



## **FLAC Guide to Review of the Civil Legal Aid Scheme: Making a Submission to the Review Consultation, the key issues under Review & FLAC's Recommendations**

**The Review of the Civil Legal Aid Scheme a vital opportunity for fundamental civil legal aid reform and the reimagining of public legal assistance.**

In June 2022, the Minister for Justice established a Group to review the Civil Legal Aid scheme for the first time in its more than 40-year history. The Review Group is currently undertaking a Stakeholder Consultation. A public consultation [survey](#) is also currently open.

Submissions to the Stakeholder Consultation may be made electronically by email to [legalaidcivil@justice.ie](mailto:legalaidcivil@justice.ie).

**The deadline for submissions is Friday, 3 February 2023**

The Review Group has published an [Issues Paper](#) in respect of their consultation. That document contains information in relation to the current scheme of Civil Legal Aid, the Review and the key issues and questions in relation to which the Review Group is seeking responses.

This document provides FLAC's analysis of the key issues under review, as well as our recommendations in relation to them, under the following headings:

- 1. Public Legal Assistance Architecture.**
- 2. Principles which should govern the Review and the new scheme of Public Legal Assistance (including human rights, equality, access to justice, the rule of law, human-centred and user-led design, and international best practice).**
- 3. The Scope of the new scheme and the criteria for accessing Public Legal Assistance (including the means test and merits test).**
- 4. The Functions and Role of the new public Legal Assistance Authority.**

## 1. Public Legal Assistance Architecture.

An accessible, effective, sustainable and reliable public legal assistance body should be in place, which will facilitate individuals and groups to effectively exercise their right of access to justice.

### **Recommendation**

There should be a new independent publicly-funded legal assistance body called the Legal Assistance Authority. Membership of the body should include users and potential users, especially people living in poverty and disadvantage.

### **Broad definition of legal aid/public legal assistance**

FLAC recommends that the Review Group and the proposed new legal assistance body use wide definitions of 'legal aid' or 'public legal assistance', which includes information about legal rights, public and community legal education, training, advocacy, legal advice, legal representation, help in preventing or resolving disputes, alternative means of dispute resolution such as mediation, and assistance in enforcing decisions/judgments.

The definition should also include legal assistance for rights that are shared, such as those related to the environment, privacy, and instances of systemic discrimination.

### **Public Legal Assistance Architecture**

In addition to the Legal Aid Board, the Review Group should have regard to the complex array of interconnected publicly-funded legal assistance schemes/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 elements should be explored during the course of the work of the Review Group.

These include the Citizens Information Board, IHREC, the Competition and Consumer Protection Commission, the Courts Service, the Workplace Relations Commission, and the non-statutory MABS and *Abhaile* schemes.

### **Independent Law Centres**

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

- FLAC, which operates a telephone information line, a network of legal advice clinics, a public interest law centre and manages a Roma Clinic, a dedicated Traveller Legal Service and an LGBTQI+ clinic.
- 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](http://Tranparency.ie) (which operates a 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 services provision and scope/fields of work should be examined in detail.

It is 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. The Review Group should also have regard to their valuable and important work.

### **Pro Bono**

While pro bono can never, and should never, be a substitute for a comprehensive system of legal aid, it nonetheless has an important role in the access to justice architecture.

### ***Recommendations***

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. This mapping exercise will inform a future Authority on the nature and scale of legal aid required.

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

The Review Group should propose that the Bar Council and the Law Society set up committees to encourage, support and regulate the provision of Pro Bono services.

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## 2. Principles which should govern the Review and the new scheme of Public Legal Assistance

The following principles should underpin and guide the work of the Review Group and its recommendations, as well as the new scheme of public legal assistance:

1. The overarching principle of ensuring access to justice underpinned by the rule of law.
2. Measuring unmet legal need and putting the user at the heart of the system.
3. International best practice.
4. Ensuring that the new system is equality, human rights and poverty proofed.
5. Innovation and flexibility.

### 2.1. Access to Justice & the Rule of Law

#### Access to Justice

Underpinning the work of the Review Group should be the recognition of the fundamental human 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 a core aspect of the operation of any future body or authority responsible for the provision of civil legal aid, regardless of structure.

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 human right and is recognised as such under a range of regional and international instruments.<sup>1</sup> In the absence of access to justice, people are

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<sup>1</sup> 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

unable to exercise and vindicate their rights, have their voices heard, challenge discrimination, or hold decision-makers and executive power to account.<sup>2</sup>

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, 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.”<sup>3</sup>*

Recent research has demonstrated the connection between legal issues and issues in accessing employment and other problems related to 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.<sup>4</sup> The results of such surveys

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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.

<sup>2</sup> See United Nations Development Programme website at: <http://bit.ly/204OeWJl> 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

<sup>3</sup> Access to Justice for persons living in poverty: A Human Rights approach. SSRN Electronic Journal.

<sup>4</sup> Canadian Forum on Civil Justice (2016), *Everyday Legal Problems and the Cost of Justice in Canada*. Available at:

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, as well as how access to justice results in significantly better health outcomes.

## **The Rule of Law**

Related to access to justice is the rule of law. The rule of law is an essential component of democracy which requires 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 members 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”<sup>5</sup>*

Publicly funded accessible 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.

### **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.

<https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>

<sup>5</sup> Lord Reed in *R(UNISON) v Lord Chancellor* [2017]UKSC 51

The Review Group should conduct research on the economic costs of not providing civil legal aid based on access to justice principles

The Review Group should propose a new Legal Assistance Authority having 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.

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## 2.2. Measuring Unmet Legal Need and Human-Centred Design: Putting the user at the heart of the system

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.<sup>6</sup>

Systemic research on unmet legal needs, including an assessment of legal capabilities, is an essential component of improving the quality and availability of public legal assistance. Research is vital to help 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 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, having regard to the legal capabilities of the community and the individual.

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.<sup>7</sup> Placing users at the heart of the delivery of the scheme should ensure that the wider principle of access to justice can be realised.

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<sup>6</sup> The OECD/Open Society report on "Legal needs surveys and access to Justice", building on 25 years experience, provides practical guidance on pitfalls, key lessons and effective practices in the development of legal needs surveys.

<sup>7</sup> (OECD, 2021) OECD Framework and Good Practice Principles for People-Centred Justice.

The user and potential user should include not just individuals but community groups and groups who come with the discriminatory grounds in the equality legislation. Using the human-centred design approach, a number of potential users should be identified and their journey should be mapped from how they can obtain legal information to legal representation. Suggested users should include:

- A homeless person seeking emergency accommodation.
- A Roma person applying for Supplementary Welfare Allowance (SWA).
- A Traveller seeking Traveller-specific accommodation from a local authority.
- A person from a minority ethnic community experiencing domestic violence.
- Local authority tenants seeking 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.
- A prisoner seeking advice on family law proceedings.
- 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 living in Direct Provision wanting to bring a claim of sexual harassment against their boss.
- A person with limited English language skills and no access to legal representation navigating family law proceedings.
- A person living in a rural area with limited public transport and no access to private transport seeking advice on a discrimination matter.

### ***Recommendations***

The Review Group should proactively engage with groups and individuals experiencing poverty, disadvantage and discrimination about the possibility of fundamental reform, to ensure evidence 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 any new public Legal Assistance Authority should use the human-centred approach on an ongoing basis.

The Department of Justice and/or the Review Group should engage in a legal needs analysis as a matter of urgency.

The Review Group should propose that the new public Legal Assistance Authority be mandated to carry out research on an ongoing basis into unmet legal need and legal capability, that ensures evidence led approaches to the design and delivery of services and in order to prioritise and target resources.

The Review Group should propose that the new public Legal Assistance Authority establish indicators of access to justice derived from the legal needs surveys and legal capability assessments.

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### 2.3. 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 structure of their justice systems and have established good practice in this area which the Irish State could benefit from. In addition, civil legal aid systems within the EU also naturally work as valuable reference points for Ireland due to our shared regional legal system within the Union.

#### ***Recommendations***

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

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

The Review Groups should provide costings for its recommendation.

The Review Group should analyse the current different models of public legal assistance using the principles of best practice, human rights and equality standards and the impact they have on poverty and social inclusion and health outcomes. These models include: Legal Aid Board Law Centres, the LAB private practitioners scheme, the information and advocacy function of the CIB, the information function of the Workplace Relations Commission, the functions and practice of IHREC in relation to the provision of assistance to victims of breaches of human rights and discrimination and information on the operation of the equality legislation, and Independent Law Centres, including Community Law Centres, specialised law centres (for example the Traveller Legal Service and Roma Clinic operated by FLAC and legal clinics for people facing homelessness run by Mercy Law Resource Centre), other NGO bespoke legal advice and information services, FLAC telephone information line, free legal advice clinics, and pro bono assistance via PILA.

The Review Group should also map and analyse the current different mediation services (including via the Legal Aid Board, Workplace Relations Commission, Financial Services

Ombudsman, the mediation services offered by Community Law and Mediation and Ballymun Community Law Centre) using the principles of best practice, person-centred approaches and human rights and equality standards, and the impact they have on poverty and social inclusion and health outcomes.

## 2.4. Equality, Human Rights and Poverty Proofing

The current civil legal aid scheme, as it stands, has been subject to criticism by many UN and European human rights bodies. 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 scope of the 1995 Act is in breach of Ireland's obligations under international law. The provision and operation of civil legal aid has been extensively considered by the ECtHR, Court of Justice of the European Union, international legal bodies and neighbouring jurisdictions.

There are potentially far-reaching human rights standards and obligations regarding legal aid and access to justice that are relevant to the Review Groups' considerations (in particular, their consideration of the scope and exemptions to any legal aid system, and the use of any means and merits tests). The Aarhus Convention provides a gold standard in terms of legal aid in environmental justice.<sup>8</sup>

According to the equality and human rights standards established by the ECtHR and CJEU, 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. A requirement to provide legal aid will depend on factors such as:

- The importance of what is at stake for the applicant.<sup>9</sup>
- The vulnerability of the applicant.<sup>10</sup>
- The emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court.<sup>11</sup>

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<sup>8</sup> 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 38 ILM 517 (1999)

<sup>9</sup> *Steel and Morris v the United Kingdom* and *P, C and S v the United Kingdom*

<sup>10</sup> *Nenov v Bulgaria*

<sup>11</sup> *Airey v Ireland*

- The complexity of the relevant law or procedure.<sup>12</sup>
- The need to establish facts through expert evidence and the examination of witnesses.<sup>13</sup>
- The applicant's capacity to represent him or herself effectively.<sup>14</sup>
- The existence of a statutory requirement to have legal representation.<sup>15</sup>
- Where initiating or defending legal proceedings would otherwise be prohibitively expensive.

### **Recommendation**

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**

A modern public legal assistance system must place human rights, equality and anti-discrimination at the heart of law and action.

The review of the civil legal aid system is a key instance of activity by the Department of Justice to which the Public Sector Duty Equality and Human Right duty applies. Section 42 of the Irish Human Rights and Equality Act 2014, requires a broad range of public and statutory bodies in carrying out their functions, to have regard to the need to eliminate discrimination, promote equality of opportunity and treatment and protect human rights.

### **Recommendations**

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.

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

<sup>12</sup> *Airey v Ireland and P, C and S v the United Kingdom*

<sup>13</sup> *Airey v Ireland*

<sup>14</sup> *McVicar v the United Kingdom and Steel and Morris v the United Kingdom*

<sup>15</sup> *Airey v Ireland and Gnahore v France*

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.

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### 3. The Scope of the new scheme and criteria for accessing Public Legal Assistance

The equality and human rights standards have direct relevance to the consideration by the Review Group of any potential means test, merits test and the scope of a public legal assistance system.

#### 3.1. The Scope of the Scheme

While its statutory remit is fairly broad, the vast majority of advice and representation provided by the Legal Aid Board relates to family law.<sup>16</sup>

Civil legal aid is not available for “disputes concerning rights and interests over land”.<sup>17</sup> The Legal Aid Board takes the general view that eviction proceedings are subject to this exception and are excluded from the remit of the civil legal aid scheme. These factors, combined with the strict application of the means test and a “merits test” mean that legal aid is often not available in cases related to housing (including family home repossession) and debt.

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 “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.

Furthermore, the Legal Aid Board is precluded by law from providing representation before many quasi-judicial tribunals. This includes the Residential Tenancies Board (RTB), the Social Welfare Appeals Office and the Workplace Relations Commission (which deals with employment and equality cases, including cases concerning discrimination in access to accommodation).

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<sup>16</sup> In 2019, 74% of cases handled by the Legal Aid Board related to family law, 14% to International Protection, 4% to childcare and only 8% to “other civil matters”.

See: Legal Aid Board (2019), *Annual Report 2019*. Available at: <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2019-pdf-version.pdf>

<sup>17</sup> Section 28(9)(iii), Civil Legal Aid Act, 1995.



In 2019, the UN Committee on the Elimination of Racial Discrimination expressed its “concern about the lack of legal aid provided for appeals concerning social welfare, housing and eviction, which has a significant adverse impact on Travellers and other ethnic minority groups to claim their rights”.<sup>18</sup> A UN Special Rapporteur on Extreme Poverty and Human Rights and UNCESCR have previously expressed similar concerns.<sup>19</sup>

CJEU jurisprudence and EU law, in particular, cast doubt over the validity of blanket exclusions from a Member State’s legal aid scheme especially in fields which fall within the scope of EU law (such as, for example, equality and non-discrimination, and employment law).

### **Recommendations**

The Review Group should propose a revised public legal assistance scheme administered by the new Public Legal Assistance Authority containing no blanket exemptions in respect of particular areas of law.

Any new public Legal Assistance Authority should be empowered to provide legal assistance in areas of law that most impact people living in poverty, such as social welfare, housing and homelessness, and equality and non-discrimination.

Application forms for access to public legal assistance should be short, simple and accessible. Applicants should have a right to reasons for a refusal of assistance which should be subject to an appeal to an independent body.

### **3.2. Merits Test**

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<sup>18</sup> UN Committee on the Elimination of Racial Discrimination (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 43.

<sup>19</sup> 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.

In 2015, 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.

UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR.

The right to civil legal aid should be decided on a case-by-case basis underpinned by access to justice, human rights and equality principles, and a new public Legal Assistance Authority should take into account the specific circumstances of each applicant. While the right to legal assistance is not absolute, in so far as there is a “merits” test, it should have regard to the following:

- 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.

### ***Recommendations***

The Review Group should recognise that while it may be possible to impose conditions on the grant of legal assistance such as the prospects of success, they should recommend that any condition concerning the prospects of success should also have regard to the above matters.

Absolute refusals of legal assistance based on the applicant’s chances of success should be confined to cases where the application is manifestly unfounded.

Community Law Centres and specialist law centres, to the extent they are funded by the public Legal Assistance Authority, should be free to determine their own conditions for the granting of legal assistance and be guided by their representative management committees in this regard.

### **3.3. Means Test**

Again, the right to civil legal aid should be decided on a case-by-case basis and the new public Legal Assistance Authority should take into account the specific circumstances of each applicant. It should not be assumed that there has to be a means test. Guidelines

adopted by the Committee of Ministers of the Council of Europe<sup>20</sup> on 31 March 2021 state that Member States should consider allowing the waiving of means-testing whenever justified. The means test should not be based solely on the applicant's financial circumstances.

At a minimum, there should be no means test in the following circumstances:

- Where an applicant receives a SUSI grant, a primary social welfare payment or possesses a medical card.
- Where the applicant is seeking legal assistance for welfare law matters such as access to Supplementary Welfare Allowance or access to emergency housing supports.
- Where someone is in immediate danger of eviction or repossession proceedings.
- "On the day" emergency advice and advocacy.
- Where initiating or defending legal proceedings would otherwise be prohibitively expensive.
- Where undue hardship will be suffered if legal aid is denied.<sup>21</sup>
- Cases of domestic violence.
- Cases where children might be taken into care.
- In cases or matters of principle or in the public interest.
- In test cases concerning constitutional or convention rights or administrative law which might act as a precedent for other cases.

### ***Recommendation***

The new public Legal Assistance Authority needs to have an overarching discretion to grant legal assistance depending on the individual circumstances of the application.

No means test should apply in the circumstances outlined above.

### **3.4 Allowances**

The current civil legal aid scheme has strict financial eligibility criteria that provides a very limited allowance for the cost of accommodation - currently set at a maximum allowance of €8,000 per annum. This does not account for the large increases in the cost of rent since that rate of accommodation allowance was set.

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<sup>20</sup> on the efficiency and the effectiveness of civil legal aid schemes in the areas of civil and administrative law, 31 March 2021.

<sup>21</sup> Baker, Gallagher et al, 'A Report on Civil Legal Aid in International Law' (n 49) § 119-121

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 LAB civil legal aid means test (by close to €9,000) when the allowance included for accommodation by the Board is taken into account. This person would therefore have to entirely fund the bringing or defending of any potential legal proceedings themselves.<sup>22</sup>

Additionally, 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,<sup>23</sup> 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.

#### ***Recommendation***

The Review Group should, if retention of a means test is recommended, ensure that it is designed so that it can respond and adjust to the changing economic environment, including increasing accommodation and childcare costs

## **4. The Functions and role of the new public Legal Assistance Authority.**

In addition to the overarching function of achieving access to justice, the powers and functions of the Legal Assistance Authority should include the following

- The provision of legal information.
- Public and community legal education.

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<sup>22</sup> Applying the standardised average rent in new tenancies nationally at Q.1, 2022 of €1,460 per month x 12 = €17,520. See Earnings and Labour Costs Q1 2022 (Final) Q2 2022 (Preliminary Estimates), Central Statistics Office 2022.

<sup>23</sup> FLAC defends Traveller family in High Court proceedings for which Civil Legal Aid not available 18 August 2021, Christopher McCann, FLAC, <https://www.flac.ie/blog/flac-defends-traveller-family-in-high-court-proceedings-for/>

- Training of lay advocates.
- Legal advice.
- Legal representation.
- Research, including into unmet legal needs and legal capability.
- Law reform proposals.

### **The Provision of Legal Information, and Public and Community Legal Education**

The Review Group and in due course the new public Legal Assistance Authority should explore best practice in relation to the provision of legal information, advice and advocacy, and ensure the provision of targeted, effective, accessible legal information on a whole range of legal rights with a particular focus on rights that impact on people living in poverty and disadvantage and hard to reach individuals and communities.

The provision of information should involve the use of a variety of means and models including, but not limited to:

- An accessible website.
- A telephone information line.
- Legal information and advice buses and kiosks.
- 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.

The Legal Assistance Authority should use technology for the most effective provision of legal information and advice. Effective technological provision should also ensure that those without access to wifi or computer equipment, or who have literacy issues are also reached.

#### ***Recommendation***

The Review Group should advocate that a new public Legal Assistance Authority should work in coordination with bodies like the CIB, IHREC, the Courts Services and the WRC in relation to the provision of legal information and community and public education.

This body should also work with organisations such as NALA to ensure that information is also accessible.

### **Advocacy and Training of Lay Advocates**

The Legal Assistance Authority should be proactively involved in the training of lay advocates who can represent claimants in straightforward claims before quasi-judicial bodies

like the WRC, the Social Welfare Appeals Office and the Residential Tenancies Board. These lay advocates should be drawn from and located in NGOs and communities experiencing poverty and disadvantage

**Recommendation**

The Review Group should recommend that the new Legal Assistance Authority should be empowered to work with other bodies like the CIB, the WRC and IHREC in relation to the provision of advocacy and the training of advocates.

**Functions of the Citizens Information Board**

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.<sup>24</sup> The CIB also provides information through its website and operates a telephone information line – the Citizens Information Phone Service (CIPS).

**Recommendations**

The Review Group should recommend that a new public Legal Assistance Authority and CIB should collaborate in the areas of information, advice, public education and advocacy. Legislation and policy should also facilitate practical collaboration between the CIB and the newly established Legal Assistance Authority as regards the manner in which they provide their services through initiatives such as co-location.

**Legal Advice**

**Recommendations**

The Legal Assistance Authority should be empowered to provide legal advice including unbundled legal advice for lay litigants. It should be empowered to work with the Court Services to provide legal information, advice and assistance to lay litigants.

<sup>24</sup> Department of Social Protection (2022), [Periodic Critical Review of the Citizens Information Board](#), p.14.

## Legal Representation

### ***Recommendations***

The Review Group and the Legal Assistance Authority should explore the best models for providing legal assistance, including but not limited to the following:

1. The establishment of a network of Community Law Centres all around the country and particularly in disadvantaged areas.
2. The establishment and funding of targeted legal services, including, but not limited to: a national Traveller legal service, a disability legal service, a homeless legal service, an employment rights service, and an environmental justice legal service.
4. At present Independent Law Centres are required to be Independent in their operation including independence from any body providing them funding, and this independence should be maintained in respect of any funding model developed to support community law centres and any other specialised legal services.
3. Through panels of highly trained and experienced lawyers. In this regard the Review Group should examine and identify the best models of panels of private lawyers where appropriate.
4. Specialised bodies.

IHREC should be resourced to enable it to provide legal assistance sufficient to establish a critical mass of cases in claims under the equality legislation.

MABS should be resourced to act as a one stop shop for those in debt and be able to provide a full range of services including information, advocacy, dedicated mortgage arrears advisers, accountancy and insolvency services, legal advice and other legal assistance (including strategic litigation where appropriate and necessary).

### **Research**

In addition to unmet legal need and legal capability assessment, the Authority's law reform/research function should be concerned with measures which would prevent matters escalating into legal disputes or court proceedings (thus reducing demand for legal representation). 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). These matters should also be of concern to the Review Group which should examine both areas.

***Recommendations***

The Legal Assistance Authority should be empowered and required to carry out research into unmet legal needs and legal capability in an ongoing basis so that resources can be prioritised and targeted.

It should also be required to research and make policy and law reform recommendations, drawing on its information, advocacy and representation functions.

The new Authority should also be required to collect comprehensive data on cohorts who are accessing their services and for what, in order to assist with mapping of particular legal problems that arise for specific groups such as older people, people with disabilities, or migrants etc.

**Clinical Legal Education**

***Recommendations***

Access to justice and legal aid should be a subject on the curriculum in third level law schools.

Clinical Legal Education programmes should be developed in third level colleges and universities along the lines of the Traveller Equality and Justice Project in UCC which provides legal information and support to Traveller victims of discrimination within Cork & Kerry and the Ulster University Law Clinic where postgraduate Law students offer free legal advice and, where appropriate, representation to the public on social security and employment law problems.