models of legal aid as follows: *“In their purest form, service models are concerned exclusively with assisting individual clients who seek access to the courts in order to resolve their own difficulties while strategic models seek to tackle social problems confronting the client communities”*.

This analysis very neatly encapsulates the difference in the objectives and approach of the statutory Legal Aid Board, reflecting the service model, and those of NGOs providing legal services as designated Independent Law Centres, which generally follow a strategic model.

While the objectives and working methods of the Legal Aid Board are relatively easy to understand and discernible from the primary legislation on which it is based, the role of Independent Law Centres may be less so. This is not only because there are relatively few Independent Law Centres in the State with only limited geographic spread outside Dublin, but also because the Independent Law Centres, while having much in common with each other, do not pursue a homogenous model that is easily defined and described. To some extent this reflects the adaptability of the Independent Law Centres, a flexibility not replicated on the statutory civil legal aid scheme.

⁵⁷ Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (2nd edn, Institute of Public Administration, 2015).

Professor Whyte suggests that, between the pure service model of legal aid at one end of the spectrum and the purely strategic model at the other, there are four discernible models as follows:

- (i) The charitable model (legal services provided by lawyers on a voluntary basis);
- (ii) The judicare model (legal services provided by legal professionals but paid for by the State);
- (iii) The salaried model (lawyers employed directly by the State or an NGO to provide legal services);
- (iv) The mixed delivery model (combines elements of the judicare and salaried models).

While the first two models of legal aid are focused on individual service provision to those who cannot afford legal services otherwise, the latter two models may incorporate elements of both the service and strategic models.

The distinction between the service model and the strategic model in its simplest terms is that the service model focuses on the immediate legal issue presented by the individual. By contrast, the strategic model pursues a broader objective, often seeking to remedy collective problems through the use of law and not necessarily confining itself to dealing with legal problems on an individual basis without reference to a broader strategic objective. The strategic model is usually proactive in addressing issues and engages not only with litigation, but may also engage in legal education, legal empowerment and campaigns for law reform. This contrasts heavily with the Legal Aid Board's model, which is more demand led, dealing with individual applicants for legal aid, within a relatively narrow range of issues.⁵⁸ While helpful to those individuals accessing its services, this approach does little to deal with structural disadvantage or to inform policy and law reform.

1.4.2. The Pringle Report & Alternatives to the Service Model

Before moving on to examine the work of the Independent Law Centres and how that model fits within an overall scheme of civil legal aid, it is worth noting that the Pringle Report, in putting forward proposals for a "comprehensive" scheme of civil legal aid, did not recommend a purely demand led or service model of legal aid. The Report was a creature of its times, and was relatively modest in its recommendations, but did envision a Legal Aid Board that would address the legal needs of those in relative poverty in a pro-active manner, a vision that was never realised or implemented. The Report recommended that the Legal Aid Board would go

⁵⁸ It might be argued that the Legal Aid Board to some extent dictates the demand by failing to promote the full range of legal services it can provide and by dedicating its resources almost exclusively to family law, creating a perception amongst the public that this is the only area of law for which legal aid is available.

further than simply meeting immediate demand, and recommended that the Legal Aid Board disseminate information about the law to the public, engage in making proposals for law reform arising from its work, and also provide legal aid based on consideration of the public importance of the individual case (in other words, cases in the public interest).

While eschewing an approach based on activism in the absence of any real experience of the community law centre model, the Report was very clear that the Legal Aid Board should work on addressing “hidden” legal need, referring to the circumstances where, through a combination of factors, including poverty and absence of knowledge of rights, a person does not even recognise that they have a legal problem or that there is a legal remedy for their situation:

“The point at issue here is whether a comprehensive legal aid and advice scheme should concern itself with the process whereby hidden need becomes known or articulated need. Should the scheme be concerned, for example, with dissemination of information on aspects of the law which are likely to concern those in need and with research aimed at establishing the precise nature and extent of hidden need? Our view is that it should. Equality of access to the law is hindered not only by lack of money but also by lack of information. Financial support for litigation, on its own, certainly does not guarantee equality.”⁵⁹

While the establishment of FLAC pre-empted and created the context in which the need for a scheme of State funded legal aid was established, the failure to meet the ambition of the Pringle Report and to develop a network of community law centres as a response to social exclusion and marginalisation led to FLAC and other NGOs developing law centres independent of the State scheme, based on the activist model identified but rejected as possibly unhelpful or premature in the Pringle Report.

1.4.3. Work undertaken by FLAC & Other Independent Law Centres

The history of the Free Legal Advice Centres was documented in a 2003 report which also recounted the development of the other Independent Law Centres that had been established at that point.⁶⁰ Essentially there have been two broad types of Independent Law Centre that have emerged since the establishment of FLAC in 1969.

First, there is the community-based law centre. FLAC established Coolock Community Law Centre (‘CCLC’) in 1975 to make the case for the establishment of further such Community Law Centres across the country. Community engagement and the direct involvement of the

⁵⁹ Pringle Report, at para. 1.3.5.

⁶⁰ Access to Justice for All, The History of the Free Legal Advice Centres, 1969-2003.

community in managing the centre ensured that it was responsive to the needs of the local community, both in terms of individual case work and also taking on issues of strategic importance, campaigning on issues such as social welfare cuts, the referendum on divorce and reform of family law. Coolock Community Law Centre later became known as Northside Community Law Centre and, having expanded its geographical reach to manage a law centre in Limerick in 2012, is now known as Community Law and Mediation. More recently, Community Law and Mediation has marked a new departure by taking on the issue of environmental rights, demonstrating the adaptability of the community law centre model. CLM established a centre for environmental justice in 2021 to encourage awareness of the impact of the environment on the community and to seek remedies for environmental wrongs such as pollution, low quality housing stock, with a view to ensuring that those with least responsibility for environmental damage do not bear the greatest burden in respect of its consequences.⁶¹

Ballymun Community Law Centre ('BCLC') was established in 2002. Before the establishment of BCLC, and despite the size of its population, a law centre had never been established by the Legal Aid Board in Ballymun and there were no private solicitors based in the area. Similar to the more recently established Community Law and Mediation in Limerick (established in 2012), Ballymun was established as part of a regeneration programme led by the local authority, which sought not only to regenerate the housing stock, but also to tackle social deprivation and put resources into the community.

Similarly to CLM, BCLC engages in training and education around legal rights, law reform and advocacy and resourcing the community in relation to legal matters of relevance in the area, as well as providing traditional legal advice and representation. One of the unique features of BCLC, when first established, was collaboration with the Legal Aid Board, whereby the Legal Aid Board seconded one of its solicitors to manage the Law Centre. While that arrangement has since ceased, it does flag the potential benefits of the Legal Aid Board engaging in the strategic model, in partnership with an Independent Law Centre.

A second type of Law Centre has emerged over the past 20 years in response to the complex legal needs among groups that have common legal problems rather than coming from a common geographical community. Specialist independent law centres⁶² have been established to take a strategic approach to addressing the legal issues facing identified groups. Sometimes this is because of a lack of legal expertise amongst practitioners in specialist areas and the unavailability of legal aid in the relevant area.

⁶¹ See <https://communitylawandmediation.ie/centre-for-environmental-justice/>.

⁶² Professor Whyte refers to these as law centres serving "distinct constituencies of interest."

Examples of the development of such specialist Law Centres include the establishment by the Irish Traveller Movement of a legal unit in 2003, later fully established as an Independent Law Centre in 2006. Similarly, the Refugee Council of Ireland and the Immigrant Council of Ireland have established Independent Law Centres to address the legal issues arising from the increase in asylum seekers and immigrants arriving in the State. Notably, these Independent Law Centres did not emerge as stand-alone initiatives, but rather developed to advance the work of existing NGOs in promoting and enforcing legal rights.

There are two further examples of the development of specialist Law Centres during this period. Mercy Law Resource Centre was established in 2009 as a specific response to the needs of the homeless and those at risk of homelessness in the Inner City Dublin area. While pre-dating the housing crisis, the specialisation of this Independent Law Centre in the housing area has been very effective in addressing the crisis of homelessness facing so many families and individuals in recent years and contributing to the discourse on housing rights that has emerged, including the proposal for a referendum on the right to housing.

Transparency International Ireland is the most recently established Independent Law Centre, again as an additional aspect of the work already being carried out by that organisation to counter corruption internationally and nationally. The Transparency Legal Advice Centre is somewhat different from the other independent Law Centres described above, in that it provides advice only rather than undertaking strategic casework. This work can be seen as something of an addendum to the core work of the organisation in terms of law reform and policy development and to this extent may be more in line with the service model than the strategic model identified described above.

Finally, over the past few years, FLAC has also increasingly targeted its legal services on specific groups who experience social exclusion, marginalisation and inequality. In 2017, FLAC was invited to be an associate partner in the JUSTROM Programme, a joint programme of the Council of Europe and the European Commission, aiming to improve the access to justice for Roma and Traveller women. Within JUSTROM, FLAC supported the running of legal clinics for Travellers and Roma until early 2018. Since 2020, FLAC has a dedicated legal service for Travellers which is supported and funded through a steering group of national Traveller organisations. This service fills the gap left by the loss of funding for the Irish Traveller Movement Independent Law Centre which ceased to operate in 2014, but adopts a similar approach to its work. In addition FLAC received a small amount of State funding to run a legal clinic for Roma in 2019 and separately established an LGBTQI legal advice clinic in 2022. All of these services have emerged from a recognition that certain groups experience significant inequality that is not addressed through mainstream legal services and where legal aid is absent or not sufficiently responsive to meet the need concerned.

1.4.4. Gaps in Provision

It is evident that the existing network of Independent Law Centres, although carrying out very valuable work, do not meet the need unaddressed by the Legal Aid Board. This is because the Independent Law Centres are far from comprehensive in the areas of law they cover and also because, with one exception, those law centres are all based in Dublin, creating a geographical challenge to accessing their services or undertaking strategic work on behalf of geographical communities outside Dublin.

As identified by Professor Whyte, those legal services that pursue a strategic model have four characteristics that separate the model from the Service model:

“The Strategic version of the model has four additional characteristics. It is proactive (that is it pursues “a proactive strategy of targeting the local problems which [it wishes] to focus on, collecting data and making submissions to relevant bodies and attempting to reach potential clients by advertising, circulars and public meetings”); controlled (it only takes on certain types of case and in limited numbers); community orientated (its focus is on the problems faced by the community and on community organisation) and, finally, committed to law reform through litigation strategy or lobbying.”⁶³

The element of control is a very significant feature of the Independent Law Centres, as the demand for the services they provide would simply overwhelm any capacity to act strategically or to build on the outcome of case work, and so all the Independent Law Centres have identified priorities in terms of case work, and are very clear in the limitations on their resources, generally focusing on case work that will bring the greater benefit to the particular issue or community in question. This is quite different from the service model that is focused on the needs of the individual rather than the potential of the case to bring about greater change.

Further, there are easily identifiable areas of need where there is no Independent Law Centre. So, as identified by Professor Whyte, there was an attempt to establish a Children and Young Peoples Law Centre which operated briefly but did not ultimately become permanently established.⁶⁴ In addition FLAC and the Irish Council for Civil Liberties established a joint project to advance the rights of persons with Disabilities called Disability Legal Resource, which operated for a period of time, but was unable to continue its work due to a lack of

⁶³ Ibid. at p.455.

⁶⁴ Ibid., at p. 498.

funding.⁶⁵ At present there is no legal service dedicated to the needs of persons with disabilities and this is a significant gap, particularly in a context where the State has ratified the UN Convention on the Rights of Persons with Disabilities.

1.4.5. Funding of Independent Law Centres

While each receives some form of State funding, independent law centres have been consistently under-resourced. By contrast to the Legal Aid Board's annual budget of around €40m, the most recent audited accounts show that FLAC operates on a budget of €1.1m per annum, CLM on a yearly budget of €820,000, BCLC on €173,000, and Mercy Law on €330,000. Budgetary constraints limit the extent to which independent law centres may recruit ancillary staff such as advocacy workers, and each centre relies on *pro bono* and volunteering to provide their services and carry out their work.

1.4.6. Conclusions

It is evident that a number of communities and groups in Ireland have adopted the strategic model of legal aid to advance the rights of their constituencies by the establishment of Independent Law Centres. However, growth in this area has been stymied to a large extent by the limitation on resources, with philanthropic funding rarely being dedicated to legal initiatives and public funding being directed to the service model of delivery. On the other hand, the Pringle Report had envisaged that the Legal Aid Board, while focusing on service delivery, would also include elements of the strategic model.

1.5. Context: The Broader Access to Justice Landscape

1.5.1. Other Forms of Publicly-Funded Legal Assistance

In addition to the Independent Law Centres, there is a complex array of interconnected publicly-funded legal assistance schemes or services. There are several statutory and non-statutory bodies, and voluntary bodies, which receive public funding and which have varying levels of experience and functions in relation to the provision of legal information, advice, advocacy, legal representation, and law reform.

These include the Citizens Information Board, IHREC, the Workplace Relations Commission, the Courts Service and other tribunals, and the non-statutory MABS and Abhaile schemes (the work of each of which is considered in detail elsewhere in this submission), as well as bodies such as the Competition and Consumer Protection Commission.

⁶⁵ Access to Justice for All, The History of the Free Legal Advice Centres, 1969-2003 at p. 35.

1.5.2. Pro Bono

The legal profession has a privileged role and a unique purpose and position in the legal system, in society, and in matters of justice. This gives it the means, the opportunity, and also the duty, to promote and, in collaboration with civil society and others, to assist in securing access to justice and respect for human rights and the rule of law. An important part of this duty is providing legal services at no cost to those who cannot afford it. FLAC believes that *pro bono* work is a professional responsibility of any lawyer and represents an important part of the landscape when it comes to tackling unmet legal need.

The legal profession in Ireland and elsewhere has traditionally contributed to meeting otherwise unmet legal needs through a number of mechanisms, such as “no foal no fee” and other arrangements. More recently there has been the development of a more formal structured *pro bono* culture. Two large Dublin firms have appointed *pro bono* associates and one firm has a *pro bono* partner. *Pro bono* work has a particular role, capacity, flexibility and potential to meet at least some of the otherwise unmet legal needs of people and groups experiencing poverty and disadvantage, whose needs will never be met by traditional lawyering and who require tailored, targeted supports.

FLAC operates PILA, the Public Interest Law Alliance, which runs a Pro Bono Referral Scheme that facilitates NGOs, community groups and independent law centres in getting *pro bono* legal assistance from members of the legal profession. The Pro Bono Referral Scheme is primarily focused on supporting social justice community and voluntary organisations. PILA works to inspire and engage lawyers in *pro bono* work by supporting a culture of legal practice that actively delivers free legal assistance to those who are unable to pay for or access legal help. 45 law firms with over 2000 solicitors, 8 in-house legal teams and more than 350 barristers are part of the alliance and provide their services free of charge. 170 social justice community and voluntary organisations and Independent Law Centres can obtain legal assistance through this alliance.

Pro bono in Ireland has grown steadily in Ireland in recent years, particularly with the launch of *Pro Bono Pledge Ireland* in 2020, which asks the legal profession to commit to provide a minimum aspirational target of 20 *pro bono* hours per lawyer per year. The Pledge provides a common definition of *pro bono*, a commitment to a minimum aspirational target of 20 *pro bono* hours per lawyer per year, and a mechanism to benchmark progress through annual reporting of anonymous *pro bono* data. Signatories to the *Pro Bono Pledge Ireland* commit to change the existing status quo and to correcting the imbalance of a justice system weighed in favour

of those who can afford access to that justice system. The Pledge has 100 signatories,⁶⁶ representing 2,500 legal practitioners, who delivered over 31,000 hours of *pro bono* work in its first year.⁶⁷

FLAC, PILA and *Pro Bono Pledge Ireland*⁶⁸, are very clear that, while *pro bono* has a valuable and important role to play in delivering legal services to those in need, it is not a substitute for an adequately funded system of civil legal aid.

While the Pro Bono Referral Scheme is primarily focused on supporting organisations, PILA has established a number of collaborative projects and strategic partnerships to address individual needs currently not met by civil legal aid, such as:

- the provision of staff to assist in FLAC’s telephone information line;
- early legal advice and representation for asylum seekers;
- advice for victims of domestic violence who are representing themselves in family law proceedings; and
- representation for those experiencing or at risk of homelessness.

Another development is the Bar of Ireland Voluntary Assistance Scheme (‘VAS’). VAS provides assistance to charities and civil society groups to either the requesting organisation itself – for legal issues arising for the organisation - or to an individual as a client of a requesting organisation.⁶⁹

It is important to emphasise that, given specialisation issues, *pro bono* does not operate in a vacuum and needs an infrastructure provided through a strong network of independent law centres, and advice and advocacy organisations. In this way, while *pro bono* has a role as a contributor to enabling access to justice, it should be by adding value to and complementing existing services and legally aided provision. There are limits to what *pro bono* can offer as it is dependent on the skills and availability of members of the legal profession. Issues of conflict may arise. *Pro bono* is not, and cannot be, a replacement for a properly resourced, community based, national legal aid system.

1.6. Context: Known & Unknown Unmet Legal Need in Ireland

⁶⁶ Signatories regard the services provided by the Legal Aid Board as vital for individuals and families of limited means. Pro bono legal services are not, nor can they be, a substitute for a properly funded system of legal aid.

⁶⁷ See: <https://www.pila.ie/resources/pro-bono-pledge-impact-report-2022/>.

⁶⁸ Pro Bono Pledge Ireland specifically states, “We regard the services provided by the Legal Aid Board as vital for individuals and families of limited means. Civil legal aid in Ireland, however, is not adequately resourced to bridge the gap in access to justice, leaving critical legal needs unmet. Pro bono legal services are not, nor can they be, a substitute for a properly funded system of legal aid.”

⁶⁹ VAS provides assistance to charities and civil society groups to either the requesting organisation itself – for legal issues arising for the organisation - or to an individual as a client of a requesting organisation. See: <https://www.lawlibrary.ie/legal-services/pro-bono-services/>

A recent presentation⁷⁰ by Professor Pascoe Pleasance, Professor of Empirical Legal Studies, UCL, suggests that Ireland is an outlier internationally as regards the extent to which unmet legal need has been researched and identified. This is considered in further detail in the next chapter of this submission. However, even in the absence of such research, it is possible to identify important gaps in legal need. Indeed, this submission in its entirety is informed by what FLAC's work has illuminated about the known and unknown unmet legal need in Ireland. We can conclude for, example, from the experience of FLAC's Roma Legal Service and Traveller Legal Clinic that there is significant unmet need in the areas of housing, homelessness, discrimination and social welfare. We also know from our second tier work in the area of debt, where we provided technical advice to MABS, that there is significant unmet legal need in the area of debt. We are also aware that there is significant unmet legal need in areas like complex social welfare appeals and disability, which is not being dealt with comprehensively on a significant scale by the Legal Aid Board, Independent Law Centres or the Citizens Information Board.

Services such as FLAC's telephone information line also provide significant insights into areas of unmet legal aid. First, the overwhelming demand for that service must be highlighted:

- 48,035 calls made to FLAC's information line during their opening hours in 2022, which includes repeated attempts to get through.
- Based on unique phone numbers it appears that 18,083 people called the information in 2022.
- 13,355 calls were answered by the information line team in 2022.
- When looking at just unique numbers, it would appear that 75% of people who called eventually got through.

In 2022 over 99% of calls to the Telephone Information Line were from members of the public looking for legal assistance, with less than 1% of calls from organisations or State Bodies.

14% of callers to the Telephone Information Line had contacted another organisation or body before contacting FLAC and were referred on to us, with over 900 callers to our Information Line referred to us by a Citizens Information Centre, 161 callers referred to us by the Workplace Relations Commission, 109 callers referred to us by the Legal Aid Board, 38 from the CCPC, 34 from the Courts Service, 29 from the Legal Services Regulatory Authority, 28 from MABS, 23 from Women's Aid, 17 from Threshold, and 13 from the Law Society:

⁷⁰ Chief Justice's Working Group, *Civil Legal Aid Review: An Opportunity to Develop a Model System in Ireland Conference*. Conference Report forthcoming.

- Of the 922 callers referred to us by a Citizens Information Centre, 29% of referrals were in relation to a family law query and 19% in relation to an employment query, the next most frequently referred query were queries about a will (8%).
- Of the 161 callers referred to us from the Workplace Relations Commission, 28% had a query about contract terms, 13% had a query about a dismissal, 10% had a query about redundancy and another 10% had a query about grievance procedures
- Of the 108 callers referred to us by the Legal Aid Board, half of these service users had a family law query, this included 20 queries related to a divorce or separation, 16 queries related to custody, access or guardianship, 12 queries related to domestic violence, and 10 queries related to maintenance
- Of the 23 callers referred to us from Women's Aid, 9 callers had queries about domestic violence, and 8 callers had a query about a divorce or separation

The gender of callers to the information line was recorded in 86% of calls answered last year. Based on those figures, 58% of callers to the information line were female, 37% of callers to the information line were male, 5% of callers were calling on behalf of someone else, and less than 1% of callers identified as transgender or non-binary.

The location of callers to the information line was recorded in half of the calls answered last year. Based on the calls where location was recorded, 53% of callers to the information line called from Dublin.

The age group of FLAC service users can only be determined from a new data collection form rolled out in 2022:

- 60% of service users are aged 26-45
- 27% of service users are aged 46-65
- 9% of service users are aged 66+
- 3% of service users are aged less than 25

In relation to the nature of the calls received:

- 30% of callers to the Telephone Information & Referral Line had a family law query
- 15% of callers had an employment law query
- 7% of callers had a query about a will
- 6% of callers had a query related to a criminal matter
- 6% of callers had a query about housing
- 5% of callers had a consumer query

2896 callers (21%) to the information line were provided with an appointment for a FLAC clinic to receive further advice.

30% of callers to the Information line were advised to contact another agency or body for further assistance, i.e. they could not get all the help that they needed from the information line.

7% of callers (969) to the Information Line in 2022 were lay litigants. When these 969 callers were asked why they are a lay litigant, 771 provided a reason:

- 253 callers (33%) said that they cannot afford a private solicitor
- 90 callers (12%) said they are above the threshold for legal aid
- 69 (9%) callers quoted delays in waiting for legal aid
- 64 (8%) callers were not happy with their private solicitor
- 53 (7%) callers were not aware of legal aid / didn't know it existed
- 33 (4%) callers did not pass the merits test for legal aid
- 31 (4%) callers were outside the areas for which legal aid can be obtained
- 25 (3%) callers were did not pass the means test for legal aid
- 25 (3%) callers were not happy with their legal aid board solicitor
- 16 (2%) had a smalls claims issue

Separately, this submission is informed by the findings from Civil Legal Aid roundtables held by FLAC in 2021. Those four roundtables sought the views of groups concerned with: Housing, Domestic Violence, Disability Rights, and Immigration/International Protection. The findings which emerge from these roundtables are particularly relevant to the quality of civil legal aid provided in Ireland (considered in chapter 7 of this submission).

2. Civil Legal Aid Principles, the Review & the New System of Civil Legal Aid

FLAC has identified a number of principles which should inform the work of the Review Group and which should underpin the new scheme of public legal assistance. Each of these principles and their implications are explored in detail throughout this submission.

2.1 Access to Justice & the Rule of Law

2.1.1. Access to Justice

Underpinning the work of the Review Group should be the recognition of the fundamental right of access to justice, with the implementation of its recommendations as a primary way in which such a right can be recognised and vindicated. Access to justice principles should be the explicit aim of any future authority responsible for public legal assistance.

Meaningful understanding of access to justice is crucial for the development of effective public legal assistance models and financing. There are legal, social and economic aspects to access to justice. Access to justice means people becoming aware of their legal rights, being supported to enforce those rights, and being able to obtain just resolution of their legal problems.

Access to justice is a fundamental right and is recognised as such under the Constitution as well as a range of regional and international instruments.⁷¹ In the absence of access to justice,

⁷¹ The right of access to the courts, an essential element of the right of access to justice, has long been recognised as a fundamental right under the Constitution: see e.g. [cite the key authorities from Kelly e.g. Macauley] The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right of fair procedures and states that “all persons shall be equal before the courts and tribunals”. International and regional instruments which are concerned with the promotion of equality, are also concerned with the right of access to justice. For example, Article 7 of the Race Directive and Article 9 of the Framework Employment Directive and Article 17 of the Gender Recast Directive obliges EU Member States to ensure that judicial and administrative procedures are available to victims of discrimination to enforce their right to equal treatment. The Race and Gender employment and goods and services Directives require member states to have designated bodies for the promotion of equal treatment and to ensure that the competencies of these bodies include providing independent assistance to victims of discrimination in pursuing their claims. The Aarhus Convention also contains provision concerning access to justice for environmental issues.

people are unable to exercise and vindicate their rights, have their voices heard, challenge discrimination, or hold decision-makers and executive power to account.⁷²

2.1.2. Access to Justice and the Rule of Law

Related to access to justice is the rule of law. The rule of law is an essential component of democracy requiring that both the governed and the government are equally subject to the law of the land:

“Courts exist in order to ensure that the laws made by parliament and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by parliament may be rendered nugatory, and the democratic election of member of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

Access to the courts is not, therefore, of value only to the particular individuals involved...”⁷³

Publicly funded legal assistance contributes to ensuring that the rule of law exists in reality as well as in principle. Unless rights are enforceable at an affordable cost, the rule of law is meaningless.

2.1.3. Access to Justice & Poverty

Unless the right of access to justice is vindicated, the risk of social and economic exclusion is greatly increased. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that groups that suffer from structural discrimination and exclusion are disproportionately represented among the poor, and encounter additional barriers to accessing justice:

“From a human rights perspective, poverty is a ‘a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights’. Therefore, fighting poverty not only requires improving income levels and access to housing, food,

⁷² See United Nations Development Programme website at: <http://bit.ly/204OeWJI> and European Union Agency for Fundamental Rights and Council of Europe (2016) Handbook on European law relating to access to justice, Luxembourg: FRA and CoE, p.16.

⁷³ Lord Reed in *R(UNISON) v Lord Chancellor* [2017] UKSC 51

education, health services and water and sanitation, but also that persons living in poverty have the resources, capabilities, choices, security and power necessary to enjoy the whole spectrum of human rights. Access to justice plays a crucial role in all parts of this equation. The exclusion of people living in poverty from the protection provide by the law denies them the opportunity to improve their enjoyment of rights.”⁷⁴

2.1.4. The Cost of Lack of Access to Justice

Recent research has demonstrated the connection between legal problems and issues in accessing employment, debt, homelessness, and mental and physical health issues. In 2016, the Canadian Forum on Civil Justice’s “Survey of Everyday Legal Problems and the Cost of Justice” report made stark findings on the consequences of experiencing legal problems in terms of health and employment.⁷⁵ The results of such surveys suggest that the cost of unresolved or prolonged legal issues to public services far outweighs the cost of investing in legal aid and access to justice which may prevent “knock-on” problems from arising. There is also a growing level of understanding and research in relation to the connections between access to justice and health outcomes, including how access to justice results in significantly better health outcomes.

Recent research by *Pro Bono Economics* for the UK’s Administrative Justice Council provides an example of straightforward metrics through which the economic benefits of measures to improve access to justice can be quantified. That research considered the poor quality of first-instance social welfare decision-making, and the avoidable economic cost of applicants for disability and care payments (“Personal Independence Payments” or “PIPs”) being forced to wait for revised decisions to issue before their payments were awarded:

“Claimants who are already in vulnerable positions as they await a revised decision are more likely to experience increased stress and uncertainty, financial hardship, increased risk of homelessness and reliance on food banks, and reduced mobility and ability to deal with their health conditions...

The costs of these indirect impacts – particularly on already stretched NHS services and local authorities – could potentially be substantial. For example:

⁷⁴ *Access to Justice for persons living in poverty: A Human Rights approach*. SSRN Electronic Journal.

⁷⁵ Canadian Forum on Civil Justice (2016), *Everyday Legal Problems and the Cost of Justice in Canada*. Available at: <https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>

- If 1 in 10 claimants who successfully had their decision changed in 2019/20 have to pay one additional visit to the GP, then it would cost the NHS an additional 2,300 GP hours, at a cost of around £600,000 per annum.
- If 1 in 20 of those who successfully had their decision changed in 2019/20 have to pay one more visit to A&E, for example, then it would cost around £1.1 million per annum.
- If 1 in every 100 people who successfully had their decision changed in 2019/20 required statutory homelessness support whilst they await the outcome of their [review] or appeal, it could cost an additional £4.4 million.
- If 1 in 200 of those who successfully had their decision changed in 2019/20 require community social care in the interim, then it could cost an additional £9.9 million.”⁷⁶

2.2. Equality, Human Rights & Poverty-Proofing

The review of the civil legal aid system is a key instance of activity by the Department of Justice to which the Public Sector Equality and Human Rights Duty applies. Section 42 of the Irish Human Rights and Equality Commission Act 2014 requires public bodies, in carrying out their functions, to have regard to the need to eliminate discrimination, to promote equality of opportunity and treatment, and to protect human rights. The Public Sector Equality and Human Rights Duty should be a core consideration in the review of the legal aid system, in the work of the Review Group, and in its recommendations. It must have regard to what is required from a human rights and equality perspective by the State in the provision of public legal assistance. These requirements are explored in detail in the subsequent five chapters of this submission and imbue the submission as a whole.

In its consultation process, the Review Group should seek to engage with individuals and groups who come within the discriminatory grounds, members of the discriminatory grounds in the equality legislation and people living in poverty and extreme poverty. The duty should also be reflected in the recommendations of the Review Group.

Finally, the Review Group must be cognisant of the implications of the duty for bodies other than the Department of Justice and Legal Aid Board, particularly insofar as it creates an obligation for those bodies to have regard to the right of access to justice. This is explored in further detail in chapter 10 of this submission.

⁷⁶ Pro Bono Economics (2021), *The cost of not getting Personal Independence Payment decisions right first time*, pp.4-5. See: <https://ajc-justice.co.uk/wp-content/uploads/2021/11/thecostofnotgettingpersonalindependencepaymentdecisionsrightfirsttime.pdf>

2.3. Measuring Unmet Legal Need & Putting the User at the Heart of the System

2.3.1. Measuring Unmet Legal Need

The lack of knowledge in relation to unmet legal need is a significant obstacle to creating a user-centred system of public legal assistance. As discussed in chapter 1, there is no definitive knowledge of the extent of unmet legal need in Ireland. Ireland is an outlier in that regard.

Legal problems are not randomly distributed across populations, but disproportionately affect disadvantaged groups and individuals and can create and exacerbate disadvantage. Meaningful understanding of legal needs and legal capability is crucial for the development of effective public legal assistance models and financing. However, there is currently no definitive information available in relation to the extent of unmet legal need and legal capabilities. Legal capability includes the knowledge and confidence that are needed to cope with day-to-day legal situations, alongside the awareness of legal and political mechanisms for effective reform.

Legal needs surveys provide an empirical basis for understanding how peoples' justice issues arise and are experienced. Legal needs surveys investigate the experience of legal problems from the perspective of those who face them (a 'bottom-up' perspective) rather than from that of legal professionals, courts etc. ('a top-down' perspective). They seek to identify and explore the full range of responses to problems and, within this, all the sources of help and institutions that are utilised in pursuing problem resolution. As discussed in the previous chapter, the legal assistance landscape in Ireland is fractured and disparate.

Surveys provide a uniquely comprehensive overview. The OECD/Open Society report on "Legal Needs Surveys and Access to Justice", provides practical guidance on pitfalls, key lessons and effective practices in the development of legal needs surveys.

Systemic research on unmet legal need is an essential component of improving the quality and availability of public legal assistance. Research is vital to help us understand where legal need is greatest and to prioritise accordingly. Access to justice indicators built from legal needs surveys can increase the visibility of civil justice barriers and highlight the experience of particular groups and communities.

The implication for a legal assistance system of measuring unmet legal need are as follows:

- Once legal needs have been measured, the public legal assistance system should be designed around the needs of system users.
- Public legal assistance services should be targeted so as to have maximum impact.
- Outreach services are required to reach the most 'legally needy', so as to leave nobody behind.

- Joined-up problems require joined-up solutions, which are seamless from the user perspective.
- Services/interventions should be timely, fitting with users' needs and capabilities.
- Services/processes should be capability appropriate.
- The economic impact of unmet legal need can be measured and understood.

2.3.2. Putting the user at the heart of the system

The Review Group should make recommendations on the design of a new public legal assistance system, from the perspective of the user and potential user to ensure that the scheme can deliver a legal assistance service that addresses the real legal needs of the growing and diverse population. The more focused a justice system is on the people who use it, the more relevant the system will be to people's lives and the more it will contribute to just outcomes.⁷⁷ Placing users at the heart of the delivery of the scheme should ensure that the wider principle of access to justice can be realised.

Human centred design is now Government policy.⁷⁸ The user includes not just individuals but communities, groups, and people and groups who come within the discriminatory grounds in the equality legislation.

A sample of potential users should be identified and the Review Group should map out how they will be able to receive the whole range of legal assistance under a new public legal assistance system. Suggested users based of FLAC's work include:

- A homeless person seeking emergency accommodation;
- A Roma person applying for supplementary welfare allowance;
- A Traveller seeking Traveller-specific accommodation;
- A person living in direct provision experiencing domestic violence;
- Local authority tenants wanting to complain about substandard accommodation;
- A Trans person seeking appropriate health care;
- A person with a disability in a residential institution bringing a discrimination claim against the service provider;
- A person in long-term mortgage arrears facing repossession proceedings;
- A community group wanting to bring proceedings about the impact of air pollution on the health of their children;
- An employee wanting to bring a claim of sexual harassment against their boss;

⁷⁷ (OECD, 2021) OECD Framework and Good Practice Principles for People-Centred Justice. See: <https://www.oecd.org/publications/oecd-framework-and-good-practice-principles-for-people-centred-justice-cdc3bde7-en.htm>

⁷⁸ Designing Our Public Services- Design principles for Government in Ireland. See: <https://www.ops.gov.ie/designprinciples/>

- A person living in a rural area with limited public transport and no access to private transport.

2.4. Best Practice

Beyond meeting the State's obligations under the Constitution, European and international law, the Review Group's recommendations – and the operation of any new system of public legal assistance – must be informed by international best practice.

Australia and Canada serve as valuable comparators to Ireland for best practice in legal aid systems and especially in relation to the provision of early legal advice and legal assistance for hard to reach groups. Both jurisdictions have a high degree of similarity in the structure of their justice systems and have established good practice in this area which Ireland could usefully draw on. In addition, civil legal aid systems within the EU also serve as valuable reference points for Ireland due to our shared regional legal system within the Union.

There is no one single best practice model of civil legal aid. In fact, best practice requires flexibility and innovation and tailoring to the specific national context. This allows services to respond and adapt to the specific needs of communities.

A hallmark of best practice is coordination between bodies providing different forms of public legal assistance, and between those bodies and other public services, including health services, and community groups. In Ireland, this means a new public legal assistance authority must be able to coordinate with other aspects of the public legal assistance architecture, such as the Citizens Information Board, the Workplace Relations Commission, IHREC and independent Law Centres, in terms of their information, advice and advocacy functions. It also needs to be flexible enough to establish or resource the co-location of services in health and community settings.

International best practice informs this submission as a whole. Notable principles of best practice which emerge include:

- Comprehensive measurement of unmet legal need, as set out in the OECD guidance.
- User-centred, rights-based and outcome-focussed civil legal aid legislation and infrastructure. The Legal Services Society Act, which governs the Legal Services Society of British Columbia, expressly provides for such an approach. It also expressly mandates the Legal Services Society to work in flexible and innovative ways, to give priority to assessing and identifying legal needs of low-income individuals, and to “to coordinate legal aid with other aspects of the justice system

and with community services”. That legislation is referenced throughout this submission and discussed in detail in chapter 8.

- The provision of legal information through a diverse range of means including a properly resourced telephone line, buses, kiosks, boats, and an accessible website.
- Targeted Early Legal Intervention services to provide preventative justice services to hard to reach groups. Particular regard should be had to examples of such services in Australia, including through the use of “legal health checks”, and to integrated services such as Health Justice Partnerships. (See further: chapter 9).
- The use of ‘closed’ private practitioner panels (as is the case for representation before the Mental Health Tribunal) where properly paid lawyers receive frequent and specialised training.
- Delivery of legal service through a network of properly resourced community law centres in every disadvantaged community, and specialised law centres to assist vulnerable communities and individuals, including but not limited to: Travellers; Roma; Minority ethnic groups; Persons with Disabilities; Children and Young People; the LGBTQI Community; refugees; low-paid, migrant and precarious workers; in relation to Environmental Rights.
- The use of flexibility in the application of criteria for accessing legal aid with an overarching discretion informed by human rights principles. (See further: chapters 5 and 6)

2.5. Recommendations

These principles, which inform the entirety of this submission, give rise to a number of preliminary recommendations.

The recognition of the fundamental human right of **access to justice** and the link between access to justice and poverty, social inclusion, health outcomes and the rule of law should underpin the work of the Review Group.

The Review Group should **propose a new Legal Assistance Authority** with an overarching function of achieving access to justice, and all necessary ancillary powers and functions to achieve this. Further, the Review Group should recommend that this new body is resourced appropriately in order to achieve its aims.

The lack of knowledge in relation to **unmet legal need** is a significant obstacle to creating a user-centred system of public legal assistance. There is no definitive knowledge of the extent of unmet legal need in Ireland:

- The Review Group should undertake an initial proper and comprehensive mapping of all forms of public legal assistance, provided by statutory and non-statutory bodies and the Independent Law Centres.
- The Department of Justice and/or the Review Group should engage in a legal needs analysis as matter of urgency.
- The Review Group must proactively engage with groups and individuals experiencing poverty, disadvantage and discrimination about the possibility of fundamental reform, to ensure evidence-based and user-led policy recommendations and solutions.
- The Review Group should use the human-centred design approach (and identify a number of vulnerable individual and group personas) and map out how they will be able to receive the whole range of legal assistance under a new public legal assistance system. The Review Group and new Legal Assistance Authority should use this human-centred design approach on an ongoing basis.
- The new Legal Assistance Authority should carry out research on an ongoing basis into unmet legal need, and legal capabilities to ensure evidence led approaches to the design and delivery of services and in order to prioritise and target resources. The regular measurement of unmet legal need among people living in poverty and deprivation should be a function of the new body. The Legal Assistance Authority should establish indicators of access to justice derived from legal needs surveys.

The Review Group should research, identify and make recommendations based on **best practice** models, in particular but not limited to:

- The provision of early legal advice and assistance to vulnerable and hard to reach groups and individuals.
- Best practice models of community, and public legal education.
- Best practice models of means and merits tests.
- Best practice models of legal assistance.

The Review Group should proactively engage with the Independent Law Centres and analyse these alternative models of legal assistance from a best practice perspective.

The Review Group (and subsequently the new Legal Assistance Authority) should engage with the Law Society of Ireland and the Bar Council of Ireland in relation to the establishment of a **Committee to develop *pro bono*** within the legal profession working with existing *pro bono* structures, such as PILA, Pro Bono Pledge Ireland, the Voluntary Assistance Scheme (VAS), in order to facilitate better coordination and to maximise the added value potential of *pro bono* to complement public legal assistance.

The Review Group should research and identify **the equality, human rights and poverty proofing standards** that apply in relation to a legal aid system and these standards should guide the work and recommendations of the Review Group.

The **Public Sector Equality and Human Rights Duty should be a core consideration** in the Review of the legal aid system, and should inform the work of the Review Group and in its recommendations. The Review Group should have regard to what is required by the State from a human rights and equality perspective in the provision of public legal assistance.

In its consultation process, the Group should seek to **engage directly with individuals and groups who come within the discriminatory grounds** in the equality legislation **and people living in poverty and extreme poverty**.

The Review Group should outline in future reports **how it has complied with the Public Sector Equality and Human Rights Duty**.

3. Civil Legal Aid, Equality & Human Rights

Human rights and equality are key principles which must inform the work of the Review Group. The State has significant obligations under the Constitution, European and international law which must inform the design and operation of the any system of civil legal aid.

The current civil legal aid scheme has been subject to criticism by many UN and European human rights bodies.⁷⁹ In particular, its restrictive scope has been repeatedly criticised by international human rights bodies for its disproportionate negative impact on vulnerable and marginalised populations.

It is likely that the current system of civil legal aid is, in a number of respects, in breach of Ireland's obligations, including but not limited to the European Convention of Human Rights, and, insofar as it falls within their scope, the Charter of Fundamental Rights of the European Union, Article 19(3) TEU, and the Aarhus Convention. It also falls short of a number of international legal standards and guidelines. Recent judgments of the Supreme Court have also highlighted flaws with the current system.⁸⁰

3.1. European Convention on Human Rights

3.1.1. Airey

Airey v. Ireland was undoubtedly a seminal case in both international law and Irish law for the provision of state funded civil legal aid. In summary, Article 6 of the European Convention on Human Rights guarantees the right to a fair trial. The European Court of Human Rights found that '[Article 6(1)] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.'⁸¹ The *Airey* judgment held that

⁷⁹ These chapters draw very heavily on two articles by Síofra O'Leary, Judge, President of Section V, European Court of Human Rights-*"Reflecting on Access to Justice from ECHR and EU perspectives"*-Report of the Chief Justice's Working Group Access to Justice Conference 1st and 2nd of October 2021 and a paper first delivered at the FLAC conference, EU Charter and the ECHR: Practice and Potential, held at the Incorporated Law Society on 18 October 2019, which was subsequently published as *"The Legacy of Airey v Ireland and the Potential of European Law in Relation to Legal Aid"* DULJ 42(2).

It also draws heavily on a report *"Civil Legal Aid in International Law,"* 13 April 2022 prepared for FLAC by Masters in Laws (LL.M) Students (Baker, Gallagher, McAuley, Nakayenga, Parkinson, Pigott, Pipania, Sutherland, Tso, Vos) and lecturers David Fennelly and Colin Smith.

Thanks also to Aoife Doonan BL for her assistance.

⁸⁰ In *SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd*, a case decided in 2018, the then Mr. Justice Clarke stated: *"I remain very convinced that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. [...] It does seem to me that this is an issue to which the legislature should give urgent consideration."* [2018] IESC 44, § 2.5. See also his comments in *Persona Digital Telephony Ltd v. Minister for Public Enterprise*, albeit in the context of third-party funding, [2017] IESC 27.

⁸¹ *Airey v. Ireland*, no. 6289/73, 9 October 1979.

Ireland had violated Ms Airey's rights under Article 6 and 8 of the ECHR. This set a significant precedent that the State may be compelled to provide legal assistance and aid under Article 6(1) ECHR when it is 'indispensable for an effective access to court':⁸²

"The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."

It is important to note that the judgment of the European Court of Human Rights did not expressly provide for civil legal aid in all circumstances. It was stated:

'It is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1.'⁸³

However, the Court acknowledged that at times positive duties are incurred onto the State to ensure the fulfilment of rights.⁸⁴ The *Airey* judgment was itself the consequence of the Strasbourg Court's previous finding on access to court four years previously in *Golder v. the United Kingdom*.⁸⁵ In *Golder*, the Strasbourg Court held that the express rights to fair, public and expeditious proceedings under Article 6 would have no value if there were no access to courts and therefore no such proceedings to begin with.

3.1.2. Post-Airey ECtHR Case Law

Post-*Airey* Strasbourg case-law confirms that the right of access to court under Article 6 is not absolute and, as such, it may be permissible to impose conditions on the grant of legal aid based on considerations relating to the financial situation of the litigant⁸⁶ or the prospects of success.⁸⁷ However, it is noted that the Court in *Aerts v Belgium*⁸⁸ held that refusing legal aid on the ground that an appeal did not, at the time of application, appear to be well-founded may

⁸² Ibid.

⁸³ Ibid [4].

⁸⁴ Along with the provision of legal aid, the simplification of court procedures was also recommended.

⁸⁵ *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975. The applicant in that case was a serving prisoner who had been wrongly accused of participation in a prison riot and who had been denied by the Home Secretary the right to consult with a solicitor about proposed civil action he wished to bring against the prison officer who implicated him in wrongdoing. The ECtHR found that the Home Secretary, by refusing the applicant's request to consult with a lawyer, had prevented him from bringing legal proceedings and violated his rights under Article 6 § 1 ECHR.

⁸⁶ *Steel and Morris v the United Kingdom*, no. 68416/01, 15 February 2005, § 62, and *Munro v the United Kingdom*, no. 10594/83, Commission decision of 14 July 1987, DR 52, pp 158-176, pp 164 and 165.

⁸⁷ Ibid.

⁸⁸ *Aerts v Belgium*, no. 25357/94, 30 July 1998, para 60

in some circumstances impair the very essence of an applicant's right to a tribunal. Following this decision, Belgium amended the law to restrict legal aid refusals to manifestly unfounded applications.

Strasbourg case-law has established that the circumstances when Article 6 may imply a requirement to provide legal aid will depend on factors such as:

- the importance of what is at stake for the applicant;⁸⁹
- the vulnerability of the applicant;⁹⁰
- the emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court;⁹¹
- the complexity of the relevant law or procedure;⁹²
- the need to establish facts through expert evidence and the examination of witnesses;⁹³
- the applicant's capacity to represent him or herself effectively;⁹⁴
- and the existence of a statutory requirement to have legal representation.⁹⁵

The European Court of Human Rights (ECtHR) has reiterated that legal aid schemes which select the cases that qualify for legal aid are justifiable, provided that they offer individuals substantial guarantees to protect them from arbitrariness.⁹⁶ The Court has accepted that various limitations may be placed on the right of access to a court or tribunal. Such limitations, however, must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.⁹⁷ In this context, the Court has considered the quality of a legal aid scheme,⁹⁸ whether the

⁸⁹ *Steel and Morris v the United Kingdom*, cited above, § 61, and *P, C and S v the United Kingdom*, no. 56547/00, 16 July 2002, §§ 91, 95 and 100

⁹⁰ *Nenov v Bulgaria*, no. 33738/02, 16 July 2009, § 52

⁹¹ *Airey v Ireland*, cited above, § 24

⁹² *Airey v Ireland*, cited above, §§ 24 and 26; *P, C and S v the United Kingdom*, cited above, § 89

⁹³ *Airey v Ireland*, cited above, § 24

⁹⁴ *McVicar v the United Kingdom*, no. 46311/99, 7 May 2002, §§ 48-62, and *Steel and Morris v the United Kingdom*, cited above, § 61.

⁹⁵ *Airey v Ireland*, cited above, § 26; *Gnahore v France*, no. 40031/98, 19 September 2000, § 41

⁹⁶ See *Gnahore v France*, cited above, § 41; *Essaadi v France*, no. 49384/99, 26 February 2002, § 36; *Del Sol v France*, no. 46800/99, 26 February 2002, § 26; *Bakan v Turkey*, no. 50939/99, 12 June 2007, §§ 75-76 with a reference to the judgment in *Aerts v Belgium*, no. 25357/94, 30 July 1998, § 60

⁹⁷ See *Teltronic-CATV v Poland*, no. 48140/99, 10 January 2006, § 47

⁹⁸ *Essaadi v France*, cited above, § 35; *Del Sol v France*, cited above, § 25

method chosen by the authorities is compatible with the Convention,⁹⁹ and has held that the ‘principle of fairness’ requires reasons to be given for the refusal of legal aid¹⁰⁰.

The Court has acknowledged that there will only be a violation of Article 6 where the ‘very essence of the right’ of access is impaired¹⁰¹ and has emphasised that there is no obligation under the Convention to make legal aid available for all disputes in civil proceedings.¹⁰² In *P, C and S*, the Court found that - in view of the exceptional complexity of the childcare proceedings at issue, the importance of what was at stake, and, the highly emotive nature of the subject matter - the principles of effective access to court and fairness required that the applicant receive the assistance of a lawyer. In *Shamoyan v Armenia*, the ECtHR was receptive to the applicant’s argument that, in light of her difficult financial situation, the absence both of legal aid and of evidence that counsel may be willing to act pro bono, the Government’s non-exhaustion objection should be dismissed.¹⁰³

Another obstacle to access to court may be created either by the actual costs incurred in the course of litigating before the domestic courts or the deterrent effect of likely or possible cost exposure on applicants. The UK Supreme Court in *Coventry et al v Lawrence et al*¹⁰⁴ held in 2015 that the system for the recovery of costs in civil litigation under the Access to Justice Act 1999, which deliberately imposed costs of all conditional fee agreement litigation on unsuccessful defendants as a class, was compatible with Article 6 of the ECHR. The majority in the Court held that the 1999 Act was compatible with the Convention as it was a general measure which was justified by the need to widen access to justice to litigants following the withdrawal of legal aid, was enacted following wide consultation, and fell within the wide area of discretionary judgment of the legislature and rule-makers.

Coventry and another UK case touching on a similar issue subsequently made their way to the ECtHR.¹⁰⁵ The case of *Austin v. the United Kingdom* was rejected for non-exhaustion reasons.¹⁰⁶ However, in a decision of 11 October 2022, the Court found in *Coventry* that there

⁹⁹ *Santambrogio v Italy*, no. 61945/00, 21 September 2004, § 52; *Bakan v Turkey*, cited above, §§ 74-78, and *Pedro Ramos v Switzerland*, no. 10111/06, 14 October 2010, §§ 41-45.

¹⁰⁰ *Tabor v Poland*, no. 12825/02, 27 June 2006, §§ 45-46; *P, C and S v the United Kingdom*, cited above, § 91

¹⁰¹ *P, C and S v the United Kingdom*, cited above, § 90.

¹⁰² *Anghel v Italy*, no. 5968/09, 25 June 2013

¹⁰³ *Shamoyan v Armenia*, no. 18499/08, 7 July 2015, §§ 35-36

¹⁰⁴ *Coventry and others (Respondents) v Lawrence and another (Appellants)* [2015] UKSC 50

¹⁰⁵ See *Coventry et al v the United Kingdom*, no. 6016/16, communicated in May 2017, a case brought by the domestic respondents. See also *Austin v the United Kingdom*, no. 39714/15, communicated in June 2016

¹⁰⁶ In a decision of 12 September 2017, a Committee of three judges rejected the *Austin* application on the grounds that the applicant had only raised her Convention arguments belatedly before the UKSC (albeit, it should be noted, only after that same court had handed down its decision in *Coventry*)

had been a violation of Article 6.1 of the Convention and Article 1 of Protocol No. 1 of the Convention.¹⁰⁷ The 1999 Act had already been examined by the ECtHR in *MGN v the United Kingdom*, where the Strasbourg Court had identified several flaws in the scheme and found that it was incompatible with Article 10 ECHR.¹⁰⁸ The Court found, *inter alia*, that the risk of a party with good prospects of a successful defence being driven to settle early by the possibility of an excessive costs burden was one of the principal objections to the scheme, especially when viewed through the prism of the principle of equality of arms.¹⁰⁹ The Court also relied on the absence of adequate safeguards, the cost burden on the defendant which vastly exceeds the fair and reasonable costs incurred by their opponents, and the cherry-picking nature of the scheme as factors which led to a violation of Article 6 § 1 of the Convention.¹¹⁰

The Court has made it very clear throughout the case law that the question of whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case.¹¹¹

3.2 Charter of Fundamental Rights of the European Union

As a member of the European Union, Ireland is obliged to take appropriate measures to ensure fulfilment of its obligations arising out of the Charter in areas falling within the scope of European Union law.¹¹² Article 47(3) of the Charter specifically provides for the right to legal aid:

“Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”¹¹³

The Explanations to the Charter make it clear that legal aid must be provided where ‘the absence of such aid would make it impossible to ensure an effective remedy’,¹¹⁴ affirming that the principle set down by the European Court of Human Rights in *Airey* also forms part of Union law. In all respects other than their substantive scope of application, the guarantees afforded by Article 6(1) ECHR will apply in a similar way to the EU.

¹⁰⁷ *Coventry et al v the United Kingdom*, no. 6016/16, 11 October 2022

¹⁰⁸ *IGN Limited v the United Kingdom*, no. 39401/04, 18 January 2011, §§ 192-220.

¹⁰⁹ *Coventry*, cited above § 81

¹¹⁰ *ibid*, §§ 83-87

¹¹¹ See; *McVicar* [48] - [49]; *P, C and S v the United Kingdom* of 16 July 2002, ECHR 2002- VI, § 91; and; *Steel and Morris* [23].

¹¹² TEU, art 4.3.

¹¹³ The Charter, art 47.

¹¹⁴ Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17.

Although the Court of Justice will offer guidance on the interpretation of Union law, it is ultimately the responsibility of the Member States to establish a system of procedural rules and safeguards to protect individuals' rights.¹¹⁵ Under the principle of effective judicial protection, national law must not undermine an individual's ability to vindicate these rights in any practical sense.¹¹⁶

The leading case on civil legal aid in the jurisprudence of the Court of Justice is *DEB Deutsche Energiehandels und Beratungsgesellschaft*¹¹⁷, where the Court had to consider whether a legal person was entitled to legal aid under Article 47 of the Charter in the context of a *Francovich*¹¹⁸ damages claim made against Germany for its failure to correctly implement Union law. Notwithstanding the specific facts of the case, the Court also examined the scope of the right to legal aid more generally in Union law. The Court held that, under the principle of effectiveness established throughout the case law, procedural rules 'must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.'¹¹⁹ The Court held that it is for national courts to determine:

“...whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.”¹²⁰

Building upon the principles established throughout the case law of the European Court of Human Rights, the Court of Justice outlined the criteria that must be taken into consideration when making the assessment for granting legal aid:

- the subject-matter of the litigation;
- whether the applicant has a reasonable prospect of success;
- the importance of what is at stake for the applicant in the proceedings;
- the complexity of the applicable law and procedure; and

¹¹⁵ CJEU, C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, 13 March 2007, 37 - 42.

¹¹⁶ CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010.

¹¹⁷ *ibid.*

¹¹⁸ Case C-6/90 and C-9/90, *Andrea Francovich and Others v Italian Republic*, 1991.

¹¹⁹ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010, 28.

¹²⁰ *Ibid* [60].

- the applicant's capacity to represent himself effectively.¹²¹

With regard specifically to legal persons, the Court indicated that the national court must look at the complexity of the applicable law and procedure and their form, and whether they are profit-making or non-profit-making as well as the financial capacity of the partners or shareholders. Advocate General Jääskinen, in his Opinion in *Commission v France*, cited *Airey* and referred to Article 47 of the EU Charter as being drawn up in full accordance with the case-law of the ECtHR under Article 6 ECHR.¹²² He argued that:

“...legal aid is increasingly regarded as a social factor necessary for ensuring the effectiveness of the fundamental right of access to justice and, hence, access to the law in general.”¹²³

Therefore, in light of Article 51, *DEB* makes it very clear that the right to legal aid in civil cases under Union law should be determined on the basis of the criteria established throughout the case law of the European Court of Human Rights.¹²⁴ The Court of Justice held that:

“Review of the case law of the European Court of Human Rights shows that, on several occasions, that court has stated that the right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6(1) of the ECHR.”¹²⁵

The principle of effective judicial protection applied by the Court of Justice of the European Union can be traced back to *Airey*, where it was held that legal aid must be provided where it is indispensable to effective access to courts.¹²⁶ The Court of Justice also affirmed that Article 47(3) of the Charter must be read in light of the judgement in *Airey*, according to which provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy,¹²⁷ as specified in the Explanations to the Charter.¹²⁸

It is notable that Article 47 is to be found under Title VI of the Charter, relating to justice, rather

¹²¹ Ibid [61].

¹²² C-492/08, *Commission v France*, EU:C:2010:72, § 24

¹²³ Ibid, [21].

¹²⁴ Ibid [45].

¹²⁵ Ibid.

¹²⁶ Ibid [12].

¹²⁷ CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010, 36.

¹²⁸ Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17.

than Title IV, relating to solidarity.¹²⁹ This would suggest that the right to legal aid is not conceived primarily as social assistance.¹³⁰ The Court took this as an indication that in assessing the need to grant legal aid, this assessment must be made on the basis of the right of the individual involved, 'rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.'¹³¹

In *Virginie Pontin*, the Court made special provision with regard to procedural rules for certain vulnerable persons in some instances, holding that such rules must not make it excessively difficult to receive legal advice in order to exercise their rights, once again using the principle of effectiveness to guide their judgment.¹³² Under this principle, due to the disproportionate impact of any restriction on their right to an effective remedy, more extensive procedural safeguards may be necessary for vulnerable or marginalised groups.

This is reflected in certain EU secondary law instruments, such as the Employment Equality Directive, which provides for effective judicial procedures in the enforcement of any obligations arising from the legislation. This Directive has been transposed into Irish law through the Employment Equality Act 1998, which must comply with the Charter in the areas which fall within the scope of EU law. In the context of asylum applications, Directive 2013/32/EU (Procedures Directive) provides for the right "*to effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure*". Article 20(1) of the Recast Procedures Directive expressly states that Member States must provide, subject to certain conditions, free legal assistance and representation in the asylum appeals process, and the provision of legal aid may be extended to courts or tribunals of first instance if the Member State deems it necessary under Article 21(2).

In her analysis, Judge O'Leary contends that, while the CJEU rule of law cases primarily relate to judicial independence, the central reliance placed by the CJEU on Article 19.1 TEU, the broader scope now given to that manifestation of the principle of effective judicial protection, and the combination of this with Article 47.3 of the Charter may provide individuals with fertile

¹²⁹ CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010, 40 - 41

¹³⁰ *ibid*

¹³¹ *Ibid* [42].

¹³² Case C-63/08, *Virginie Pontin v T-Comalux SA*, 29 October 2009, 65.

ground in a wide variety of circumstances to argue that in the absence of legal aid that access is disproportionately or unfairly restricted.¹³³

The right to legal aid for legal persons was considered by the Irish courts recently in *Friends of the Irish Environment CLG v. The Legal Aid Board* [2023] IECA 19. In that case, the Court of Appeal has sought submissions on the applicability of the Charter to the issues raised (concerning the exclusion of legal persons from the civil legal aid scheme) for the purposes of considering a reference to the CJEU:

“Viewed from one perspective, it might be said that the decision in *DEB* makes clear both that Article 47(3) envisages an entitlement to legal aid in some circumstances as a necessary component of the principle of effective judicial protection and that that right is enjoyed by natural and legal persons. While the decision leaves no doubt but that natural persons and legal persons may be treated differently for this purpose, it is at the very least arguable that the decision demands that the Member States have in place a facility for legal aid that may be availed of in cases involving litigation that engages EU law, that that system be open in principle to legal persons, and that there must be a process whereby applications for legal aid by bodies corporate in cases within the field of EU law can be assessed in accordance with the factors and considerations identified by the court in *DEB*. On this construction, and in the absence of any other system of legal aid for such cases, it might be said that the Act should be construed harmoniously with EU law so as not to impose a blanket prohibition on the grant of legal aid to bodies corporate.”¹³⁴

3.3. International Legal instruments to which Ireland is a party

The current civil legal aid scheme as it stands has been subject to criticism by many UN and European human rights monitoring bodies. International human rights instruments and their monitoring bodies address general principles of human rights obligations and the specific and distinct issues faced by particular vulnerable groups such as women, children, refugees and persons with disabilities. The right of access to justice underpins many of these instruments, either directly or indirectly, with the intention of providing adequate remedies for victims of human rights abuses. The provision of civil legal aid is therefore a natural prerequisite for ensuring effective access to justice for vulnerable individuals who do not have

¹³³ O’Leary, ‘The Legacy of *Airey v Ireland* and the Potential of European Law in Relation to Legal Aid’ § 110

¹³⁴ *Friends of the Irish Environment CLG v. The Legal Aid Board* [2023] IECA 19 at para. 87.

the economic or social capital to effectively navigate the legal system.¹³⁵

The following international treaties, which have been ratified by Ireland, are relevant in the context of access to justice and civil legal aid:

3.3.1. The International Covenant on Civil and Political Rights

Ireland ratified the International Covenant on Civil and Political Rights (the 'ICCPR') in 1989. The ICCPR protects civil and political rights and its implementation is monitored by a body of independent experts known as the Human Rights Committee. The ICCPR addresses right to legal aid under Article 14(3)(d) stating that individuals are required '...to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'¹³⁶

3.3.2. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (the 'ICESCR') was ratified in Ireland in 1989. The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the Covenant, has underlined the importance of free legal aid in the effective protection of and access to the rights protected in the Covenant.¹³⁷ The Committee has criticised Ireland on a number of occasions for the lack of free legal aid services in the country and the negative effect this has had on the vindication of Convention rights such as housing, social welfare, and employment. It has directly called for the expansion of the scope of the civil legal aid scheme in its most recent evaluations of Ireland.¹³⁸

3.3.3. The European Social Charter

The European Committee on Social Rights, the monitoring body for the European Social

¹³⁵ Kristel Juriloo, 'Free Legal Aid - A Human Right' (2015) 33 Nordic J Hum Rts 203.

¹³⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Although the primary intention of Article 14(3)(d) was to establish the right to criminal legal aid, the Human Rights Committee made it clear in General Comment No. 32 that Member States are encouraged to provide legal aid in civil instances and may also be obliged to do so in certain circumstances. UNHCR 'General Comment 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (2007) UN Doc CCPR/C/GC/32. In *Currie v Jamaica*, the Human Rights Committee held that Article 14(3)(d) of the ICCPR guarantees legal aid for constitutional motions relating to criminal trials (e.g., as is related to a death penalty sentence), explicitly extending its protection to civil trials in which applicants seek available remedies for criminal cases. *Currie v Jamaica* Comm No 377/1989 UN Doc CCPR/C/50/D/377/1989 (31 March 1994).

¹³⁷ CESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (8 July 2015) UN Doc E/C.12/IRL/CO3, para 8.

¹³⁸ CESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (8 July 2015) UN Doc E/C.12/IRL/CO3; UNCAT, 'Concluding Observations on the Second Periodic Report of Ireland' (31 August 2017) UN Doc CAT/C/IRL/CO/2.

Charter, has highlighted concerns surrounding the provision of legal aid¹³⁹ including finding a violation of Article 16 in the case *European Roma Rights Centre v Ireland*, in part on the basis that Irish Travellers facing eviction did not have sufficient access to legal aid.¹⁴⁰

3.3.4. The United Nations Convention against Torture (UNCAT)

The United Nations Committee against Torture, established under the UN Convention Against Torture which has been ratified by Ireland, drew attention to the lack of effective access to civil legal aid for specifically vulnerable groups in Ireland; namely, ‘victims of domestic violence’¹⁴¹ ‘those undergoing reviews for the Assisted Decision Making (Capacity) Act 2015’¹⁴², and ‘individuals denied leave to land’¹⁴³.

3.3.5. The Convention on the Elimination of all forms of Racial Discrimination

In their most recent country report for Ireland, the Committee on the Elimination of Racial Discrimination (CERD), the monitoring body under the Convention on the Elimination of all forms of Racial Discrimination, directly criticised the limited scope of Section 27(2) of the Civil Legal Aid Act 1995 as contrary to Ireland’s obligations under Article 5(a) and Article 6 of the Convention. The Committee emphasised their concern that the lack of availability of legal aid in the Workplace Relations Commission resulted in an inequality of arms that was in violation of Ireland’s obligations to provide ‘equality before the law’¹⁴⁴ and ‘effective protection and remedies’¹⁴⁵ under the Convention.

3.3.6. Further UN Conventions

Article 13 of the UN Convention on the Rights of Persons with Disabilities contains express provisions on access to justice:

“1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of

¹³⁹ *European Roma Rights Centre v Italy*, Complaint No 27/2004, Decision on Merits (7 December 2005); *Medecins du Monde-International v France*, Complaint No 67/2011, Decision on Merits (11 September 2012), *European Roma Rights Centre v Bulgaria*, no. 31/2005, (30 November 2006), § 52.

¹⁴⁰ *European Roma Rights Centre v Ireland* Complaint No. 100/2013, Decision on Merits (1 December 2015) § 136-147

¹⁴¹ UNCAT, ‘Concluding Observations on the Second Periodic Report of Ireland’ (31 August 2017) UN Doc CAT/C/IRL/CO/2, paras 31-32.

¹⁴² *ibid* [para 35] – [para 36].

¹⁴³ *ibid* [para 12].

¹⁴⁴ Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 5.a.

¹⁴⁵ Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 6.

procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

The Committee on the Rights of Persons with Disabilities¹⁴⁶ and the Committee on the Elimination of Discrimination against Women¹⁴⁷ have both criticised Ireland’s civil legal aid scheme and recommended that Ireland improve upon gender and cultural sensitivity in the provision of services.

3.3.7. UN Universal Periodic Review

In February 2022, The United Nations Human Rights Council published its report on foot of the review of Ireland’s Human Rights record through the Universal Periodic Review mechanism (UPR). Ireland accepted the following four recommendations in relation to Civil Legal Aid:

- 157.124 Undertake a comprehensive and independent review of the legal aid system for civil cases and ensure equal treatment before the courts (Belarus);
- 157.125 Continue its efforts and consider reform measures related to the legal aid system to ensure improved legal aid schemes, particularly for low-income groups (Bhutan);
- 157.126 Broaden efforts to increase legal and financial aid in enabling the vulnerable, migrants and asylum seekers to fully access justice and addressing their social welfare and equality issues (Cambodia);
- 157.127 Review its civil legal aid system and put into place a mechanism to ensure that disadvantaged and marginalized individuals and groups benefit from better access to the law, in accordance with target 16.3 of the Sustainable Development Goals (Switzerland).

3.3.8. The Aarhus Convention

The objective of the Aarhus Convention¹⁴⁸ is the protection of environmental and human rights with a focus on rights of participation in decision-making and access to information and justice

¹⁴⁶ CRPD Committee, ‘General Comment No 6’ (2018) CRPD/C/GC/6, p 18

¹⁴⁷ CEDAW, ‘General recommendation on women’s access to justice’ (2015) CEDAW/C/GC/33

¹⁴⁸ 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Ratified and entered into force in Ireland in June 2012

regarding the environment. Article 9(4) of the Aarhus Convention states that Parties shall provide 'adequate and effective remedies to overcome barriers to access to justice' that are not 'prohibitively expensive'.¹⁴⁹

The assessment of whether or not legal costs are deemed to be prohibitively expensive is closely linked to the availability of legal aid, as the lack thereof may constitute a barrier to access to justice.¹⁵⁰ The United Nation's Aarhus Convention Compliance Committee has found [in its consideration of Spain] that "instituting a system of legal aid which excluded small NGOs from receiving such aid provided sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice as required by article 9, paragraph 5, and also failed to provide for adequate and effective remedies, as required by article 9, paragraph 4".¹⁵¹

The Aarhus Convention (and its implementation through the Environment (Miscellaneous Provisions) Act 2011) was considered by the Supreme Court in the recent cases of *Conway*¹⁵² and *Heather Hill Management Company v An Bord Pleanála*.¹⁵³ In *Conway*, the Supreme Court considered whether the proceedings engaged with the Aarhus Convention and the Public Participation Directives¹⁵⁴ and if so, would entitle the applicant to legal aid. Clarke J, as he then was, dismissed the application on the basis that it fell outside the scope of the Convention.

The Court in *Conway* nevertheless considered the scope of the Convention and noted that in principle, provisions of the Convention may be directly effective in Member States on the basis of its interpretative role in construing the Public Participation Directives.¹⁵⁵ Clarke J remarked that there may be some cases where the State may either have to provide legal aid or provide some subsidy for parties who bring litigation within the scope of the Aarhus Convention and/or

¹⁴⁹ UNECE, 'The Aarhus Convention: An Implementation Guide Second Edition' (2014) 199, 205

¹⁵⁰ G. De Baere and J. Nowak, 'The right to 'not prohibitively expensive' judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: Edwards and Pallikaropoulos' (2016) 53 Common Market Law Review 53: 1727–1752, 1737

¹⁵¹ UNECE, 'The Aarhus Convention: An Implementation Guide Second Edition' (2014) 206.

¹⁵² *Conway v Ireland* [2017] 1 IR 53; See also *Friends of the Irish Environment CLG v The Legal Aid Board* [2020] IEHC 454

¹⁵³ *Heather Hill Management Company v An Bord Pleanála* [2022] IESC 43, 10 November 2022

¹⁵⁴ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

¹⁵⁵ See Slovak Brown Bears case [*Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*] Case C-240/09; *The Queen (Edwards & anor) v. Environmental Agency & ors* (Case C-260/11)

the Public Participation Directives. However, he highlighted the practical problems which may follow and noted that it would not necessarily be appropriate for the Court to put in place such a legal aid scheme.¹⁵⁶ The Court also noted that any obligation to provide legal aid in cases in which the Aarhus Convention and/or the Public Participation Directives were engaged could not be met within the context of the Irish civil legal aid scheme as presently constituted.¹⁵⁷

In *Heather Hill Management Company*, the Supreme Court held that the applicants challenging planning permissions on environmental grounds were entitled to a special protective costs order pursuant to the relevant planning legislation, giving effect to Article 9(4) of the Aarhus Convention.¹⁵⁸ In *Friends of the Irish Environment CLG v. The Legal Aid Board*, the Court of Appeal summarised the principles derived from the Supreme Court's decision in *Heather Hill* as follows:

“...Article 9(2) requires access to a review procedure to challenge the legality of decisions, acts or omissions of public authorities regarding certain activities of a substantial scale having significant environmental effects, while Article 9(3) requires such access to challenge acts and omissions of private persons and public authorities which contravene provisions of national law relating to the environment. Article 9(4) requires inter alia that both of these procedures not be ‘prohibitively expensive’. As a matter of EU law – having regard in particular to the incorporation of aspects of Article 9 of the Aarhus Convention into the Public Participation Directives – there will be certain circumstances in which national courts applying national environmental law will be required to give an interpretation to national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Articles 9(3) and 9(4) of the Aarhus Convention. That obligation, in particular, arises in ‘fields covered by EU environmental law’”.¹⁵⁹

The Court of Appeal found, however, that the Aarhus Convention did not avail the applicants in their challenge to the exclusion of legal persons from the scheme of civil legal aid, noting that “the Aarhus Convention is not directly effective and, unlike Article 47 of the Charter, does not even arguably confer a right capable of being wielded against the provisions of the [Civil Legal Aid] Act”¹⁶⁰:

¹⁵⁶ *Conway*, § 28

¹⁵⁷ *ibid*, § 31

¹⁵⁸ *Heather Hill Management Company v An Bord Pleanála* [2022] IESC 43, 10 November 2022

¹⁵⁹ *Friends of the Irish Environment CLG v. The Legal Aid Board* [2023] IECA 19 at para. 90.

¹⁶⁰ *Ibid* at para. 97.

“None of the comments of the Advocate General in *Edwards*, the observations of Clarke J. in *Conway* nor the findings of the Compliance Committee on communications ACCC/C/2009/36 (Spain), or ACCC/C/2008/33 (United Kingdom) (to which reference was made in the course of the hearing) change this.”¹⁶¹

However, as discussed above, the Court of Appeal has sought submissions from the parties to that matter on the applicability of the Charter to the issues raised for the purposes of considering a reference to the CJEU.

3.4. Conclusions

In accordance with the case-law of the European Court of Human Rights and the Court of Justice of the European Union, the question of whether legal aid is necessary for a fair hearing must be determined on a case-by-case basis and the relevant body is obliged to take into account the specific circumstances of each applicant under the established criteria. A requirement to provide legal aid will depend on factors such as:

- the importance of what is at stake for the applicant;
- the vulnerability of the applicant;
- The emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court;
- The complexity of the relevant law or procedure;
- The need to establish facts through expert evidence and the examination of witnesses;
- The applicant’s capacity to represent him or herself effectively;
- The existence of a statutory requirement to have legal representation;
- Where initiating or defending legal proceedings would otherwise be prohibitively expensive.

These obligations raise serious questions in relation to elements of the current civil legal scheme in Ireland, including: its limited scope and use of blanket exemptions, the means test, and the merits test. These matters are considered in detail in the next three chapters (chapters 4, 5 and 6) of this submission, which also draw from the findings of international human rights bodies and examples of international best practice.

Human rights and equality standards are also relevant to:

- forms and procedures for applying for legal aid and appeal mechanisms against refusals of legal aid;
- the quality of the legal aid;

¹⁶¹ Ibid at para. 99.

- the collection of appropriate data.

Those matters are considered in chapter 7 of this submission.

4. Scope of the Civil Legal Aid Scheme & Exclusions

This chapter discusses the scope of the current scheme of civil legal aid – in law and practice. It then analyses the current scheme by reference to relevant human rights and equality standards obligations, and highlights tensions between those standards and obligations and the current scheme. Finally, this chapter considers examples of international best practice.

4.1. Scope of the Current Scheme of Civil Legal Aid

4.1.1. The Law

Section 27 of the Civil Legal Aid Act provides that:

1) In this Act “legal aid” means representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under section 11 , in any civil proceedings to which this section applies and includes all such assistance as is usually given by a solicitor and, where appropriate, barrister in contemplation of, ancillary to or in connection with, such proceedings, whether for the purposes of arriving at or giving effect to any settlement in the proceedings or otherwise.

2) This section applies to all civil proceedings other than those relating to designated matters in respect of which there is not for the time being an order in force under subsection (10) of section 28 —

(a) conducted in the District Court, the Circuit Court, the High Court or the Supreme Court, or

(b) conducted in any court or before any tribunal for the time being prescribed by the Minister, with the consent of the Minister for Finance, by order under this section,

including proceedings arising out of or connected with such proceedings conducted before an officer of such court or tribunal, by its direction and proceedings under Article 177 of the Treaty establishing the European Economic Community, signed at Rome on the 25th day of March, 1957.

The effect of Section 27(2) (a) is to enable civil legal aid to be provided in civil proceedings in the District, Circuit, High, Court of Appeal or Supreme Courts. However, this broad coverage is in turn subject to a list of specific exclusions contained in Section 28(9) of the Act¹⁶².

¹⁶² It should be noted here that sub-section (10) provides that ‘*the Minister may, with the consent of the Minister for Finance, by order disapply subsection (9) from any matter to which that subsection, for the time being applies*’.

These exclusions include defamation cases; disputes concerning rights and interests in or over land; civil matters within the jurisdiction of the District Court (Small Claims Procedure) Rules; licensing; conveyancing and election petitions. In addition, this sub-section also excludes test cases and class actions from being covered under the scheme.

Civil proceedings that are conducted outside the courts will only qualify for civil legal aid where there is a specific order issued under Section 27(2)(b) to that effect by the Minister for Justice, with the agreement of the Minister for Finance.

Thus far, only one arena has been the subject of exemption under this section, the prescribing firstly of proceedings in the then Refugee Appeals Tribunal and subsequently the International Protection Appeals Tribunal which replaced it.¹⁶³ It should be pointed out that the State had no option here, as the application of standards of international law renders access to legal advice and representation compulsory in matters of asylum.

There is a wide cross-section of non-court adjudicative and quasi-adjudicative bodies operating in the legal system in Ireland. Examples include:

- The Workplace Relations Commission (WRC) (with a right of appeal to the Labour Court)
- The Residential Tenancies Board (RTB) (with a right of appeal to the Tenancy Tribunal)
- The Personal Injuries Assessment Board (known as the Injuries Board)
- The Social Welfare Appeals Office (SWAO)
- The Financial Services and Pensions Ombudsman (FSPO)
- The Tax Appeals Commission (TAC) (formerly the Revenue Appeals Commissioners)
- An Bord Pleanála
- The Government Ombudsman
- The Children's Ombudsman
- The Ombudsman for the Defence Forces
- The Criminal Injuries Compensation Tribunal

Broadly, these bodies have a number of key features in common:

1. As they are all outside the formal civil courts system, there is no right to apply for civil legal aid to be legally represented at hearings before them, as none have (as yet) been prescribed under the terms of Section 27 (2) (b) of the Civil Legal Aid Act 1995 by the Minister for Justice (with the consent of the Minister for Finance).

¹⁶³ See SI 730/2005 (Civil Legal Aid (Refugee Appeals Tribunal) Order 2005) and SI No 81/2017 (Civil Legal Aid (International Protection Appeals Tribunal) Order 2017) respectively.

2. There is generally no right of appeal *de novo* (i.e. a full rehearing) into the courts against decisions of these bodies. Full appeals are available in some cases from the initial complaints handler to another layer outside of the courts system, for example, from the WRC to the Labour Court in employment rights cases, or from the Residential Tenancies Board to the Tenancies Board in respect of the RTB's Dispute Resolution Service. The Injuries Board assesses for compensation in personal injury claims (except cases of alleged medical negligence) based on a Book of Quantum or Personal Injuries Guidelines, where the respondent does not object to PIAB's jurisdiction. If either side rejects PIAB's award, the claim can be referred to the courts. In other cases, there is only one avenue of complaint, for example from the conduct of a financial service provider to the Financial Services and Pensions Ombudsman. An apparent statutory right of appeal to the High Court (which has been retained in the recent Financial Services and Pensions Ombudsman Act 2017) has been interpreted quite restrictively in a line of decisions by the superior courts.¹⁶⁴
3. These bodies make decisions on matters of major importance to citizens in the course of their contractual dealings with private parties such as employers, landlords, banks and insurance companies; with organs of government and local government; and public services, businesses, enterprise and property. Some of these concern the enforcement of rights relating to matters of key social and economic importance such as employment rights and equality and anti-discrimination protections, social security entitlements and tenancy rights. Others concern access to complaints and appeal mechanisms that arise in the course of interacting with financial services, the Revenue Commissioners and the planning system.

Section 29(9)(a) of the 1995 Act also provides that "legal aid shall not be granted" in:

"(viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;

(ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned."

¹⁶⁴ See for further detail FLAC's 2014 report 'Redressing the Imbalance' discussing the doctrine of 'curial deference'.

These provisions operate to exclude cases concerning collective rights or cases in the public interest which may have a significant positive impact beyond the litigants involved.¹⁶⁵

4.1.2. Scope of the Scheme in Practice

Over the years of the civil legal aid scheme, the provision of legal services in family law and related areas, including family mediation and childcare services has come to dominate the Board's workload. While a focus on family law is undoubtedly important, it has led to a disproportionate adverse effect on the provision of legal services in other important areas of civil law. It is also perhaps worth noting that the infrastructure to resolve family law issues and disputes continues to take place largely within the courts system when many other areas of law have been largely removed from the remit of the courts.

Below we look in detail at two recent Annual Reports of the Board (those of 2018 and the most recently available report of 2021) in order to examine casework trends and their effect on broader access to justice issues.

4.1.3. Scope of the Scheme in Practice: LAB Annual Report 2018

Number of 'Applications'

There were 18,248 applications for legal services in 2018 (page 19). This figure does not include 4,564 family mediation or 1,407 Abhaile cases, which are recorded separately.

These applications in turn are broken down into five categories as follows:

- 'General family law matters' (9,761 – 53.5% of the total);
- 'Divorce/separation/nullity' (3,892 – 21.3%);
- 'International protection' (2,079 – 11.4%);
- 'Cases involving possible State care of children' (1,768 – 9.7%); and
- 'Other civil matters' 748 (4.1%).

The 1 in 25 (4.1%) rate of applications in 2018 in the last category of 'Other civil matters', outside of the core family law, childcare and refugee areas is a first statistical indication of the limited coverage of the scheme.

¹⁶⁵ Further, the decision of Court of Appeal in *Friends of the Irish Environment CLG v. The Legal Aid Board* [2023] IECA 19 has affirmed the Legal Aid Board's interpretation of the provisions of the 1995 Act, which excludes legal persons from the scheme of civil legal aid. (However, the Court has sought submissions as to whether those provisions may be contrary to the Charter).

This figure seems to only include applications that were successful, with the report stating that *'It should be noted that not every applicant is provided with legal services'* given that *'a number of applicants do not pursue their application when they are offered an appointment'*.

Page 48 of the report details that there were 248 formal refusals of legal aid on the merits criteria in 2018, a piece of information that is presented with no additional context.¹⁶⁶

Number of 'Cases handled'

There were 17,803 'cases handled' by the Board in 2018 (page 20). These cases were initiated in a variety of years, as explained by Table 4 (page 23). Thus, of the 17,803 cases handled in 2018, only 5,101 stemmed from applications made in 2018 itself. A total of 1,859 were applied for pre-2014, with the remainder between 2014 and 2018.¹⁶⁷

Somewhat confusingly, the 'cases handled' category is then only broken down into three categories below, in contrast to the five categories for 'applications received' noted above.¹⁶⁸

The three categories are:

- 'Family law' (12,080 – 67.9%);
- 'Childcare' (1,823 – 10.2%) and
- 'Other civil matters' (3,900 – 21.9%).

¹⁶⁶ As far as we can see, this is the only information in the report that refers to applications for legal services that were rejected by the Board. The merits of the case, an issue that is discussed in greater detail in a separate chapter in this submission, is not the only reason that an application may fail. An applicant may fail the means test or the subject matter of the application may be considered to be outside the scope of the legislation.

There is also an additional question, anecdotally, of applications that are never made because a potential applicant is informally told that civil legal aid is not available in a particular area of law or that they are over the means threshold.

The apparent failure to document refusals in any tangible way is a notable omission in terms of accountability. If there is no figure given for refusals, there is no statistical chain to link the number of refusals to the number of appeals. Given that the Board itself accepts that the scheme is limited in scope, it should document instances where a person enquired about obtaining legal services but they were not available. Put simply, unmet demand must be recorded.

¹⁶⁷ These figures perhaps reflect the perennial problem of the waiting times between the date of the application for civil legal aid and beginning work on the relevant case, in addition to staff and resource shortages in the Board's law centres once work on the case has begun. They may also reflect other problems in the Irish legal system including resource problems in the court structure, case management bottlenecks and the adversarial nature of proceedings.

It might be further noted here that Table 3 in the Report suggests that the figure for new cases initiated in law centres for 2018 is 6,221 new cases. Table 5 (see further below) explains that the number of cases closed in 2018 was 5,852 cases (including international protection cases).

¹⁶⁸ An explanation is not provided as to why a different classification has been used between 'applications' and 'cases handled'. For the sake of consistency, there seems no immediate reason why the five categories used to classify applications should not be replicated for cases handled and this should be considered for all future Annual Reports.

From this it would appear that first, all family law cases are bundled together in this section (they are broken up into two categories - 'General family law matters' and 'Divorce/separation/nullity' in the applications section) and second, that international protection cases (i.e. refugee cases) are included under the 'Other civil matters' heading, even though they are a category of their own in the applications section.¹⁶⁹

The question that occurs here is how many of these cases involved legal advice and subsequent representation and how many involved legal advice only. The use of the term 'legal services' seems to cloud rather than clarify the picture and it would be useful if the Board distinguished between the two from a statistical point of view in future Annual Reports.

Broadly speaking, it is evident that a 'case handled' involving advice *and* representation will take up more of the Board's time, expertise and resources than an advice 'case handled'. It seems likely, but we cannot be sure without specific figures, that the majority of the family law cases handled involve legal representation in addition to legal advice. The status of the 'Other Civil' figures in terms of representation as opposed to advice is a matter that is arguably less clear. How many of these involved advice only in a scheme that is already dominated by Family Law cases?

Looking at the overall 'cases handled' figures, 3,900 'Other Civil matters' cases are recorded under this heading in 2018. However, a total of 1,673 'International Protection' cases are included amongst this number for reasons that are also unexplained. Subtracting these leaves 2,227 cases handled remaining under the 'Other Civil matters' heading (12.5% of the total of 17,803).

These remaining 2,227 cases appear to be approximately made up of what might be tentatively¹⁷⁰ suggested to be the non-family law case categories outlined in the report (page 22) as follows:

The largest category here by far is Tort, accounting for 716 cases (32%) or almost one in three cases of the Other Civil matters cases.¹⁷¹

¹⁶⁹ A notable feature of the figures provided on 'Cases handled' is a certain ambiguity in the terminology used to describe the services provided. For example, Page 20 states that 'Legal aid and advice was handled through the Board's law centres in over 17,803 cases in 2018'. On the other hand, Page 21 states that 'a more detailed breakdown of the main issues in respect of which legal services were provided in in 2018 is provided in Chart 3' in another specific reference to the 17,803 cases handled.

¹⁷⁰ Ultimately, this is the only information that we have in the non-family, other civil matters category (excluding international protection cases) and there is no further breakdown provided of the subject matter of the cases handled within these quite broad categories.

There may also be some doubt about what categories the property and equity headings fit into.

¹⁷¹ The law of Torts (or civil wrongs) is one of the broadest of legal subjects, with many diverse branches. It is hard to understand therefore why a summary of subject matter is not provided for here. In particular, given

There were 217 debt cases in total where legal services were provided in 2018. But how many of these involved advice alone; how many concerned representation in proceedings to recover a debt or land on behalf of the applicant and how many to defend an applicant against whom debt proceedings had been brought? Here it might be noted that in response to a parliamentary question put by Roisin Shortall TD in October 2019¹⁷², the Minister for Justice and Equality, Charlie Flanagan, TD was able to reply that the number of financially eligible legal aid applications in 2018 to defend proceedings to repossess a family home was 37, with 7 of these applications being granted. This response seems to demonstrate that the Board can generate details of the number of applications it receives that are approved and refused, even in a sub-category of a specific area.

The nature of the 76 employment cases where legal services were provided could also do with clarification, since the bulk of employment rights complaints are now brought through the Workplace Relations Commission (WRC) and Labour Court infrastructure and civil legal aid is not available outside the courts. Some decisions given in favour of complainant employees are not implemented by respondent employers, leaving the complainant having to seek to enforce the decision in the District Court. How many of the 76 cases handled in this category sought to enforce awards?

Number of 'Cases completed'

A further category of legal services detailed in the Report concerns cases that were completed in the course of 2018, as set out in Table 6 (page 24) of the report.

Below that table the Report observes that: *'It can be seen from Table 6 that divorce, separation and nullity cases generally take longer to reach completion than most other family law matters. Approximately 47% of divorce, separation and nullity cases completed in 2018 had been on-going for longer than three years, compared to 9% of childcare cases and 22% of other family law matters.'*

This table also illustrates that Non-family law cases account for 903 (15.4%) of the total number of cases completed during the year and that 57% of these (513 of 903) were completed in less than one year, a higher percentage than any of the other categories. Again, this proves nothing in the absence of further information, but it may suggest that non-family law cases were less likely to be the subject of legal proceedings and more likely to be the subject of legal advice only.

that the remit of the Personal Injuries Assessment Board does not extend to medical negligence cases, a figure within this category for medical negligence 'cases handled' should be provided.

¹⁷² From Roisin Shortall TD, Social Democrat Party, PQ No 101, 3rd October 2019.

4.1.4. Scope of the Scheme in Practice: LAB Annual Report 2021

Number of 'Cases handled' (page 27)

The 2021 LAB Annual Report indicates that the Board “handled” 1,809 (11.0% of the total) civil cases outside of the areas of family and immigration law.¹⁷³

The total of cases handled at 16,400 is divided into a large number of diverse categories. Again, it is difficult to compute the non-family law case categories in this list to arrive at a figure that approximates to 1,809 ‘Other Civil’ cases handled.¹⁷⁴

At the risk of labouring the point here, the information provided is very general and lacks definitions and specifics in terms of the categories and the sub-categories within those categories. And again, it is not clear how many ‘cases handled’, particularly within the ‘Other Civil’ category, may involve legal advice only, rather than legal advice and ensuing legal representation.

Number of 'Cases completed' (page 28)

The number of family law cases between Divorce and other Family Law applications (maintenance, custody, access etc.) is 55% of the total number completed. Non-Family cases amount to 25% of the total, Childcare cases at 12% and International Protection at 7%.

Submissions approved and refused

The 2021 Report also provides figures on the number of submissions granted and refused in that calendar year (page 56). It is not exactly clear what the relationship is between this information and the data provided on the number of applications for legal services summarised above (and at page 26 of the report), as they would appear, on the face of it, to refer largely to the same processes.

However, it is likely that, unlike the applications figures on page 26, the figures do not include District Court Family Law cases, since the Board’s solicitors working in its law centres have discretion to approve these applications, without having to make a submission to the Board for approval.

It is also perhaps conceivable that submissions relate to cases of legal representation only, whereas applications may include both cases of legal representation and legal advice only.

¹⁷³ As with the 2018 Report, there are again five categories for ‘applications’ and three categories for ‘cases handled’. And, again, International Protection (i.e. refugee) cases handled are included in the ‘Other Civil’ category for reasons that remain unexplained.

¹⁷⁴ Only the numbers for Torts, Services to Victims, Other non-family law, Succession, Debt, Contract and Employment fit clearly into this category and, collectively, these amount to 1,319. Adding property and equity cases would bring that total to 1,722.

Thus, for example, it is notable that there were only 235 submissions for legal aid certificates in ‘Non-Family Law cases’, yet it appears that 992 applications were approved under the ‘Other Civil’ heading, broadly the same category.

The categorisation of cases in this table of submissions (i.e. applications) approved or refused in 2021 differs from the categorisation of ‘cases completed’ above. Nonetheless, we can see from this data that the ratio of non-Family to Family Law submissions (i.e. applications) in 2021 is extremely low – 235 to 10,470 applications (0.22%).

The other principal subject categories – International Protection cases and Personal Insolvency applications – are provided either by law (s.61 of the International Protection Act 2015 in the case of the former) or by a separate funding stream (the Abhaile Scheme of assistance in family home mortgage arrears cases in the case of the latter).

The remaining areas referred to – Amendments, Authorisations, Waivers of Contributions or Costs – broadly concern adjustments or additions to cases that were already legally aided.

Of the small number of 235 submissions for legal aid in Non Family Law cases, 63 of 235 (27%) were refused. The rejection rate in Family Law cases, on the other hand, was almost non-existent (25 of 10,470 submissions).

The perception that civil legal aid in Ireland is primarily a Family Law service is very much supported by these figures which shows a very low number of new non-Family applications for legal representation in 2021 (235 made, 172 approved).¹⁷⁵

4.2. Human Rights & Equality Analysis

The scope of the civil legal aid system in Ireland has been criticised repeatedly by international bodies and human rights organisations to which Ireland is a party. Both the Committee against Torture (UNCAT) and the Committee on Economic, Social and Cultural Rights (CESCR) have directly called for the expansion of the scope of the civil legal aid scheme in their most recent evaluations of Ireland.¹⁷⁶ Both committees regard access to civil legal aid as a necessary element in the vindication of the rights guaranteed under their respective instruments. CESCR specifically highlighted the disproportionate impact exclusions have in regards to ‘the areas of employment, housing and forced evictions, and

¹⁷⁵ A breakdown of the 235 submissions in non-Family cases should be provided and, in addition, there should also be a breakdown provided of the subject matter of the refused submissions. It may be that 2021 was something of an exception when viewed against the much higher number of Non-Family cases completed in that year at 1,238.

¹⁷⁶ CESCR, ‘Concluding Observations on the Third Periodic Report of Ireland’ (8 July 2015) UN Doc E/C.12/IRL/CO3; UNCAT, ‘Concluding Observations on the Second Periodic Report of Ireland’ (31 August 2017) UN Doc CAT/C/IRL/CO/2.

social welfare benefits'.¹⁷⁷ UNCAT drew attention to the lack of effective access to civil legal aid for specifically vulnerable groups in Ireland; namely, 'victims of domestic violence'¹⁷⁸, 'those undergoing reviews for the Assisted Decision Making (Capacity) Act 2015'¹⁷⁹, and 'individuals denied leave to land'¹⁸⁰.

In their most recent country report for Ireland, the Committee on the Elimination of Racial Discrimination (CERD) directly criticised the limited scope of Section 27(2) as contrary to Ireland's obligations under Article 5(a) and Article 6 of the Convention. The Committee emphasised their concern that the lack of availability of legal aid in the Workplace Relations Commission resulted in an inequality of arms that was in violation of Ireland's obligations to provide 'equality before the law'¹⁸¹ and 'effective protection and remedies'¹⁸² under the Convention. In its reasoning, the Committee drew attention to the reality that 'the lack of legal aid provided for appeals concerning social welfare, housing and eviction... has a significant adverse impact on Travellers and other ethnic minority groups to claim their rights'.¹⁸³ As a result, the Committee recommended that Ireland not only expand the general scope of the 1995 Act but, specifically, 'designat[e] the Social Welfare Appeals Office and Workplace Relations Commission as prescribed tribunals under Section 27(2)(b) of the Civil Legal Aid Act 1995'.¹⁸⁴

As discussed in detail in Chapter 3 of this submission, in line with the State's obligations under European law, the right to civil legal aid should be decided on a case-by-case basis and the relevant body is obliged to take into account the specific circumstances of each applicant under the established criteria. The existence of blanket exclusions in the 1995 Act clearly run contrary to these established principles (which are considered in further detail below).

¹⁷⁷ CESCR, 'Concluding Observations on the Third Periodic Report of Ireland' (8 July 2015) UN Doc E/C.12/IRL/CO3, para 8.

¹⁷⁸ UNCAT, 'Concluding Observations on the Second Periodic Report of Ireland' (31 August 2017) UN Doc CAT/C/IRL/CO/2, paras 31-32.

¹⁷⁹ *ibid* [para 35] – [para 36].

¹⁸⁰ *ibid* [para 12].

¹⁸¹ Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 5.a.

¹⁸² Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 6.

¹⁸³ CERD, 'Concluding Observations on the Combined Fifth to Ninth Reports of Ireland' (23 January 2020) UN Doc CERD/C/IRL/CO/5-9, para 43.

¹⁸⁴ *ibid* [para 44].

4.2.1. The Importance of What is at Stake for the Applicant

It was highlighted by the European Court of Human Rights that the importance of what is at stake for the applicant,¹⁸⁵ and the vulnerability of the applicant,¹⁸⁶ must be taken into account when assessing whether the provision of legal aid is necessary for a fair hearing under Article 6 ECHR. This principle has been echoed by the Court of Justice of the European Union in cases such as *DEB*.¹⁸⁷

Under Section 28(9)(a)(ii) of the 1995 Act, disputes concerning rights and interests in or over land are listed as one of the 'designated matters' which are excluded from the scope of civil legal aid in Ireland. As a result of this blanket exclusion, individuals involved in eviction proceedings are not entitled to receive legal aid, for example. This would appear to run contrary to the established principles developed by the European Court of Human Rights and Court of Justice of the European Union, as outlined above. Additionally, the concerns raised by the UN Committee on the Elimination of Racial Discrimination (CERD), make specific reference to the impact of such a blanket exclusion on the ability of Travellers and other minorities to vindicate their rights.¹⁸⁸ A similar matter of concern is the perception that civil legal aid is not available in cases concerning housing and homelessness against the State and local authorities. The difficulty created by the lack of legal aid in cases of "disputes concerning rights and interests in or over land" does not arise in this context, nor does any other statutory barrier to the availability of legal aid. However, this is not reflected in the practice of the Legal Aid Board; FLAC is aware that callers to Legal Aid Board Law Centres have been told that the LAB does not deal with housing claims.

There is ample case law demonstrating the seriousness of eviction proceedings, with the European Court of Human Rights holding that 'the loss of one's home is a most extreme form of interference with the right under Article 8¹⁸⁹ to respect for one's home.'¹⁹⁰ The Court noted that, when assessing the proportionality of eviction proceedings, the interference with Article 8 will be considered more serious where there is a lack of alternative accommodation

¹⁸⁵ *Steel and Morris*.

¹⁸⁶ *Nenov* [52].

¹⁸⁷ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010.

¹⁸⁸ CERD, 'Concluding Observations on the Combined Fifth to Ninth Reports of Ireland' (23 January 2020) UN Doc CERD/C/IRL/CO/5-9, para 43.

¹⁸⁹ Article 8, ECHR: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' 171 See, for example: *Winterstein and Others v France*, no. 27013/07, 17 October 2013, 148.

¹⁹⁰ See, for example: *Winterstein and Others v France*, no. 27013/07, 17 October 2013, 148.

available.¹⁹¹ The current system of civil legal aid and the exclusion of disputes concerning rights and interests in or over land is in operation during an unprecedented housing crisis, where rental supply is ‘at an all-time low’ and prices continue to rise, according to a 2021 report.¹⁹² As such, it is essential that legal aid is made available to those who need it so that they are afforded the right to effectively challenge eviction proceedings, which can have grave implications for the basic human rights of some of the most vulnerable persons in our society.

In *Clare County Council v Bernard McDonagh and Helen McDonagh*,¹⁹³ the Supreme Court endorsed the principle established by the Strasbourg Court¹⁹⁴ whereby special consideration must be given to the needs and different lifestyles of vulnerable groups such as the Roma and Travellers, placing a positive obligation on the State to facilitate their way of life. The European Committee on Social Rights, in analysing the rights of the Roma under Article 16¹⁹⁵ of the European Social Charter, held that ‘the law must also establish eviction procedures... provide legal remedies and offer legal aid to those who need it to seek redress from the courts.’¹⁹⁶ Article 31 of the Revised Social Charter specifically provides for the right to housing, which was examined by the European Committee on Social Rights in *FEANTSA v France*.¹⁹⁷ The Committee found France to be in violation of Article 31 on the basis of, *inter alia*, ‘unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions for evicted families.’¹⁹⁸ This wide-ranging decision established the extent of the protection that should be provided under Article 31 of the Revised Social Charter.¹⁹⁹

The absence of legal aid in disputes concerning rights and interests in or over land is just one example of many illustrating how the blanket exclusions in operation under the current system of civil legal aid are incompatible with Ireland’s obligations under both European and international law, particularly bearing in mind the grave implications blanket exclusions can have on the fundamental rights of the most vulnerable in our society.

¹⁹¹ Ibid.

¹⁹² The Daft.ie Q3 Rental Price Report, 2021.

¹⁹³ *Clare County Council v McDonagh & Anor* (Approved) [2022] IESC 2.

¹⁹⁴ *Winterstein and Others v France*, no. 27013/07 17 October 2013.

¹⁹⁵ Article 16 of the European Social Charter provides: ‘The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.’

¹⁹⁶ *European Roma Rights Centre v Bulgaria*, no. 31/2005, 30 November 2006, 52.

¹⁹⁷ *European Federation of National Organisations Working with Homeless (FEANTSA) v France* (Complaint No. 39/2006\0, Merits, 5 December 2007 (European Committee on Social Rights

¹⁹⁸ Ibid.

¹⁹⁹ Gerry White, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration 2015) 963.

4.2.2. The Complexity of the Relevant Law or Procedures

It was established in *Airey v Ireland* that Article 6(1) of the ECHR may compel the State to provide legal aid where such aid ‘proves indispensable for an effective access to court... by reason of the complexity of the procedure or of the case.’²⁰⁰ Under the current civil legal aid system in Ireland, individuals involved in proceedings before certain quasi-judicial tribunals are not entitled to legal aid under any circumstances. These tribunals include the Workplace Relations Commission, the Labour Court, and the Social Welfare Appeals Office. Although they are not explicitly excluded from the scope of legal aid, they have not been prescribed by way of a ministerial order under Section 27(2)(b) of the 1995 Act.²⁰¹ The blanket exclusion of legal aid in cases before these tribunals has been condemned by a number of international bodies, with both CESCR and CERD noting their concern for the areas of employment and social welfare.²⁰²

The social welfare system in Ireland has been described as ‘a labyrinth of complex law, rules and regulations with an appeals mechanism that is neither open nor transparent.’²⁰³ While the social welfare code was consolidated in 2005,²⁰⁴ it has been amended on many occasions since. The constant addition of new provisions and legal rules only serves to exacerbate the complexity and opacity of this particular area of law. This can present challenges even for experienced legal practitioners, but the fact that lay litigants are expected to navigate this process without any legal aid raises serious concerns as to the effectiveness of their right to a fair trial as guaranteed by Article 6 ECHR and Article 47 of the Charter. Of the 26,790 appeals finalised in 2020, 14,239 (53.2%) had a favourable outcome for the appellant.²⁰⁵ This would suggest that the initial decision-making process of the Social Welfare Appeals Office is not fit for purpose, and that applicants clearly have difficulties effectively stating their claim at first instance. This concern was supported by CESCR, which specifically expressed concern at ‘the number of social welfare appeals owing to the lack of clear understanding and consistent application of the eligibility criteria.’²⁰⁶

²⁰⁰ *Airey* [11].

²⁰¹ Section 27(2)(b) Civil Legal Aid Act 1995.

²⁰² CESCR, ‘Concluding Observations on the Third Periodic Report of Ireland’ (8 July 2015) UN Doc E/C.12/IRL/CO3, para 8; CERD, ‘Concluding Observations on the Combined Fifth to Ninth Reports of Ireland’ (23 January 2020) UN Doc CERD/C/IRL/CO/5-9, para 43.

²⁰³ FLAC, *Not Fair Enough*, Making the case for reform of the social welfare appeals system, 2012.

²⁰⁴ Social Welfare Consolidation Act 2005.

²⁰⁵ Annual Reports of the Social Welfare Appeals Office 2020, available at:

<https://www.gov.ie/en/publication/888e0f-social-welfare-appeals-office-annual-report-2018/>

²⁰⁶ CESCR, ‘Concluding Observations on the Third Periodic Report of Ireland’ (8 July 2015) UN Doc E/C.12/IRL/CO3, para 20.

Cases involving social welfare benefits are of the utmost importance to applicants as it provides a social safety net to the most disadvantaged and marginalised.²⁰⁷ Without access to social welfare services, the rights of vulnerable groups to live in dignity would be disproportionately impaired. Therefore, it is imperative that the blanket exclusion of legal aid in cases before the Social Welfare Appeals Office is removed to reflect the international standards outlined above.

Employment and equality disputes before the Workplace Relations Commission are also excluded from the scope of civil legal aid, despite both the importance of what is at stake for the applicant and the complexity of the relevant law. Under the principle of equality of arms, which is well established in the case law of the European Court of Human Rights,²⁰⁸ it would be contrary to the notion of a fair trial to expect an individual with no legal training or knowledge to advocate for themselves in adversarial proceedings, when their employer will often have the resources to hire professional legal representation. Although the right to civil legal aid is not absolute, the imbalance of power that can arise between parties may require the State to provide legal aid where failure to do so would place the applicant at a substantial disadvantage vis-à-vis the other party, as previously discussed above.²⁰⁹

While employers and businesses can often afford to pay for private legal representation in equality cases before the WRC, persons making complaints often cannot. Where a person alleging discrimination does not have such financial means and is faced with an experienced legal team on the other side, this can give rise to an inequality of arms in practice. Research undertaken by LLM students in Trinity College Dublin examining “*the absence of Legal Aid for Employment Equality cases*”, found that “*professional legal representation significantly improves the chance of winning an employment equality dispute before the WRC*”:

“It is very difficult to win an employment equality case before the WRC. Of the cases brought before the WRC between the 1st of January 2019 and the 31st of January 2021, complainants lost over 75% of the cases. From January 2018 to the end of January 2021, claimants with professional representation won more than 30% of the cases before the WRC and claimants with union representation won 32.6% of their cases. For those claimants without representation, there was a loss rate of more than 86% before the WRC. Overall, unrepresented claimants

²⁰⁷ CESCR, ‘Concluding Observations on the Third Periodic Report of Ireland’ (8 July 2015) UN Doc E/C.12/IRL/CO3, para 20.

²⁰⁸ For example, see: *Ruiz-Mateos* [63].

²⁰⁹ *Kress*.

had a success rate of less than 14%, indicating that legal representation more than doubles a claimant's chance of success."²¹⁰

It is worth highlighting the significance of certain equality cases heard by the WRC, as well as the issues of sensitivity and vulnerability which may arise. Cases under the Equal Status Acts may concern access to schools (including for children with disabilities) or access to housing where there is a risk of homelessness or where the complainant is experiencing homelessness (such as in cases under the HAP ground). Cases may concern harassment and sexual harassment (which are prohibited under both the Equal Status Acts and Employment Equality Acts) against persons (protected by any of the grounds including gender and disability) by employers or service providers.

The areas of social welfare and anti-discrimination/equality law are considered in further detail in chapter 11 of this submission.

4.2.3. The Applicant's Capacity to Represent Him or Herself Effectively

In *McVicar v United Kingdom*,²¹¹ it was highlighted that an individual's capacity to represent themselves is a fundamental factor in ensuring effective access to the courts under Article 6(1) ECHR. In this case, it was already established that the relevant area of law was not sufficiently complex to require legal aid.²¹² However, the Court still emphasised the importance of taking into account the individual circumstances of the applicant and their own capacity to represent themselves when making a determination about the provision of legal aid.²¹³

The importance of this principle can be traced back to *Airey v Ireland* when the Court determined that Ms. Airey lacked the objectivity necessary to represent herself due to the emotional nature of the matters at hand.²¹⁴ Further, this principle was upheld by subsequent cases in the European Court of Human Rights²¹⁵ as well as the Court of Justice.²¹⁶ However, it is important to note that the practical difficulties facing the applicant may be even more acute. Under the Employment Equality Act, discrimination complaints can be brought before the Workplace Relations Commission on nine specific grounds. Notably, under Section 27(2) of the 1995 Act, this tribunal is excluded from the provision of legal aid. As a result, under the

²¹⁰Trinity College Dublin, LLM Human Rights Law Clinic (2021), [A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland](#).

²¹¹ *McVicar* [48] - [62].

²¹² *ibid* [16].

²¹³ *ibid* [14] - [18].

²¹⁴ *Airey* [24].

²¹⁵ *Steel and Morris* [23].

²¹⁶ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010, 61.

current scheme, an individual with a cognitive disability who intends to file a discrimination complaint in the WRC on such grounds is ineligible for legal aid.

Regardless of the circumstances of the applicant, the blanket exclusions under Section 27(2) of the 1995 Act do not provide for the individual assessment of capacity as outlined in *McVicar*. In fact, when discussing the blanket exclusion of certain tribunals under Section 27(2) before the Committee on Economic, Social and Cultural Rights, a representative for the Irish Government submitted that the exclusions were justified due to the ‘informal and accessible’ nature of tribunals.²¹⁷ This is in direct tension with the principles established in *McVicar*.

An individual’s capacity to effectively represent themselves is a fundamental factor in the European Court of Human Rights and the Court of Justice case-law on securing effective access to justice. This case-law repeatedly asserts that there must be a case-by-case assessment of the provision of legal aid. By establishing blanket exclusions which preclude an applicant from receiving legal aid no matter the context or situation, the existing scheme lacks the ability to make exceptions which may be required to ensure effective access to justice for the applicant.

4.2.4. Cases in the Public Interest & On Behalf of Groups

While so-called “test” or “strategic” cases are excluded from the scheme of civil legal aid, they are nonetheless a significant part of the Irish public legal assistance landscape through the work of independent and community law centres (each of which receive some form of public funding).

The EU’s Fundamental Rights Agency has highlighted the significant role that representative actions and group complaints may play in the promotion of equality rights: “their [i.e. representative groups, NGOs and Trade Unions] participation may help to reduce the financial and personal burden on individual victims, giving them greater access to justice”.²¹⁸

The blanket exclusion of such cases from the present scheme of civil legal aid is difficult to reconcile with the principles set out in the ECtHR case-law, as such cases often raise issues of particular significance and sensitivity. Further, the litigants (and the wider group who may benefit from such cases) are often particularly vulnerable.

²¹⁷ CESCR, ‘Summary Record of the 32nd Meeting’ (16 June 2015) UN Doc E/C.12/2015/SR.32, 58.

²¹⁸ European Union Agency for Fundamental Rights (2012), *The Racial Equality Directive: Application & Challenges*, p.14.

Relatedly, the blanket exclusion of groups from accessing the scheme of civil legal aid runs contrary to the findings of the CJEU in *DEB*.²¹⁹ In environmental matters, this exclusion raises questions of compliance with the Aarhus convention.

4.3. Conclusions, Recommendations & Best Practice

Within a comprehensive system of legal aid, access to legal aid should be determined by reference to a case-specific assessment of individual need. While the nature of the case will, in many cases, be a factor in such an assessment, it is vital that the factors articulated by the ECtHR and CJEU are also considered in order to ensure that the system of civil legal aid is compliant with Ireland's human rights obligations. In this regard, it can be concluded that blanket exemptions have no place in a rights-based scheme of civil legal aid.

By way of example, the Legal Services Society Act (British Columbia) imposes no limits on the nature of the cases in which the Legal Services Society of British Columbia may provide legal services. Instead, the Society is specifically mandated to consider "the needs of the person or persons involved" in "determining the method, if any, by which legal aid is to be provided in any circumstance". That legislation is considered in further detail in chapter 8 of this submission.

The Review Group should recommend that:

- The scope of any new scheme of civil legal aid in Ireland does not include any blanket exemptions in respect of the forum in which a case is heard, or by reference to the subject matter/area of law.
- Any new scheme of civil legal aid must not exclude cases in the public interest or test cases. Further, there should be no blanket exemption for cases on behalf of groups, including in environmental matters.

²¹⁹ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010, 61.

5. The Means Test

This chapter will provide an overview of the relevant international regulations and framework regarding the means test in order to qualify for civil legal aid.

The means test is discussed in Section 29 of the 1995 Act. The means test refers to an assessment of various criteria relating to a person's financial status, to determine whether they are eligible for legal aid. In 2020, 29% of the refusals of legal aid by the Irish Legal Aid Board were because the applicant was deemed financially ineligible.²²⁰

The requirement to pass such a means test in order to be eligible for civil legal aid is not unique to the Irish civil legal aid system. In fact, according to the Global Study on Legal Aid Report conducted by the UNDP and UNODC, globally, financial need is the most common factor determining eligibility to legal aid in civil cases (73% of participating countries). Notably, countries that have adopted a separate law on legal aid recognize financial need (78%) as a basis for eligibility to legal aid in civil matters more frequently than countries where no such law is in place (63%).²²¹

While the means test in itself is widely used around the world, Ireland has been criticised for its strict financial eligibility requirements and application of the test. The 2021 'Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights,' by FLAC, the Irish Council for Civil Liberties and the Irish Penal Reform Trust, criticised the means test for legal aid in Ireland as 'strict and done without reference to a person's ability to have a fair trial without civil legal aid.'²²² That report further notes that the contribution required for legal aid can be excessive given a person's limited means and may be even more financially challenging given that: 'applicants may even become liable for the full costs of a case, with the Board's solicitor charging their time at an hourly rate.'

Since 2006, there have not been any changes to the financial eligibility criteria. FLAC has called for these criteria to be measured annually against national poverty proofing standards.²²³ In addition, in various Annual Reports of the Legal Aid Board, most recently in the 2020, 2019 and 2018 Annual Reports, then Board Chairperson Philip O'Leary repeatedly stressed the importance of a revision of the financial eligibility criteria and the danger of

²²⁰ Legal Aid Board, Annual Report (2020) 62.

²²¹ United Nations Office on Drugs and Crime and United Nations Development Programme, 'Global Study on Legal Aid: Global Report' (2016) 119.

²²² FLAC, ICCL, IRPT, 'Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights' (2021) 85.

²²³ FLAC, 'Civil Legal Aid in Ireland: 40 Years On' [20].

'poverty traps'.²²⁴ He noted that the rigidity of the financial eligibility test results in a lack of discretion needed to provide legal aid or similar services to applicants who may be 'marginally outside the financial limits'. Whereas the financial threshold is absolute within the civil legal aid system in Ireland, other countries, including for example Australia, exercise discretion in the means test, leading to a more inclusive civil legal aid system.

5.1. Equality & Human Rights Standards

5.1.1. European Convention on Human Rights

In *P., C. and S. v The United Kingdom*, the European Court of Human Rights held that 'the right of access to court is not absolute and may be subject to legitimate restrictions.' However, these restrictions must be compatible with the Convention. With regard to the establishment of a financial eligibility test, in *P., C. and S.*, the European Court of Human Rights explicitly stated that 'the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice'.²²⁵ In applying the Strasbourg jurisprudence in the context of EU law, the European Court of Justice observed that there is no infringement of Article 6(1) of the European Court of Human Rights if an applicant is not eligible for legal aid because their income exceeds the financial criteria.²²⁶ However, this is subject to the condition that the refusal of legal aid may not 'affect the very substance of his right of access to a court.'²²⁷ In assessing conformity with the Convention, the Court will 'take concrete account of the quality of the legal aid system in a State and to check whether the method chosen by the domestic authorities in a particular case is in conformity with the Convention'.²²⁸

Another European Court of Human Rights case, *J.D. and A v. The United Kingdom*, involved a stringent means test. In the national judgment, Lady Hale discussed the consequences of overly-strict means tests in her dissent. This case involved two applicants unable to pay their respective rents due to reductions of their Housing Benefits, to which the Court held the reduction did not violate their rights under the Convention.²²⁹ Lady Hale referenced the Court of Appeal's decision in *Burnip v. Birmingham City Council*; the discretionary housing payment scheme in that case involved a strict means test with an onerous application process.²³⁰

²²⁴ See: <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/>

²²⁵ *P., C. and S. v The United Kingdom* App no 56547/00 (ECtHR, 16 October 2002)

²²⁶ *Airey*; See also: *Glaser v United Kingdom* App no. 32346/96 (ECtHR, 19 September 2020) para 99.

²²⁷ *Santambrogio* [para 58].

²²⁸ *ibid* [para 52].

²²⁹ *J.D. and A v. The United Kingdom* App nos 32949/17 and 3461/17 (ECtHR, 24 October 2019)

²³⁰ *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117, para 46.

Although this case did not specifically involve a legal aid means test, Lady Hale's overall message was that it is not justifiable for an individual, already dealing with the fear and anxiety of their circumstances, to also have to endure the difficulties and uncertainties posed by means tests.

In another case, *Santambrogio v. Italy*, the applicant was going through divorce proceedings and applied for legal aid. He was denied legal aid because he did not meet the national financial eligibility criteria, which was being in a 'state of poverty,' as his family was able to fund his legal representation. The European Court of Human Rights clarified that a financial threshold for legal aid is *not* contrary to Article 6(1) of the European Convention on Human Rights. The court stipulated that it is up to the national authorities which factors are included in the means test ('calculations'), but these must be provided for by law and cannot be arbitrary.²³¹ The European Court of Human Rights defined 'arbitrary' in *Anđelković v Serbia*,²³² holding that a domestic court's decision amounted to a 'denial of justice' because it had no basis in domestic law and did not contain any connection between the established facts and the applicable law. In *Santambrogio v Italy*, the Court tested whether or not there existed 'substantial guarantees' for applicants in the national system for selecting cases that are eligible for legal aid. These guarantees must, *inter alia*, prevent arbitrariness in the decision not to grant legal aid. In this case, the Court held that there was no violation of Article 6 as it found that the national system offered these substantial guarantees to applicants. Factors that were included in this test included the existence of an independent legal aid commission and an appeals procedure for rejection decisions.

In *Steel and Morris*, the defendants incurred significant court fees and an order for £40,000 in damages by the lower court. The European Court of Human Rights held that the 'inequality of arms could not have been greater,' given the overpowering economic position of the plaintiff, McDonalds. The Court stated: 'States are not obliged to spend public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.'

5.1.2. Charter of Fundamental Rights of the European Union

In her recent analysis Judge O'Leary considered the effects of the ECtHR case-law and EU law on the financial means test for legal aid. The ECtHR has said that there will be no violation of Article 6.1 if an applicant falls outside the legal aid scheme because his or her income exceeds the financial criteria, provided of course the essence of the right of access to a court

²³¹ *Santambrogio*

²³² *Anđelković v. Serbia* App no 1401/08 (ECtHR, 9 April 2013) [para 24] - [para 27].

is not impaired.²³³ In contrast, the legal aid provision of the EU Charter reflects a procedural principle or right, and now (given the recent interpretation of Article 19.1 TEU), it is directly or indirectly linked to the value of the rule of law recognised in Article 2 TEU. In her view, the classification of Article 47.3 as a procedural right or principle, while harnessing the powerful EU principle of effectiveness in relation to it, might make the right to legal aid in an EU context less susceptible to arguments concerning budgetary restraints.²³⁴

5.1.3. International Human Rights Law

Strict means tests have been criticised by some UN human rights treaty bodies. Norway's system, which bears many similarities to Ireland's, including a strict 'earnings and wealth' limit in order to qualify for legal aid, and similar coverage of areas of law eligible for legal aid.²³⁵ Norway has been repeatedly urged to reform its means test. In 2011, the Human Rights Committee stated its concerns in its Concluding Observations with respect to Norway's compliance with the ICCPR. It was particularly concerned with the fact that the means test applied by Norway 'failed to take account of the actual circumstances of the applicants and is assessed without regard to the actual cost of the legal service being sought.'²³⁶

A similar observation was made when the Human Rights Committee considered Norway's compliance again in 2018: 'The Committee reiterates its concern and notes that, despite its previous recommendation, the means-tested legal aid system continues to fail to take into account in practice the actual circumstances of the applicant and the cost of legal services being sought, and does not provide legal aid in many categories of cases.'²³⁷

The issue was also raised by the Committee on Economic, Social and Cultural Rights in 2020: '[T]he Committee is concerned that disadvantaged individuals have limited access to remedies if their Covenant rights are violated, owing to the limited scope of free legal aid and the unrealistic financial eligibility of the means-tested legal aid scheme, which has not been adjusted since 2009.'²³⁸

The similarities between Norway's system and Ireland's system suggest that Ireland's system

²³³ *Airey v Ireland*, cited above, § 26, and *Glaser v the United Kingdom*, no. 32346/96, 19 September 2000, § 99, and *Santambrogio v Italy*, cited above, §§ 53 and 58

²³⁴ O'Leary, 'The Legacy of *Airey v Ireland* and the Potential of European Law in Relation to Legal Aid' § 111

²³⁵ Ole Hammerslev and Olaf Rønning, *Legal Aid in the Nordic Countries* (Palgrave Macmillan, 2018).

²³⁶ International Covenant on Civil and Political Rights, 'Concluding Observations of the Human Rights Committee' CCPR/C/NOR/CO/6 (18 November 2011).

²³⁷ International Covenant on Civil and Political Rights, 'Concluding Observations on the Seventh Periodic Report of Norway' CCPR/C/NOR/CO/7 (25 April 2018).

²³⁸ Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Sixth Periodic Report of Norway' E/C.12/NOR/CO/6 (2 April 2020).

is also incompatible with the State's obligations under the ICCPR and the ICESCR. In the general comments from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee, it was found to be necessary that States 'remove economic barriers to justice by providing legal aid and by ensuring that fees for issuing and filing documents as well as court costs are reduced for women with low income and waived for women living in poverty.'²³⁹ In its Concluding Observations on Canada in 2016, the CEDAW Committee noted its concern with regard to financial eligibility tests and particularly the effect they have on access to justice for women: 'Income tests for eligibility limit civil legal aid to women living well below the poverty line, consequently denying low-income women access to legal representation and services'. To counter this barrier for women's access to justice, CEDAW recommended that Canada review the criteria it applied in the income tests for eligibility.²⁴⁰

Other difficulties with regard to the means test arise in instances where women facing domestic violence do not satisfy the eligibility criteria for civil legal aid due to holding assets under a joint name which they may not have access to, as was reported by Safe Ireland, a women's advocacy group.²⁴¹

5.1.4. International Guidance

The UNDP has noted that in general, the requirement of submission of proof of capital or income may deter individuals from seeking legal aid: 'in [civil] cases where eligibility for legal aid is not automatically based on the type of case or its gravity, applicants for legal aid may be required to produce additional forms of eligibility (e.g. proof of poverty by assessment of capital). Unsurprisingly, this may serve as a disincentive to seek legal aid since many applicants will not have such proof on hand.'²⁴² This application process has been recognized as a 'bureaucratic burden' and a potential obstacle for access to justice by the Council of Europe. In the recently published Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, the Council of Europe stated that Member States should reduce

²³⁹ Committee on the Elimination of Discrimination against Women 'General recommendation No. 33 on women's access to justice' CEDAW/C/GC/33 (23 July 2015).

²⁴⁰ Committee on the Elimination of Discrimination against Women 'Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada' CEDAW/C/CAN/CO/8-9 (25 October 2016).

²⁴¹ SAFE Ireland, Transforming the Response to Gender Based Violence in Ireland, The importance of CEDAW to help make Ireland the safest country in the world for women and children (January 2017).

²⁴² United Nations Office on Drugs and Crime and United Nations Development Programme ('UNDP') [119].

the number of documents applicants are required to provide in order to prove eligibility.²⁴³ In order to remove this barrier in obtaining legal aid, Spain for example has implemented a system through which applicants can request judicial aid and the designation of a lawyer through a single online application point. This spares the applicants from having to gather various documentation for several applications relating to the same issue. Spain's practice has been awarded the 2014 Crystal Scales of Justice Prize by the Council of Europe and the European Commission.²⁴⁴

In the European Court of Human Rights judgment in *Santambrogio v Italy*, the Court stated that the existence of an appeals procedure is an important factor in preventing arbitrariness in the decision not to grant legal aid. The importance of an appeals procedure is reiterated in the Council of Europe Guidelines, in which it is stated that: 'Whenever an application for legal aid is refused, member States should consider allowing applicants to challenge the refusal before a competent authority which should give reasons for its decision.' Finally, Section 15 of the Council of Europe Guidelines states that: 'Member States should consider allowing the waiving of means testing whenever justified'.²⁴⁵

As previously stated, one of the issues identified in the Irish means test is the rigidity of the means test and the exclusion of applicants that are marginally outside the financial limits. A waiver of the means test in specific cases like these could be a solution to this problem. In Australia and certain provinces in Canada, a more flexible approach with regard to the means test is already taken.

5.2. The Means Test in Ireland

The means test in Ireland is an assessment of the financial eligibility of the applicant and it includes both the applicant's 'disposable capital' and 'disposable income'.

The applicant's owned 'disposable capital' must be valued at less than €100,000 (prior to the Civil Legal Aid Regulations 2013, the maximum for owned capital value was €320,000). Included in the calculation for 'disposable capital' are all assets owned by the applicant, such as farm land, machinery and cash, minus any debt on the assets. It is important to note that an *owned* residence in which the applicant lives (family home) is not included as disposable capital. A concern noted with regard to the means test and its inclusion of disposable capital,

²⁴³ Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, 31 March 2021 (Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes), 16.

²⁴⁴ European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European Law Relating to Access to Justice' (2016) 66.

²⁴⁵ Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes.

is that it limits the availability of legal aid and access to justice for those who may have assets but limited income (cash poor). Even if the applicant's income is below €18,000, if the disposable capital is above €100,000, they are not eligible for legal aid, which leads to a lack of legal aid for, for example, farmers and self-employed individuals.

The disposable income of an applicant must be below €18,000 in order to qualify for legal aid, according to the Civil Legal Aid Regulations 2006.²⁴⁶ Since 2006, Ireland has seen an inflation rate of 19.5%²⁴⁷; this means that €18,000 in 2006 is €21,510 in 2022. These figures do not contemplate the current inflation and cost-of-living crisis.

An applicant's 'disposable income' consists of their projected total income for the year. The total income includes salary, social welfare, pensions and any rental allowances, minus deductible expenses. These deductible expenses include income tax, social insurance contributions, child-care facility expenses, expenses for dependants, maintenance for the spouse and accommodation. Only the income tax and social insurance contributions are deducted in full – there is a standard cut-off for deductions related to child-care facility, dependants, spouse and accommodation expenses that applies to all applicants. In 2021, following the tabling of a Private Member's Bill in Seanad Éireann Civil Legal Aid (Exclusion of Value of Free or Partly Free Board) (Amendment) Bill 2021, the Legal Aid Board stated it would no longer treat Housing Assistance Payment - paid to landlords - as a form of income of the purposes of determining financial eligibility for civil legal aid.²⁴⁸

If the means test does not respond and adjust to the changing economic environment, it becomes merely a control mechanism for minimising expenditure on Civil Legal Aid. A clear example of a marked and ongoing failure here is the limited allowance for accommodation, whether mortgage or rented, at a maximum allowance of €8,000 per annum. Many potentially seeking legal aid to defend themselves in eviction cases, were civil legal aid to be made available in eviction cases that reach the courts, or repossession proceedings, for example, would fail the means test, simply by virtue of the income they would have needed to obtain the tenancy or get the mortgage in the first place.

The means test criteria is a common theme in calls to FLAC's telephone information line. In many cases, callers do not meet the means test by a relatively small amount and cannot, by

²⁴⁶ Regulation 3(a) of the Civil Legal Aid Regulations 2006 (SI No. 460/2006).

²⁴⁷ An Phríomh-Oifig Staidrimh Central Statistics Office, CPI Inflation Calculator.

<<https://www.cso.ie/en/interactivezone/visualisationtools/cpiinflationcalculator/>> (accessed 1 April, 2022).

²⁴⁸ Letter to Gary Gannon TD, 23rd July 2020 re: Treatment of Housing Assistance Payment for financial assessment purposes, from Legal Aid Board circulated to members of the Legal Aid Board External Consultative Panel by email 15th September 2020.

extension, afford any level of private legal costs. As a result, such callers either do not progress their case (including family law cases) or end up acting as lay litigants - trying to navigate the court system, often with serious difficulty.

FLAC's analysis of average rents and average gross earnings in Ireland shows that:

- A single person earning the average gross weekly wage in Ireland and paying the average national rent for a new tenancy in Q.1 2022 easily fails the current civil legal aid means test (by close to €9,000) when the allowance included for accommodation is taken into account by the Board. S/he would therefore have to entirely fund the bringing or defending of any potential legal proceedings himself/herself.
- On the other hand, a single person earning the average gross weekly earnings in Ireland and paying the average national rent for a new tenancy in Q.1 2022 *would* just pass the LAB civil legal aid means test, *if* the full amount of his/her accommodation costs were to be taken into account, although s/he would still have to make a substantial financial contribution to the cost of such civil legal aid.

By contrast to the approach of the Legal Aid Board (under the 1995 Act and civil legal aid regulations), the Insolvency Service of Ireland adopts a “reasonable living expenses” approach for those engaging with its services:

“The ISI believes that you are entitled to a reasonable standard of living while you address your debt problem. If you tackle your debt using one of the ISI’s solutions, there is a reasonable standard of living that you are entitled to. The RLEs cover the costs of this standard and includes housing, utilities, food, transport and other needs...

You are entitled to a reasonable standard of living for the duration of your arrangement. This means a higher standard than merely living at a subsistence level, which people often exist on when in debt...

Special circumstances cover instances where your family may have higher than normal expenditure due to a variety of reasons. This can include the care of an elderly relative who is financially dependent or a college-going child. It can also be utilised if you or your dependants have a requirement for additional medical costs or equipment or if you have more than six children.”²⁴⁹

It is interesting to note that while a financial eligibility test, is not *per se* an interference with Article 6 of the ECHR, the ECtHR may still examine the relevant national procedure to assess whether there has been a violation of the Convention. If one compares the Irish Legal Aid

²⁴⁹ See: <https://backontrack.ie/rle-calculator/>

Board and the composition of its appeals commission with the Italian procedure that was at issue in the *Santambrogio* case, one can find that the Irish system offers substantially less guarantees for applicants. In the Italian case, 'the commissions for legal aid set up within the courts are presided over by a magistrate from the bench of that court and also include a member chosen by the public prosecutor's office and the president of the Bar Council, as well as a court clerk (...), rejection decisions may be appealed to the commission set up within the courts of appeal, which may re-examine the contentious decision insofar as it concerns the likelihood of a favourable outcome of the case'. The Court ruled that the Italian legal aid system offered substantial guarantees for the applicant in this case, and therefore found that there was no infringement of Article 6(1). An analogous appeals procedure does exist within the Irish Legal Aid Board. An applicant may ask the Legal Aid Board to reconsider the decision through a review application. However, the applicant will need to submit further information along with the review application, and the reconsideration is made by the same Board. Additionally, applicants may appeal against any decision (including the review decision), which will then be considered by the Appeal Committee which consists of the Chairperson and four other members of the Board. Appeals and review procedures are concerned in further detail in chapter 7 of this submission.

5.3. Best Practice: Means Tests Elsewhere

Other countries are more flexible with their means tests. In the Canadian province of Prince Edward Island, legal aid eligibility is determined through a flexible means test. Income is the primary factor but there are no fixed income cut-offs.²⁵⁰ Applicants receiving social assistance are financially eligible for legal aid, subject to the merits of the case. Applicants may also be considered eligible if they are without funds and require immediate legal assistance to preserve their rights or they cannot pay for a lawyer without impairing their ability to keep themselves and any dependents fed, clothed, sheltered and living as a family.²⁵¹ An applicant's assets, liabilities and the complexity of the case, urgency of situation, cost of proceeding and whether a reasonable person will spend money to advance the case will be considered.²⁵²

The income scale was increased, in July 2001, to meet the 1999 before-tax income cut-offs published by Statistics Canada.²⁵³ This new guideline increased the eligibility level for a

²⁵⁰ Department of Justice Canada, 'Legal Aid Research Series: Legal Aid Eligibility and Coverage in Canada' (2002) 37.

²⁵¹ *ibid* [37] - [38].

²⁵² *ibid* [38].

²⁵³ *Ibid*.

single person with no dependents from \$13,572 to \$14,176 (an increase of \$604).²⁵⁴ In applying these guidelines, the applicant's assets, liabilities, the complexity of the legal matter, the urgency of the situation, the cost of the proceeding and whether a reasonable person who had to pay for a lawyer would spend the money to advance the case will be considered.²⁵⁵

Another Canadian province, Ontario, also uses a means test. This means tests accounts for net income and family size but also considers the expenses and liabilities of the applicants.²⁵⁶ Applicants who meet 'income waiver' levels are not subject to the detailed assessment of assets.²⁵⁷ Applicants whose incomes are above the waiver levels by family size undergo a more detailed assessment of their financial viability.²⁵⁸ Legal Aid Ontario (LAO) sets out a series of allowances: a basic allowance, a shelter allowance, border allowance and a debt allowance.²⁵⁹

Further, Australia has provisions for granting legal aid in situations where one's income exceeds the income eligibility limit by over ten percent and/or the applicant does not satisfy the means test for other reasons.²⁶⁰ In essence, legal aid may still be granted upon consideration of the likely cost of the proceedings, the type of proceedings, the overall financial position of the applicant, and whether the applicant would suffer undue financial hardship if legal aid is refused.²⁶¹ In a situation where the applicant is outside the means test specifically because the assets contribution exceeds the allowable amount for the type of matter, a determining officer will consider whether there is sufficient time for the applicant to raise the funds necessary to pay for legal assistance and whether the applicant could reasonably be expected to borrow against assets.²⁶²

5.4. Conclusion & Recommendations

The means test, or financial eligibility test, is not unique to the Irish system. As we have seen, the means test is included by many other countries when determining eligibility for civil legal aid. The European Court of Human Rights has explicitly stated that including a financial eligibility requirement in the civil legal aid system is not a violation of Article 6(1). However, if

²⁵⁴ *ibid*

²⁵⁵ *ibid*

²⁵⁶ *Ibid* [6]

²⁵⁷ *ibid*

²⁵⁸ *ibid*

²⁵⁹ *ibid*

²⁶⁰ Policy Online (Ch. 7) (NSW).

²⁶¹ *ibid*

²⁶² *ibid*

such a test is included, the Court has stated that States must offer substantial guarantees to applicants in order to avoid arbitrariness. There is no requirement for a means test and it should not be assumed that such a test should be applied in all circumstances. Indeed, Council of Europe Guidelines state that: 'Member States should consider allowing the waiving of means testing whenever justified'.

The Review Group should recommend that:

- A means test should not apply in certain circumstances, such as – in line with international best practice – for those in receipt of means-tested social welfare payments, in child protection cases (or cases where the welfare of a child is concerned), in urgent cases such as where there is a risk of homelessness, eviction, deportation or other serious consequences for the applicant should legal aid not be granted, or in cases where there is the risk of an imminent withdrawal of a social welfare payment.
- Where a means test is applied, it should be flexible and give decision-makers an overarching discretion to grant legal aid by reference to the individual circumstances in line with the principles of European law. Such a system should be informed by international best practice in Australia and Canada.
- In circumstances where a means test does apply, the income threshold should be adjusted in line with inflation and poverty-proofed. FLAC has previously recommended that financial eligibility criteria be measured, at minimum, annually against national poverty proofing standards and for the publication of the underlying analysis by the Department of Justice.
- Additionally, certain assets and incomes should not be included in calculations for disposable capital and disposable income: for example, where the inclusion of applicants' homes or land in a calculation essentially forces them to choose between legal aid or having a place to live or ability to earn a living.
- Drawing from the Insolvency Service of Ireland model, a means test (if applied) should allow for reasonable living expenses and any contributions levied must allow for a reasonable standard of living. It should also have regard to:
 - Measures and indicators of poverty set out in government policy publications on poverty and social inclusion;
 - Official statistics and surveys related to household income and expenditure published by the central statistics office;
 - The Consumer Price Index or an equivalent index;

- Differences in the size and composition of households and the differing needs of persons;
 - Regional differences such as higher rental costs in urban areas and higher transport costs in rural areas.
- Any means test should be applied in a manner which is responsive to applicants' ability to evidence their financial situation in accordance with the Council of Europe Guidelines.
- Any means test should be assessed, in the first instance, on the basis of a short, simple and accessible form.

6. The Merits Test

This chapter provides an overview of the international standards in relation to merits tests for access to civil legal aid, focusing on the case-law of the European Court of Human Rights. It then analyses the Irish merits test by reference to these standards.

6.1. International Standards & Obligations relating to Merits Tests

6.1.1. The ECHR

In the case of *Aerts v Belgium*, the applicant had been refused legal aid as his appeal did not appear to be 'well-founded'.²⁶³ The applicant sought legal aid as he did not have sufficient means to pay for a lawyer for his appeal and at that time Belgian law required representation by counsel in civil cases before the Court of Cassation. The Strasbourg Court found that refusing Mr Aerts' application on the basis that the appeal did not at that time appear to be well-founded impaired the very essence of his right to a tribunal. Following this decision, Belgium amended the law to restrict legal aid refusals to manifestly unfounded applications.

In the case of *Gnahoré v France*, the applicant argued that the decision of the Court of Cassation and subsequently its President in relation to his application for legal aid resulted in his case being prejudged and infringed his right of access to a court. The French Government argued that such decisions were based on the relevant national law, which made provision for an applicant to be refused civil legal aid if no arguable ground of appeal on points of law could be made out. Furthermore, they argued that this was conducted objectively and applied without an examination of the actual merits of the appeal. Its purpose was therefore solely to avoid legal aid being granted in cases where the appeal was manifestly bound to fail. These arguments were accepted by the Court.²⁶⁴

Similarly in *Del Sol v France*, the European Court of Human Rights distinguished between the French system (in which only 'manifestly ill-founded' applications shall be refused) and that which had been censured by the Court in *Aerts*.²⁶⁵

In the case of *M.A.K. and R.K. v The United Kingdom*, the applicants were initially granted legal aid in relation to negligence proceedings taken against a local authority and hospital trust seeking compensation for personal injury and financial loss. The county court found that no duty of care was owed to the first applicant (the father in the case) by the local authority and that only the hospital owed a duty of care to the second applicant, his daughter, who the case was centred around. The applicants subsequently appealed this decision, however legal aid

²⁶³ *Aerts v Belgium* App no 25357/94 (ECtHR, 30 July 1998)

²⁶⁴ *Gnahoré v. France* App no 40031/98 (ECtHR, 19 September 2002)

²⁶⁵ *Del Sol v France* App no 46800/99 (ECtHR, 26 February 2002)

was withdrawn in relation to the second applicant.

In *M.A.K.* the Court noted that the reason relied on by the legal aid authority and the Independent Funding Review Committee for refusing the second applicant's application for legal aid, namely that the cost of funding the case would outweigh any likely award for damages, is expressly contemplated in the Legal Aid Act 1988. In addition, the Court in this case observed that the legal aid system in the United Kingdom offers individuals substantial guarantees to protect them from arbitrariness by way of an appeal to an Independent Funding Review Committee, adding that if the applicant is unhappy with a decision by this committee, they may apply to have it examined by way of judicial review. The Court further stated that even if withdrawing legal aid amounted to restricting the right to access of justice for an applicant, it would be warranted given such a restriction was both legitimate and proportionate.²⁶⁶

6.1.2. United Nations High Commissioner for Refugees

The UNHCR has stated that merits test for legal aid should be set and applied in a flexible and humane manner. In particular, it has noted that asylum seekers face major constraints in accessing adequate legal advice and face challenges when it comes to obtaining the necessary evidence to satisfy legal aid criteria.²⁶⁷

6.1.4. European Commission Against Racism and Intolerance

The ECRI notes, in its fourth Report on Cyprus, that applications for legal aid are subject to a means and merits test, and asylum seekers must demonstrate that they lack sufficient financial resources and that the appeal is likely to succeed. It was further noted within the report that it is almost impossible for them to formulate a successful legal aid application, particularly in relation to the merits test, as many do not have a command of the Greek language.²⁶⁸

6.2. The Merits Test in Ireland

Section 24 of the Civil Legal Aid Act 1995 provides:

Without prejudice to the other provisions of this Act a person shall not be granted legal aid or advice unless, in the opinion of the Board-

²⁶⁶ *M.A.K. and R.K. v United Kingdom* App nos 45901/05 and 40146/06 (ECtHR, 23 March 2010)

²⁶⁷ United Nations High Commissioner for Refugees, 'Ministry of Justice Consultation on Transforming Legal Aid Response of the United Nations High Commissioner for Refugees (UNHCR)' (June 2013) <<https://www.unhcr.org/uk/5756ebc47.pdf>> accessed 1 April 2022.

²⁶⁸ ECRI Report on Cyprus (fourth monitoring cycle) (31 May 2011) 36 <<https://hudoc.ecri.coe.int/eng?i=CYP-CbC-IV-2011-020-ENG>> accessed 1 April 2022.

- (a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense, and*
- (b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.*

Section 28 (2) of the Act provides:

(2) Subject to sections 24 and 29 and the other provisions of this section and to regulations (if any) made under section 37, the Board shall grant a legal aid certificate under this section to a person if, in the opinion of the Board—

- (a) the applicant satisfies the criteria in respect of financial eligibility specified in section 29,*
- (b) the applicant has as a matter of law reasonable grounds for instituting, defending, or, as may be the case, being a party to, the proceedings the subject matter of the application,*
- (c) the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned,*
- (d) the proceedings the subject matter of the application are the most satisfactory means (having regard to all the circumstances of the case, including the probable cost to the applicant) by which the result sought by the applicant or a more satisfactory one, may be achieved, and*
- (e) having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it.*

Section 24 applies to both legal aid (i.e. legal representation) or legal advice and Section 28 to legal aid only.

Sections 24 and 28 provide the Board with a wide set of criteria to apply in deciding whether public funds will be spent on providing legal services to individuals who have been generally assessed in advance as being eligible for such services, in terms of the Board's financial means test.

The Civil Legal Aid Regulations 1996 (SI No.273/1996), provide further detail on the procedures concerning the application of the merits test (and the means test).

The Board's website²⁶⁹ states that the following factors are considered in its application of the merits test:

- Do you have grounds for taking the case, or defending the case the other person is taking against you?
- Is it the best way of solving your dispute?
- Would you be likely to win your case?
- The cost to the taxpayer against the benefit you might receive if you win.
- Where the welfare of a child is at stake – for example, in cases where the State is trying to take your children into care, or a dispute over who has custody of a child – we will not take into account whether or not you would be likely to win the case or a cost/benefit analysis.

The Board's 2021 Annual Report²⁷⁰ states:

'The Board's operating model allows local law centres to grant civil legal aid certificates for most family law District Court cases [our emphasis], which tend to be less complex and less expensive cases. Whilst many of these cases are dealt with directly by the relevant law centre, representation is provided in the majority of them by private solicitors on the Board's District Court panel'....

*'For cases which require representation in the Circuit or Superior Courts, the decision-making function rests with the Board's Decision Making Unit [our emphasis]. The decision to grant or refuse legal aid is made on foot of a submission from the applicant's solicitor, which sets out the relevant facts and seeks to apply the law to those facts including the merit criteria of the Civil Legal Aid Act 1995. The authority for case-related expenditure, such as briefing a barrister or procuring expert reports, also rests with the Decision Making Unit.'*²⁷¹

Thus, for potential Circuit Court cases and upwards, a solicitor in the relevant law centre to which the application has been made, makes a submission to the Board's central '*Decision Making Unit*' (DMU) who decide on the application and on ancillary issues such as subsequent case-related expenditure. Decisions of the Decision Making Unit may be appealed to an Appeal Committee of the Board.²⁷²

²⁶⁹ See: <https://www.legalaidboard.ie/en/our-services/legal-aid-services/faqs/what-is-the-%E2%80%98merits%E2%80%99-test-.html#>

²⁷⁰ <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/annual-report-2021.pdf>.

²⁷¹ Ibid.

²⁷² Ibid.

It should be noted that the Board has a practice in a significant number of cases of seeking counsel's opinion to help it assess the legal merits of applications. According to the Annual Report for 2018²⁷³, for example:

'...there were 3,364 certificates granted by the Board's Legal Services function on foot of submissions made by law centres on behalf of applicants, which mirrored the demand of the previous year...

*There were 904 authorisations given on cases prior to a decision on whether a legal aid certificate should be granted; these were primarily to enable an opinion to be sought from a barrister to help determine the merits of certain cases [our emphasis]'*²⁷⁴

6.3. Conclusions & Recommendations

The merits criteria under the 1995 Act are quite general and, as a result, the manner in which they are applied by various limbs of the Legal Aid Board can be opaque. This is particularly concerning in light of the fact that the Board's decision-making procedures more generally lack transparency and independence (as discussed in the next chapter).

The Irish legislation may be usefully contrasted with the UK's Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 104/2013), which set out extremely detailed guidance on the application of the merits test in various circumstances. Further, the UK Civil Legal Aid (Procedure) Regulations 2012 (SI 3098/2012) allow for an appeal to an independent adjudicator.

The Review Group should recommend:

- Greater transparency in law and practice in relation to any merits test.
- A merits test should not be applied in all cases (such as matters of extreme urgency or where the importance of the matter is manifestly evident). If it is applied, it should be flexible and give decision-makers an overarching discretion to grant legal aid by reference to the individual circumstances of the case as required by European law.
- Any merits test should only exclude cases which are manifestly ill-founded (per the decisions of the ECtHR).

²⁷³ See: <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2018-with-financial-statements1.pdf>.

²⁷⁴ Ibid page 48.

7. Quality, Accessibility & Administration of the Civil Legal Aid System

Civil legal aid plays a critical role in ensuring that legal and human rights are upheld and that equality is achieved in practice. The quality, accessibility and administration of the civil legal aid system are central to how functional and beneficial the system is and in ensuring its fundamental fairness.

This chapter will examine the implications of the State's human rights obligations on the quality of legal representation within a legal aid scheme and the overall quality of a civil legal aid programme. In each of the areas examined, it can be argued that quality boils down to the principle of effectiveness, as laid out in *Airey v Ireland*: whether the legal representation offered practically and effectively ensures that the individual's rights are being upheld.

It will also examine the accessibility and administration of the system in light of the principles discussed in preceding chapters, as well as the principles of natural and constitutional justice.

7.1. Quality of Civil Legal Aid Lawyers

7.1.1. International Standards on Quality of a Civil Legal Aid Lawyer

The libel case *Steel and Morris* is a prime example of why quality of a legal aid lawyer matters in equality before the courts. In this case, Ms. Steel and Mr. Morris were taken to court by McDonald's for defamation under libel laws after handing out pamphlets containing anti-McDonald's rhetoric. At the time of the case, both applicants were either unemployed or part-time, low-wage workers. The European Court of Human Rights found that the applicants were severely disadvantaged in the libel case because they did not have the resources for a legal team like the defendant, the multi-billion dollar corporation McDonald's. McDonald's was represented by one of the largest firms in England with counsel that specialised in libel law. Meanwhile, the applicants were put in a position where they had to rely on volunteer lawyers who were not expert in libel law and lacked experience. The European Court of Human Rights found that the disparity between the legal assistance available to the applicants and to McDonald's was so great that the trial was unfair. In addition, the Court found that the applicants' right to a fair trial guaranteed by Article 6 of the European Convention of Human Rights (ECHR) was violated in part because the sporadic help of the volunteer lawyers was not an adequate substitute for 'competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel'.²⁷⁵ In other cases relating to civil legal aid, the European Court of Human Rights has concluded that assessing the quality of a lawyer

²⁷⁵ *Steel and Morris*.

includes an evaluation of whether they are meeting quality standards in their actions and work.²⁷⁶

These principles are reflected in international soft law instruments, with the Council of Europe stating that, '*[m]echanisms and measures should be in place to ensure the quality of legal aid schemes, both in terms of their general functioning and, more importantly, in terms of the legal services delivered by legal aid providers.*' The mechanisms that were suggested for civil legal aid schemes included:

- *'The use of clear, objective criteria for the appointment of legal aid providers;*
- *Thorough and regular assessment of legal aid providers... against clear criteria, including the quality of their management, policies, accreditation, electronic and paper-based case-management systems, customer-care standards, complaints procedures;*
- *In-service training programmes, adequacy of premises, and accessibility;*
- *Continuous professional development on a regular basis for legal aid providers;*
- *The use of quality assurance clauses in public contracts between governmental bodies responsible for legal aid providers;*
- *Requirements that legal aid providers adhere to ethical codes and other forms of ethical provisions; [and]*
- *The use of quality assessment tools such as client satisfaction surveys and peer reviews by other legal aid providers, based on objective sets of criteria and/or rating systems, and carried out by either an independent body or by individuals (for example, fellow lawyers)...'*²⁷⁷

Cases before the European Court of Human Rights relating to criminal legal aid have reached similar conclusions which may be valuable when considering Ireland's civil legal aid scheme. The Court found that simply having a legal aid representative physically present during a case does not mean that there has been sufficient legal representation such as would be sufficient by ECHR standards.²⁷⁸ Legal representation must be *effective* for one's rights to have been fulfilled.²⁷⁹ This case-law is consistent with findings from the United Nations Human Rights Committee, which concluded that criminal legal aid '*must be provided in ways that adequately*

²⁷⁶ *Staroszczyk v Poland* App No 59519/00 (ECtHR, 22 March 2007) 134; *Siatkowska v. Poland* App Nos 8932/05 and 59519/00 (ECtHR, 22 March 2007); As a result of the judgement, the Polish Bar Association and the National Bar of Legal Advisors introduced new ethical requirements for lawyers preparing cassation appeals.

²⁷⁷ Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, 31 March 2021 (Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes).

²⁷⁸ *Aras v Turkey* (No 2) App No 15065/07 (ECtHR, 18 November 2014) 40.

²⁷⁹ *Imbrioscia v. Switzerland* App No 13972/88 (ECtHR, 24 November 1993) 43.

*and effectively ensure justice*²⁸⁰, and with case law on criminal legal aid from other regional human rights systems.²⁸¹ While the focus of these international authorities has been on the quality of legal aid in the criminal context, it is arguable that gauging effectiveness in legal aid representation in any context should include an evaluation of whether a given lawyer is competent, actively engaged in the case, and has adequate training and/or experience.

The OECD report *Legal Needs Surveys and Access to Justice*, which is not specific to civil legal aid but of value to the holistic consideration of Ireland's scheme, recommended gathering data on the quality of lawyers to ensure the '*quality [and] appropriateness of legal assistance.*' More specifically, it suggested collecting, analysing and reporting on data relating to the perceived quality of the service; the regulation of the service; the experience of the client ('satisfaction', 'trust' and 'perception'); and the perceived adequacy and/or appropriateness of the 'specific service' and 'overall.'²⁸² As Ireland does not publish similar data, it cannot be measured against these standards.

In conclusion, international law would suggest that the legal representatives employed by civil legal aid schemes must meet certain quality standards in order for an individual's rights to have been fulfilled. In order to ensure that these quality standards are met, a programme must have in place quality assurance mechanisms and collect data on their efficacy; this matter is discussed in further detail throughout this chapter. While the case-law on quality of legal aid in the civil context is less developed than in the criminal context, it is nonetheless essential that any representation provided by way of legal aid is competent and effective. If these quality standards are not considered and ensured by Ireland's civil legal aid scheme, there is a risk that the principle of effectiveness - which underpins Ireland's international obligations in this context- will not be satisfied. Where poor quality in legal representation has been identified, there must be effective remedies in place. The international standards in respect of these

²⁸⁰ *Daniel Pinto v Trinidad and Tobago* (Comm No 232/1987) UN Doc CCPR/C/39/D/232/1987 (21 August 1990) 12.5; See also *Paul Kelly v Jamaica* (Comm No 253.1987) UN Doc CCPR/C/41/D/253/1987 (8 April 1991) 5.10.

²⁸¹ The Inter-American Court of Human Rights found that the State had failed in its obligation to provide an acceptable defence lawyer when a public defender did not offer any de facto legal assistance, concluding that the fulfilment of the right to legal assistance was dependent upon counsel being effective; *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (Preliminary Objections, Merits, Reparations and Costs, Judgement) Inter-Am Ct HR (ser. C) No. 170 (21 November 2007); See also American Convention. In the African system, it has been found that criminal legal aid lawyers must have the necessary training and experience which should correspond to the 'nature and severity' of the cases they are representing. These legal representatives must also have a specific set of qualities, including a qualification to provide legal representation; that they be free of State or judicial influence such as would influence their professional judgement; that they be able to 'advocate in favour of the accused or party to a civil case'; and that they be remunerated sufficiently to incentivize providing 'adequate and effective representation.'; African Commission on Human & Peoples' Rights (ACHPR) 'Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa'.

²⁸² OECD/Open Society Foundations, 'Legal Needs Survey and Access to Justice' (2019) 147.

remedies are discussed below.

7.1.2. Remedies for Poor Quality

A discussion of quality begs the question - if an individual legal aid lawyer is found to have not met the quality standards outlined under international human rights law, what are the consequences? The instruments examined herein would suggest that there are two core remedies: firstly, that any complaints are thoroughly and quickly investigated by governing bodies and disciplinary measures are taken where needed; and secondly, that there be a longer-term solution for improving the legal aid programme itself to ensure that its mechanisms are conducive to ensuring quality of lawyers. The former will be addressed in this section while the latter will be discussed in detail below.

Under the ECHR, the way in which a case is conducted is respected as being a decision between civil legal aid lawyer and client.²⁸³ The European Court of Human Rights has made it clear that it is the State's responsibility to ensure a balance between respect for this relationship and ensuring effective access to justice via civil legal aid.²⁸⁴ In order to protect this balance, Ireland should have an 'adequate institutional framework' to respond when issues with legal aid representation are brought to their attention on a case-by-case basis.²⁸⁵

The UN Development Programme has stated that any quality complaints against legal aid providers need to be 'promptly investigated' against all relevant standards and codes of ethics before impartial reviewers, including and up to judicial review.²⁸⁶ In its discussion of the quality assurance mechanisms to ensure efficiency and effectiveness in civil legal aid schemes, the Council of Europe suggested:

- *'...Establishing formal and impartial procedures that allow clients to complain about a legal aid provider;*
- *Establishing formal and impartial procedures that allow for the replacement of a legal aid provider whose services are of unsatisfactory quality;*
- *And establishing procedures for imposing disciplinary measures (including warnings, fines, withdrawal from a list of approved legal aid providers, removal of files and transfer to another legal aid provider) on a legal aid provider who fails to comply with quality*

²⁸³ Staroszczyk [134].

²⁸⁴ *ibid* [133]; the Court added, 'It is in the nature of things that such powers of the State would be detrimental to the essential role of independent legal profession in a democratic society which is founded on trust between lawyers and their clients.'; See also *Anghel v. Italy* App No 5968/09 (ECtHR, 25 June 2013) 51; *Steel and Morris*.

²⁸⁵ *Anghel* [51].

²⁸⁶ UNDP [43].

*standards.*²⁸⁷

However, the obligation to act where quality standards have not been met is limited to special circumstances.²⁸⁸ The meaning of 'special circumstances' has been more thoroughly defined in cases relating to criminal legal aid but these findings are also relevant, by analogy, for civil legal aid. For instance, this obligation has been found to only be triggered where 'authorities are alerted to a 'manifest shortcoming' on the part of a criminal legal aid lawyer'²⁸⁹ having either become aware of this shortcoming based on a blatant lack of quality or when an individual brings a complaint to their attention.²⁹⁰ Even then, the State is liable only when a state authority has failed to act after being alerted.²⁹¹ Along the same vein, the Human Rights Committee found that the State's obligation to ensure competent criminal legal aid counsel has predominantly been limited to protection from 'blatant misbehaviour or incompetence' on the part of legal representatives²⁹², such that it would be or should be clear to a judge that the lawyer's conduct was 'incompatible with the interest of justice.'²⁹³

All told, international human rights law would suggest that Ireland has an obligation to respond to complaints based on a lack of quality directed at the lawyers and legal aid providers within its civil legal aid scheme and to take action where a clear lack of quality can be confirmed.

However, Ireland also has the opportunity to build a higher quality civil legal aid programme more generally. In doing so, it could help prevent individual quality complaints from arising in the first place. The attributes which define a high-quality, fair and accessible civil legal aid programme will be the focus of the remainder of this chapter.

7.2. Quality of the Civil Legal Aid System

The mere recognition of the right to legal aid and the assigning of a lawyer to represent an applicant does not in itself guarantee effective access to justice.²⁹⁴ This essentially means that in order to realise the right to legal aid and to ensure its effectiveness in enhancing access to justice, the legal aid scheme through which legal assistance is given must be of sufficient

²⁸⁷ Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes.

²⁸⁸ *Anghel* [51].

²⁸⁹ *Daud v. Portugal* App No 22600/93 (ECtHR, 21 April 1998) 42; European Union Agency for Fundamental Rights and Council of Europe [83].

²⁹⁰ *Daud* [42]; *Imbrioscia* [41].

²⁹¹ *Tripodi v. Italy* App No 13743/88 (ECtHR, 22 February 1994) 30.

²⁹² Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Third Edition edn, Oxford University Press 2013) 14.165.

²⁹³ *Barrington Campbell v Jamaica* (Comm No 618/1995) UN Doc CCPR/C/64/D/618/1995 (3 November 1998) 7.3.

²⁹⁴ *Sialkowska* [para 116].

quality. As the European Court on Human Rights stated in the *Airey* case, the ECHR ‘...is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’.²⁹⁵ This precedent was further built upon in *Del Sol v France*, which found that it is important to have due regard to the quality of a legal aid scheme within a State.²⁹⁶ This section will demonstrate the elements of a high-quality civil legal aid scheme which in turn determines how practical and, above all, effective the right to legal aid is.

7.2.1. Appointment of Legal Aid Lawyers & Delay

The process and criteria for the appointment of legal aid lawyers should be clear and objective. The appointment of a lawyer should be conducted diligently, as an appointed lawyer will have a decisive impact on the legal aid applicant’s right to access justice.

In exercising diligence, the appointment of lawyers should be done in a timely manner to provide the lawyer with adequate time to prepare for their client’s case. The ECtHR states that there must be sufficient time for an appointed lawyer to prepare for a criminal case.²⁹⁷ In *Daud v Portugal*, for instance, the European Court on Human Rights held that it was manifestly evident that a legal aid lawyer who was only appointed three days before the trial did not have time to prepare for the case. Furthermore, diligence is not only required in the timely appointment of a lawyer but is also necessary in the event of the rejection of a legal aid request. Diligence in these circumstances will give the rejected applicant time to appeal the rejection decision. In *Tabor v Poland*, the European Court of Human Rights found that the applicant’s request for legal aid was not handled with the requisite degree of diligence as the regional court did not provide reasons for the rejection and issued its decision one month after the deadline for lodging a cassation appeal.²⁹⁸

Although the ECHR and the aforementioned cases from the European Court on Human Rights refer to criminal legal aid cases, similar standards should apply to civil legal aid schemes. The criteria for the appointment of a legal aid lawyer should clearly state the timeline within which an applicant will receive a response regarding their application. On one hand, there will be adequate time for the preparation of a client’s case in the case of a successful application and, on the other hand, sufficient time to lodge an appeal in the case of a rejected application. This will significantly contribute to the quality of the legal aid scheme by demonstrating its effectiveness.

²⁹⁵ *Airey* [9].

²⁹⁶ *Del Sol* [6].

²⁹⁷ ECHR Act, art 6.3; See also *Daud* [42].

²⁹⁸ *Tabor v Poland* App. No. 12825/02 (ECHR, 27 June 2006) at paras. 44-46.

Significant delay in accessing civil legal aid is a common issue amongst callers to FLAC's telephone information line. Callers have reported waiting for months for legal aid to meet a solicitor, including in circumstances where they have received family law proceedings, are facing motions for judgement in default or care proceedings applications, or who are living in very difficult family law situations.

In addition, choice of lawyer is a critical aspect that must be taken into account in the appointment of a legal aid lawyer. The International Covenant on Civil and Political Rights²⁹⁹ and the ECHR³⁰⁰ set out the right to legal assistance of one's own choosing in criminal cases. This right is not absolute and it can be subject to limitations in the interest of justice.³⁰¹ While these rights only hold analogous meaning to civil legal aid, it is important to note that Ireland's civil legal aid system is based around law centres with limited individual choice (or no choice at all) of one's representative. Applicants seeking civil legal aid should be accorded the right to exercise their wishes in appointing their legal representative within reason.³⁰² Limitations should only be applied in the interests of justice. For instance, an acceptable limitation on the choice of lawyer can include requiring specialist lawyers for specialist proceedings.³⁰³

7.2.2. Specialisation of Legal Aid Lawyers

The specialisation of legal aid lawyers should be taken into account in the establishment of an effectively functioning legal aid scheme. A legal aid lawyer should be knowledgeable in the particular area of the law to which they are to be assigned. The mere appointment and presence of a lawyer is of no benefit to the client if the lawyer is not well-versed in the area of the law in a case before the Courts or Tribunals.

The European Committee on Legal Co-operation, in its guidelines on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, refer to the English and Belgian legal aid schemes as reference points.³⁰⁴ In Belgium, all barristers providing legal aid are specialised in a certain area of law such as family law, commercial law, criminal law or social law, while in the UK, the Legal Aid Agency procures legal aid by category of law and the contracts that are awarded have category-specific rules on how those services are to be delivered. For instance, legal aid providers who are authorised to undertake family work will be required to meet the service specifications for that area of law, including having a

²⁹⁹ International Covenant on Civil and Political Rights, Article 14(3)(d).

³⁰⁰ ECHR Act, art 6.3.c.

³⁰¹ *Lagerblom v. Sweden* App no 26891/95 (ECtHR, 14 January 2003) para. 54.

³⁰² *Croissant v Germany* App no 13611/88 (ECtHR, 25 September 1992).

³⁰³ European Union Agency for Fundamental Rights and Council of Europe [67].

³⁰⁴ Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes, s 29.

supervisor with specific accreditation in family law.

7.2.3. Adequate Funding and Resources

The remuneration of legal aid lawyers should be adequate. The Human Rights Committee stated in *Reid v Jamaica* that an effective legal aid system must operate in a way that there is adequate remuneration for legal aid to enable lawyers to discharge themselves of their duties and responsibilities as effectively as the interests of justice would warrant.³⁰⁵ Amnesty International emphasised the consequences of cuts to civil legal aid that were included in the UK's 2012 Legal Aid, Sentencing and Punishment of Offenders Act.³⁰⁶ It stated that the cuts created a two-tier justice system that is open to those who can afford it but increasingly closed to the poor and vulnerable who need it the most.³⁰⁷ The European Commission Rule of Law 2021 report on Ireland noted that whereas the Irish criminal legal aid scheme was generally considered as well-functioning, the Bar of Ireland has raised concerns about the low level of remuneration provided for barristers under the scheme.³⁰⁸ The European Committee for the Prevention of Torture³⁰⁹ and the UN Subcommittee on Prevention of Torture³¹⁰ also noted that on top of being understaffed and under-resourced, excessive workloads and low fees for services have a discouraging effect on legal aid lawyers. For a legal aid system to operate effectively, there must be provision of sufficient financial and human resources.

7.2.4. Quality Assurance Mechanisms in Legal Aid Schemes

To ensure the quality of a legal aid scheme, there must be quality assurance mechanisms in place. These mechanisms guarantee effectiveness, transparency and accountability of the scheme both in terms of its general functioning and service delivery.³¹¹ The United Nations Development Programme emphasises that a comprehensive approach must be taken to the quality of a legal aid system because it is not merely about control but rather about monitoring and guidance to ensure effective access to justice, which ultimately reflects on the quality of

³⁰⁵ *Reid v Jamaica* CCPR/C/39/D/250/1987 (20 July 1990) para 13.

³⁰⁶ Amnesty International UK, *Cuts That Hurt: The impact of Legal Aid Cuts in England on Access to Justice* (2016) 3.

³⁰⁷ *ibid*

³⁰⁸ European Commission, 2021 Rule of Law Report: Country Chapter on the Rule of Law Situation in Ireland (2021) 5.

³⁰⁹ Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003, CPT/Inf (2007) 15, at para. 24; Report on the visit to Hungary carried out by the CPT from 5 to 16 December 1999, CPT/Inf (2001) 2, at para. 32.

³¹⁰ Fifth Annual Report of the SPT covering the period January-December 2011, 19 March 2012, U.N. Doc. CAT/C/48.3, at para. 78

³¹¹ Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes 8.

the legal aid scheme.³¹² In that regard, the Council of Europe's Guidelines on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law provide that there should be thorough and regular assessments of the legal service and the legal aid lawyers against clear criteria. It is recommended to use quality assessment tools such as client satisfaction surveys and peer reviews by other legal aid providers based on objective sets of criteria or rating systems carried out by either an independent body or by individuals such as fellow lawyers.³¹³

The Guidelines also provide benchmarks from legal aid schemes within Europe, including Ireland.³¹⁴ In Finland, Latvia, Lithuania and Ukraine, the quality of legal aid is assessed through surveys of beneficiaries. In Belgium, the legal aid office checks each legal aid provider's work after completion by means of peer reviews by fellow lawyers, who assess whether the legal aid assignment has been carried out properly for purposes of quality control or has not been carried out at all for purposes of effectiveness. Additionally, there is a 'cross-check' by a group of auditors, composed of Flemish and Walloon barristers, who review a certain number of completed assignments according to their field of specialisation. If the auditors disagree about a case, the president of the Flemish or Walloon legal aid office will make the final decision on it.

In Ireland, authorised officers of the Legal Aid Board carry out file reviews of beneficiaries' case files. To determine the scheme's performance, Ireland has also used satisfaction surveys. Given the requirements of international law, the relevance of quality assurance mechanisms cannot be overemphasised. A more systematic and thorough assessment of legal aid systems is necessary to identify the strengths and weaknesses within the system and to trace necessary interventions.³¹⁵

It is also essential to conduct legal needs surveys that specifically relate to the legal aid programme. Legal needs surveys go beyond the institutional programme and the experience of legal aid lawyers to identify obstacles to accessing the legal aid services from individual and community perspectives. To put it plainly, as the Director of Mali's Justice, Planning and Statistics Unit stated, '*Normally, we are the ones who judge. This time, it is the citizens who are judging us.*' The surveys serve as a mechanism for monitoring changes in experience and behaviour in light of legal service reforms.³¹⁶ Ultimately, legal needs surveys complement the

³¹² UNDP 23.

³¹³ Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes 8.

³¹⁴ Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes 20.

³¹⁵ UNDP 23.

³¹⁶ OECD 'Legal Needs Survey'

analyses of administrative data and data derived from the legal aid lawyers by contextualizing administrative data and providing an overview of a population's perspective on access to justice through the legal aid programme.

Furthermore, it is vital for a legal aid scheme to establish formal and impartial procedures that allow clients to complain about a legal aid provider.³¹⁷ Complaints against legal aid providers should be promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review.³¹⁸ The Council of Europe provides examples of countries where such procedures have been established within their legal aid systems.³¹⁹ In Latvia and Lithuania, a complaint against a legal aid provider's actions can be lodged with the national legal aid authority or the national bar association. In Latvia, it is also possible to appeal the national bar association's decision about a lawyer's poor performance. Additionally, in Finland and Norway, a legal aid provider's misconduct may be reported to the disciplinary authorities.

There must also be well-established procedures for imposing disciplinary measures. This can be an effective deterrent measure to ensure that a legal aid lawyer's behaviour and performance in the conduct of their work is of a high quality. To maintain a high quality standard, the legal aid programme should provide for continuous professional development on a regular basis for legal aid lawyers. This means that there should be mechanisms in place to ensure that all legal aid lawyers possess education, training, skills and experience that are commensurate with the nature of their work and area of specialisation. The UN Development Programme called for systemic professional training that includes training needs assessments, assessment of training procedures and the impact of training under one holistic system within a programme.³²⁰

7.2.5. Data Collection & Analysis

In order to ensure an effective, efficient, and sustainable civil legal aid system, it is imperative to put in place a comprehensive system of data collection and analysis. Although the Legal Aid Board is required to produce and submit an annual report to the Minister for Justice and Equality in accordance with Section 9 of the Civil Legal Aid Act 1995, these reports are limited in scope and lack detailed, qualitative data analysis. The focus of these annual reports is

³¹⁷Guidelines on efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law and Explanatory memorandum, European Committee on Legal Co-operation, 2021, 8.

³¹⁸ United Nations Office on Drugs and Crime Principle 13.

³¹⁹Guidelines on efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law and Explanatory memorandum, European Committee on Legal Co-operation, 2021, 21.

³²⁰ United Nations Office on Drugs and Crime Principle 13.

primarily on administrative data, such as the type of cases handled, the total number of cases, and the duration of these cases from the time of application. Although this data can be useful, by itself it offers a very narrow perspective on access to justice and severely limits the ability to identify the unmet legal needs of the population, as outlined by the Organisation for Economic Co-operation and Development (OECD) in its 2016 report on access to justice.³²¹

The European Committee on Legal Co-operation, in its guidelines on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, highlighted the importance of quality data collection and analysis measures.³²² The Committee recommended that Member States collect data on legal aid through 'surveys, focus groups, complaints mechanisms, lawyer self-assessments and case-management systems.'³²³ Analysis of such data will help Member States identify the unmet legal needs of their citizens and understand how these citizens interact with the legal aid system.³²⁴

Guideline 17 of the UN Principles and Guidelines makes similar provision for the need to ensure '*mechanisms to track, monitor and evaluate legal aid are established and... continually strive to improve the provision of legal aid.*'³²⁵ Although these guidelines specifically apply to criminal legal aid, the benefits of a comprehensive system of data collection and analysis are universal to both the civil and criminal justice systems.

7.2.6. Private Practitioner Panels

The analysis and recommendations contained in this chapter are particularly relevant to the use of practitioner panels for the provision of civil legal aid. Callers to FLAC's telephone information line frequently raise issues relating to the quality of service they receive through such panels. Issues include only meeting shortly before or on the day of a hearing, encouragement to settle cases given the "small fee" paid to the solicitor, failure to respond to emails and/or calls seeking information on a particular application or issue, and, occasionally, where a case may require a number of appearances, solicitors requesting payment of additional fees. Further, callers frequently report difficulty in obtaining a solicitor after they have been granted a legal aid certificate.

In addition to considering the existing private practitioners' scheme in light of the standards

³²¹ OECD, Understanding Effective Access to Justice, 2016.

³²² Guidelines on efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law and Explanatory memorandum, European Committee on Legal Co-operation, 2021.

³²³ *ibid*

³²⁴ *ibid*

³²⁵ United Nations Office on Drugs and Crime, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013, 74.

set out in this chapter, it is worth contrasting the private practitioners' scheme with the system for providing representation of patients before Mental Health Commission ('MHC') tribunals. Under the latter scheme, representation is provided through a 'closed' panel of legal representatives appointed by the MCH. Further:

- "The MHC issues regular guidance and updates to tribunal members and legal representatives to ensure that all professional attendees at the MHC tribunals are aware of current guidelines and up to date case law on the area of mental health law in Ireland and their obligations to ensure that they remain up to date with same."³²⁶
- "The MHC provides training for solicitors on the panel and there is also a requirement for solicitors to keep their skills updated by undergoing relevant and appropriate training as required, in order to keep abreast of developments in the area."³²⁷

7.2.7. FLAC Civil Legal Aid Roundtable Findings

In 2021, FLAC held four roundtables which sought the views of civil society groups on the present scheme of civil legal aid. The themes covered were: Housing, Domestic Violence, Disability Rights, and Immigration/International Protection. The findings which emerge from these roundtables are particularly relevant to the quality of civil legal aid provided in Ireland:

- Groups reported that service users felt disempowered by engaging in the legal aid process and that some had come through court hearings and felt they had not received the service that they needed and questioned if they would have been better off being lay litigants.
- Multiple representatives at the session on International Protection discussed applicants who did not have much regular communication from their solicitor. Multiple organisations reported that IP applicants often have to "chase solicitors" for appointments. Often this can lead to enormous mental health stress for applicants who find this incredibly difficult. Additionally, it was reported that many in the IP system, in particular LGBTQI+ applicants, may not have a relationship of trust with authorities or state bodies or their solicitors.
- Representatives from one of the housing organisations said that a lack of contact from solicitors as well as solicitors not showing up for appointments leads to negative repercussions for their service users.
- Groups repeatedly flagged that there are not enough solicitors available in either the law centres or on the private practitioner panels. There is often no availability for urgent

³²⁶ See: https://www.lawsociety.ie/Solicitors/knowledge-base/Practice-Notes/legal-representation-at-the-mental-health-commission-guidelines-for-solicitors---second-edition#.Y_38eXbP2U

³²⁷ Ibid.

advice. Groups suggested there is a high level of burnout among solicitors and legal practitioners who engaged in this work. Some groups suggested that there should be a trauma-informed approach to the provision of legal aid. Very often practitioners are faced with clients and service users who are deeply traumatised and not acknowledging this can be a barrier to them accessing services. Additionally, undertaking this type of work on a daily basis can lead to vicarious trauma for the practitioner and it is believed by some groups that this is not factored into the strategic work of the Legal Aid Board.

- Groups stated that geographic distance could sometimes be a barrier to seeking and accessing legal aid.

7.3. Accessibility of the Civil Legal Aid System

Accessibility facilitates the realisation of the right of access to justice so that it is not a right that is merely theoretical but one that is practical and effective.

The Council of Europe states that potential beneficiaries of the programme must be informed by all accessible and appropriate means about the right to legal aid and about the legal aid system.³²⁸ For instance, language barriers can restrict access to civil legal aid and access to justice:

'The Courts Service states that 210 languages and dialects are used in Irish courts; CSO figures show that one person in ten in Ireland was born outside this country. Both in criminal and in civil law, in cases involving asylum-seekers, migrant workers, or any persons for whom English is not a first language, more and more instances arise in courtrooms across the country where language is a barrier to effective communication.'³²⁹

The Council of Europe highlighted a best practice in Ukraine, which implements a Civil Counsellors' Initiative in which legal advice is provided through respected members of local communities who disseminate legal information and refer persons with legal problems to the legal aid system.³³⁰ It emphasises the need to pay particular attention to the vulnerable groups and individuals with special needs. In Poland, information on legal aid (brochures and leaflets) is disseminated by post especially to older adults or persons with disabilities.³³¹ It also

³²⁸ UNDP 23

³²⁹ Ivana Bacik, 'Breaking the Language Barrier: Access to Justice in the New Ireland,' *Judicial Studies Institute Journal* [2007:2].

³³⁰ Guidelines on efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law and Explanatory memorandum, European Committee on Legal Co-operation, 2021, 18.

³³¹ *ibid* [17].

recommends that the programme's information strategy should be developed jointly by all interested parties. In addition, the programme should also ensure proper geographical distribution of legal aid providers particularly in remote areas.³³²

Accessibility in relation to the provision of legal services (including legal information) is considered in chapter 9 of this submission.

7.3.1. Capacity to Take into Account the Special Needs of Vulnerable Persons

The case of *Nenov v Bulgaria* provides an important example of the need to take the special needs of vulnerable persons into account. In this case, the applicant experienced mental health problems (in addition to being of low income) but was repeatedly denied civil legal aid. Although this denial was due to the lack of civil legal aid scheme in Bulgaria at the time, the European Court of Human Rights still found that the applicant's rights under ECHR Article 6(1) were violated. Article 6(1) was found to necessitate civil legal aid regardless of the existing scheme (or lack thereof) due to factors including the complexity of the procedures at hand and the specific vulnerability of the applicant.³³³ Supporting this viewpoint, the Council of Europe highlights that specific protection and assistance via legal aid may be granted to vulnerable persons, including people with disabilities, women, children and ethnic minorities.³³⁴ This means that a high-quality programme must put in place measures to guarantee protection and assistance for these groups.

Similarly, special provision for the protection of vulnerable groups has been made by the Court of Justice of the European Union in *Virginie Pontin*.³³⁵ The Court found that procedural rules must not make it practically impossible or excessively difficult for certain vulnerable groups³³⁶ to receive legal advice in order to exercise their rights under Union law, using the principle of effective judicial protection to guide their judgement.³³⁷ This would suggest that more extensive procedural safeguards to protect vulnerable groups may be necessary under Union law, in the areas which it applies to. This is also reflected in certain secondary EU law instruments, for example the Recast Procedures Directive³³⁸ provides for the right to legal assistance for

³³² *ibid* [10].

³³³ *Nenov* [52].

³³⁴ Guidelines on efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law and Explanatory memorandum, European Committee on Legal Co-operation, 2021, 7.

³³⁵ CJEU, Case C-63/08, *Virginie Pontin v T-Comalux SA*, 29 October 2009.

³³⁶ The case at hand involved the dismissal of a pregnant woman who, as a result of the procedural rules in operation, was not afforded an effective remedy under the principle of effective judicial protection.

³³⁷ CJEU, Case C-63/08, *Virginie Pontin v T-Comalux SA*, 29 October 2009 [65].

³³⁸ Article 20(1) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

certain vulnerable groups, specifically to applicants during the asylum appeals process.

Additionally, the UN Human Rights Committee has on several occasions noted concern over the failure of States to provide counsel in various types of civil cases involving litigants belonging to racial, ethnic and national minorities.³³⁹ The Committee recommended that States put in place measures explicitly recognising the need to protect these groups and facilitate their access to legal aid. Additionally, the Committee on the Convention on Elimination of All Forms of Discrimination Against Women noted the importance of incorporating a gender sensitive perspective within all aspects of the justice system.³⁴⁰ In the Committee's concluding observations on Ireland's 6th and 7th periodic reports, it recommended that Ireland ensure that prosecutors and the police are properly trained to identify, investigate and prosecute cases of gender-based violence, including domestic violence, particularly targeting Traveller, Roma and migrant women and girls.³⁴¹ Although the Committee makes reference to cases of a criminal nature, the standard is applicable in the civil context. This is because the incorporation of a gender perspective ensures gender equality, equal and fair access to justice and essentially enhances the programme's quality.

The civil legal aid programme should take specific measures to protect the rights of children. Legal aid work that involves cases that impact the welfare of children is a specialised field necessitating a greater degree of specialisation. The Committee on the Rights of the Child provides specific guidance on the specialisation of legal aid providers in matters involving children.³⁴² It specifies that legal aid lawyers should be able to work in interdisciplinary teams, and should be well informed about the social, psychological and other aspects of the development of children, with special attention paid to girls, children belonging to minorities or indigenous peoples, and the culture and the trends in the world of young people.

These human rights and equality standards apply directly to the Legal Aid Board and will apply to any new system of legal aid in the same manner under the Public Sector Equality and Human Rights Duty. In this regard, the legal aid system in Ireland must respond and account to the needs of all groups protected under the equality legislation. The duty encompasses many of the matters raised in this chapter and also extends to making provision for those experiencing poverty and extreme poverty, those with language and literacy issues, and those

³³⁹ UN Human Rights Committee, 'Concluding Observations on Sweden, UN. Doc. CCPR/C/SWE/CO/6 (2009) para. 21, UN Human Rights Committee, 'Concluding Observations on Switzerland, UN. Doc. CCPR/C/CHE/CO/3 (2009) para. 18.

³⁴⁰ CEDAW 'General recommendation No. 33 on women's access to justice' (CEDAW/C/GC/33) para. 29 (a).

³⁴¹ Committee on CEDAW, 'Concluding Observations on the combined sixth and seventh periodic reports of Ireland' (CEDAW/C/IRL/CO/6-7) 9 March 2017, para 27(b).

³⁴² Committee on the Rights of the Child, General Comment No. 24' (CRC/C/GC/24) para 49.

with capacity issues.

To maintain the programme's capacity to provide for the special needs of vulnerable groups, there should be continuous professional development of legal aid lawyers, especially regarding their training needs and developing their capacities.³⁴³ There should also be continuous engagement with all groups protected under the equality legislation and other groups.

7.3.2. Consideration of Special Needs of Persons with Disabilities

Equality law and the Public Sector Equality and Human Rights Duty requires the provision of reasonable accommodation for people with disabilities to facilitate their access to legal aid. The programme should be capable of making adjustments to the standard practice or procedure which must be undertaken to remove a particular disadvantage at which a specific disabled person would otherwise be placed in order to access justice. Examples of reasonable accommodation include allowing a member of the deaf community to give evidence through a sign language interpreter, changing the environment of the courtroom for a person whose sensory impairment makes them overly sensitive to certain kinds of light or noise, and the availability of services and information using multiple means of communication.³⁴⁴ For example, in Canada, the Ontario Legal Aid Office provides all information online in alternative formats and trains employees on communicating with individuals with various types of impairments.³⁴⁵

Where there is a failure to provide reasonable accommodation for persons with disabilities, this constitutes discrimination and a failure on the State's part to provide effective access to justice on an equal basis. Therefore, to ensure that this does not happen, the programme should assess the measures in place against the discrimination test which states that to ascertain whether discrimination has occurred, the relevant question is whether a non-disabled person would have been able to access justice in the same circumstances where a disabled person has been prevented from accessing justice.³⁴⁶

Finally, in the provision of protection to persons with disabilities within the programme, the Committee on the Convention on the Rights of Persons with Disabilities calls upon States to respect the will and preferences of these persons and protect their procedural rights,

³⁴³ UNDP [24].

³⁴⁴ Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The convention on the rights of persons with disabilities: a commentary* (Oxford University Press 2018) 391.

³⁴⁵ Human Rights Council, 'Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities' (Report of the Office of the High Commissioner for Human Rights, 2017), para 41.

³⁴⁶ Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds) 392.

particularly the right to legal capacity at the same level as for other types of legal representation.³⁴⁷ State parties must consistently ensure that instruments for protection are not based on removing legal capacity or otherwise hindering the access of persons with disabilities to justice. For instance, in Ireland, following a case concerning the rights of a mother with an intellectual disability in child care proceedings, the Legal Aid Board produced guidelines on assistance in such cases (although they are not on a statutory footing).³⁴⁸ As a result, the Irish Human Rights and Equality Commission in its submission to the Committee on the Elimination of Discrimination Against Women in 2017 recommended that the Civil Legal Aid Act 1995 be amended in order to place the Legal Aid Board's guidelines on assistance to persons with an intellectual disability on a statutory footing.³⁴⁹

7.4. Administration of the Civil Legal Aid System: Freedom from Arbitrariness in Decision-Making & Availability of Reviews/Appeals

7.4.1. Standards governing the Administration of Civil Legal Aid

Legal systems can establish selection procedures for determining whether legal aid will be granted in civil cases but these should not function in an arbitrary or disproportionate manner or impinge on the essence of the right to access court.³⁵⁰ This means that a high-quality legal aid programme must have in place substantial guarantees to protect applicants from arbitrariness. In *Del Sol v France*, the European Court on Human Rights lauded the scheme set up by the French legislation for offering individuals substantial guarantees to protect them from arbitrariness.³⁵¹

Instances of arbitrariness were stated by the European Court of Human Rights in *Santambrogio v Italy* to include where the legal aid body's decisions are unreviewable, where the criteria and selection of cases eligible for legal aid is unclear, and if the composition of the legal aid body could be said to be biased.³⁵² Notably, regarding the composition of the legal aid body, the Court in *Del Sol v France* found that the composition of the Legal Aid Office with judges, lawyers, civil servants and members of the public meant that it was immune to any

³⁴⁷ UN CRPD Committee 'General Comment No 6' para 49(c).

³⁴⁸ *Legal Aid Board v District Judge Patrick Brady and the Northern Area Health Board & Others* (March 2007)

³⁴⁹ Irish Human Rights and Equality Commission, Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports (January 2017) 39.

³⁵⁰ European Union Agency for Fundamental Rights and Council of Europe [60].

³⁵¹ *Del Sol* [4].

³⁵² *Santambrogio* [para 54] - [para 55].

accusation of bias.³⁵³ This finding was based on the diversity within its composition that ensured that it had due regard to the demands of the proper administration of justice and the rights of the defence.

The principles of constitutional and natural justice are also highly relevant in this regard.

7.4.2. Administration of the Current Scheme

Regulation 7 of the Civil Legal Aid Regulations provides for the grant and the refusal of legal aid certificates as follows:

“(1) On reference to it, the Board or the certifying committee shall decide whether, having regard to the provisions of the Act of 1995 and these Regulations, a certificate should be granted.

(2) If the Board or the certifying committee considers that a certificate should be granted it may, where it considers necessary, determine the conditions on which the certificate should be granted and the actual contribution to be paid by the applicant.

(3) If the Board or the certifying committee considers that a certificate should be refused, it shall convey its decision in writing to the applicant, through a member of the staff of the Board and shall, at the same time, state the reasons for refusal.”

Regulation 12 provides for review and appeals procedures that:

“(1) An applicant who is aggrieved by any decision of the Board or a certifying committee, the Chief Executive, an officer of the Board or, a solicitor of the Board may submit such further information in writing to the Board as he or she deems appropriate with a view to having the decision reviewed. The review of the decision in the light of the information provided, shall, so far as possible, be made by a certifying committee, the Chief Executive or the officer or solicitor of the Board, as the case may be, who made the original decision.

(2) If a review is requested under the provisions of paragraph (1), the applicant's solicitor shall convey to the Board an opinion as to whether the decision should stand.

(3) If, following a decision or a review of any decision under the provisions of paragraph (1), other than a decision of the Board, the applicant continues to be aggrieved, he or she may appeal to a committee of Board members which shall be known as the appeal committee. The appeal committee shall consist of

³⁵³ *Del Sol* [4], [6].

members of the Board, not being members of the certifying committee which made the original decision, comprising a chairperson and four other members of whom two shall be members who, prior to their appointment as Board members, were either practising barristers or practising solicitors and the quorum for a meeting of the appeal committee shall be four.

(4) The submission of further information under paragraph (1) or the lodgement of an appeal under paragraph (3) shall be made within a period of one month from the date on which he or she has been informed, in accordance with Regulations 4(4) and 5(9), that he or she is not entitled to legal aid or advice.

(5) The appeal committee may affirm, reverse or otherwise alter any decision which is the subject of an appeal and, if the appeal committee considers it desirable to review not only the particular decision which is the subject of the appeal but the application generally, it may do so and may, following that review, make a decision either affirming, reversing or otherwise altering any decision made in connection with the application.”

On the question of reviews and appeals, the website of the Board states as follows:

“Any decision we take can be reviewed and/or appealed. This allows you to have your application reconsidered in the light of fresh information, or for the initial decision to be appealed to an appeal committee of the Board.

Reviews

A review means that you or your solicitor can submit further information to us and ask us to re-consider our decision. The purpose of the review is to allow us to re-examine – and if appropriate, reverse - their decision to refuse in the light of the new information which is being submitted.

You can request a review through your solicitor (or any member of staff in the law centre, if you have not been told who your solicitor is). You can also contact the decision maker directly to request a review.

You do not need to submit further information for a review. But if you do not it is likely that we will arrive at the same decision. It is in your best interests to submit all the information available when asking for a review. Any review where no new information is received will be conducted by a more senior person than made the original decision.

You must ask for a review within a month of the original decision being taken.

Appeal

You may also appeal against any decision, including any decision taken following a review of the original decision. Your appeal will be considered by an appeal committee consisting of a chairperson and four ordinary members of the board of the Legal Aid Board of whom two must be practising solicitors or barristers. The members of the appeal committee will not be members of our staff.

You can request an appeal through your solicitor (or any member of staff in the law centre, if you have not been told who your solicitor is). You can also contact our Head Office directly to request an appeal.

You must request an appeal within a month of the original decision being taken, unless you already requested a review. If you requested a review, you have another month after you are told what the outcome of the review was.

The decision of the appeal committee is final.”

While the regulations set out strict time limits for submitting reviews and appeals, they do not set out a time limit for the determination of reviews or appeals. Further, while entitling applicants who receive a negative decision to a written decision, they are silent as to fair procedures more generally, including the right to information on which decisions are based (including counsel’s opinion – as discussed in the previous chapter) and the right to an oral hearing. Finally, and perhaps most conqueringly, they do not provide for an independent appeal mechanism. While decisions of the Board may be subject to judicial review, this is not an effective remedy for persons facing urgent and substantive legal issues.

7.5. Conclusion & Recommendations

The realisation of the right of access to justice, in terms of its effectiveness, is achieved through ensuring quality of both individual lawyers and the civil legal aid programme itself. Quality for a civil legal aid lawyer is based on their competency, their active engagement in their case(s), and their training and/or experience. These quality standards can be embedded into programme standards, including ensuring continuous training and development of staff and lawyers, sufficient resourcing and remuneration, and thorough and responsive disciplinary procedures when quality standards are not met. A high-quality civil legal aid programme requires a system that is free from arbitrariness in all aspects, with clear and objective criteria for the appointment of legal aid lawyers. Furthermore, a high-quality programme requires a substantial breadth of lawyers specialised in the different areas of law to adequately meet clients’ needs, as well as the capacity to effectively meet the special needs of vulnerable persons such as persons with disabilities, women, children and ethnic minorities. The need for

adequate funding and resources to run the programme effectively cannot be overemphasised. Quality of a programme is linked to establishing and maintaining quality assurance mechanisms necessary to ensure that the programme's quality is up to standard on an ongoing basis.

The Review Group should recommend that:

- Civil Legal Aid legislation provides for thorough and sustained quality assurance mechanisms in respect of the legal aid system and legal assistance provided.
- Legislation should also provide for an efficient and thorough mechanism for the investigation and resolution of complaints in relation to the provision of legal assistance.
- The system of civil legal aid, and legal aid legislation, should provide for mechanisms to ensure sufficient specialization of lawyers dealing with specific categories of cases and continuous professional development and training.
- The criteria for the appointment of a legal aid lawyer should clearly state the timeline within which an applicant will receive a response regarding their application. There must be adequate time for the preparation of a client's case in the case of a successful application, and sufficient time to lodge an appeal in the case of a rejected application.
- Applicants seeking civil legal aid should be accorded the right to exercise their wishes in appointing their legal representative within reason.
- The legal aid system must be sufficiently staffed and resourced and lawyers must be adequately remunerated.
- Legal aid legislation must provide for thorough data collection, including legal needs surveys specifically relating to the legal aid system which can inform assessments of its quality and effectiveness.
- Private practitioner schemes should include the use of 'closed' panels where participation in regular training is required.

The principles of equality and non-discrimination should inform the design of the system of civil legal aid – in particular in ensuring the system's accessibility for all groups who enjoy the protection of the equality legislation. The Review should recommend that:

- Information about the legal aid system should be accessible to all groups and targeted measures should be put in place to ensure all groups protected under the equality legislation and those experiencing poverty and disadvantage are aware of the availability of public legal assistance. This should be mandated by civil legal aid legislation.
- Forms for applying for legal aid should be as short and simple and possible, and, where necessary, adapted to the needs of particular groups. Applications should be available

in hard copy, as well as online, and assistance should be available in applying for legal aid. Requirements to provide specific documentation should be applied flexibly, especially for those experiencing poverty, homelessness or with literacy or language issues.

- Civil Legal Aid legislation must ensure that the system of legal aid has capacity to take into account and provide for the specific needs of vulnerable and marginalised groups, as well as groups protected under the equality legislation. To maintain the programme's capacity to provide for the special needs of the vulnerable groups, there should be continuous professional development of legal aid lawyers especially regarding their training needs and developing their capacities. There should also be continuous engagement with all groups protected under the equality legislation.

The administration of the system of civil legal aid should be informed by international human rights standards as well as the principles of natural and constitutional justice. The Review Group should recommend:

- Civil Legal aid regulations should provide for a review mechanism of decisions regarding entitlement to legal aid, as well an independent and accessible appeals mechanism. Legislation should provide for time limits for the determination of review and appeals with regard to the circumstances of specific cases.
- Legislation should provide for fair procedures in the conduct of reviews and appeals including a right to information on which decisions were based (such as counsel's opinion) and to an oral hearing on appeal.

8. Public Legal Assistance Law and Infrastructure

In the preceding chapters, this submission has examined the implications of the principles outlined in chapter 2 on specific elements of the legal aid system. In this chapter, the broader topics of civil legal aid and infrastructure will be considered in light of those principles.

A shift to a rights-based, person-centred and outcome-focussed approach to legal aid begins with, and depends on, the legislation governing the system of civil legal aid, as well as the body which oversees the system (including its membership, mandate, powers and functions).

Such a system must be ultimately concerned with giving practical effect to the right of access to justice for individuals and groups; “To be truly effective, access to justice must be linked to outcomes...”:

“This approach benefits not just those who are seeking a resolution to their problems, but the broader justice system and society as a whole because a focus on outcomes will result in more enduring resolutions to the legal challenges that bring individuals to the justice system in the first place.

In civil matters, an outcomes-focused justice system starts with prevention, has timely resolution as its goal and views litigation as a last resort.”³⁵⁴

This approach is consistent with the findings of the ECtHR in *Airey* – which focussed on giving rights practical effect.

8.1. Public Legal Assistance Legislation & A New Public Legal Assistance Authority

The Civil Legal Aid Act 1995 (as amended) establishes the Legal Aid Board, and provides for its membership. Along with the Civil Legal Aid Regulations 1996 to 2021, it sets out the functions and powers of the Board in detail, as well as the circumstances in which legal aid may be granted. The right of access to justice is not referred to in the legislation,³⁵⁵ nor do the provisions of the legislation set out any over-arching mandate or aims of the Legal Aid Board.

The legislation’s long title does provide that its purpose is to “make provision for the grant by the State of Legal Aid and Advice to persons of insufficient means in civil cases”. However, the functions and powers which the 1995 Act bestows upon the Legal Aid Board reveal a limited conception of legal aid (focussed almost exclusively on legal representation and advice), as well as access to justice more generally. These limitations mean that the current scheme of civil legal aid cannot meet even the modest ambitions of the 1995 Act’s long title.

³⁵⁴ Legal Services Society of British Columbia (2012), [Making Justice Work - Improving Access and Outcomes for British Columbians: Report to the Minister of Justice and Attorney General](#).

³⁵⁵ Indeed, the word “justice” itself only arises in reference to the Minister and to other pieces of legislation.

Those ambitions are further hampered by issues around the resourcing of the Legal Aid Board, by the Board's practices, and by its narrow interpretation of its own mandate.

Civil legal aid legislation should give effect to the right of access to justice. The legislation should create a body with an explicit and overarching access to justice mandate and function. Access to justice should be defined in a manner which explicitly acknowledges the links between that right and the promotion of social inclusion, combatting poverty, promoting equality, and the enjoyment of other fundamental rights.

To achieve this, a new legislative framework is required, which adopts a holistic approach to access to justice, rather than the current narrow, prescriptive and technical conception of legal aid evident in the 1995 Act.

Given that the term 'legal aid' has become almost synonymous with the provision of legal representation alone, the new body established should be referred to as a Public Legal Assistance Authority (to better reflect the full range of the functions it should carry out).

8.1.1. Functions of the New Public Legal Assistance Authority

The functions of the Legal Aid Board are limited to the provision of advice, representation, family mediation and training in family mediation as prescribed by the 1995 Act.³⁵⁶

These limited functions alone cannot achieve the objective of access to justice: "[L]egal aid programs have been progressively shifting their focus away from litigating problems to solving problems. Litigation is no longer seen as an end itself, but as a means to an end. This is a fundamental conceptual shift - one that moves the focus from court process to client and justice system outcomes":

"Today, legal aid is no longer just about lawyers in courtrooms. It now encompasses a full spectrum of services ranging from education programs and self-help information aimed at the general public, through outreach services to assist vulnerable communities, to legal advice and representation for individual clients."³⁵⁷

The Legal Services Society of British Columbia states that where access to justice is the "fundamental goal" of a legal aid system, that system should equip people with "four basic tools":

“(1) Awareness of rights, entitlements, obligations, and responsibilities

³⁵⁶ Section 5, Civil Legal Aid Act 1995.

³⁵⁷ Legal Services Society of British Columbia (2012), [Making Justice Work - Improving Access and Outcomes for British Columbians: Report to the Minister of Justice and Attorney General](#), at p.11.

- (2) Awareness of ways to avoid or resolve legal problems
- (3) The ability to effectively use court and non-court dispute resolution systems and procedures
- (4) The ability to effectively participate in the resolution process to achieve just outcomes³⁵⁸

Equipping all individuals and groups with these tools requires measures and services, including:

1. Legal information
2. Public Legal Education
3. Legal Advice & Early Legal Intervention Programmes
4. Advocacy & Advocacy Training
5. Legal Representation
6. Research and Law Reform

Each of these functions (and the manner in which they should be provided) are considered in detail in the next chapter this submission.

8.1.2. Principles & Objects of the New Public Legal Assistance Authority

As well as including its overarching access to justice mandate, the legislation establishing the Legal Assistance Authority should clearly articulate that body's objectives and the principles that should guide it in carrying out its functions.

Section 9 of the Legal Services Society Act, which governs the Legal Services Society of British Columbia, specifically sets out that body's principles and objects:

- “(1) The objects of the society are,
- (a) subject to section 10(3), to assist individuals to resolve their legal problems and facilitate their access to justice,
 - (b) subject to section 10(3), to establish and administer an effective and efficient system for providing legal aid to individuals in British Columbia, and
 - (c) to provide advice to the Attorney General respecting legal aid and access to justice for individuals in British Columbia.
- (2) The society is to be guided by the following principles:

³⁵⁸ Ibid at p.10.

- (a) the society is to give priority to identifying and assessing the legal needs of low-income individuals in British Columbia
- (b) the society is to consider the perspectives of both justice system service providers and the general public;
- (c) the society is to coordinate legal aid with other aspects of the justice system and with community services;
- (d) the society is to be flexible and innovative in the manner in which it carries out its objects.”

The Legal Services Society of British Columbia has further articulated the principles which should underpin an “outcome-focussed” system of civil legal aid – these include:

“Effective: It must be user-centred and focus on what people want and need to resolve their legal problems.

Integrated: It must work with other government and community agencies to facilitate users’ access to services that address the underlying issues, such as poverty, or mental or physical health, that triggered or resulted from their legal problems.

Accessible: It must provide user-focused services and procedures that are easy to find and use for all people including those with low incomes, Aboriginal peoples, people with limited education, or those facing physical or mental health challenges.

Fair: It must be grounded in the rule of law, protect rights, and respect independence.

Appropriate and proportionate: It must help individuals find the most appropriate route for dealing with their legal problems at each stage of the process. Services must be proportionate to the problem and be provided by the right person at the right time.

Timely: It must support access to early resolution without undue delay and encourage people to take early action to resolve their legal problems.

Efficient: It must make the best possible use of all available resources. Its processes must be designed to ensure fairness while taking the least possible amount of time, effort, and money to produce fair outcomes.”³⁵⁹

³⁵⁹ Legal Services Society of British Columbia (2012), [Making Justice Work - Improving Access and Outcomes for British Columbians: Report to the Minister of Justice and Attorney General](#), at pp.12-13.

Similarly, the Social Security (Scotland) Act 2018 requires the Scottish Commission on Social Security to have regard to the “Scottish social security principles” which are set out in section 1 of that legislation:

- “(a) social security is an investment in the people of Scotland,
- (b) social security is itself a human right and essential to the realisation of other human rights,
- (c) the delivery of social security is a public service,
- (d) respect for the dignity of individuals is to be at the heart of the Scottish social security system,
- (e) the Scottish social security system is to contribute to reducing poverty in Scotland,
- (f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence,
- (g) opportunities are to be sought to continuously improve the Scottish social security system in ways which—
 - (i) put the needs of those who require assistance first, and
 - (ii) advance equality and non-discrimination,
- (h) the Scottish social security system is to be efficient and deliver value for money.”

In Irish law, section 8 of the Assisted Decision-Making (Capacity) Act 2015 sets out “guiding principles” in respect of any action taken under that legislation.

The Irish Human Rights and Equality Commission Act 2014 provides an instructive model of legislation for the establishment of a public body whose mandate and functions are concerned with the vindication of rights. Section 10(1) of the 2014 Act articulates the Commission’s overarching mandate, including “to protect and promote human rights and equality” (human rights are broadly defined in section 2 of the legislation).

Section 10(2) sets out a non-exhaustive list of specific functions to be carried out “in furtherance of the functions referred to in subsection (1)”. Section 10(5) provides that the “Commission shall have all such powers as are necessary or expedient for the performance of its functions”. Section 10(3) sets out the broad aims of the Commission in carrying out its functions.

8.1.3. Collaboration, Co-ordination & Integration

In respect of many of its functions, the Legal Assistance Authority's role should include funding the provision of services (including through a national network of Community Law Centres) and to ensure that such services are provided in accordance with its mandate, principles and objectives. Such an approach ensures that, where appropriate, legal assistance services are provided in a manner which is community-based and tailored to the needs of specific communities.

Separately but relatedly, a wealth of international research has highlighted the benefits of integrated approaches to providing legal services, particularly for hard to reach groups. These practices centre around providing legal assistance (including outreach and targeted legal services and projects) in tandem with community and health services: "Modern legal aid programs also endeavour to integrate their work with other social service agencies to address a client's underlying issues (such as poverty, mental health, or addiction) that have an impact on the individual's legal problems and the justice system".³⁶⁰

There are currently a number of public bodies whose statutory functions and mandates are concerned with access to justice, including through the provision of information, advice, assistance, advocacy and legal representation. These bodies include IHREC, the Workplace Relations Commission and the Citizens Information Board. However, the legislation providing for those bodies and their functions is largely silent as to their relationship with the current Civil Legal Aid Scheme. There is a clear role for the Legal Assistance Authority in collaborating with such bodies in areas where their mandates overlap.

In light of these matters (each of which is explored in detail in the next chapters of this submission), and given the extent of its competencies, the Legal Assistance Authority must be empowered to co-ordinate and collaborate with other bodies (including State Bodies, public services, community organisations and NGOs) in providing (and ensuring the provision of) legal assistance. It should also be concerned with ensuring an integrated approach to the provision of legal assistance services. The potential role of the Authority in coordinating and encouraging the development of clinical legal education is discussed in the next chapter and its role in relation to *pro bono* has been discussed in chapter 2.

8.1.4. Flexibility & Innovation

³⁶⁰ Legal Services Society of British Columbia (2012), [Making Justice Work - Improving Access and Outcomes for British Columbians: Report to the Minister of Justice and Attorney General](#), at p.11.

The 1995 Act is very prescriptive as to the Legal Aid Board's functions, how those functions should be carried out, and as to whom the Board may provide services.

Legislation should ensure that the new Legal Assistance Authority may provide legal assistance services in innovative and flexible ways (for example, in collaboration with other bodies, as discussed above). In this regard, the legislation should not be drafted in an unnecessarily prescriptive manner and should afford the Legal Assistance Authority scope to exercise its functions as it sees fit and in accordance with its mandate, principles and objectives.

Such an approach is evident in the British Columbian Legal Services Society Act. In addition to specifically mandating the Legal Services Society of British Columbia to be "flexible and innovative in the manner in which it carries out its objects"³⁶¹, section 1 of that legislation defines "legal aid" broadly as "legal and other services" provided by the Legal Services Society.

Section 10(1) of the Legal Services Society Act grants the Legal Services Society of British Columbia significant discretion as to how it seeks to meet its objectives:

"For the purposes of its objects, the society has, subject to subsections (2) and (3) all the powers and capacity of an individual and, without limiting this, may

- (a) establish priorities for the types of legal matters and classes of persons for which it will provide legal aid,
- (b) establish policies for the kinds of legal aid to be provided in different types of legal matters,
- (c) determine the method or methods by which legal aid is to be or may be provided, with power to determine different methods for different types of legal matters and different classes of persons,
- (d) determine who is and who is not eligible for legal aid based on any criteria that the society considers appropriate,
- (e) undertake, inside or outside British Columbia, commercial activities that it considers appropriate for the purposes of obtaining funds for the pursuit of its objects,
- (f) recover, through client contributions or any other methods it considers appropriate, its costs of providing legal aid, and

³⁶¹ Section 9(2)(d), Legal Services Act.

(g) facilitate coordination among the different methods, and the different persons and other entities, by which legal aid is provided.”

Section 11 of that legislation does not prescribe or limit the manner in which the Legal Services Society may provide legal assistance services:

“(1) Subject to subsections (2) to (4), the society may provide legal aid by any method that it considers appropriate, including without limiting this,

(a) by providing one or both of

(i) services ordinarily provided by a lawyer, and

(ii) other services,

(b) by providing duty counsel,

(c) by assisting individuals representing themselves, including by providing them with summary advice, information packages, self-help kits and assistance in preparing documents,

(d) by funding alternative dispute resolution services, and

(e) by providing public legal education and information.

(2) The society may provide legal aid through lawyers or any other persons, whether or not those lawyers or other persons are employed by the society.”

8.1.5. Membership & Independence of the New Public Legal Assistance Authority

Section 3(3) of the 1995 Act provides that the Legal Aid Board “shall, subject to the provisions of this Act, be independent in the exercise of its functions”.

However, questions arise in relation to the Board’s independence in light of the fact that its membership is selected by the Minister for Justice. Section 4(1) of the 1995 Act provides that the Legal Aid Board “shall consist of a chairperson and 12 ordinary members, who shall be appointed to be members of the Board by the Minister”. The Minister is also responsible for appointing the Chairperson.³⁶²

The membership of the Board must accord with the provisions of section 3 of the 1995 Act which states:

“(a) In appointing persons to be members of the Board, the Minister shall have regard to the desirability of their having knowledge or experience of the law, the practice and procedure of the Courts, business, finance, management and

³⁶² Section 4(2) of the 1995 Act.

administration, consumer or social affairs, or of any other subject, which would, in the opinion of the Minister, be of assistance to the Board in the performance of its functions.

(b) Of the members of the Board—

(i) 2 shall be barristers who have been engaged in practice as such for a period of not less than 7 years prior to their appointment as such members, and if either such member ceases during his or her term of office as such to be a practising barrister, he or she shall thereupon cease to be a member of the Board,

(ii) 2 shall be solicitors who have been engaged in practice as such for a period of not less than 7 years prior to their appointment as such members and, if either such member ceases during his or her term of office as such to be a practising solicitor, he or she shall thereupon cease to be a member of the Board,

(iii) 2 shall be members of the staff of the Board,

(iv) not less than 5 shall be men, and

(v) not less than 5 shall be women.”

At least half of the Board’s members, then, must be members of the legal profession or employees of the Board and the Minister has broad discretion in respect of the other half.

By contrast, the Irish Human Rights and Equality Commission Act 2014 requires the Government to “for the purposes of identifying persons and making recommendations to the Government in respect of those persons for appointment as members of the Commission, invite the [Public Appointments] Service to undertake a selection competition”.³⁶³

The 2014 Act then requires the Public Appointments Service to appoint a selection panel with experience of “human rights matters or law”, “equality matters or law”, and other matters.³⁶⁴ One member of the panel must be nominated by the Director of the European Union Agency for Fundamental Rights.³⁶⁵

The 2014 Act further provides that a “person shall not be recommended for appointment by the President under this section unless the person is, in the opinion of the Service and the Government agrees, suitably qualified for such appointment by reason of his or her possessing

³⁶³ Section 13(2), Irish Human Rights and Equality Commission Act 2014.

³⁶⁴ Section 13(5), Irish Human Rights and Equality Commission Act 2014.

³⁶⁵ Section 13(4), Irish Human Rights and Equality Commission Act 2014.

such relevant experience, training or expertise as is appropriate having regard in particular to the functions conferred on the Commission by or under this Act”.³⁶⁶

Section 13(13) of the 2014 Act provides for the expertise and experience of Commission members:

“In making recommendations for appointment of persons to the Commission under this section, the Service, and the Government shall have regard to the need to ensure that the members of the Commission broadly reflect the nature of Irish society and that such persons possess knowledge of, or experience in—

- (a) matters connected with human rights, and
- (b) without prejudice to the generality of paragraph (a), matters connected with persons or classes of persons who are disadvantaged by reference to the following factors:
 - (i) gender;
 - (ii) civil status;
 - (iii) family status;
 - (iv) sexual orientation;
 - (v) religious belief;
 - (vi) age;
 - (vii) disability;
 - (viii) race, including colour, nationality, ethnic or national origin;
 - (ix) membership of the Traveller community.”

The model created by the 2014 Act should be replicated in respect of a new Legal Assistance Authority. In addition to members with knowledge of public interest, legal aid, human rights and equality law, the membership of that Authority should include representatives of relevant NGOs and civil society organisations, and users and potential users of the Legal Assistance Authority, especially people living in poverty and disadvantage.

8.1.6. Best Practice

Best practice should guide the Legal Assistance Authority in carrying out its functions in accordance with its mandate, objectives and the other principles which inform its work. Notably, section 9(3) of the Irish Human Rights and Equality Commission Act 2014 provides

³⁶⁶ Section 13(9), Irish Human Rights and Equality Commission Act 2014.

that “the Commission shall in the performance of its functions have regard to, and be guided by, best international practice applicable to national human rights institutions and to equality bodies”.

8.2. Recommendations

The Review Group should recommend:

- The introduction of a new legislative framework which adopts a holistic approach to access to justice (rather than the current narrow, prescriptive and technical conception of legal aid).
- That legislation should give effect to the right of access to justice and create a body with an explicit and over-arching access to justice mandate and function. Access to justice should be defined in a manner which explicitly acknowledges the links between that right and the promotion of social inclusion, combatting poverty, promoting equality, and the enjoyment of other fundamental rights.
- Given that the term ‘legal aid’ has become almost synonymous with the provision of legal representation alone, the new body established should be referred to as a Public Legal Assistance Authority (to better reflect the full range of the functions it should carry out).
- The Legal Assistance Authority should have functions which include the provision of, and/or ensuring the provision of:
 - Legal information
 - Public Legal Education
 - Legal Advice
 - Advocacy & Advocacy Training
 - Legal Representation
 - Research and Law Reform
- As well as including its overarching access to justice mandate, the legislation establishing the Legal Assistance Authority should clearly articulate that body’s objectives and the principles that should guide it in carrying out its functions. These should include:
 - Effectiveness.
 - Integration, Collaboration & Co-operation.
 - Flexibility & Innovation.
 - Best Practice.
 - Accessibility.

- Fairness.
- The promotion of Equality & the Elimination of Discrimination.
- The promotion of Social Inclusion.
- Efficiency & Timeliness.
- The Legal Assistance Authority must be empowered to co-ordinate and collaborate with other bodies (including State Bodies, public services, community organisations and NGOs) in providing (and ensuring the provision of) legal assistance. It should also be concerned with ensuring an integrated approach to the provision of legal assistance services (such as in Health Justice Partnerships). These matters should be provided for in legislation.
- Civil legal aid legislation must ensure that the Legal Assistance Authority may provide legal assistance services in innovative and flexible ways (for example, in collaboration with other bodies). In this regard, the legislation should not be drafted in an unnecessarily prescriptive manner and should afford the Legal Assistance Authority scope to exercise its functions as it sees fit, in accordance with its mandate, principles and objectives.
- The Legal Assistance Authority) should coordinate and engage with the Law Society of Ireland and the Bar Council of Ireland to develop *pro bono* within the legal profession - working with existing *pro bono* structures, such as PILA, Pro Bono Pledge Ireland, and the Voluntary Assistance Scheme (VAS) - to maximise the added value potential of *pro bono* to complement public legal assistance.
- The new Legal Assistance Authority should be independent. Its membership should be appointed in a transparent and independent manner. In addition to members with knowledge of public interest, legal aid, human rights and equality law, the membership of that Authority should include representatives of relevant NGOs and civil society organisations, and users and potential users of the Legal Assistance Authority, especially people living in poverty and disadvantage.
- Legislation should provide that best practice should guide the Legal Assistance Authority in carrying out its functions in accordance with its mandate, objectives and the other principles which inform its work.

9. Forms of Public Legal Assistance: Giving Effect to the Right of Access to Justice

As discussed in the previous chapter, legal aid or legal assistance cannot be understood as involving dispute resolution services such as legal representation and mediation alone. Instead, a person-centred and rights-based approach is outcome-focussed and involves all measures required to prevent legal problems arising or escalating, with litigation as a last resort.

This chapter discusses the suite of measures and services which a new Legal Assistance Authority should ensure the provision of in order to meet its overarching mandate of achieving access to justice for all individuals and groups. Again, this analysis is informed by the principles set out in chapter 2 – particularly that of international best practice.

9.1. Preventative Justice Services

A person's ability to recognize, avoid, or address a potential legal problem can stop the problem from arising. A person's ability to take early action can stop the legal problem from escalating:

“A preventative model starts with helping citizens address issues that trigger legal problems before the problems arise, and it enables citizens to make the best possible use of legal resources when necessary. Too often, our justice system treats symptoms with court processes and fails to address the underlying causes.

Key strategies include:

- Enhancing public legal education and information services
- Supporting prevention and early intervention programs, particularly with community agencies that are often the first point of contact for people facing legal problems
- Building system-wide capacity to direct people to the most appropriate pathway for resolution, irrespective of their first point of contact with the justice system
- Ensuring timely access to representation services when necessary to obtain fair outcomes
- Identifying the issues that trigger clients' legal problems and providing the legal, medical, and social service supports to address these issues”³⁶⁷

³⁶⁷ Legal Services Society of British Columbia (2012), [Making Justice Work - Improving Access and Outcomes for British Columbians: Report to the Minister of Justice and Attorney General](#), at p.13.

Preventative Justice Services are a range of interconnected and overlapping measures including Legal Information, Public Legal Education, Legal Advice, Early Legal Intervention Programmes, Advocacy, and Legal and Advocacy Training.

9.1.1. Legal Information

Research undertaken by Ipsos-MORI and the Law Society of England and Wales found that knowledge of legal rights was a critical factor in determining how quickly a legal issue was resolved. That research was based on a statistical analysis of the results of a legal needs survey in which over 8000 participants described their experience of legal issues (over 16,000 legal issues were reported on in total), including cases concerning welfare rights, homelessness, evictions, home repossessions, family law, domestic violence, discrimination, employment and debt:

“Knowledge of legal rights was the third most important factor affecting the likelihood of resolution, with participants who had little knowledge of their legal rights being 33% less likely to resolve their problems. The importance of this variable potentially indicates the benefits that could arise from legal education programmes.”³⁶⁸

The Legal Aid Board has no legal information function either in relation to the provision of information in relation to its services or in relation to the law and legal rights more generally. The legal information landscape in Ireland is fractured and incoherent. State Bodies (including courts and tribunals and bodies providing public services) provide varying degrees of information to the public, in various ways. However, few of these bodies are mandated to provide information (let alone to provide information in relation to legal rights or to provide that information in an accessible manner). Bodies with specific information mandates include IHREC, the Workplace Relations Commission and the Citizens Information Board, who each provide telephone information lines and websites. (The role of these bodies is discussed in further detail in chapter 10).

A significant number of NGOs offer information services, including FLAC (which operates a Telephone Information and Referral Line which provides basic information in relation to legal rights). FLAC provided legal information to 13,147 callers to its Telephone Information and Referral Line in 2021, which was a 5% increase on the calls dealt with the previous year. The majority of calls related to family law and employment law. However, FLAC does not have the resources to answer every call to its telephone line and in 2021 “the overwhelming demand

³⁶⁸ Ipsos MORI and The Law Society (2017), [Analysis of the potential effects of early legal advice/intervention, at p.6.](#)

for legal information, advice and advocacy continued to exceed our resources, despite the addition of new staff, further resources and expertise”.³⁶⁹

The Review Group and the new Legal Assistance Authority should map the existing legal information landscape in Ireland and identify examples of best practice (at home and internationally).

The Legal Assistance Authority should have a role in coordinating and collating the information provided by State Bodies and supplementing it with information around legal rights and the availability of public legal assistance. As well as providing a telephone line and accessible website, the Legal Assistance Authority should engage in awareness-raising and outreach campaigns, and provide information in innovative and accessible ways such as through kiosks, boats and buses. They should also use technology for the most effective provision of legal information and advice. Effective technological provision should also ensure that those without access to Wi-Fi or computer equipment, or who have literacy issues, are also reached. (Preventative Justice Services for hard-to-reach groups is discussed in further detail below).

Provision of information should include information and awareness-raising in relation to environmental rights, including awareness of the right to information contained in the Aarhus Convention and the means through which it may be vindicated.

The Legal Assistance Authority should ensure the provision of (or resourcing of) legal information officers in the Courts Services, NGOs, family resource centres and health centres, prisons, residential institutions such as hospitals and nursing homes, and public libraries.

9.1.2. Public Legal Education

Related to the provision of legal information, is the concept of ‘Public Legal Education’:

“[Public Legal Education] Activities range from face-to-face education workshops to TV and radio, information materials, websites, text messaging and phone apps.

Public legal education has a number of aims that include:

- Spreading awareness of legal procedures and approaches to problems;
- Helping individuals and groups to understand and exercise their legal rights and obligations;
- Fostering self-help activities;
- Counteracting relations of dependency between lawyers and clients;
- Demystifying law; and
- Supporting the autonomy of groups to pursue other forms of social action.

³⁶⁹ FLAC (2022), [Annual Report 2021](#).

The aims of [Public Legal Education] can be organised around supporting self-help, raising awareness, and law reform combined with community organising, though many activities invariably over-lap. Much of what is intended has a preventive focus, and seeks to avoid unnecessary legal disputes or escalating conflicts. Legal awareness-raising may be focused on a particular change in the law to warn people of new obligations, or it may be aimed at dealing with common misconceptions and legal myths... Awareness-raising can also target particular groups who have been identified as being excluded from effective legal protection.

The ultimate aim of achieving more capable and empowered citizens in everyday legal interactions is apparent across most [Public Legal Education] programmes...

Many [Public Legal Education] providers offer both information and education services, but draw distinctions between the purposes of each. Legal information is generally associated with more or less extensive details about particular legal situations and rules. Education, on the other hand, provides the mechanism for applying and implementing the information in a contextualised way. Education affords a critical dimension in which action can be fostered rather than the passive receipt of information as well as addressing the particular life-circumstances that people are in. Individuals are therefore empowered in their relationship to legal service providers and more able to solve problems at an early stage if legal information is easily accessible and available as early as possible when a particular need arises.”³⁷⁰

Again, the Legal Aid Board has no Public Legal Education function. The activities of some Public Bodies such as IHREC, Independent Law Centres and other NGOs can be categorised as Public Legal Education. An example is the Community Talks and Legal Courses provided by Community Law and Mediation which includes “training and accredited courses on issues such as housing law and prevention of homelessness; employment and equality law; environmental justice; and social welfare appeals”.³⁷¹

However, as with legal information, the Public Legal education landscape in Ireland is fractured and incoherent. The findings of 2015 research by the NGO Law for Life (concerning the legal information and Public Legal Education landscape in the UK) may be relevant in this regard:

³⁷⁰ Law for Life: the Foundation for Public Legal Education (2015), [Legal Needs, Legal Capability and the Role of Public Legal Education](#), at pp.6-7.

³⁷¹ Community Law and Mediation, [Community Talks and Legal Courses](#).

“Some key themes emerge from the literature concerning legal capability and advice services:

- The quality and design of legal education and information is currently extremely patchy, with inadequate awareness of good practices. The need for a quality stamp or mode of accrediting and assessing good quality legal information and education design is long overdue.
- Legal services for vulnerable, or otherwise disadvantaged groups are unlikely to meet needs in isolation, and require multiple fields of expertise that are not part of the mainstream of the legal profession. This expertise is likely to require joined up health, social and legal support to be effective.
- The lack of awareness of legal service is compounded by low levels of legal capability that inhibit effective searching for and access to legal tools. This requires a coordinated effort on and offline, to help users find what they need, when they need it.”³⁷²

The Review Group and the new Legal Assistance Authority should map the existing Public Legal Education landscape in Ireland and identify examples of best practice (at home and internationally).

The Legal Assistance Authority should directly provide and (through funding and resourcing) ensure the provision of Public Legal Education.

9.1.3. Legal Advice & Early Intervention Programmes

Early legal advice and intervention seeks to identify legal problems *and* resolve them as soon as they have been recognised.

Early legal advice and intervention addresses problems before they escalate and can prevent cases going to court: “Just as an early medical diagnosis increases the chances of successful treatment and saves money down the line, early advice resolves legal problems as they arise, at a reduced cost”.³⁷³

In addition to addressing unmet legal need (by providing urgent assistance to those who seek legal information or advice before their problems escalate), early legal advice and assistance services can also address *unknown* unmet legal need by proactively targeting individuals and

³⁷² Law for Life: the Foundation for Public Legal Education (2015), [Legal Needs, Legal Capability and the Role of Public Legal Education](#), at p.25.

³⁷³ Chris Minnoch, Legal Action Group (2019), [“What does ‘early advice’ actually mean? Might we be advocating for something we don’t want?”](#).

groups who may be experiencing legal issues or problems which may escalate into legal issues.

The Civil Legal Aid Act 1995 (as amended) and related regulations do not mandate the provision of early legal advice and the Legal Aid Board do not provide such services.³⁷⁴ However, national and international experience (as well as research in the UK) indicates that there are significant benefits to early legal advice and intervention, particularly for hard-to-reach groups.

The provision of early legal advice has significant benefits for individuals, as well as the cost-effectiveness of the legal aid system and public services more generally:

“Without legal aid for early advice, legal problems can escalate unnecessarily and cause issues such as poor health, debt and homelessness. As a result of escalating legal problems, a lack of early legal advice can increase taxpayer costs and the burden on the courts”.³⁷⁵

The Law Society of England and Wales has also highlighted that: “Early advice on housing benefits problems can resolve rent arrears problems, removing the need for, and costs of possession proceedings, evictions and re-housing homeless families and vulnerable individuals”.³⁷⁶ Again taking the example of housing, that group highlights the “wider system benefits” of early advice, including “health benefits as people would, for example, be able to compel landlords to carry out repairs before they become a health risk. Fewer people would be made homeless, and fewer people would leave rent arrears and mortgage debts unaddressed”.³⁷⁷

In the area of family law, the same report notes:

“Funding early advice for people with familial disputes which could be resolved by mediation, would mean that, when faced with a dispute, people are more likely to

³⁷⁴ The definition of “legal advice” under section 25 of the Civil Legal Aid Act 1995 (as amended) encompasses both written and oral advice as to the application of the law, “any steps which that person might appropriately take” and “any assistance... in taking any such steps”. Section 26(2)(b) of the 1995 Act precludes the provision of legal advice in relation to “designated matters” such as “disputes concerning rights and interests in or over land”. Beyond the provisions of section 26(2) of the 1995 Act, there is no statutory barrier to the provision of legal advice in a wide range of areas such as social welfare, social housing, landlord/tenant issues, employment and discrimination. However, as with legal representation, the vast majority of legal advice provided by the Legal Aid Board relates to family law. See: Legal Aid Board (2022), Annual Report 2021, p.28.

³⁷⁵ The Law Society of England and Wales (2022), [Early legal advice](#).

³⁷⁶ The Law Society of England and Wales (2017), [Access Denied? Lapsos four years on: a Law Society review](#), at p.26.

³⁷⁷ The Law Society of England and Wales (2017), [Access Denied? Lapsos four years on: a Law Society review](#), at p.28.

speak to a legal adviser who could signpost them to mediation and support them through the process.

This would both reverse the trend of fewer people making use of mediation, and ensure fewer people enter the legal system with no advice about the options available to them after mediation, or as an alternative to mediation, where it is not appropriate.

In turn, this would make sure victims of domestic abuse are more likely to be informed of their right to legal aid to make sure that they have access to justice, without having to face their abuser unsupported in court or face the prospect of returning to an abusive relationship.”³⁷⁸

The Irish Refugee Council’s Independent Law Centre provides early legal advice for those seeking international protection. That service illustrates the benefits of early legal advice, including its particular importance for marginalised groups engaging with legal processes:

“Early Legal Advice (ELA) is an essential pillar of a meaningful asylum system. Given the complexities of this area and the inherent vulnerability of people seeking protection, early intervention is as valuable and important as it is in other areas of law...

Since 2011, our Law Centre has developed an innovative model of free ELA for those in need of international protection in Ireland. The Centre has found that ELA has been particularly important for vulnerable adults who may have difficulty articulating their application, particularly in an unfamiliar environment.

ELA is also valuable for those who have not yet applied for protection and who wish to make an informed decision about making an application for protection. In providing services at the earliest possible stage, ELA protects the integrity of the process by preventing unnecessary applications for international protection as well as offering comprehensive individualised advice and representation to those in the process.”³⁷⁹

The research undertaken by Ipsos-MORI and the Law Society of England and Wales “showed that early advice has a statistically significant effect on the timing of the resolution of people’s legal issues”:

³⁷⁸ Ibid.

³⁷⁹ Irish Refugee Council, [Early Legal Advice](#).

“On average, a quarter (25%) of people who received early professional legal advice had resolved their problem within 3-4 months of the problem first occurring, whereas for people who did not receive early legal advice it was not until 9 months after the issue had first occurred that 25% had resolved their issue.

Correspondingly, and controlling for other factors that can affect problem resolution, people who did not receive early advice were 20% less likely than average to have resolved their issue at a particular point in time.”³⁸⁰

Analysis published by the UK Legal Action Group emphasises that the effective delivery of early legal advice and assistance services must involve two processes – the identification of legal issues *and* the taking of urgent steps to resolve those issues before they escalate:

“For [early legal advice] to work, you need experienced lawyers with multiple, linked specialisms, working together to quickly and accurately diagnose legal problems *and* with the ability to take action. Guided self-help, easy-read websites, student clinics, algorithms and chatbots might help *identify* some legal issues, but all these forms of ‘early advice’ combined can’t *resolve* most of them. They can’t interview a distressed homeless family and recognise that a public body is acting unlawfully, draft a pre-action letter, issue a judicial review and get in front of a judge to argue the case at 6 pm on a Friday afternoon.”³⁸¹

For someone to seek early legal advice and assistance, they must first recognise that the problem they are experiencing is a legal issue:

“If people do not know they have rights or legal responsibilities; do not have the confidence to assert them or do not know the pathways to gain access to legal support and advice to action these legal rights, then those legal rights become unrealisable.”³⁸²

It follows that, to ensure that unmet legal need is addressed as early as possible, public legal education and information initiatives must highlight the availability of early legal assistance and advice services.

FLAC operates a telephone information line which provides basic legal information, and a national network of legal advice clinics. As discussed earlier, demand for both services is

³⁸⁰ Ipsos MORI and The Law Society (2017), [Analysis of the potential effects of early legal advice/intervention, at p.2.](#)

³⁸¹ Chris Minnoch, Legal Action Group (2019), [“What does ‘early advice’ actually mean? Might we be advocating for something we don’t want?”.](#)

³⁸² Liz Curran, [Lawyer Secondary Consultations: improving access to justice: reaching clients otherwise excluded through professional support in a multi-disciplinary practice](#), Journal of Social Inclusion, 8(1), 2017.

overwhelming and illustrates the extent of unmet legal need in terms of access to information and early legal advice. In terms of the utility of such services, recent surveys undertaken by FLAC show that almost 80% of clinic attendees are satisfied with the service they receive.

Early legal advice and assistance services should be accessible and tailored to the needs of disadvantaged groups and communities (for whom the consequences of legal problems may be particularly stark). Further, given the reality of unknown unmet legal need (particularly amongst hard-to-reach groups), early legal advice and assistance initiatives must also be concerned with pro-actively seeking to identify legal issues:

“...[V]ulnerable and marginalised people will not always know where to go for help, may not have knowledge, capacity or the confidence to identify their problem as a legal problem and are likely to present to other services first.

...[M]any vulnerable and marginalised groups may never seek help at all. These people present the greatest challenge as the research reveals that they are often the most likely to experience serious and escalating problems which can increase their social exclusion.”³⁸³

There is no one-sizes-fits-all approach to ensuring that legal advice and assistance are available to all individuals and groups to resolve legal problems early and to prevent those problems (and their consequences) from snowballing. Indeed, research in the area indicates that accessibility and tailoring such services to the needs of specific groups and communities is key to their success:

“If legal aid services are to be effective in reaching people who are disadvantaged, disempowered or marginalised, then integrated, connected service delivery, outreach and relationship building, community development and education play a vital role.”³⁸⁴

This reflects the broad agreement in the available research that legal services “can reach clients with complex needs and who had not sought assistance before from mainstream legal service providers, or who otherwise would not have received legal assistance. However, to achieve these outcomes, outreach services need to be appropriately located and connected

³⁸³ Liz Curran (2007), [*Ensuring Justice and Enhancing Human Rights: Improving Legal Aid Service Delivery to Reach Vulnerable and Disadvantaged People*](#).

³⁸⁴ Alexy Buck and Liz Curran, ‘Delivery of advice to marginalised and vulnerable groups: The Need for Innovative Approaches’ [2009] 3 Public Space: The Journal of Law and Social Justice.

with target groups and their support agencies”.³⁸⁵ (Preventative Justice Services for hard-to-reach groups is discussed in further detail below).

The functions of the new Public Legal Assistance Authority must include providing (and ensuring the provision of) Early Legal Advice and Early Legal Intervention Programmes.

9.1.4. Advocacy

There is a large range of NGOs, community groups and Trade Unions which provide non-legal advocacy in areas such as social welfare, employment, equality and housing. As discussed further below, the Citizens Information Board also provides some advocacy services. However, the Legal Aid Board has no function as regards mapping, providing or improving the quality of non-legal advocacy.

The Equal Access Project (‘EAP’) is a joint FLAC & INAR project, funded by the European Union, to improve access to justice for people who are subjected to discrimination on the basis of race or membership of the Traveller community. The project developed and delivered an accredited training programme in Anti-Racism Advocacy to equip non-legal advocates with the skills and knowledge to represent claimants on the race ground at the Workplace Relations Commission.³⁸⁶ The project facilitated the formation of a network of advocates (including participants in the training) supporting people in seeking justice under the Equality Acts.

The experience of the EAP has illustrated the demand for training specifically in relation to pursuing cases under the Equality Acts amongst community advocates and NGOs.

The Review Group and the Legal Assistance Authority should map the non-legal advocacy landscape in Ireland and identify national and international best practice models. The functions of the Legal Assistance Authority should include the provision of (or ensuring the provision of) legal and advocacy training for Community Groups, NGOs, Trade Unions and (as discussed further below) the Citizens Information Board.

9.1.5. Preventative Legal Services for Hard to Reach Groups

The work of Independent and Community Law Centres in Ireland (discussed in chapter 1) is instructive in examining how legal services can be tailored to meet the needs of specific groups

³⁸⁵ Suzie Forrell and Abigail Gray, ‘Outreach legal services to people with complex needs: what works?’ [2009] 12 Justice Issues; Suzie Forrell, ‘[Review of Legal Aid NSW outreach legal services](#)’ (2013); LawRight, ‘[Legal Outreach Best Practice Guide](#)’; Pascoe Pleasence, ‘[Reshaping legal assistance services: building on the evidence base](#)’ (Law and Justice Foundation, 2014); OECD, ‘[Designing people-centred legal and justice services](#)’ (2019); Melina Buckley, ‘[Moving Forward on Legal Aid: Research on Needs and Innovative Approaches](#)’ (2010).

³⁸⁶ See further: <https://www.flac.ie/news/eap/>

and communities or to respond to legal issues in particular areas. Additionally, a number of best practice models have emerged internationally in relation to the provision of Preventative Justice Services to hard-to-reach groups.

An example is the ‘collaborative service delivery’ model - in which health or community workers collaborate with community legal services. Co-location and outreach is a key feature of such models. For example, Homeless Persons’ Legal Service in New South Wales, Australia, operates free legal clinics in partnership “with welfare agencies in the greater Sydney metropolitan and Hunter regions that provide direct services, such as food and accommodation, to people in housing crisis”³⁸⁷:

“What makes this model innovative is that the lawyers at the clinic provide civil and administrative legal services at crisis accommodation centres and welfare agencies where the clients are most likely to go to seek other services, food or emergency accommodation. In line with the suggestions of the LSRC (although this clinic predates their research) the legal advice is proffered at the locations where the clients, in this case the homeless, are likely to be rather than expecting the homeless to find the legal service and make appointments.”³⁸⁸

There is a significant emerging body of research in relation to the potential and benefits of ‘health justice partnerships’:

“Health Justice Partnership (HJP) is an international practitioner-led movement which brings legal and healthcare professionals together to address the root causes of ill health among low income and vulnerable groups from negative social determinants. HJPs, which are also referred to as medical-legal partnerships (MLP) in the US, are collaborations between health and free welfare legal services providing advice and support for patients experiencing health-harming challenges such as housing problems (e.g., landlord/tenant disputes, housing discrimination), benefits (e.g., benefits accessibility and claims denials), family (e.g., child support and civil protective orders) and consumer (e.g., bankruptcy and utility shut-offs). Welfare legal service providers working in partnership with health services are therefore highly relevant to public health, as they focus on prevention, by addressing upstream systematic social and legal problems that affect patient and population health. Many of the health issues experienced by individuals are due

³⁸⁷ Pro Bono Centre Australia, ‘[Outreach: A practical guide to what works](#)’.

³⁸⁸ Liz Curran (2007), [Ensuring Justice and Enhancing Human Rights: Improving Legal Aid Service Delivery to Reach Vulnerable and Disadvantaged People](#), at p.59.

to, or exacerbated by, the effect of unenforced laws or incorrect denial of critical services or support that they are entitled to.”³⁸⁹

For example, in 2013, Loddon Campaspe CLC and Bendigo Community Health Services launched their Health Justice Partnership project at the health service’s site: “The embedded LCCLC practitioner works with medical staff at the health service to address the unmet legal needs of local families and children in various areas of law including housing, debt, child protection and family violence”.³⁹⁰ Other health justice partnerships have targeted people experiencing legal issues in relation to youth homelessness³⁹¹ and social welfare³⁹².

In Australia, a prevalent feature of such initiatives is the use of ‘legal health checks’:

“The Legal Health Check is a resource designed to equip non-legal professionals to ask the right questions and identify legal needs — potentially in multiple areas of law — in their own client consultations. Rather than merely setting out legal information, it provides the community worker with a diagnostic process, and enables the community worker to refer the client to one or more appropriate legal services for assistance. After the legal health check has been used to interview the client, the completed legal health check document can also be used to brief the pro bono lawyer or community lawyer who receives the referral...

The Legal Health Check is a response to research findings that disadvantaged or vulnerable clients are likely to consult their community or health workers, rather than legal service providers, about socio-legal issues, that they are likely to have multiple legal issues, and that their legal, health and social issues are interrelated.”³⁹³

A legal health check is utilised by the “Street Law” programme at Canberra Community Law – an “outreach legal service for people who are experiencing or at risk of homelessness”.³⁹⁴ In collaboration with Autism Spectrum Australia, Canberra Community Law has also developed

³⁸⁹ Granger R, Genn H and Tudor Edwards R (2022) [Health economics of health justice partnerships: A rapid review of the economic returns to society of promoting access to legal advice](#). Front. Public Health.

³⁹⁰ Pro Bono Centre Australia, ‘[Outreach: A practical guide to what works](#)’.

³⁹¹ Farzana Choudhury, [Addressing ACT Youth Homelessness through Health Justice](#), Parity, vol 31(9), pp. 31-32, November 2018.

³⁹² Beardon, S., Woodhead, C., Cooper, S., Raine, R. and Genn, H. (2020), “[Health-justice partnerships: innovation in service delivery to support mental health](#)”, Journal of Public Mental Health, Vol. 19 No. 4, pp. 327-332.

³⁹³ Pro Bono Centre Australia, ‘[Outreach: A practical guide to what works](#)’.

³⁹⁴ Canberra Community Law, [Street Law](#).

a series of 'social scripts'³⁹⁵ – resources which “aim to assist autistic people, and people with lived experience of mental ill health and low levels of English literacy to access legal services and legal processes”.³⁹⁶

The examples discussed above illustrate how Preventative Legal Services can be effectively provided to hard-to-reach groups. In particular, they illustrate the importance of:

- co-location and collaboration with other services which targeted groups engage with (such as community groups and health and welfare services).
- tailoring of services to the needs of specific groups and ensuring that they are accessible.
- outreach and proactive approaches to the identification of legal need.

The diversity of the initiatives described above also illustrates the need for continuous flexibility and innovation in legal aid policy and practice:

“There is a key role for government in ensuring that it provides an appropriate environment and funding resources so that its services can develop the methods and service provision that will enable people to benefit from the law through early and effective advice. This includes contractual arrangements and policy frameworks wherein legal advisers have scope to deal with all clients’ problems together, rather than in isolation, and by cooperation between services working together which can improve clients’ outcomes immeasurably.

Government needs to be better at enabling services that it funds to have greater autonomy in identifying issues and resolving them on behalf of clients/patients and be less prescriptive about the services provided. More trust in the professional judgment of the service providers who work directly with affected people is needed. It is important that government, in the manner in which it specifies service delivery, is informed by the reality and context for people on the ground affected by their policies and legislation. It is recognised that agencies have to be accountable, but if the different approaches suggested in the research as likely to work are to come to fruition, then government may also need to be more flexible if services are to be more responsive to need.”³⁹⁷

³⁹⁵ Canberra Community Law, [Social Scripts](#).

³⁹⁶ Farzana Choudhury & Jacqueline Hrast, [Social scripts: Improving access to legal services and the justice system](#), ACT Law Society Journal, issue 262, Summer 2021, pp 34-38.

³⁹⁷ Liz Curran (2007), [Ensuring Justice and Enhancing Human Rights: Improving Legal Aid Service Delivery to Reach Vulnerable and Disadvantaged People](#), at p.68.

9.1.6. Mediation

The Mediation Act 2017 provides for the possibility of mediation in all civil disputes. In reality, however, mediation is only freely available in disputes before the Workplace Relations Commission (concerning employment or equality) and in family law matters (where the Legal Aid Board may provide mediation). There is a clear need for the expansion of free mediation services. However, it is important to emphasise that the expanded availability of mediation cannot be seen as an alternative (or to reduce the need for) comprehensive legal aid reform, or to the resourcing of legal aid or the Courts.

There may be a preventative justice value to referring certain matters for mediation, but mediation is not appropriate in all cases (even in what might appear straightforward cases). Mediation should never be imposed on parties. It is a fundamental feature of mediation that it is a voluntary process and it is vitally important that any increased recourse to mediation is based on the informed consent of the parties. In order to be truly voluntary, parties must be made aware of their rights and entitlements before they enter into the mediation process in order to ensure that the consent to the mediation agreement has been fully informed. FLAC regularly hears from callers to its telephone information line who have entered into mediation agreements with no idea of what their rights were in relation to their family home, pensions, or maintenance, and who only come to FLAC after an agreement has been signed

There is a significant role for the system of civil legal aid in ensuring that parties to mediation have access to information and advice regarding their rights before and during the mediation process. Parties should be informed that a mediator is not obliged to inform parties of what their legal entitlements are. Parties should also have legal advice available to them in relation to any proposed mediation settlement, including advice on the likely outcome if the matter was to proceed to court.

9.2. Legal Representation

While litigation should be a last resort, and the Public Legal Authority should be actively engaged in preventing issues escalating to the point where it is required, it is nevertheless an integral pillar of any system of civil legal aid.

Chapters 4, 5 and 6 of this submission have discussed the conditions which should (and, most importantly, should not) pertain to eligibility for representation under any scheme of civil legal aid, including the new model proposed in this submission. Chapter 4 emphasises that there should be no blanket exemptions to the nature of cases in which representation may be provided. Chapter 7 discusses the quality of legal representation and ensuring access to representation is equality-proofed and fair. The means of delivering legal services, including legal representation is discussed in section 9.3 below.

The proposed new model would allow those providing legal services under the auspices of (or funded by) the new Legal Assistance Authority autonomy in relation to the cases in which they provide representation and allow those service providers to respond to the needs of the individuals and communities they serve through litigation. This should include strategic litigation, and cases concerning collective rights and systemic human rights abuses or discrimination. The latter category is particularly important in areas such as environmental law and equality law.

9.3. Delivery of Public Legal Assistance Services

The diversity of the functions outlined above requires diversity in how those services are delivered – particularly as the means of delivering those services should be tailored to the needs of specific areas and communities. Broadly speaking this should involve:

- The Legal Assistance Authority directly providing legal information, public legal education, legal advice, and legal and advocacy training.
- The Legal Assistance Authority funding a nationwide network of Community Law Centres who may carry out all of the functions described above in accordance with the principles set out in the previous chapter.
- The Legal Assistance Authority funding specialised and dedicated legal services.
- The Legal Assistance Authority coordinating private practitioner panels.
- Collaboration and coordination between the Legal Assistance Authority (and the organisations it funds) and other public bodies, community organisations and other services.

9.4. Other Functions

9.4.1. Research & Law Reform

In addition to research and analysis in relation to unmet legal need and the efficacy of its services (discussed in previous chapters), there is significant scope for legal aid authorities to conduct research in relation to access to justice more generally. This research, and law reform proposals arising from it, should be informed by the experience of the authority in providing legal services and should focus on law reform which would prevent legal issues arising to begin with or escalating. In this regard, the promotion of better quality first instance administrative decision-making (in areas such as social welfare) should be a key concern. As should the availability of accessible tribunals for challenging decisions of State bodies (such as in the area of social housing).

9.4.2. Co-ordinating the Development of Clinical Legal Education

The State has ultimate responsibility for enabling individuals to access justice. While access to justice remains a state obligation, FLAC believes that it is the responsibility of lawyers, including legal practitioners and legal academics, to promote access to justice,³⁹⁸ and that access to justice should be an important part of law school and university. All graduating law students should have a basic understanding of the issues relating to access to justice and know that fostering access to justice is an integral part of their professional responsibility. Clinical legal education ('CLE') in the area of social justice gives students the opportunity to reflect not just on the obstacles to justice in the legal system but on the structural and economic forces behind them. It sensitises students to the challenges inherent in the legal system, its accessibility and the need to understand how access is often heavily reliant not only on financial resources but also trust and historic trauma through minority and marginalised groups experiences of the legal system and authority more broadly. Legal education can also act as an ethical training space whereby future lawyers learn empathy, trauma informed lawyering and sensitivity.

Given the importance of access to justice and its connection with the rule of law, a basic understanding of access to justice issues with an experiential component should be seen as a necessary and inherent component of all legal education. Access to justice and legal aid - with an experiential component - should be a core subject on the curriculum of law schools and the King's Inns and The Law Society.

Clinical legal education is the defining term for a form of legal education which exposes students to the practical application of the law and puts them in a position of using their legal knowledge to respond to real life issues. They are often public -facing initiatives through which students provide legal advice to members of the public on their legal problems, under the supervision of academics and /or legal, practitioners.

The development of this type of legal education can meet multiple ambitions. First, to provide education through high quality teaching and research. Second, to seek to deliver social justice by being responsive to justice problems. Third, to add value to the student experience by developing professionally relevant skills in students and enhancing their employability.

FLAC believes that an effective means of giving lawyers a sense of their own responsibility for increasing access to justice is through early exposure to those most in need of legal services.

³⁹⁸ This is reflected in the wording of the Pro Bono Pledge. The Pledge was developed by an independent grouping of law firms, barristers, and in-house legal teams with a presence in the Republic of Ireland who have come together to affirm their commitment to delivering pro bono services in Ireland. The Pledge is coordinated by PILA (the Public Law Alliance, a project of FLAC).

To this end, PILA plays a significant role in the development of clinical legal education – which seeks to complement the theoretical training law students receive in the classroom with practical, hands-on experience that is academically assessed.

Globally, clinical programmes provide a wide range of otherwise unavailable legal services through live clinics and placements, along with various law reform activities. Most universities in the United Kingdom³⁹⁹ now offer clinical options at under-graduate and LPC level, as well as for the Bar Professional Training Course. The most successful of these programmes offer a range of options to suit different levels of commitment and experience, the key being to enhance learning experience and employability. Leading universities run programmes for law students to take on real cases under the supervision of practising solicitors. These clinics are hugely popular, being habitually oversubscribed⁴⁰⁰ and considered a major selling point for law schools. They also offer crucial work experience that may not in practice be available to students from more deprived socio-economic backgrounds where working for free as an intern is not an option.

Research on the role of University Law Clinics in delivering access to justice ⁴⁰¹ examined 64 Law Schools in the UK.

“University law clinics in the UK cover a diverse range of legal areas, with housing law the most popular, covered by 27 out of 32 of the respondent clinics. Commercial law, (including company law, contract and intellectual property) follows this, with 24 clinics offering support in this area; and 24 covering consumer law. Family law is covered by 21 clinics; employment law by 16 clinics; health and social care covered by 12; and immigration (including statelessness), criminal law and education are each covered by nine clinics. Social security law is covered by seven clinics; five cover asylum; three cover human trafficking; property; probate and wills. There are a range of ‘other’ areas of law covered by clinics, including: criminal injuries compensation, property law, neighbour disputes, inquests, environmental law, debt, planning, human rights and data protection”.

³⁹⁹ As of 2014, 70% of all UK law schools provided free legal services to individuals, groups, and organisations. See the Public Law Project’s report on ‘Public Law and Clinical Legal Environments’, April 2018, page 8, available at: <http://www.publiclawproject.org.uk/data/resources/278/Public-Law-and-Legal-Advice-Clinics-Final.pdf>).

⁴⁰⁰ *Ibid.* page 16.

⁴⁰¹ O. Drummond and G. McKeever, Access to Justice through University Law Clinics (2015: Ulster University Law School), available on the Ulster University Law Clinic website at <http://www.ulster.ac.uk/lawclinic/files/2014/06/Access-to-Justice-through-Uni-Law-Clinics-November2015.pdf>.

One promising comparative development is that the Council of Canadian Law Deans has established an access to justice committee to consider the role of law schools in this area. Priorities include moving toward a requirement that law school education include an experiential component and increasing access to justice research. To the extent that they are not already doing so, law schools should take a dual focus to integrating access to justice into education, by establishing requirements for all students and supporting opportunities for those particularly interested in access to justice.

In Ireland, the focus of clinical legal education programmes in Irish university settings has generally been on research or placement clinics, and does not involve engagement with casework. FLAC regularly takes short-term placements from UCD and TCD law students. Students from the Masters in Law Course, in TCD and the Environmental Law Clinic in UCC provide valuable legal research for FLAC. Staff from FLAC on occasion provide guest workshops to students on the NUIG Masters in Law and Public Policy course. However, while law students will learn about FLAC's work through these initiatives, they are generally not actively engaged in casework or coming into contact with clients. Live clinics have been slow to evolve in Irish universities due to legal services regulation, funding and resource constraints, insurance and institutional buy-in. Engagement with casework in the Irish context may be challenging in terms of ensuring compliance with rules around legal representation, require a supervising solicitor or access to willing legal practitioners and require some financial supports.

However there is potential for university law clinics and professional training bodies to provide support for citizens to enhance their capability as can be seen by three examples.

*The Traveller Equality and Justice project*⁴⁰²

The TEJP Clinic won the UCC President's Awards for Excellence in Teaching 2022. FLAC is a partner of the project. It is a Traveller client legal clinic based within the School of Law. It is a live-client clinic which provides legal information and supports to Traveller victims of discrimination within Cork & Kerry. Owing to its unique scope, it offers an innovative pedagogy example, developing vital skills, student ethics and community engagement. This opportunity is the only such partnership within an Irish law school and an independent law centre which provides students with a unique clinical legal education experience, speaking to development of graduate attributes. Embedded within the Traveller Community Partner Group partners, the TEJP Clinic receives referrals directly from the Community and all research arising is participatory and guided by Traveller stakeholders. It is a model of Community-based research

⁴⁰² This is funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020) under Grant Agreement number: 963353 — TEJP — REC-AG-2020 / REC-RDIS-DISC-AG-2020.

and learning. Students work alongside advocates who are running real cases and see how these progress. Students are exposed to access to justice and social justice initiatives through court observation, research work and working with available legal information resources as well as supporting advocacy staff throughout the academic year. The student clinic provides crucial access to legal information for vulnerable Traveller litigants with significant unmet legal needs.

Ulster University Law Clinic

Ulster University Law School as part of the award-winning LLM in Access to Justice, through the Ulster University Law Clinic, postgraduate Law students offer free legal advice and, where appropriate, representation to the public on social security and employment law problems.

Law Society Street Law Initiative

The Law Society has led a 'Street Law' initiative, where trainees – and now also qualified solicitors – provide legal education and information to school children and disadvantaged groups on their rights and responsibilities. The Law Society sees this as meaningful experiential learning that instils in trainees a commitment to increasing access to legal education and the legal profession, develops awareness around the importance of *pro bono* legal services, and fosters an ethos of public service within the legal profession. The 'Street Law' programme has seen a steady increase in participants, but currently involvement is on a voluntary basis and does not attract academic credit, as required by clinical programmes.

While clinical legal education is not a replacement for an adequately funded system of civil legal aid, there is significant room to scale up in order to promote access to justice to the next generation of lawyers. Students from FLAC student societies regularly express interest in such initiatives. University law clinics could play an important role in the legal advice architecture.

9.5. Recommendations

A new Legal Assistance Authority must ensure the provision of:

- Preventative Justice Services, including Legal Information, Public Legal Education, Legal Advice, Early Intervention Programmes, Advocacy, and Legal and Advocacy Training. This must include the provision of preventative legal services for hard-to-reach groups informed by international best practice. Provision of information should include information and awareness-raising in relation to environmental rights, including awareness of the right to information contained in the Aarhus Convention and the means through which it may vindicated. The Legal Assistance Authority should ensure the provision of (or resourcing of) legal information officers in the Courts Services,

NGOs, family resource centres and health centres, prisons, residential institutions such as hospitals and nursing homes, and public libraries.

- Legal Representation through a nationwide network of Community Law Centres, specialised and dedicated legal services, and private practitioner panels.
- Training for representatives of NGOs, Trade Unions and community organisations to ensure that lay advocates may provide advocacy and representation in straightforward case heard by bodies such as the Social Welfare Appeals Office and WRC. Such advocates should also have access to appropriate referral mechanisms for legal advice and representation in more complex cases.

All forms of legal services provided by the Legal Assistance Authority should comply with the relevant equality, human rights, accessibility, quality and fairness standards (set out in chapter 7 of this submission).

In addition to research and analysis in relation to unmet legal need and the efficacy of its services, the Legal Assistance Authority should be mandated to conduct research in relation to access to justice more generally and make law reform proposals. This research, and law reform proposals arising from it, should be informed by the experience of the authority in providing legal services and should focus on law reform which would prevent legal issues arising to begin with or escalating.

Given the potential of university law clinics to be part of the legal advice infrastructure, the Review Group (and subsequently the new Legal Assistance Authority) should engage with third level colleges, King's Inns and the Law Society of Ireland in relation to the development of:

- access to justice and legal aid (with an experiential component) as core subject on the curriculum of law schools and the King's Inns and The Law Society.
- Clinical Legal Education programmes in third level colleges and universities along the lines of the Traveller Equality and Justice Project in UCC, the Ulster University law Clinic and the Law Society Street Law Clinic.

10. The Role of Other State Bodies

So far this submission has focused on the role of a State Body specifically concerned with access to justice. This chapter examines the role of other State Bodies in the wider civil legal aid architecture.

Access to justice is a human right and, pursuant to the Public Sector Equality and Human Rights Duty, all State and Public Bodies and Government Departments must consider it in carrying out their functions.⁴⁰³ This has significant implications for State Bodies providing public services which are vital for the realisation of rights, including in areas such as housing, health, education and social welfare. Courts and Tribunals have a particularly significant role in the vindication of the right of access to justice and it should be at the centre of their administration and procedures.⁴⁰⁴ As referenced previously, it is crucial that a new Legal Assistance Authority collaborate with such bodies in performing its functions.

Additionally, there are a number of public bodies whose statutory functions and mandates are concerned with access to justice, including through the provision of information, advice, assistance, advocacy and legal representation. However, the legislation providing for these bodies and their functions is largely silent as to their relationship with the civil legal aid system. The remainder of this chapter considers three such bodies in detail.

10.1. The Citizens Information Board (CIB)

The Citizens Information Board (CIB) is a statutory body with information, advice, and advocacy functions. The CIB lies under the aegis of the Department of Social Protection, which provides annual Exchequer funding to CIB to perform its statutory functions. It has an annual expenditure exceeding €50 million.⁴⁰⁵

Section 7(1) of the Comhairle Act 2000 (as amended) provides that the functions of the Board include:

- “to support the provision of or, where the Board considers it appropriate, to provide directly, independent information, advice and advocacy services so as to ensure that individuals have access to accurate, comprehensive and clear information relating to social services and are referred to the relevant services”.
- “to support, promote and develop—(i) greater accessibility, co-ordination and public awareness of social services, and (ii) the provision and dissemination of integrated

⁴⁰³ Section 42, Irish Human Rights and Equality Commission Act 2014.

⁴⁰⁴ FLAC will shortly publish research on the implications of the public sector equality and human rights duty for the Courts Services, the Workplace Relations Commission and the Legal Aid Board.

⁴⁰⁵ Department of Social Protection (2022), [Periodic Critical Review of the Citizens Information Board](#), p.8.

information in relation to such services by statutory bodies and voluntary bodies”.

The CIB carries out its information, advice and advocacy functions in a number of different ways. The CIB funds eight regional Citizens Information Services (CISs). The regional CISs in turn operate a national network of Citizens Information Centres (CICs) which provide information, advice and advocacy through a network of over 100 offices.⁴⁰⁶ The CIB also provides information through its website⁴⁰⁷ and operates a telephone information line – the Citizens Information Phone Service (CIPS).

10.1.1. Co-ordination between CIB and the LAB

The legislation governing the CIB and LAB is silent as to relationship between the two bodies.

The recent Critical Review of the CIB does not consider the co-ordination of the work of the CIB with other State Bodies with related mandates, such as the Legal Aid Board. There is significant scope for collaboration in this regard in the areas of information, advice, public education and advocacy.

Under section 7(1)(c)(i) of the 2000 Act (as amended), CIB are mandated to “*support, promote and develop... greater accessibility, co-ordination and public awareness of social services*”, whilst section 7(1)(a) mandates them to support the provision of, or provide directly “*accurate, comprehensive and clear information*”. The Critical Review notes that this function “*does not feature prominently in CIB or DSP documentation*” and that it could be “*further utilised to support, promote, and develop, greater accessibility, coordination, and public awareness of social services*”.⁴⁰⁸

The Critical Review discusses the potential for greater coordination in the manner in which the CIB provides its own services. This includes discussion of potential “co-location” of these services with the offices of the Department of Social Protection:

“[T]he majority of enquiries in CICs related to Social Welfare. The Department of Social Protection has a wide network of Intreo offices, and there is potential to further explore co-location of Intreo, CIC and MABS offices. This would enable the public to access both independent information on a service and the service itself within a single location. This approach has been successfully implemented in Coolock and was perceived by DSP to be working well.”⁴⁰⁹

⁴⁰⁶ Department of Social Protection (2022), [Periodic Critical Review of the Citizens Information Board](#), p.14.

⁴⁰⁷ See: www.citizensinformation.ie

⁴⁰⁸ Department of Social Protection (2022), [Periodic Critical Review of the Citizens Information Board](#), p.27.

⁴⁰⁹ Department of Social Protection (2022), [Periodic Critical Review of the Citizens Information Board](#), p.37.

The Critical Review recommends that CIB and the Department of Social Protection “examine the feasibility of co-location of offices, including possible co-location with Intreo offices”. In FLAC’s view, there may be significant potential for co-location between Citizens Information Services and the new Legal Assistance Authority.

10.1.2. Accessibility

Section 7(c)(i) of the 2000 Act (as amended) does not create a mandate for the CIB provide information in an accessible manner.

In the context of their obligations under section 42 of the Irish Human Rights and Equality Commission Act 2014 (the Public Sector Equality and Human Rights Duty), the Board: “*aim to ensure equality of access by providing services in person, by phone and online, as well as through the Live Advisor service on the webchat and the Irish Remote Interpreting Service (IRIS). The citizensinformation.ie website has been designed to provide a high level of accessibility*”.⁴¹⁰

Accessibility should be a key concern of the CIB in performing each of its functions. As is discussed elsewhere in this submission, accessibility of information is critically important in areas such as social welfare, and in relation to access to other vital public services.

10.1.3. Information & Public Education

The CIB’s information mandate is confined to the provision of information “*relating to social services*”. However, in practice, it provides a significant amount of basic information including information in relation to legal rights (in areas such as social welfare, housing and employment), via its website and phone services, alongside the network of Citizens Information Centres. The equivalent body in the UK – Citizens Advice - is explicitly concerned with the promotion of rights in carrying out their information and advocacy role. The work of the CIB in this regard also significantly contributes to public education regarding legal rights.

10.1.4. Advice & Advocacy

Again, the CIB’s advice and advocacy functions are limited - section 7(1) of the 2000 Act only provides for such services to be provided in matters “relating to social services”. In practice, the CIB provides advocacy and advice, mainly to persons pursuing social welfare appeals. They also provide some advocacy and advice to persons pursuing cases in the WRC (the tribunal that deals with equality and employment cases). However, the Critical Review Notes that the latter category of advocacy cases may not be within the CIB’s current legislative mandate:

⁴¹⁰ Citizens Information Board (2021), [Annual Report 2020](#), p.92.

“In 2020, the eight regional CISs worked on 4,016 advocacy cases, requiring over 11,130 hours of work. Typical activities included completing forms on an individual’s behalf and accompanying an individual to a hearing or other formal process. The areas of advocacy are client-led. Most (69%) of advocacy cases related to social welfare, primarily working with, or on behalf of, clients to submit a social welfare appeal...

Employment advocacy was the second-highest category at 15%. Specific actions undertaken under this area included direct negotiations with employers and attendance at Workplace Relations Commission (WRC) hearings. While the advocacy provided is customer-led it should be noted that the legislation focuses on provision of advocacy to support individual[s] to secure entitlements to social services. It does not appear that engagement with bodies such as the WRC is within the intended legislative remit. In addition, legislation provides for advocacy support, and it would be important to clarify whether some of the services provided by the CIC network have extended beyond advocacy, into representation and negotiation services.”⁴¹¹

The Review recommends that the CIB “*review and formalise scope of advocacy and representation services provided through the Regional CISs*”.

There is significant scope for development of the CIB’s role in providing assistance and advocacy in areas such as employment, discrimination and housing (including social housing and landlord and tenant issues). The expansion of such services would require the Legal Assistance Authority to perform an advocacy and legal training role in respect of CIS advocates, the creation of referral pathways from the CIB to the Legal Assistance Authority in cases requiring legal representation, and a mechanism for the provision of second-tier legal support to the CIB in respect of specific issues and cases.

CIB functions in the area of social welfare (and the potential role of the Legal Assistance Authority in this regard) are discussed in the next chapter of this submission.

10.2 The Irish Human Rights & Equality Commission (IHREC)

The various function of IHREC correspond with the continuum of access to justice, from access to information to law reform. IHREC has significant functions and powers in each of these areas under the Irish Human Rights and Equality Commission Act 2014 (‘the IHREC Act 2014’).

⁴¹¹ Department of Social Protection (2022), [Periodic Critical Review of the Citizens Information Board](#), p.22.

The section of the next chapter of this submission dealing with Equality & Anti-Discrimination Law discusses ways in which some functions of IHREC and the LAB overlap. It highlights that IHREC (despite having the power to provide representation) cannot provide legal representation in all equality cases, and notes that there is a significant role for the new Legal Assistance Authority to provide representation in such cases. These arguments apply equally to cases concerning human rights. The existence of IHREC should not act as a barrier to the Civil Legal Aid scheme providing representation in human rights and equality cases, or to the new Legal Assistance Authority providing information, advice, and training in those areas.

Further, that section of this submission discusses the significant scope for an enhanced legal and advocacy training role for IHREC in the context of equality and anti-discrimination law.

10.3 The Workplace Relations Commission (WRC)

Section 11(1)(h) of the Workplace Relations Act 2015 states that one function of the Workplace Relations Commission is to “provide information to members of the public in relation to employment enactments (other than the Act of 1998)”. This expressly excludes the Equal Status Acts and Employment Equality Acts from the ambit of this function. The rationale for this exclusion may be the existence of IHREC. However, the WRC is ideally placed to provide information in relation to the Equality Acts.

10.4. Recommendations

In relation to the Citizens Information Board, the Review Group should recommend that:

- Civil Legal Aid legislation and the Comhairle Act 2000 should mandate coordination between the CIB and the Legal Assistance Authority in the areas of information, advice, public education and advocacy.
- Legislation and policy should also facilitate practical collaboration between the CIB and Legal Assistance Authority as regards the manner in which they provide their services through initiatives such as co-location.
- The Comhairle Act 2000 should be amended to specifically mandate the CIB to provide information in an accessible manner, including in collaboration with the Legal Assistance Authority.
- The Comhairle Act 2000 should be amended to mandate the CIB to perform an information function in relation to legal rights, as well as a public education function. The legislation should facilitate collaboration with the Legal Assistance Authority in this regard.
- The Comhairle Act 2000 should be amended to specifically mandate the Citizens Information Board to provide advice and advocacy in relation to legal rights (in areas

such as social welfare, employment, discrimination and housing). This should provide, if necessary, that the CIB is empowered to collaborate with bodies such as the Legal Assistance Authority in carrying out this function.

- Civil Legal Aid legislation should require the Legal Assistance Authority to perform an advocacy and legal training role in respect of CIS advocates, the creation of referral pathways from the CIB to the Legal Assistance Authority in cases requiring legal services, and a mechanism for the provision of second-tier legal support to the CIB in respect of specific issues and cases.

In relation to IHREC, the Review Group should recommend that:

- IHREC's training function under the IHREC Act 2014 should mandate the provision of advocacy training in relation to equality law – including, if necessary, provisions allowing IHREC to collaborate with bodies such as the CIB, the Legal Assistance Authority, Trade Unions and Civil Society Organisations in carrying out this function.
- The legislation concerning the functions of the Legal Assistance Authority, the Citizens Information Board, IHREC and the Workplace Relations Commission should allow for collaboration between the bodies in relation to the provision of legal information, advice, education, training and representation in the context of equality law.

In relation to the WRC, the Review Group should recommend that: Section 11 of the Workplace Relations Act 2015 should be amended to allow the WRC to provide information in relation to equality law and discrimination complaints (in addition to their existing information function in relation to employment law).

11. Case Studies: The Rationale for – and potential of – a New Approach to Civil Legal Aid

This section examines the need for, and potential impact of, the reforms called for in this submission, with a focus on four areas of law in which FLAC has considerable experience and expertise.

The potential impact of a new approach to access to justice in the areas of social welfare and equality law are examined – along with recommendations specific to both of those areas.

The deficiencies of the existing system in the areas of judicial review (taking the example of housing cases) and credit and debt law are then examined.

11.1. Social Welfare: The Potential of a New Approach to Access to Justice for Welfare Rights

There are a significant number of social assistance and insurance schemes administered by the Department of Social Protection. These various schemes provide a safety net for those who are unable to work, who are unemployed, retired or in low paid employment.

Bar a few schemes established on an administrative basis (such as Direct Provision Allowance), almost all social welfare payments are underpinned by legislation which set out the eligibility criteria for claims under each scheme. The primary legislation in the area is the Social Welfare Consolidation Act 2005 (as amended) ('the 2005 Act').

Section 300 of the 2005 Act provides that decisions in relation to entitlement to payments and disqualifications are made by Deciding Officers.⁴¹² The decisions of a Deciding Officer are subject to an "internal review" process⁴¹³ and appeal to the Social Welfare Appeal Office.⁴¹⁴ Appeals Officers have discretion to hold oral hearings or to decide appeals on the basis of written submissions. Decisions of Appeals Officers are also subject to review mechanisms.⁴¹⁵

⁴¹² It provides that "every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer".

⁴¹³ The "internal review" mechanism stems from the power of Deciding Officers conferred on them by S.301(a) SWCA to "revise any decision of a Deciding Officer" in certain circumstances, including "by reason of some mistake having been made in relation to the law or the facts".

⁴¹⁴ The appeal process is prescribed by Chapter 2 of Part 10 of the 2005 Act as well as S.I. 108 of 1998 (Social Welfare (Appeals) Regulations 1998) as amended.

⁴¹⁵ Following an appeal, an appellant can also seek to have any decision of an Appeals Officer revised pursuant to section 317(a) of the 2005 Act which states that an Appeals Officer may revise a decision made on appeal "where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given". Further, the Chief Appeals Officer is empowered by section 318 of the 2005 Act to "at any time, revise any decision of an appeals officer, where it appears to [him or her] that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts". Under section, 301(1)(b) of the 2005 Act, Deciding Officers may "revise any

Section 327 of the 2005 Act provides for a statutory appeal to the High Court of decisions of Appeals Officers and the Chief Appeals Officer. Decisions concerning entitlement to social welfare payments may also be challenged by way of judicial review.

The Department of Social Protection processes over one million new claims each year,⁴¹⁶ while the Appeals Office decides on around 20,000 appeals per annum.⁴¹⁷ During 2021, over two million people received some form of social welfare payment from the Department of Social Protection.⁴¹⁸

11.1.1. Welfare Rights & Access to Justice

Social welfare is a human right of itself.⁴¹⁹ Access to justice is essential for the enjoyment of welfare rights. Barriers to (and delays in) accessing social welfare payments can have a devastating impact on individuals' and their families' lives – it can result in evictions, and exacerbate or create health issues and debt issues.⁴²⁰

The right to access to justice must be vindicated from the time of initial entitlement to payments and during all social welfare adjudication processes. Achieving this requires measures across the continuum of access to justice including legal information and advice regarding welfare rights, advocacy, public education, training and legal representation.

11.1.2. Legal Information re Welfare Rights: Knowledge of Legal Rights, Entitlements and Services

The vindication of welfare rights, requires claimants and applicants to have knowledge of:

- The payments which are available, the entitlement criteria for those payments, the supporting evidence required to satisfy those criteria, and the application process.
- The ongoing conditions which apply to payments which they are in receipt of, such

decision of an appeals officer where...it appears to the deciding officer that there has been any relevant change of circumstances which has come to notice since the decision of the appeals officer was given”.

⁴¹⁶ Mel Cousins & Gerry Whyte, *Social Security Law in Ireland* (3rd Edn, Wolters Kluwer, 2021), p.366.

⁴¹⁷ See: [Annual Reports of the Social Welfare Appeals Office](#).

⁴¹⁸ Department of Social Protection (2022), [Annual Statistics Report 2021](#).

⁴¹⁹ The right to social security is a well-established socio-economic right within the framework of international human rights law, recognised as such by Article 22 of the Universal Declaration of Human Rights and protected by the provisions of Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 12 and 13 of the European Social Charter. Article 1 of the First Protocol to the European Convention on Human Rights provides for “protection of property” and the European Court of Human Rights has held that the right to property extends to social security payments. Social Welfare is also often essential for the realisation of some of the most basic human rights such as the right to life, dignity and private and family life.

⁴²⁰ The Low Commission (2015), *Getting it right in social welfare law: the Low Commission's follow-up report*; G. McKeever, M. Simpson and C. Fitzpatrick, *Destitution and Paths to Justice* (The Legal Education Foundation and The Joseph Rowntree Foundation, 2018), pp.51-52.

as requirements to “genuinely seek work” and to provide information and updates to the Department in relation to their circumstances. This also includes information in relation to the consequences for failure to satisfy such conditions.

- The various appeal and review options available to them in relation to decisions on their entitlement and how to avail of the various appeal and review mechanisms.
- Their rights while engaging with the Department whether as a claimant or applicant, such as the right to reasons for decisions.
- The available information, support, advocacy and legal services.

In addition to the frequently amended and complicated primary legislation,⁴²¹ the rules in relation to entitlement to social welfare payments and the application and appeals processes are further detailed in regulations which have been described by the Supreme Court as “*extremely complex and almost opaque*”⁴²².

Through their website, telephone line and a nationwide network of Citizens Information Centres, the CIB provides detailed and accessible information in relation to social welfare payments and the social welfare system. The Citizens Information Service dealt with over 300,000 social welfare queries in 2020 (over 40% of the total queries they had received).⁴²³

The functions of the CIB in this regard are extremely significant in the promotion of access to justice for welfare rights. However, as noted in the section of this submission dealing with the functions of the CIB, it is a matter of concern that the CIB’s mandate is not expressly concerned with information in relation to legal rights, including welfare rights, and is instead focussed on information related to access to “social services.” Given the significance of their role in the area, the absence of a specific mandate in relation to social welfare is also notable, as is the absence of a specific mandate for any State Body to undertake public education campaigns in relation to welfare rights (a role which the CIB is ideally situated to perform).

A recent report from two UK access to justice bodies (JUSTICE and the Administrative Justice Council) highlighted the specific need for accessibility of information pertaining to social welfare. It highlighted the significant number of people with disabilities in receipt of social welfare payments, as well as groups who may be particularly affected by the “digital divide”.⁴²⁴

⁴²¹ The 2005 Act is amended from year to year on foot of budgetary and other legislative decisions that occur during the course of the year.

⁴²² [PC v Minister for Social Protection](#) [2017] IESC 63 at para. 20.

⁴²³ Citizens Information Board (2021), [Annual Report 2020](#), p.46.

⁴²⁴ JUSTICE and the Administrative Justice Council (2021), [Reforming Benefits Decision-Making](#), pp.96-101.

A recent Private Members Bill sought to create a duty on the Minister for Social Protection to undertake “take-up” campaigns in respect of social welfare payments.⁴²⁵ Section 6(2) of the Principles of Social Welfare Bill 2021 (which was opposed by the government and defeated by vote) would have compelled the Minister to have regard to the following in providing information in relation to social welfare eligibility:

- “(a) the importance of communicating in a way that ensures that persons who have difficulty communicating (in relation to speech, language or otherwise) can receive information and express themselves in ways that best meet their personal needs,
- (b) the importance of providing information in a way that is accessible for persons who have a sensory, physical or mental disability...”

11.1.3. Welfare rights: Advice, Advocacy & Training

The recent research by JUSTICE and the Administrative Justice Council notes the “*clear role for expert advice in helping people understand their potential social security entitlements and to navigate the application process*”:

“Many claimants may require advice and assistance to complete the application as well as understand the evidence that they need to provide to support their application. The need for advice and support is particularly acute for those with certain health conditions and disabilities which may make understanding and completing the forms particularly challenging. Advice and support is also crucial for claimants who have poor literacy rates and/or are non-English speakers and... those who are digitally excluded.

However, a lack of, or poor, advice at the application stage may result in delay and/or loss of income... Without advice, people often feel forced to give up, or make errors leading to much slower resolution of their problems.

Evidence demonstrates that access to early advice leads to more effective resolution of individuals’ problems. Research by Ipsos MORI on behalf of the Law Society found that those ‘who did not receive early advice were, on average, 20% less likely to have resolved their issue at a particular point in time (compared to those who did receive early advice).’ Given that people often experience ‘clusters’ of interrelated legal and non-legal issues particularly around social welfare, debt, housing and health, early legal advice also has economic benefits of reducing downstream costs for other public services...

⁴²⁵ See: [Principles of Social Welfare Bill 2021](#).

Advice is also crucial for helping people understand whether the decision they have received is correct and therefore whether they should challenge it. Advice is also needed so that claimants understand how to go about challenging a decision.”⁴²⁶

The experience of FLAC’s Roma Legal Clinic has consistently illustrated the significant demand for legal advice and advocacy in relation to social welfare (particularly amongst marginalised and disadvantaged groups). It has also demonstrated the complexity of the legal and evidential issues which may arise even at the earliest stages of the social welfare application process.

Consistent with previous years, in 2021, Social Welfare files constituted the largest category of case files dealt with on behalf of callers to the Roma Legal Clinic (45.2%) and the largest number of new files opened by that service (55.6%). The majority of social welfare case files arising from the Roma Legal Clinic in 2021 related to issues around satisfying the Habitual Residence Condition (HRC). Adjudication in relation to the HRC often raises complex questions of EU law. Roma often face significant additional difficulties in satisfying the HRC due to lack of documentation, proof of address and language and literacy skills.⁴²⁷

The demand for the services of the CIB in this area is also notable. In addition to a significant number of social welfare queries received by the CIB in 2020, almost 70% of the over 4,000 “advocacy cases” undertaken by Citizens Information Services during that period related to social welfare.⁴²⁸

The high rate of success in social welfare appeals also indicates the need for advice and advocacy in relation to social welfare applications and appeals. In each of the last five years, almost 60% of appeals have been decided in favour of appellants. Recent analysis by the Comptroller and Auditor General showed that “significant additional information” was provided in the majority of successful appeals. The Comptroller and Auditor General recommended measures “to ensure claimants are able to supply all necessary information to assess eligibility when they are making a claim”.⁴²⁹

While these figures indicate the significant issues in relation to social welfare decision-making at the first instance, they also highlight the role for advocates in assisting claimants to understand the information and evidence needed to support their application and to assist them in gathering it as early as possible.

⁴²⁶ JUSTICE and the Administrative Justice Council (2021), *Reforming Benefits Decision-Making*, pp.101-2.

⁴²⁷ FLAC (2021), [Remote Justice: FLAC Annual Report 2020](#).

⁴²⁸ Citizens Information Board (2021), [Annual Report 2020](#), p.47-8.

⁴²⁹ Comptroller and Auditor General (2021), [Report on the Accounts of the Public Services 2020](#).

The CIB have an advice and advocacy mandate (discussed above) which they exercise in the context of social welfare. While it has significant expertise and experience in the area of social welfare advocacy, the CIB does not, and cannot, provide legal advice or assistance. The CIB does seek second-tier legal advice in relation to certain social welfare issues and advocacy cases.⁴³⁰ However, there is no body specifically mandated to provide such support to the CIB, or to perform a social welfare law and advocacy training function more generally.

Given the complexity (and importance) of the legal issues which may arise in relation to social welfare applications and appeals, the absence of legal advisory and assistance services in this area is a matter of significant concern.

FLAC has previously noted that the “information and advice given to an appellant prior to a hearing or when making written submissions can have a significant impact on the outcome of an appeal”.⁴³¹ Early legal advice may also reduce the likelihood of cases proceeding to the review or appeal stage. In addition to being beneficial to the claimant by reducing delays in accessing payments (the purpose of many of which is to ensure a basic level of subsistence), the “provision of advice and assistance at the preliminary stages of an appeal could expedite the process as well as being more cost-effective for the State in the long-term.”⁴³²

11.1.4. Welfare rights: Legal Representation

Cases concerning social welfare entitlement are heard by the Social Welfare Appeals Office (a quasi-judicial tribunal), as well as the Courts (in the form of judicial review and plenary proceedings, as well as statutory appeals of decisions of the Social Welfare Appeals Office under section 327 of the 2005 Act).

The Legal Aid Board cannot provide representation in appeals heard by the Social Welfare Appeals Office.⁴³³ While, in theory, the LAB could provide legal advice to appellants, it does not do so in practice. The LAB also does not provide representation in cases concerning entitlement to social welfare payments heard by the Courts as a matter of practice.

The Social Welfare Appeals Office adopts relatively informal processes. While the support of experienced and trained advocates⁴³⁴ may suffice in many cases, this does not negate the

⁴³⁰ “Advocates in CIS have access to an expert panel, contracted by the Citizens Information Board. When CIS clients face a particularly complex social welfare or employment issue, the CIS can request advice from legal experts. This expert advice was integral to the successful resolution of some of CIS’s more complex advocacy cases in 2020”. See: Citizens Information Board (2021), [Annual Report 2020](#), p.49.

⁴³¹ FLAC (2012), [Not Fair Enough: Making the case for the reform of the social welfare appeals system](#), at p.42.

⁴³² FLAC (2012), [Not Fair Enough: Making the case for the reform of the social welfare appeals system](#), at p.43.

⁴³³ The Minister for Justice may “prescribe” the tribunals in which the Legal Aid Board may provide representation under section 27(2)(b) of the Civil Legal Aid Act 1995 – the SWAO is not so prescribed.

⁴³⁴ Such as the Citizens Information Services and NGOs such as Crosscare.

fact that a significant number of appeals deal with complex issues of national and EU law, evidential issues (including in relation to medical and social care needs) and questions of fair procedures and natural and constitutional justice. Further, oral appeals are often held where there are conflicts of evidence between the appellant and the Department of Social Protection⁴³⁵ – circumstances which may require cross-examination of departmental officials.

Research in the UK since the 1990s has consistently demonstrated that representation before social security tribunals increases the likelihood of success for appellants.⁴³⁶

In 2015, the UN Committee on Economic, Social and Cultural Rights noted its concern at “*the lack of free legal aid services, which prevents especially disadvantaged and marginalized individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of employment, housing and forced evictions, and **social welfare benefits***” (emphasis added). The Committee recommended that Ireland “*ensure the provision of free legal aid services in a wider range of areas, including through expanding the remit of the Civil Legal Aid Scheme*”.⁴³⁷ In 2019, the UN Committee on the Elimination of Racial Discrimination expressed similar concerns and specifically recommended designating the Social Welfare Appeals Office as a prescribed tribunal under Section 27(2)(b) of the Civil Legal Aid Act 1995.⁴³⁸

FLAC’s submissions in this area are informed by its work as an Independent Law Centre and in providing dedicated legal services, such as our Roma Legal Clinic, where matters concerning social welfare frequently arise. Independent Law Centres such as FLAC and Community Law and Mediation have long practiced in this area. FLAC believes that such law centres may provide a model for the provision of legal services in the area of social welfare, both for communities and for specific groups.

⁴³⁵ In *Kiely v Minister for Social Welfare* [1971] IR 21 Henchy J held that a request for an oral hearing should be granted in any case where there are “unresolved conflicts in the documentary evidence, as to any matter essential to the ruling of the claim”. Further, in *Galvin v Chief Appeals Officer and Minister for Social Welfare* [1997] 3 I.R. 240, Costello P held that an oral hearing should be held where a conflict of fact required resolution.

⁴³⁶ “[E]vidence suggests that appellants who are represented before social security tribunals, or at least have access to expert advice prior to the hearing, are likely to have a greater level of success than those who are not. A FOIA request showed that in 2012/13 the overall success rate for appellants in the FTT (SSCS) was 47% and the success rate for those with representation was 63%”. See: JUSTICE and the Administrative Justice Council (2021), *Reforming Benefits Decision-Making*, p.119.

See also: FLAC (2012), [Not Fair Enough: Making the case for the reform of the social welfare appeals system](#), at p.42.

⁴³⁷ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, at para. 8.

⁴³⁸ UN Committee on the Elimination of Racial Discrimination (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 43.

11.1.5. Recommendations on Welfare rights

The Review Group should recommend that:

- The Comhairle Act 2000 should be amended to mandate the Citizens Information Board to provide information in relation to legal rights and public education, including in relation to welfare rights. This information mandate should encompass eligibility criteria, the social welfare system, review, appeals and procedural rights. It should also include specific provisions in relation to the accessibility of information. As discussed previously, legislation should provide for collaboration with the new Legal Assistance Authority in this regard.
- The functions of the Legal Assistance Authority should encompass the provision of legal representation in appeals heard by the Social Welfare Appeals Office and cases concerning entitlement to social welfare payments heard by the courts. It should also encompass:
 - The provision of legal advice in the area of social welfare law.
 - The provision of training in the area of social welfare law and advocacy to Citizens Information Services, NGOs, community organisations and other relevant bodies/organisations.
 - Support for the advocacy work of the CIB in the area of social welfare, including the provision of second-tier legal advice on particular issues and in particular cases, a referral mechanism from the CIB to the new Legal Assistance Authority in cases requiring legal advice and representation, and training.
- The Comhairle Act 2000 should be amended to specifically mandate the Citizens Information Board to provide advice and advocacy in relation to legal rights (including in the context of social welfare applications, reviews and appeals). This should provide, if necessary, that the CIB is empowered to collaborate with bodies such as the new Legal Assistance Authority in carrying out this function.

11.2. Equality & Anti-Discrimination Law: The Potential of a New Approach to Access to Justice

The Equal Status Acts 2000-2018 prohibit discrimination in the provision of goods and services, accommodation and education. They cover the nine grounds of gender, civil status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. The Employment Equality Acts 1998-2015 prohibit discrimination in employment on the same nine grounds. In addition, the Equal Status Acts prohibit discrimination in the provision of accommodation services against people who are in receipt of rent supplement,

housing assistance, or social welfare payments. Both Acts prohibit multiple forms of discrimination (subject to some exemptions) including indirect discrimination and discrimination by association, sexual harassment and harassment, and victimisation. They also prohibit discriminatory advertising.

Ireland's 'Equality Acts' operate chiefly on the basis of an 'anti-discrimination' approach to equality and are generally enforced on the basis of an 'individual complaint' model.⁴³⁹ While most discrimination complaints are heard by the Workplace Relations Commission in the first instance, the Equality Acts provide that certain complaints may be heard by the Circuit Court and some must be made to the District Court.⁴⁴⁰ The Department of Children, Equality, Disability, Integration and Youth is currently undertaking the first comprehensive review of Ireland's equality legislation since its introduction over twenty years ago (the 'Review of the Equality Acts').

According to a recent survey, just 3% of persons who experienced discrimination made an official complaint, with over 70% taking no action.⁴⁴¹ Along with a consistent decline in the number of discrimination complaints referred to the WRC annually, this indicates the presence of significant barriers to justice in the context of equality rights.

A critical mass of cases under the Equality Acts is needed to promote a culture of compliance with the legislation. The European Commission has stated that "real change [in the context of promoting equality and eliminating discrimination] often requires a critical mass of cases".⁴⁴²

It can be extraordinarily difficult for individuals to pursue discrimination claims. Where discrimination occurs, the claimant must have access to information, advice, representation and support.

11.2.1. The Role of IHREC

The Irish Human Rights and Equality Commission is Ireland's National Equality Body. The various functions of the IHREC correspond with the continuum of access to justice, from

⁴³⁹ The legislation also contains some provisions which aim to actively promote equality. Both Acts contain provisions which allow for positive action to promote equality or to cater for the special needs of persons, and provisions in relation to reasonable accommodation for people with disabilities.

Section 42 of the Irish Human Rights and Equality Commission Act 2014 provides for the Public Sector Equality and Human Rights Duty. Under this legal obligation, all public bodies in Ireland have responsibility to have regard to the need to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users and everyone affected by their policies and plans.

⁴⁴⁰ Further, Section 8(3) of the ESA provides that applications in relation to discriminating clubs must be made to the District Court.

⁴⁴¹ Central Statistics Office, [Equality and Discrimination: Quarter 1 2019](#) (2019).

⁴⁴² European Commission DG-JUST (2015) [Know Your Rights: Protection From Discrimination](#).

access to information to law reform. The IHREC has significant functions and powers in each of these areas under the Irish Human Rights and Equality Commission Act 2014 ('the IHREC Act 2014').

One reason for the creation of specialised equality bodies is the acknowledged difficulties in access to justice for individuals and groups trying to enforce their anti-discrimination rights. The individual enforcement model relies on individuals and groups to know that they have rights, that the rights have been breached, and to have the resources and resilience to be able to make a claim and withstand litigation.⁴⁴³

There is also a significant role for equality bodies in promoting a critical mass of cases and, by extension, promoting a culture of compliance with equality law. This includes the information, advice, training and education functions of such bodies, as well as their litigation functions.

IHREC's functions, and their relationship with the Civil Legal Aid Scheme, are discussed in further detail below.

11.2.2. Equality in the Constitution, EU Law and International Law

As with the right of access to justice (including access to legal aid), the Constitution, EU law, and regional and international human rights instruments are each concerned with the promotion of equality and elimination of discrimination.

Article 40.1 (the equality guarantee) of the Constitution provides that "all citizens shall, as human persons, be held equal before the law". While it is sufficiently broad to encompass a demanding understanding of equality⁴⁴⁴, the equality guarantee in Article 40.1 of the Constitution has not been interpreted by the Superior Courts in such a way. As a result of a number of factors⁴⁴⁵, "*Irish constitutional law has rarely been beneficial for disadvantaged*

⁴⁴³ The significant powers of equality bodies reflect the fact that it may be impossible for an individual or group to challenge certain forms of discrimination, including structural and systemic discrimination.

In addition to their power to take own name proceedings, IHREC may conduct equality reviews (section 32 of the IHREC Act 2014) and undertake inquiries (section 35 of the IHREC Act 2014). These powers are extremely significant in terms of promoting a compliance with equality law and in terms of challenging structural discrimination. However, the review power has only been utilised rarely and IHREC has never conducted an inquiry.

⁴⁴⁴ Ben Mitchell (2015), *Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law*, *The Irish Jurist*, 53(1), 36-57.

⁴⁴⁵ See: FLAC (2022), *Submission to the Joint Committee on Gender Equality: Constitutional Change & Gender Equality*, Section 1.1: Equality, the Equality Guarantee & its Interpretation.

*groups whether homosexuals, non-Irish nationals, members of the Traveller community, or people with disabilities”.*⁴⁴⁶

By contrast with Article 40.1 of the Constitution, the international⁴⁴⁷ and regional human rights instruments to which Ireland is subject, as well as European Union law, give rise to comprehensive equality obligations with significant fields of application.

Article 14 of the European Convention on Human Rights prohibits discrimination on a wide range of grounds in relation to the enjoyment of the rights guaranteed under the Convention. The prohibition on discrimination has a wide and significant reach.⁴⁴⁸

The European Union has competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, under Article 19 of the Treaty on the Functioning of the European Union (TFEU). The Equality Chapter in the Charter of Fundamental Rights of the European Union (‘the Charter’) recognises that equality is a multifaceted concept which gives rise to a fundamental right to equal treatment. The EU Equality Directives⁴⁴⁹ are a legislative expression of the fundamental right of equal treatment enshrined in the Charter.

11.2.3. Legal Information & Equality Law

Research conducted by the Fundamental Rights Agency across the European Union has highlighted that awareness of the national legislative and procedural frameworks giving effect to the prohibition on discrimination appears to be low among minorities. This, in turn, affects

⁴⁴⁶ Colm Ó Cinnéide, [‘Aspirations Unfulfilled: The Equality Right in Irish law’](#) (2006) IHRLR 41.

⁴⁴⁷ The international human rights instruments to which Ireland is a party require that the rights enumerated are to be enjoyed without discrimination. A number of international human rights instruments such as the Convention on the Elimination of all forms of Discrimination against Women, the Convention for the Elimination of all forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities are specifically designed to eliminate discrimination.

⁴⁴⁸ The prohibition of discrimination under the ECHR only applies where discrimination occurs within the scope of another right under the Convention. However, the European Court of Human Rights (ECtHR) has clarified the role of Article 14 by finding that there does not have to be a breach of the substantive right involved to apply the Article 14 prohibition on discrimination, provided that the discrimination is experienced within the field of that substantive right. See: *E.B v France* (2008) ECHR 55.

⁴⁴⁹ Directive 2000/43 (the Race Directive) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The Race Directive prohibits discrimination on the grounds of racial or ethnic origin in employment as well as in relation to social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Directive 2000/78 (the Framework Directive) prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation in employment.

Directive 2004/113 (the Gender Goods and Services Directive) prohibits discrimination based on gender in the “access to and supply of goods and services”.

Directive 2006/54 (the Recast Directive) prohibits gender discrimination in employment.

the degree to which victims pursue their rights and reduces the frequency with which the prohibition of discrimination is enforced and remedies are obtained.⁴⁵⁰ These findings have been reflected in FLAC's experience of providing dedicated legal services to groups protected by the equality legislation, including the Traveller Legal Service, Roma Legal Clinic and LGBTIQ Legal Clinic.

The European Commission Against Racism and Intolerance (ECRI) guidelines for equality bodies place an emphasis on accessibility in the manner in which information in relation to equality rights is provided, and highlight the need for outreach campaigns to hard to reach groups.⁴⁵¹

The Legal Aid board has no specific mandate in relation to the provision of legal information, awareness raising, or public legal education. However, the IHREC is mandated to provide information to the public in relation to human rights and equality generally⁴⁵², as well as specifically in relation to the Equality Acts⁴⁵³.

While the CIB's mandate is confined to the provision of information on social services, it provides a significant amount of basic information, including legal information on rights. It also provides advocacy to a limited extent, including in discrimination claims. Empowering CIB to provide information in relation to equality rights (in collaboration with IHREC) would ensure that relevant information is accessible to those who use CIB's services (whether in-person, via telephone or online). The CIB's information functions are discussed in further detail in the section of this submission on that organisation's mandate and functions.

Section 11(1)(h) of the Workplace Relations Act 2015 confers an information provision function on the WRC, but expressly excludes legislation relating to equality from the ambit of this function. The rationale for this exclusion may be the existence of IHREC. However, the WRC is ideally placed to provide information in relation to the Equality Acts.

⁴⁵⁰ European Union Agency for Fundamental Rights (2012), [The Racial Equality Directive: Application and Challenge](#), p.19.

⁴⁵¹ ECRI (2017), [General Policy Recommendation on Equality Bodies to Combat Racism and Intolerance at National Level](#).

⁴⁵² Section 2(a) of the IHREC Act 2014.

⁴⁵³ Section 30(1) of the IHREC Act 2014.

11.2.4. Legal Advice & Advocacy

Beyond legal information in relation to equality and anti-discrimination law, individuals and groups require legal advice to “clarify their rights and possible ways of securing these rights”.⁴⁵⁴

Section 10(2)(f) and section 40 of the IHREC Act 2014 provide for IHREC’s legal assistance function, including through the provision of legal advice.

The Civil Legal Aid Act 1995 empowers the Legal Aid Board to provide legal advice (as defined in section 25 of that legislation) subject to certain criteria set out in section 26 of that legislation. Section 26(2)(c) provides that a person shall not qualify for legal advice in relation to “*a matter concerning which the Board considers it would be possible for the person, without hardship, to obtain the appropriate advice without obtaining legal advice under this Act*”. Whether the existence of IHREC acts as a barrier to the LAB providing information in relation to equality rights is unclear. In practice, the LAB do not provide legal advice in relation to equality law.

As with legal information, there may be a significant role for both the new Legal Assistance Authority and CIB in relation to the provision of legal advice and advocacy relating to equality rights.

11.2.5. Legal & Advocacy Training

FLAC’s Traveller Legal Service and Roma Legal Clinic have demonstrated the benefits of (and need for) targeted and specialised approaches to access to justice, including the promotion of awareness of rights and community education.

The Equal Access Project (‘EAP’) is a joint FLAC & INAR project, funded by the European Union, to improve access to justice for people who are subjected to discrimination on the basis of race or membership of the Traveller community. The project developed and delivered an accredited training programme in Anti-Racism Advocacy to equip non-legal advocates with the skills and knowledge to represent claimants on the grounds of race at the Workplace Relations Commission.⁴⁵⁵ The project facilitated the formation of a network of advocates (including participants in the training), supporting people in seeking justice under the Equality Acts.

The experience of the EAP has illustrated the demand for training specifically in relation to pursuing cases under the Equality Acts amongst community advocates and NGOs.

⁴⁵⁴ ECRI (2017), [General Policy Recommendation on Equality Bodies to Combat Racism and Intolerance at National Level](#).

⁴⁵⁵ See further: <https://www.flac.ie/news/eap/>

The ECRI's guidelines state that Equality Bodies should "promote and contribute to the training of key groups in relation to equality and non-discrimination". The explanatory memorandum to that guidance states that Equality Bodies should "furthermore strengthen the individual and collective capacities of members of groups exposed to discrimination and intolerance by training them about their rights, available legal remedies and how to exercise them".

IHREC's submission to the Review noted the valuable role of civil society in enforcing equality law and recommended that "*the State develop policy and training measures to promote the capacity of civil society organisations to provide independent advocacy and support services to people experiencing discrimination across the equality grounds*".⁴⁵⁶

Section 2 of the IHREC Act 2014 provides for the following functions of IHREC:

"(j) to undertake, sponsor, commission or provide financial or other assistance for research and educational activities;

(k) to provide or assist in the provision of education and training on human rights and equality issues;"

11.2.6. Legal Representation/Legal Aid before the WRC

The Legal Aid Board cannot provide legal representation in discrimination claims under the Equality legislation before the Workplace Relations Commission,⁴⁵⁷ irrespective of how complex or sensitive the issue may be and irrespective of the resources and capacity of the claimants.

Article 47(3) of the Charter of Fundamental Rights provides that "*Legal aid shall be made available to those who lack sufficient resources in so far as aid is necessary to ensure effective access to justice*". Given that the Equality Acts in large part give effect to the State's

⁴⁵⁶ The IHREC submission stated: "The experience of anti-discrimination litigation in Ireland and elsewhere has demonstrated that people who have experienced discrimination also require specialised and independent advocacy and support from civil society organisations to access enforcement mechanisms and remedies. The State is required to create an enabling environment that fosters and promotes the capacity of such organisations to empower individuals to claim their rights, particularly people living in poverty, disabled people, and those who face intersectional discrimination. Civil society organisations, including community-based and voluntary groups, are uniquely placed to provide an accessible range of independent advocacy and support services to individuals wishing to bring discrimination actions. Such services include measures to raise awareness about the meaning of discrimination and existing remedies, build capacity for self-advocacy, as well as assistance in reporting discrimination, initiating legal action and finding appropriate legal support. The provision of adequate support can enable discrimination complainants to better navigate the process of lodging a complaint and the lengthy subsequent procedures, including the stress and feelings of isolation that can be involved, and reduce the overreliance on families or carers".

See: IHREC (2021), [Submission on the Review of the Equality Acts](#).

⁴⁵⁷ The Minister for Justice may "prescribe" the tribunals in which the Legal Aid Board may provide representation under section 27(2)(b) of the Civil Legal Aid Act 1995 – the WRC is not so prescribed.

obligations under EU law, this provision is of particular relevance and the blanket exclusion of equality law from the scheme of civil legal aid may represent a breach of Ireland's obligations under the Charter.

There is a concern that the provision of legal aid in discrimination claims may lead to a more adversarial and complex process before the WRC. However, the provisions of the Equality Acts are already complex; cases often involve the interpretation of EU Law and other complicated legal and evidential issues.

While employers and businesses can often afford to pay for private legal representation in equality cases before the WRC, persons making complaints often cannot. Where a person alleging discrimination does not have such financial means and is faced with an experienced legal team on the other side, this can give rise to an inequality of arms in practice. Research undertaken by LLM students in Trinity College Dublin examining "*the absence of Legal Aid for Employment Equality cases*", found that "*professional legal representation significantly improves the chance of winning an employment equality dispute before the WRC*":

"It is very difficult to win an employment equality case before the WRC. Of the cases brought before the WRC between the 1st of January 2019 and the 31st of January 2021, complainants lost over 75% of the cases. From January 2018 to the end of January 2021, claimants with professional representation won more than 30% of the cases before the WRC and claimants with union representation won 32.6% of their cases. For those claimants without representation, there was a loss rate of more than 86% before the WRC. Overall, unrepresented claimants had a success rate of less than 14%, indicating that legal representation more than doubles a claimant's chance of success."⁴⁵⁸

Concerns around the absence of legal aid before tribunals such as the WRC are all the more pressing in light of the recent decision of the Supreme Court in *Zalewski v Adjudication Officer & Ors*. In that decision, the Court held that the exercise of powers by WRC Adjudication Officers, while permissible under Article 37 of the Constitution, also constitutes the administration of justice under Article 34. Notably, Mr Justice O'Donnell held that: "The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34".

In 2019, the UN Committee on the Elimination of Racial Discrimination expressed its concern "*about the absence of legal aid available for claims of racial discrimination under equality*

⁴⁵⁸Trinity College Dublin, LLM Human Rights Law Clinic (2021), [A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland](#).

legislation brought before the Workplace Relations Commission, which results in non-equality of arms as respondents are mostly represented by legal counsels”.⁴⁵⁹ Thereafter the Committee recommended:

“...that the State party extend the scope of the Legal Aid Board to the areas of law that are particularly relevant to Traveller and other ethnic minority groups, including by designating the Social Welfare Appeals Office and Workplace Relations Commission as prescribed tribunals under Section 27(2)(b) of the Civil Legal Aid Act 1995.”

A UN Special Rapporteur on Extreme Poverty and Human Rights⁴⁶⁰ and the UN Committee on Economic, Social and Cultural Rights⁴⁶¹ have previously expressed similar concerns.

Section 10(2)(f) of the IHREC Act 2014 provides for the Commission: “to provide such practical assistance, including legal assistance, to persons in vindicating their rights as it sees fit in accordance with section 40”. Section 40 of the legislation gives IHREC broad powers to provide legal assistance by reference to certain criteria.⁴⁶²

However, the Commission has neither the staff nor the resources to provide representation in every equality or discrimination case where it is required, or in a sufficient number of cases to achieve a culture of compliance with the equality legislation across all grounds.⁴⁶³

⁴⁵⁹ UN Committee on the Elimination of Racial Discrimination (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para.43.

⁴⁶⁰ In 2011, the former UN Special Rapporteur on Extreme Poverty and Human Rights noted her concern that “several areas of law that are particularly relevant for people living in poverty” are excluded from the scope of the Legal Aid Board. See: Office of the High Commissioner for Human Rights (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council*, Geneva: OHCHR, p.4.

⁴⁶¹ In 2015, the UNCESCR expressed concern regarding the exclusion of certain areas of law from the civil legal aid scheme “which prevents especially disadvantaged and marginalised individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits”. Thereafter, UNCESCR recommended that the remit of the Legal Aid Board be expanded and that civil legal aid services be made available in a wider range of areas. See: UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR.

⁴⁶² Additionally, under section 85 EEA and section 23 ESA, IHREC may institute ‘own name’ proceedings in the WRC including in circumstances where discrimination is being generally practised or where it is not reasonable to expect an individual to pursue a complaint.

⁴⁶³ For example, IHREC’s 2020 Annual Reports states that 77 applications for legal assistance were approved by IHREC in that year, of which 22 were offered legal advice only. 15 of the files completed by IHREC in 2020 related to equality matters. See: IHREC (2021), [Annual Report 2020](#).

11.2.7. Legal Representation/Legal Aid before the Courts

While most discrimination complaints are heard by the Workplace Relations Commission at first instance, the Equality Acts create some carve outs to the WRC's jurisdiction⁴⁶⁴:

- Section 8 of the ESA provides that applications in relation to discriminating clubs must be made to the District Court.⁴⁶⁵
- Section 19 of the Intoxicating Liquor Act 2003 provides that where a person considers that they have been discriminated against on or at the point of entry to a licensed premises, they must apply to the District Court (rather than the WRC) for redress.⁴⁶⁶
- Under section 21(1A) of the ESA and section 77(3) of the EEA, complaints on the gender ground under the Equality Acts may be made to the Circuit Court at first instance. Under section 27(5) of the ESA and section 82(3) of the EEA, there are no limits on the amount of financial compensation which may be awarded by the Circuit Court in such cases.⁴⁶⁷

Further, in the event of non-compliance with a determination of the WRC or Labour Court, a complainant may bring enforcement proceedings before the District Court. They may apply to

⁴⁶⁴ Per FLAC's Submission to the Equality Acts, all equality matters should be heard by the same expert and specialised tribunal (the WRC) at first instance.

⁴⁶⁵ The justification for giving the District Court jurisdiction in respect of applications in relation to discriminating clubs is unclear.

⁴⁶⁶ Prior to the commencement of section 19 of the 2003 Act on 29 September 2003, all cases of discrimination in the provision of goods and services, including that which occurred on or at the point of entry to licensed premises, were determined by the Equality Tribunal. Many early equality complaints related to discrimination in access to licensed premises, particularly for members of the Traveller Community. The creation of a separate jurisdiction for licensed premises cases did not arise out of concern for victims of discrimination. Rather, it was principally the result of complaints from a category of respondent, and following "pressure exerted by vintners' organisations" the jurisdiction of the Equality Tribunal was removed. Section 19 of the ILA offends the principles of equivalence (which requires Member States not to treat matters under EU law less favourably than purely domestic matters) and effectiveness enshrined in EU law. In its consideration of the State's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UNCERD noted that Travellers and Roma may be hindered in the enjoyment of their rights under Articles 5 and 6 of the ICERD by being required to engage with the complex court processes that pertain to the District Court to challenge an alleged discriminatory refusal of entry to licenced premises. The transfer of jurisdiction to the District Court has resulted in a sharp decline in complaints against licenced premises. Statistical data gathered by the IHREC also shows that "a vast majority of the proceedings instituted in the District Court under the ILA 2003 were either struck out or withdrawn" and "an extremely small number of cases resulted in an Order for compensation".

⁴⁶⁷ The exceptional treatment for cases brought under the gender ground represents an attempt to ensure compliance with EU law. In Case C- 271/91 (*Marshall v Southampton* [1993] ECR1), the CJEU concluded that it was contrary to the Equal Treatment Directive for national provisions to lay down an upper limit on the amount of compensation recoverable by a victim of discrimination in respect of the loss and damage sustained. However, in light of the extremely limited number of cases initiated in the Circuit Court, this workaround measure may not constitute an effective remedy (as required by EU law).

the WRC or IHREC (under section 40 of the IHREC Act 2014) for assistance with those proceedings. As with cases heard by the WRC and Labour Court, the IHREC may provide legal assistance before the Courts in equality matters.

By virtue of section 27(2) of the Civil Legal Aid Act 1995, which stipulates that legal aid can be provided in respect of proceedings conducted at all levels of the courts system, legal aid may be provided in equality matters heard by the Courts (rather than the WRC or Labour Court). However, even where there is no statutory barrier to doing so, the Legal Aid Board does not generally provide legal representation in equality matters.

For example, in theory, civil legal aid is available for applications to the District Court for redress under section 19(2) of the Intoxicating Liquor Act 2003. In the period between January 2014 and November 2019, the Legal Aid Board was unable to identify any cases in respect of which legal aid had been granted to individuals who intended to and/or who did in fact institute proceedings under section 19 of the ILA 2003. Between November 2019 and February 2022, legal aid was provided to as little as four individuals in proceedings in which they sought redress under section 19 of the ILA 2003.⁴⁶⁸

11.2.8. Dedicated Legal Services across Equality Grounds

Many of the matters addressed herein are informed by FLAC's work over the previous five years in providing dedicated legal services to the Traveller⁴⁶⁹ and Roma⁴⁷⁰ communities. In 2020, the majority of FLAC's casework was undertaken on behalf of callers to the Roma Legal Clinic and Traveller Legal Service. Almost one-third of casefiles related to the area of Equality/Anti-Discrimination law.

While these services cannot be viewed as an alternative to a comprehensive system of civil legal aid, they seek to address unmet legal need to the greatest extent as their resources allow, as well as bringing strategic litigation which has the potential to benefit the Roma and

⁴⁶⁸ IHREC (2022), [*Report of a review of section 19 of the Intoxicating Liquor Act 2003 carried out pursuant to section 30 of the Irish Human Rights and Equality Commission Act 2014.*](#)

⁴⁶⁹ Access to the Traveller Legal Service functions principally on a referral basis with many of its cases originating with local Traveller groups or advocates. The Traveller Legal Service – which functions under the auspices of a Steering Group of Traveller organisations – also provides training to Traveller advocates. However, it is only able to deal with a small amount of the significant levels of unmet legal need amongst the Traveller community.

⁴⁷⁰ Prior to the onset of the Covid-19 Pandemic, the Roma Legal Clinic operated on the basis of a drop-in clinic where interpretation services were provided by a member of the Roma Community, fluent in English, Romanian and Romani. FLAC sits as a member of the National Roma Network which is made up of local and national Roma organisations, as well as organisations who work with the Roma Community in Ireland. The Roma Legal Clinic was funded by the Department of Children, Equality, Disability, Integration and Youth's National Roma and Traveller Inclusion Strategy until the end of 2021.

Traveller communities as a whole. The services also allow for barriers to justice to be identified and for the accumulation of expertise as to how those issues may be addressed.

FLAC believes that the Traveller Legal Service provides a rights-based model which should be replicated in respect of other groups. For example, FLAC believes that provision should be made for a Roma Legal Service which operates on a similar basis to the Traveller Legal Clinic after the conclusion of the current funding period for the Roma Legal Clinic. Such a model would allow FLAC to support and empower advocates, such as those who sit on the National Roma Network, and to take on strategic cases with the potential to benefit the wider Roma community in Ireland.

However, the provision of such services is contingent on funding and resources. The Traveller Legal Service is staffed by only one full-time solicitor with part time administrative support. While FLAC has secured project funding for both the Traveller Legal Service and Roma Legal Clinic (and recently for an LGBTQI Legal Clinic), none of these services has any form of long-term funding. This serves as a barrier to the growth and strategic planning of those services.⁴⁷¹

11.2.9. Recommendations on Equality Law & Access to Justice

The Review Group should recommend that:

- Legislation should allow the new Legal Assistance Authority to collaborate with bodies such as the CIB, IHREC and WRC in carrying out its information and Public Legal Education functions (including in the context of equality rights).
- Section 11 of the Workplace Relations Act 2015 should be amended to allow the WRC to provide information in relation to equality law and discrimination complaints.
- The Comhairle Act 2000 should be amended to require the Citizens Information Board to provide information in relation to legal rights, including equality rights.
- The Comhairle Act 2000 should be amended to require the Citizens Information Board to provide advice and advocacy in relation to legal rights, including equality rights.

⁴⁷¹ IHREC's submission to the Review of the Equality Acts noted that: "In the National Traveller and Roma Inclusion Strategy 2017-2021, the Department of Justice committed to supporting a legal advice and advocacy service for Travellers and Roma. While the Department does provide funding for the Free Legal Advice Centre for Roma, this support is tied to the lifetime of the Strategy and there is no clear timeframe or criteria for decision-making in respect of core funding. FLAC has responded to the ongoing gap in services by establishing a Traveller Legal Service, but it has extremely limited financial and staff resources and cannot fully meet the significant legal needs. The reliance on pilot programmes and project funding undermines sustainable funding for community organisations and can result in the disruption and discontinuation of services if there is no route to mainstream evidence-based interventions. *The Commission recommends that the State increase the allocation of sustainable core funding to organisations providing legal, independent advocacy and support services to people experiencing discrimination across the equality grounds.*"

- The new Legal Assistance Authority should be empowered to collaborate with the IHREC and the CIB in carrying out its advice function insofar as it concerns equality rights.
- IHREC's training function under the IHREC Act 2014 should mandate the provision of advocacy training in relation to equality law – including, if necessary, provisions allowing the IHREC to collaborate with bodies such as the CIB, new Legal Assistance Authority, Trade Unions and Civil Society Organisations in carrying out this function.
- The new Legal Assistance Authority should provide representation in equality cases at all stages of equality and discrimination proceedings in matters before all tribunals and Courts, and at all stages of proceedings (including enforcement).
- The legislation governing the new system of Civil Legal Aid must mandate the provision of (and/or funding of) dedicated legal services for marginalised and disadvantaged groups, including across the grounds protected by the equality legislation.

11.3. Judicial Review & Housing: The Rationale for a New Approach to Civil Legal Aid

While there is no obvious prohibition in the Civil Legal Aid Act 1995 or the Civil Legal Aid Regulations 1996 to 2021 to the provision of legal advice and/or legal aid in judicial review proceedings per se, it appears that the Legal Aid Board does maintain a significant throughput of judicial review cases. As outlined below, FLAC's experience suggests that the availability of access to legal advice and/or legal representation in judicial review proceedings is a vital component of the work of its independent law centre. This is most notable where issues such as housing, homelessness and evictions are concerned, all of which, excepting cases which fall within the jurisdiction of the Residential Tenancies Acts, are areas where recourse to the High Court is often an individual's only option. Accordingly, the absence of the provision of legal aid in such cases constitutes a serious deficiency in the current scheme of civil legal aid.

11.3.1. The importance of judicial review

Judicial review is the process through which the High Court exercises its supervisory jurisdiction over inferior courts and administrative bodies. In judicial review proceedings, the High Court is vested with the power to assess the lawfulness, fairness and rationality of decisions of inferior courts and administrative bodies and to make a wide range of orders in circumstances where a decision is found to be deficient.

Access to the courts is a vital component of the right of access to justice.⁴⁷² Access to judicial review provides a means through which decisions of the State, its organs and its public bodies may be challenged. Judicial review is an accountability mechanism that encourages better administrative decision-making, and provides a remedy where this is not achieved. For this reason, it is important that it is as accessible as possible to the ordinary person who may be seriously affected by the decisions of public bodies in areas such as housing, health and social security.

Judicial review has also been identified as an important bulwark for minorities and other marginalised groups, whose rights and interests are often overlooked or actively worked against by the political system. Members of marginalised groups are also often required to interact with State bodies to a much greater extent than the wider population on matters of central importance to their wellbeing and livelihood, such as social housing, education and social welfare. Consequently, a system of civil legal aid which does not unambiguously promote and facilitate access to advice and/or representation for judicial review proceedings is one which is not fully equipped to address the needs of minority or marginalised groups.

Indeed, the perceived absence of legal aid in cases concerning housing and evictions was the subject of criticism of Ireland by the UN Committee on the Elimination of Racial Discrimination (a body with an explicit focus on the interests of minority groups) in its 2019 report on Ireland.

11.3.2. FLAC's experience

As an independent law centre, FLAC routinely takes judicial review proceedings on behalf of its clients. In recent years FLAC has regularly acted in judicial review proceedings across a

⁴⁷² Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments. The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed.

range of areas such as social welfare⁴⁷³, education⁴⁷⁴, and citizenship⁴⁷⁵. These cases are illustrative of the value of judicial review, particularly for marginalised groups.

Issues around housing and homelessness have dominated FLAC's casework (including its judicial review casework) in recent years. The majority of those cases arise from FLAC's Traveller Legal Service and Roma Legal Clinic.

There is limited accountability for local authorities and the State in the field of housing and judicial review is often the only means to challenge decisions of local authorities in relation to housing.

FLAC has acted in several such cases on behalf of clients in dire circumstances with no recourse other than to the courts.

In 2018, FLAC acted for a young Traveller woman with a serious illness who, pregnant and living on the side of the road in a caravan, was served with a 48-hour eviction notice. After correspondence from FLAC, the local authority agreed not to forcibly evict her but subsequently removed her from the housing list. Judicial review proceedings in relation to the decision to remove her from the housing list without a proper examination of her full circumstances were settled on the basis of her being reassessed as homeless, being provided with emergency accommodation and the making a proposal regarding the provision of long term housing.

In 2021, FLAC acted in judicial review proceedings in the High Court against a local authority in relation to its decision not to proceed with the development of Traveller-specific accommodation. The relevant local authority conceded the proceedings and agreed to orders being made against it in the terms sought by FLAC's clients.

⁴⁷³ For example: In 2017, FLAC acted on behalf of an older Roma woman whose Rent Supplement payment had been suspended in October 2016 without notice to her, pending an investigation. The woman had engaged with the Department and had provided documents they requested from her, but her payment remained suspended and she faced becoming homeless due to the rent arrears she was accruing. FLAC initiated High Court proceedings seeking an Order for the Department to make a determination in relation to the investigation, arguing that the inordinate delay was unlawful. Four days after proceedings were initiated, the investigation into the woman's payment was concluded. In January 2018, the woman's Rent Supplement payment was restored and arrears were paid in respect of the period of the suspension. See: FLAC (2019), [FLAC Annual Report 2018](#), p.26.

⁴⁷⁴ For example: In 2019, two sets of High Court judicial review proceedings (and linked Equal Status complaints on the Disability ground) concerning access to the July provision scheme against the Department of Education were settled in FLAC's client's favour, with the families receiving compensation. The terms of the settlement are confidential. See: FLAC (2020), [FLAC Annual Report 2019](#), p.36.

⁴⁷⁵ For example, in 2020, judicial review proceedings were initiated in a case concerning a prolonged delay in issuing FLAC's client's Certificate of Naturalisation after his citizenship application was approved in principle. Those proceedings were resolved in his favour. See: FLAC (2021), [FLAC Annual Report 2020](#), p. 37.

These are just two examples of a significant number of judicial review cases taken by FLAC in recent years on behalf of members of the Traveller community in relation to access to social housing supports, including Traveller-specific accommodation and emergency accommodation. Often these cases are the only means through which the institutional and societal discrimination experienced by members of the Traveller community in the context of housing may be challenged.⁴⁷⁶ Similarly, judicial review has also proven to be one of the only mechanisms for challenging systemic issues faced by Travellers in the social housing system, such as inappropriate police interventions in the process of allocating social housing to Travellers.⁴⁷⁷

11.3.3. Inadequacy of the current scheme of civil legal aid

In FLAC's view, the purpose of the current scheme of civil legal aid, as expressed by the long title to the Civil Legal Aid Act 1995, "to make provision for the grant by the State of legal aid and advice to persons of insufficient means" may only be achieved by unambiguously offering such aid and advice in judicial review proceedings.

Despite the express purpose of the Civil Legal Aid Act and the importance of judicial review proceedings to marginalised groups, there is scant evidence that judicial review cases form even a small minority of the Legal Aid Board's current output.

The annual reports of the Legal Aid Board from 2017 – 2021 contain statistical data on the number of cases handled by the Legal Aid Board in a given year and a breakdown of the areas of law to which those cases relate. It is evident that in each year during the period reviewed, the vast majority of cases handled by the Legal Aid Board concerned family law and childcare. While these are undoubtedly areas of significant legal need where the service provided by the

⁴⁷⁶ For example: In 2019, FLAC initiated 3 JR cases against a local authority on behalf of Traveller families living on an overcrowded halting site with poor facilities. The case concerned the failure of the Local Authority to complete a planning process to build proposed houses for the three families on a site adjacent to the scheme. The Local Authority received planning objections from local residents which made reference to a written agreement between the Local Authority and a Residents Association from many years previously when the halting site was originally developed and purportedly agreeing not to expand the halting site. It was argued that reliance on the purported agreement was discriminatory and in conflict with the statutory duty of the local authority. These cases settled after the Local Authority agreed to restart the planning process and not to be restricted or fettered by the purported agreement with the resident's association.

A set of 3 related judicial review proceedings were commenced late in 2019 when it became apparent that the 3 houses intended to be developed for FLAC's clients and which had been included in the Draft Traveller Accommodation Programme had subsequently been removed without notice in the Traveller Accommodation Programme as adopted by the local authority. It was asserted that this deliberate removal of the housing scheme from the TAP undermined the legal obligation on the Council and the elected members to proceed with the proposed development. These cases were also compromised in favour of FLAC's clients. See: FLAC (2020), [FLAC Annual Report 2019](#), p.36.

⁴⁷⁷ FLAC (2021), [FLAC Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland](#), section 7.

Legal Aid Board is of importance, the predominance of these areas of law has led to a perception that they are the primary, if not the only, areas of law covered by the Civil Legal Aid Act 1995. Indeed, the Legal Aid Board’s own Circular on Legal Services, an administrative guide prepared for use by Legal Aid Board employees, states:

There is a general perception - even among the legal profession - that we only deal with family law cases. While these make up the largest part of our work, they are far from being the only type of case we handle. Never tell any person that comes to the law centre that we ‘only deal with family law’.”

As has been noted elsewhere in this submission, the Legal Aid Board itself contributes to this perception and creates a self-fulfilling effect by failing to promote its full remit as set down by the Civil Legal Aid Act 1995 and by dedicating the majority of its resources to family law.

Apart from the inaccurate yet widely held perception that the Legal Aid Board only deals with family law cases, there are capacity issues militating against the provision of legal aid in judicial review proceedings. Most notable among these is the longstanding issue of long waiting times for a first appointment.

The rules applicable to the institution of judicial review proceedings, including the time within which such proceedings must be taken, are contained in Order 84 of the Rules of the Superior Court. Order 84, rule 21 of the RSC requires that an application for judicial review be made within three months from the date when the grounds for the application first arose. This has been interpreted as requiring that an application is opened before the High Court, as opposed to papers being filed in the Central Office, within the said three months. Therefore, all necessary preparatory work, such as consultations with the client, research, briefing counsel, filing the case, etc., must be completed in a period of under three months.

The table below sets out the average waiting time in weeks for a first appointment across each of the Legal Aid Board’s law centres between 2017 – 2021.

2017	2018	2019	2020	2021
15.9 weeks	17.6 weeks	22.6 weeks	17.2 weeks	18.2 weeks

The figures above take into account the waiting time in weeks for “triage” appointments. Triage was used until 2021 in a number of the Legal Aid Board’s law centres to ensure that a client received “some legal advice” (per the 2017 annual report) where they would otherwise have not received full legal service within 4 months of applying.

As can be seen from the table above, even taking the shortest average waiting time of 15.9 weeks into account, the Legal Aid Board, as currently constituted, is unequipped to provide representation in judicial review proceedings consistently with the time limits applicable to such proceedings.

It should be noted that the Legal Aid Board does assign priority to certain cases where it is considered that immediate or near immediate service is required. However, the cases which are typically assigned priority reflect the non-priority case load of the Board, and are principally in the areas of family law, childcare and international protection.

11.4 Civil Legal Aid in Debt and Credit cases: The Rationale for a New Approach to Civil Legal Aid

11.4.1. Secured debt - Mortgage arrears

The provision of civil legal aid from the Legal Aid Board to defend the borrower on the receiving end of repossession cases concerning his/her family home has been and continues to be largely unavailable to borrowers for two specific reasons; first the income means test and, secondly the merits test, as set out in the Civil Legal Aid Act 1995 and associated regulations.

The first of these barriers is what might be considered to be a very strict means test. Indeed, given the income that a borrower/s now requires to obtain a mortgage loan to purchase a dwelling in many parts of Ireland, particularly in urban areas, many applicants seeking to defend their position in repossession proceedings are destined to fail the means test. This is compounded by what is now a totally unrealistic maximum allowance of €8,000 per annum that is allowed for accommodation costs (equivalent to €667 per month) before arriving at the applicant's net disposable income. It might also be noted that this limited allowance similarly impacts on those living in now very expensive rented accommodation, when applying for civil legal aid in other areas of law covered by the Scheme.

For those borrowers who do manage to satisfy the means test, a merits test that has often been strictly interpreted and applied by the Legal Aid Board must also be met. In the case of mortgage arrears, the merits test can have a particularly adverse impact if applied in a strict manner, as the defendant borrower is technically in breach of contract, albeit usually for reasons outside his/her financial control, and identifying a legal defence to the proceedings is difficult.

Nonetheless, despite these hurdles, it appears to be the case from some figures provided by (former) Minister for Justice and Equality, Charles Flanagan, TD in answer to a parliamentary question in late 2019 that such applications *can* be approved.⁴⁷⁸ However, it is also clear from

⁴⁷⁸ From Róisín Shortall TD, PQ No 101, 3rd October 2019.

this response that the number of financially eligible applications may be low to begin with, due to the tightness of the means test, as observed above. Thus, the number of successful applications over an approximate six year period covered by this reply is 43 out of 329 applications deemed to be eligible (13% or one in eight), and this low ratio is likely to be attributable to the strictness of the merits test. Anecdotally, from years of monitoring civil legal aid trends in Ireland, FLAC also knows that many people are not aware of their right to apply for civil legal aid and some potential applicants may be informally discouraged from applying at the first point of contact with a Legal Aid Board law centre. The response to the PQ states as follows:

‘As requested by the Deputy, the following table contains the number of financially eligible applications for legal services received by the Legal Aid Board where the applicant was in potential danger of losing their family home, and the number of cases where legal aid was granted in connection with the defence of possession proceedings, in each of the years in the period 2014-2018 and to date in 2019 (as at 1st October 2019)’.

TABLE 1: Applications for Legal Aid in cases involving potential loss of the family home

	Number of applications received	Number of applications where legal aid granted
2019 to date	24	8
2018	37	7
2017	35	6
2016	66	6
2015	108	9
2014	59	7

Source: Department of Justice.

The outcome of this is that the significant majority of borrowers are not legally represented in repossession cases. It is arguable, that as a result, the legal system has adapted to this lack of representation and clear ‘inequality of arms’ in devising what might be described as an ‘Irish solution to an Irish problem’. Thus, although technically a borrower who wishes to defend his or her position in a repossession case is required to enter an affidavit setting out and disclosing a defence⁴⁷⁹, this seldom occurs in practice but this does not seem to affect the borrower’s right to continue to argue against the granting of a Possession Order. The County Registrar

⁴⁷⁹ See S.I. 264/2009 – Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2009 (as amended).

for the relevant Circuit has charge of the case file and, generally speaking, as long as the borrower is engaging with the relevant state-funded assistance – MABS Dedicated Mortgage Arrears Advisors (DMA) or money advisors, MABS court mentors and/or Abhaile services - will generally allow a significant number of adjournments to ‘see how things go’ in the hope that payments will increase over time and that the case might be settled or withdrawn on mutually acceptable terms.

There is some evidence that this does eventually occur in a number of cases, although better and more detailed statistics are required. The price to be paid though is ongoing worry, stress and anxiety for defendant borrowers, which can lead to long-term adverse consequences for both them and their dependents, frustration and increasing cost for the lender, pressure on the courts system, and a strain on the public purse, before a solution may be eventually found or a Possession Order is granted. An attempt to evaluate the social and financial costs of all of this, in its various manifestations, over a protracted period of over a decade at this point, would be a worthwhile though perhaps chastening experience.

The Review Group report on the review of the Administration of Civil Justice in Ireland,⁴⁸⁰ has expressed considerable concern about the situation of lay litigants or ‘litigants in person’, appearing in court without legal representation. In the specific case of family home repossession proceedings, the review noted, for example, research conducted into mortgage possession proceedings in the Circuit Court by the Centre for Housing Law, Rights and Policy at NUI Galway, which examined a sample of 99 Circuit Court, County Registrar and Call-over Lists in December 2017 and January 2018. In the 2,396 cases examined, the home loan debtor had no recorded legal representation in 70% of cases.⁴⁸¹

11.4.2. Unsecured debt – Consumer Credit arrears

The provision of targeted legal or insolvency advice services through the Abhaile scheme *only* to those who have family home mortgages and who are in arrears on those mortgages is a notable feature of the debt landscape in Ireland. At present, a person living in rented accommodation who has debts totaling an overall balance *of over €35,000* – including debts such as rent arrears, utility arrears, personal loans, car finance agreements, credit cards, credit sales or overdrafts – and is insolvent, does not have access to state funded legal advice or personal insolvency advice to help them formulate a proposal for a Debt Settlement

⁴⁸⁰ See: https://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf, accessed 6th September 2022.

⁴⁸¹ Ibid, page 346. The report referenced is: Centre for Housing Law, Rights and Policy (2020). *A Lost Decade-Study on Mortgage Possession Court Lists in Ireland*. Galway: Centre for Housing Law, Rights and Policy, NUI Galway.

Arrangement (DSA)⁴⁸² under the Personal Insolvency Act 2012 (as amended). That person may have a home, but it is not a home covered by the Abhaile scheme. It is perhaps unsurprising then that the number of successful DSA applications from 2014 to the end of Q.2 2022 amounts to only 1,204 from a total of 1,862 Protective Certificates granted. This amounts to a low average of just over 140 arrangements per year from an average of around 220 applications.⁴⁸³

Those who are insolvent but whose qualifying debts total €35,000 or less are not entitled to advice under 'Abhaile', but at least they can access a specialist 'Approved Intermediary' service set up within the MABS structure to advise on and process 'Debt Relief Notice' (DRN) applications under the personal insolvency legislation.⁴⁸⁴ A further potential advantage for debtors in this situation who wish to avail of a DRN is that approved intermediaries themselves have access to external legal advice (through the MABS Technical Support Panel) to assist them through the numerous and sometimes difficult processes and mechanics involved in these applications. As with the DSA however, the numbers accessing DRN are also low, with less than 2,000 completed arrangements over an approximate eight-year period.⁴⁸⁵

It is likely that two years of Covid, with the adverse effects that this has had on people who are unemployed, employees on low incomes, and those working in sectors where restrictions and closures have particularly affected demand for goods and services, has created an incipient pool of insolvent debtors with unsecured debt in particular.⁴⁸⁶ As ever, there is little concrete data available to act as a guide and the fact that many MABS services have not been seeing clients face-to-face until recently may also serve to disguise the potential scale of the problem.⁴⁸⁷

The comparative lack of complementary services – legal, insolvency and accounting – to support MABS in seeking formal solutions for those who do not have mortgages is problematic, particularly in light of the financial challenges that are likely to be posed to a

⁴⁸² See: https://www.isi.gov.ie/en/ISI/Pages/Debt_Settlement_Arrangement, accessed 7th September 2022

⁴⁸³ See: Insolvency Service of Ireland (2022). *ISI Statistics Quarter 2 2022*. Dublin: Insolvency Service of Ireland, p.11.

⁴⁸⁴ See: <https://mabs.ie/tackling-debt/personal-insolvency/debt-relief-notice/>, accessed 7th September 2022.

⁴⁸⁵ Insolvency Service of Ireland, *ibid*. A report commissioned by the Citizens Information Board and the eight MABS regions analysing DRN's from a debtor perspective was published in May 2022 and launched on June 23rd 2022. This report is written by the authors of this Pillar to Post series. See: Stamp, S. and Joyce, P. (2022). *For the Few but not the Many? An analysis of Debt Relief Notices from a debtor perspective*. Dublin: Money Advice and Budgeting Service and the Citizens Information Board. See Section 4.6. below for further detail.

⁴⁸⁶ As discussed in Paper Three of this series on 'payment breaks'.

⁴⁸⁷ There is some evidence that adverse financial consequences of the pandemic have impacted disproportionately on those who were marginalised to begin with. See: Stamp, S. (2021). *Social Distancing on the Margins: COVID-19 & Associated Issues for Dublin Region MABS Clients*. Dublin: Dublin South MABS and North Dublin MABS.

number of households post-Covid and the current inflationary pressures and spiralling costs of energy and housing.⁴⁸⁸

It should also be noted here that a borrower might wish to challenge the validity of an individual unsecured debt claim being brought by a creditor in the courts, for example where the debt is alleged to be statute-barred or the amount of the debt incorrectly calculated or where the debtor alleges there has been a material breach of relevant consumer credit legislation. Civil legal aid on a merits tested basis should be available in such cases, but there is scant information to indicate that it is provided. The Legal Aid's Board 2020 Annual Report suggests that legal 'services' were provided in 147 debt cases that year.⁴⁸⁹ However, there is no further information to clarify the nature of the services provided, for example, how many of these cases merely involved advice and how many resulted in legal representation.

⁴⁸⁸ See below Sections 4.5 and 4.6.

⁴⁸⁹ See: <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2020.pdf>, p.20, accessed 17th October 2022.