

**Submission by Safeguarding Ireland on the
Review of the Civil Legal Aid Scheme.**

Introduction.

Safeguarding Ireland is an independent organisation, registered with both the Companies Registration Office and the Charities Regulatory Authority. Its main objective is to promote safeguarding of adults who may be vulnerable, protect them from all forms of abuse by persons, organisations and institutions and develop a national plan for promoting their welfare - <https://www.safeguardingireland.org/>

One of the main objectives of Safeguarding Ireland is the pursuit of the enactment of Adult Safeguarding legislation in Ireland and the establishment of an independent National Adult Safeguarding Authority. In this regard, see Safeguarding Ireland's Strategic Plan 2022 to 2025 at – <https://www.safeguardingireland.org/wp-content/uploads/2022/04/6419-SI-Strategy-Report-web.pdf> and Discussion Paper 2022 setting out a proposed legal framework on '*Identifying RISKS Sharing RESPONSIBILITIES*' at https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf.

In addition to its Board of Directors, Safeguarding Ireland has a National Safeguarding Advisory Committee representing of up to 40 member organisations - <https://www.safeguardingireland.org/about/>

Safeguarding Ireland welcomes the decision of the Minister for Justice to establish a Group to review the Civil Legal Aid scheme. It notes the terms of reference for the Group and the undertaking of the Group to adopt a principles-based approach and, in particular, an understanding that access to justice is a fundamental principle and a necessary one to support people to realise their rights. Safeguarding Ireland's view is that, not only is it necessary to support people to realise their rights, but many people also need direct support to enable them to exercise their rights. This is particularly necessary for many people, who, due to disadvantage or personal circumstances need such support and includes those who have a disability or chronic illness. It is, therefore, important to recognise that there are increased obligations on the State in the performance of its public sector duty to ensure that any framework for access to justice takes account of the necessary supports that may be required by such persons.

Safeguarding Ireland acknowledges the great work done by the Legal Aid Board since its foundation in spite of scarce financial and human resources being made available to it but stress that the State has a duty to provide a comprehensive Civil Legal Aid Scheme to meet human rights standards required by the Constitution and also for the State to comply with its international human rights obligations.

Before addressing the specified questions put in the Issues Paper, we wish to make a few general comments based on Safeguarding Ireland's perspective on issues to be addressed.

There appears to be an over emphasis (in your *Issues paper to guide submissions on the Review of the Civil Legal Aid Scheme*) on the cost of providing initial financial resources to meet the legal needs of those on low incomes without a recognition on the right of a person to have their human rights vindicated and also a recognition of the overall advantage, both financial and social, to the State in addressing the needs and supports of access to justice at an early stage.

Legal Advice and Legal Aid

While the *Civil Legal Aid Act 1995* (1995 Act) provides for both 'legal advice' as defined in Section 25 and 'legal aid' as defined in Section 27, there appears to be an over emphasis in providing legal aid with a very minimum service being provided for legal advice.

Legal Advice:

It is important that there is a recognition that the availability of legal advice in a timely manner (as soon as advice is required) is a matter that needs to be addressed urgently. It is clear that the current system provides a very limited service in respect of legal advice. Although the 1995 Act sets out the criteria for obtaining legal advice, which **does not include** a 'merits test', in reality and in practice a 'litigation' lens is being applied in the decisions being made to provide legal advice which is based on the possibility of the matter ending with a court process. This is not the correct optimum approach.

The availability of appropriate legal advice resolves or avoids the escalation of stress, abuse, and emotional and financial worries for individuals. In addition, there are clear advantages for the State. Where timely legal advice is available, individuals have information to proceed with important decisions in their lives and, for some, expensive court processes may be avoided. The State is enabled to fulfil its obligation in ensuring that all, particularly those of limited means, are treated equitably and are not denied early access to justice. Where early advice is not available, there can be major cost implications for the State in having to deal with matters, often in times of crises for individuals and where limited resources - human and financial (and often in the area of

healthcare) - have to be diverted to deal with issues that could have been addressed at a much earlier stage.

The lack of an offering of a legal advice service is also evident from the fact that the panels of solicitors established by the Legal Aid Board, to provide a service, are confined to providing legal aid in specific circumstances and does not appear to include the provision of legal advice which is not dependent on subsequent proceedings. There is no panel of solicitors providing legal advice in general civil law matters. See Legal Aid Board [annual-report-2021.pdf](#) page 33.

It is noted that there is no data in either the Issues Paper or the Legal Aid Board's annual report for 2021 in respect of the number or type of cases where legal advice was provided.

Safeguarding Ireland is of the view that, if there was a clearer focus on legal advice, it would minimise the very adverse legal situations people find themselves in with no redress and have the effect of reducing a number of costs to the State in the long term.

Legal Aid:

There is clearly an emphasis on the provision of legal aid in of respect cases that are classified as 'family law' in nature (as acknowledged by the Legal Aid Board). It is also clear that the service being provided and classified as 'family law' is further limited to those cases that refer to persons who are, or have been, in an intimate relationship (direct relationship breakdown issues) or where matters regarding child care/maintenance/support are at issue. However, the wider ambit and growing number of cases where wider 'family' issues need to be addressed are not referred to or do not appear to be factored into the service being provided; for example, where an older person/a person with a disability/a person who lacks decision-making capacity is subject to coercive control, financial abuse or other abuses by family members in near or distant relationships. There is no evidence that many of these issues are being addressed within the remit of 'family law' within the legal aid scheme. Indeed, the Supreme Court noted in the AC Case (AC v Cork University Hospital & others [IESC 2019] at para 239 + 367) the lack of legal aid by way of advice or representation in relation to wardship hearings. (This particular case related to concerns about the potential abuse of an older person and the need for her to be protected).

In 2019, the Courts service carried out a very limited informal observance survey in relation to cases where an older person was seeking a protection order against a family member. Figures indicated that about 25% of the applications in a 3-month period related to older persons. These applications to the court, for protection orders, were mainly taken by the Health Service Executive (HSE). There is no evidence that any of the cases/nor indeed evidence from the statistics provided by the Legal Aid Board that such cases were the subject of legal aid provided to the person the subject of the application. It can also be stated that a not insignificant number of court applications, to have a person taken into wardship, were taken by the HSE without the person who was the subject of the wardship application having the benefit of independent legal advice or representation.

See the HSE National Safeguarding Office report of 2021 - <https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/national-safeguarding-annual-report-2021.pdf> at pages 19 and 20 where 'issues of concern' of those over the age of 65+ years and those over the age of 80+ years are at a much higher rate than concerns raised for persons between the ages of 18-64 years. This report also confirms that the person allegedly causing concern to a person over the age of 65+ was, in most cases, an immediate family member or another relative. See also Safeguarding Ireland's Discussion Paper 2022 on 'Identifying RISKS Sharing RESPONSIBILITIES' – https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf

While it is acknowledged that the lack of a legal framework in respect of adult safeguarding and the slow development of professional knowledge and expertise around adult safeguarding has led to many of these issues not being addressed, it is important that there is provision for a range of legal services in a reformed Legal Aid scheme to enable the State to meet its obligations to provide access to justice and, indeed, to highlight issues which need to be addressed by more comprehensive legislation. It is worth pointing out that Ireland ratified the UN Convention on the Rights of Persons with Disabilities in 2018. Article 12 provides for *Equal recognition before the law*. Article 13.2 on *Access to Justice* provides:

In order to help to ensure effective access to justice for persons with disabilities, State Parties shall promote appropriate training for those working in the field of administration of justice....

It is necessary that the wider concept of 'family law' be fully addressed and understood in any framework providing for legal aid and not limited to the current narrow interpretation of family law that is clearly now out of date.

The Legal Aid Board should also be required to give information about mediation and also to provide mediation services in all cases where ‘family’ issues arise for resolution.

In spite of our constitutional provisions, as a society we have been slow to recognise the need to treat all persons equally and to respect individual rights. It is necessary that the revised Legal Aid Scheme prioritises equality, ensures human rights standards and ensures that mechanisms are in place to enable the performance of the public sector duty.

ACCESSING THE SCHEME

Issue 1 – Types of civil law cases

Technically – unless specifically excluded – civil legal aid is available for all types of civil court proceedings. However, in reality the majority of cases which are supported through the scheme are family law in nature, with the remainder spread across a range of other civil law types. The legislation states that civil legal aid will not be available for certain types of cases before the courts, including criminal matters, defamation, disputes concerning rights and interests in or over land, conveyancing, licensing and Small Claims Court cases.

Question 1: Considering the current operation of the scheme and the areas of civil law that are currently covered, what areas of civil law do you think it should cover? What is your reasoning for this?

Answer:

Firstly, it is important to recognise that many of the areas that are currently provided for in the legislation (1995 Act) are not, in fact, being provided. It is clear that there is a minimal or no service actually being provided in many civil law areas. It appears that some of these **civil law areas are *de facto* ‘excluded’** by the Legal Aid Board due to a lack of professional expertise or a lack of financial resource available to provide the service. In areas where there is provision for civil legal aid (representation), it is important that the provision of civil legal advice is also equally available.

Secondly, even where civil legal aid is available, there is a very narrow lens applied to the types of issues addressed under specific headings.

Limited approach to interpretation of ‘family law’

As already stated, regard must be had to family law issues that arise outside of ‘intimate relationship’ issues.

- Pressure on a person with a very limited income to transfer a family home – it being the only asset the person has.
- Place of Care issues for older persons is an issue for many families. The older person has legal rights that must be respected.
- Applying for the Fair Deal under the Nursing Homes Support Scheme is a matter to be dealt with by many families where families make decisions (some for their own convenience or to protect their inheritance) without the older family member having legal advice in the matter. Many of these issues, be they contentious or non-contentious, require a court process to resolve at a not insignificant cost to the State. Many of such court applications could be avoided if rights were respected and individuals had access to legal advice/aid at an early stage.

Planning for the Future

Creating an Enduring Power of Attorney

Safeguarding Ireland has persistently advocated for legal aid (to include legal aid and legal advice) to be available to applicants under Part 5 of the *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) - (an application to court where a person lacks capacity and has no arrangement in place to deal with a decision/s that need to be made), Part 6 (application to court for the review of the decision-making capacity of Wards of Court) and Part 7 (legal advice for persons to create an Enduring Power of Attorney to come into effect when they lack capacity to make a decision/s personally).

Provision has now been made in the 2015 Act as amended by the *Assisted Decision-Making (Capacity)(Amendment) Act 2022* to amend the *Civil Legal Aid Act 1995* to provide for legal aid for applications to court under Parts 5 and 6 but regrettably no specific provision has been made under Part 7 of the 2015 Act to enable a person to create an EPA. It should also be stated that the giving of legal advice to create an Enduring Power of Attorney is not excluded from the *Civil Legal Aid Act 1995* but equally there is no positive obligation to provide such advice. The reality is such advice is generally not provided.

There are a number of points to be made on the implications of this omission which need to be addressed by the provision by the State of legal advice to those who cannot afford private legal fees to put in place arrangements to manage their finances in the future when they are unable to make decisions personally.

- Research carried out in Ireland over a number of years has indicated that there is a high level of financial abuse in Ireland. Financial abuse was identified as the most common form of abuse reported in relation to older people in the 2010 Irish prevalence study by the National Centre for the Protection of Older People (NCPOP UCD) - <https://www.safeguardingireland.org/wp-content/uploads/2020/02/National-Prevalence-Study- FullReport2010.pdf>
and
<https://www.safeguardingireland.org/wp-content/uploads/2018/10/NCPOP-Older-Adult-Financial-Exploitation-Measure-2014.pdf>
- The current prevalence rates for persons over the age of 65 years is at a level of 22-25%, for those over the age of 80 years, the level of abuse is at yet a higher level. There is a high level of financial abuse perpetrated on persons whose capacity to make financial decisions is at issue. See also Sage Advocacy Annual Report 2021 at page 4 where issues of finance are a dominant issue for many of its clients. <https://www.sageadvocacy.ie/media/2351/sage-advocacy-annual-report-fs-2021.pdf>. Some of these issues would not arise if an Enduring Power of Attorney was in place.
- Financial abuse is mainly facilitated where there is an absence of formal arrangements in place (such as an EPA) and the lack of oversight to ensure that a person's money and assets are being used for their benefit. (See Safeguarding Ireland's RedC Poll of November 2022 <https://www.safeguardingireland.org/wp-content/uploads/2022/11/617622-Safeguarding-Ireland-Oct-22-FINAL.pdf>).
- Many 'abuse' type cases have been 'resolved' with an application being made to have a person made a Ward of Court. This has resulted in persons being denied the right to make many decisions which they might otherwise have been able to make themselves. The Supreme Court was critical of this approach when it stated – '*In principle, where the risk to a patient comes from a third party, it seems to me to be preferable that appropriate legal measures should be directed at the persons creating that risk (as they were in this case), rather than unnecessarily depriving the patient of her liberty, notional as that liberty may be in practice*' - AC v Cork University Hospital & others [IESC 2019] at para 381. Many of these past wardship applications to court would have been avoided if an Enduring Power of Attorney was in place. On the commencement of the Assisted Decision-Making (Capacity) legislation, many more of these cases will still find their way through a court application if arrangements, such as an enduring power of attorney, are not put in place.

- Following the commencement of the Assisted Decision-Making Capacity legislation, there will be a requirement to ensure that the past and present will and preferences of a person are, in so far as possible, ascertained and that informal ad-hoc decisions taken by third parties will no longer be acceptable. Public awareness has also had some success in that 'next-of-kin' have become more aware that they have no legal authority to make decisions on behalf of a family member unless they have been given that formal authority to do so and that the term 'next of kin' in practice simply refers to a preferred emergency contact.
- Figures from the Central Statistics Office indicate that the number of older people (65+) of the Irish population are increasing at a faster rate than those in the age bracket 1-34 years of age. In 2022, the number of persons aged 65+ was 768.9 thousand, estimated figure for 2031 is 1,007,000 and for 2051 is 1,600,000. Based on these figures, it is clear that the costs of not addressing Enduring Powers of Attorney will, cumulatively, become much greater than the cost of addressing them.

Protection of Liberty Safeguards (Place of Care Decisions)

Following the Supreme Court decision in *AC v Cork University Hospital & others* [IESC 2019] in relation to the issue deprivation of liberty, it is no longer possible to have third parties, including healthcare professionals in acute hospitals, assuming that they have the authority to make decisions as to place of care. Following the AC decision in 2019, there has been a significant escalation of wardship applications to the court in relation to place of care decisions as there are currently no procedures *in accordance with law* as provided by the constitution. The Department of Health is currently working towards a legal framework on Protection of Liberty Safeguards. The forthcoming legislation will inevitably have to provide for legal procedures to be followed to address the constitutional rights of persons who are detained against their will and a resulting right of a person to appeal decisions in this regard. Legal advice and representation will now be required in a number of cases to comply with the constitutional requirements which to date have not been addressed.

Conveyancing and disputes concerning rights and interest in or over land.

Safeguarding Ireland notes that there is specific exclusion of legal aid in respect of conveyancing and disputes concerning rights and interests in or over land. The UN Convention on the Rights of Persons with Disabilities, in Article 12.5, provides:

‘Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property’.

As a society, we have tended not to vest property in a person who has a disability or a person who may be in a vulnerable circumstance, even if they have needs and where provision should be made for them. It is important that the law recognises their right to own and inherit property on an equal basis with others and that persons have the right to appropriate legal advice in this regard.

Safeguarding Ireland is of the view that advice on general conveyancing is not a priority but legal advice and legal representation on the matters outlined above is a very necessary service to respect the rights of persons with disabilities and to comply with the State’s obligations under the UN Convention on the Rights of Persons with Disabilities

Claims for proper provision in Wills and family trusts.

In addition to conveyancing matters and the vesting of real property in persons who are entitled, there should be a clear positive obligation on the Legal Aid Board to provide Legal advice and representation for persons, some with particular needs, where they have been excluded from provision in Wills or family trusts and require support and advice to make relevant claims under the Succession Act or under Trust provisions.

Even where provision is made by parents/family in Wills and Family trusts, in some cases where siblings/other family members are appointed trustee, trustee decisions are made which are not to the benefit of a person in vulnerable circumstances but protect the interest of the trustee who may be a potential beneficiary. This is a further area where the *Civil Legal Aid Act 1995* does not exclude access to legal aid or representation but there should be a positive obligation to ensure legal support is available to persons who wish to exercise such rights and to ensure that the State takes its obligations under the UN Convention on the Rights of Person with Disabilities seriously.

Civil claims for debts:

Given the level of financial abuse perpetrated on those vulnerable members of society, Safeguarding Ireland is of the view that legal representation should be available in respect of civil claims for debt when money/assets are deliberately misappropriated and not used for the benefit of the person who is the owner of the money/assets.

It is acknowledged that, in these circumstances, it is likely that an offence has been committed under the Criminal Justice (Theft and Fraud Offences) Act 2001 and will also be a matter to be dealt with by An Garda Síochána.

General Comment in relation to above matters.

The findings of RedC surveys, commissioned by Safeguarding Ireland in both 2020 and 2022, indicated that only about 6% of the Irish population has created an Enduring Power of Attorney and only about 4% had made a Place of Care decision. Planning in advance by creating an Enduring Power of Attorney will not only facilitate the expression of the will and preference of the maker of the power but will also avoid many court applications. If an Enduring Power of Attorney is not in place, then it will be necessary for court applications for the appointment of a Decision-Making Representative at a not insignificant cost to the State.

As indicated, to comply with constitutional requirements in respect of Place of Care decisions, the absence of clear articulation of the will and preferences of persons concerned will certainly lead to more court applications in this matter. It is preferable, that individuals are enabled (with the provision of legal advice) to deal with these matters personally.

Safeguarding Ireland is also aware that there has been a reluctance by the Legal Aid Board to deal with certain categories of persons, such as those whose decision-making capacity is at issue. It is important, given the decision-making capacity legislation is due for imminent commencement, that the Legal Aid Board has access to skilled legal practitioners in this area of law. It is important that such practitioners are fully conversant with the various arrangements provided for in the 2015 Act and understand the extent of agency that decision-making supporters have in relation to a person whose decision-making capacity is at issue or who lacks the capacity to make a decision.

Question 2: Do you have any particular views on how types of cases should be prioritised for support, advice and representation in the future under the scheme?

Answer:

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As indicated above, Safeguarding Ireland is of the view that the emphasis in the current scheme should be changed from a possible 'litigation' approach to ensuring that access to and the provision of support and legal advice should be available at an early stage. This interaction should be available within a period of 24/48 hours. The modus operandi of response from the Legal Aid Board from initial contact to the provision of a service should be examined. Consideration should be given as to the appropriate approach in particular cases using the sequence of support, advice and representation.

The availability of an experienced support and information service for initial contact with the Legal Aid Board should not be underestimated. An experienced support service can identify calls that need urgent attention, can identify and give immediate information which may divert the caller to other more appropriate service (see under Issue 8 below) and can give valuable information so that a person is enabled to deal with a matter immediately. Many people simply need accurate and relevant/appropriate legal information to deal with a matter and the availability of such a service should be viewed as cost effective.

The support service must also have the expertise to give relevant and appropriate information in relation to services available from other organisations/agencies. In this regard the Legal Aid Board should work in collaboration with the Citizens Information Board.

While inevitably there will be urgent cases where immediate legal representation is required for a court application, the priority should not be placed on case type but should take the particular circumstance of the person requiring a service into account. For example, a domestic violence case may be a priority for A but not for B who is now no longer at risk. Equally, a place of care decision may be extremely urgent for C but not for D. The making of an Enduring Power of Attorney may be extremely urgent for E (who is about to undergo complex brain surgery) but may not be as urgent for a healthy 70-year-old who wishes to put her affairs in order for a possible future event.

There should be a priority system which gives a weighting to certain situations as described in this section – for example, the making of an Enduring Power of Attorney for a person undergoing major surgery should have a higher weighting than a healthy 79-year-old without major health concerns. This would help ensure consistency in terms of prioritisations. In any event, all cases should be dealt with in a timely manner.

The Legal Aid Board has become accustomed to working with long waiting lists. However, waiting periods of up to four months are unacceptable. A review of the organisational structures and service providing systems is required in advance of any expansion of services.

Issue 2 – Jurisdictions covered by the scheme

In addition to particular types of cases, proceedings in quasi-judicial settings, such as tribunals (including tenancy tribunals, social welfare tribunals and the Labour Court), are also excluded from the scheme. The only exception here is the International Protection Appeals Tribunal (IPAT).

Question 3: Should the current exclusion of proceedings before quasi-judicial settings continue to apply? Why?/Why not?

Answer:

If the State is concerned about the issue of equality and the need to support people to realise their rights, then the exclusion before quasi-judicial settings should not continue.

There is no arguable reason why a person of limited means should be excluded from access to tribunals such as tenancy tribunals, social welfare tribunals, the Labour Court and other administrative tribunals.

In examining this issue, it is also necessary to look at skills required at initial support stage, the mode of delivery of the Legal Aid service and also have a clear understanding of the thresholds for dealing with particular issues or whether a person should be initially directed to another organisation.

Issue 3 – Eligibility

In order to access the scheme, applicants have to meet certain eligibility criteria:

- **An individual's disposable income must be below €18,000 to be eligible for the scheme, net of a certain number of allowances.**
- **An individual's disposable capital must be below €100,000 to be eligible for the scheme. Questions:**
- **A merits test – determining whether an individual would go to court, or be recommended to go court, if they had to pay for legal advice and representation themselves.**

These criteria reflect the nature of the scheme as set out in law, to support those with low incomes or modest means to access legal advice and representation to help them resolve their matters. Other tests are designed to ensure, in part, that the finite resources available to operate the scheme are put to best use.

Questions 4: How appropriate are the current eligibility thresholds?

Answer:

Obviously, the tests need to be reconsidered as to whether they are still appropriate and need to take account of changes since 2006.

i. How should the financial eligibility threshold be determined to access the scheme or any successor in the future?

Answer:

The application of a specific figure can be a very rigid approach in determining the financial eligibility threshold. One can think of a number of imaginative ways in which a financial eligibility threshold could be determined to take account of a number of factors but it is important that any eligibility threshold is simple and clear and that people can easily understand it. It is also important to understand that, if there is movement away from simple and clear criteria, it becomes an administrative burden, difficult to manage and account for and leads to lack of consistency in the manner in which the criteria is applied.

Safeguarding Ireland therefore suggests either of two possible options –

The first is that the financial eligibility threshold be determined by continuing to specify a specific figure but subject to the application of flexibility in some circumstances. In specifying a specific figure, Safeguarding Ireland would be of the view that the legislation must provide for discretion to be applied, in some cases, by ‘specified persons’ to deal with certain cases where a humanitarian approach is called for or where there are borderline cases. The types of cases might be indicated in a code of practice and the ‘specified persons’ may be the Chief Executive and a limited number of other Senior Managers.

The second option is for the Legal Aid Board to adopt the Reasonable Living Expenses approach based on family size and taking account of items such as social inclusion and participation, and the cost of a motor vehicle which can be important living expenses for individual well-being as used by the Insolvency Service of Ireland. See - https://www.isi.gov.ie/en/ISI/RLEs_Background_Information_24_November_2022.pdf/Files/RLEs_Background_Information_24_November_2022.pdf

It is noted that these Guidelines issued by the Insolvency Service of Ireland were prepared in consultation with the Minister for Justice, the Minister for Finance, the Minister for Social Protection and a number of organisations which included the Legal Aid Board and MABS.

ii. Is there a particular figure which you would set?

Answer:

Yes, in 2023 it should be set at the level that a person's disposable income be below €30,000, net of a certain number of allowances. An individual's disposable capital should be below €150,000, excluding the value of principal residence.

For clarity, even where a particular figure is applied –

- The legislation must provide for discretion to be used in some cases.
- The legislation must provide that no financial eligibility is necessary in some cases. See answers to questions 5, 6 and 7 below.

iii. What is your rationale for that figure?

Answer:

This figure is calculated to ensure that any person whose only income is a state benefit/pension would automatically come within this specified figure. To some extent, it takes into account that the current figures were set in 2006 at a time when there was little developed thinking or data available on the requirements of adequate living expenses.

Question 5: Are there other allowances or considerations, which should be made in determining eligibility (financial or otherwise) for the scheme?

Answer:

Where it is necessary to defend personal rights, a person should have access to legal advice and representation without imposing any eligibility criteria.

Question 6: Are there certain types of cases that are so fundamental to the rights of an individual that legal aid should be provided without a financial eligibility test? If so, what types of cases do you believe fall into this category?

Answer:

Personal Right - Deprivation of Liberty:

Since the protection of liberty is a basic human right set out in the Constitution, the European Convention of Human Rights and the UN Convention on the Rights of Person with Disabilities, Legal Aid (advice and representation) should be provided to any individual without any financial eligibility test.

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New development

It should be noted that the *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) as amended by the *Assisted Decision-Making (Capacity) (Amendment) Act 2022* provides for the amendment of the *Civil Legal Aid Act 1995* (1995) Act to provide that a relevant person (as defined in the 2015 Act) and a ward of court do not have to satisfy the criteria in respect of financial eligibility specified in Section 29 of the 1995 Act and, furthermore, where a relevant person or a ward does not satisfy the criteria in respect of financial eligibility, the Legal Aid Board may seek to recover some or all of the costs of providing the Legal Aid to the relevant person or ward. This relates to persons who lack capacity to give relevant information about their own finances.

This approach should be adopted much more widely to include those who wish to create an Enduring Power of Attorney, so that delays in trying to establish financial eligibility can be avoided and a person can obtain immediate early legal advice where it is urgent and necessary.

Question 7: Should some form of merits test apply to the cases at 7? If so, what should that look like? (Should read 6 rather than 7?)

Answer:

Yes, in relation to Protection of Liberty, it should be necessary to proceed through the proposed administrative procedures to establish if a deprivation of liberty has occurred or is about to happen against the person's past or present wishes. A person will, of course, have the right to appeal any administrative decision to the court.

In other cases, it may not be appropriate to have any form of merit test. Again, the legislation should allow for flexibility/discretion to be applied.

Question 8: Do you agree with how merit is defined and what matters should be included in the merits test?

Answer:

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There should be further consideration as to how merit should be defined and as already stated, a wider lens than simply looking at a potential court process should be considered.

The Legal Aid Board should assess the potential systemic impact that specific issues give rise to which would indicate the points of principle that should be considered in any definition of 'merit' to qualify for legal assistance/aid.

Issue 4 - Financial Contribution

In all cases, the minimum contribution requested by the Legal Aid Board is €30 for legal advice and €130 (inclusive of the initial €30) in cases where full legal representation is provided. This is the minimum contribution payable. It can rise significantly depending on the amount of the individual's disposable income. There is also a capital contribution payable when the individual's disposable capital exceeds €4,000.00. Questions:

The amount of the contribution does not depend on the subject matter of the legal issue or nature of any proceedings that may be contemplated. The contribution is calculated solely on the basis of the individual's financial circumstances. For example, for an individual financially eligible for legal aid and advice, the financial contribution payable for a District Court matter, which may only take a couple of hours to conclude, is the same as the contribution that would be payable for a Divorce in the Circuit Court, which may take a couple of years to conclude, as it is for a complicated action in the High Court which might also take years to conclude and involve considerable investment in professional witnesses, junior counsel and senior counsel.

Question 9: How appropriate are the current levels of financial contributions?

Answer:

It is suggested that the minimum contribution currently requested by the Legal Aid Board of €30 should remain for legal advice and €130 in cases where full legal representation is provided. It is noted that this minimum contribution is increased depending on the person's ability to pay.

Safeguarding Ireland also agrees that the amount of the contribution should not depend on the subject matter of the legal issue or nature of the proceedings but should be calculated on the basis of the individual's financial circumstances.

Question 10: Should the financial contribution be assessed differently in respect of different types of subject matter?

Answer:

As stated above the financial contribution should be calculated on the basis of the individual's financial circumstances.

Question 11: If so, should an individual pay a contribution based on the complexity of the subject matter and pay that in instalments over the length of the case as the case is progressed on his/her behalf?

Answer:

However the calculation is made, it should be considered in each case and particularly if the matter takes some time to resolution, if payment by instalments is desirable. This may be appropriate where a person is being asked to pay more than the minimum contribution as indicated in Comment at Issue 4 above.

OPERATION

Issue 5 – Mode of delivery

As noted above, the Civil Legal Aid scheme is delivered through a mix of in-house or Legal Aid Board-employed legal practitioners working in law centres and the commissioning of services from panels of private legal practitioners. However, the point of entry to the system is, in the vast majority of cases, the law centre.

Question 12: What are your views on the current modes of delivery of civil legal aid (i.e., through family law centres and private panel of solicitors)? Are there additional modes you would suggest?

Answer:

It is important, no matter what mode of delivery is used, that the person seeking the service has the benefit of lawyers who are expert in the area of law where the service is required.

Safeguarding Ireland is in agreement with the use of a combination of Legal Aid Board legal practitioners and private legal practitioners but there needs to be a sufficient pool of legal practitioners to provide a comprehensive skilled service. In this regard, rather than have panels of private practitioners for particular areas of law, there should be a comprehensive list of private practitioners available with details of the area of law in which they have expertise and who can be contacted when a need arises. For example, it is assumed that there will not be many cases where a detailed knowledge of trust law is required but it is necessary to have this expertise available if and when it is required. It should be noted that one of the 'property and affairs' decisions that an attorney or a decision-making representative would have authority to make on behalf of a relevant person under the provisions of the *Assisted Decision-Making (Capacity) Act 2015* is 'the execution or exercise of any of the powers or discretions vested in the relevant person as a tenant for life.' Given the frequency where such advice may be required, it makes sense that access to a private legal practitioner is the appropriate approach rather than endeavouring to maintain in-house expertise in a discrete area of law.

The Legal Aid Board should establish a national register of civil legal aid practitioners, similar to the national centralised Criminal Legal Aid Panel now established by the Courts Service. This would enable individuals as well as voluntary bodies and NGOs to know what legal expertise is available and where it can be accessed.

On the issues of additional modes of delivery, it is suggested that more use could be made of the pro bono service which many firms of private practitioners provide as part of their Corporate Social Responsibility. It is acknowledged that some firms do assist FLAC but the Legal Aid Board should consider contracting for a number of pro bono hours on an annual basis. The service could be valuable in giving support and information.

It is also suggested that specialist legal advice should be available at key Citizen Information Centres.

Issue 6 – Accessibility

The Group is keen to receive feedback on how accessible the current scheme is. This issue asks you to identify barriers to accessing the service as well as recommending future measures that would ensure the administration of the service works better for users.

Question 13: What are key barriers to accessing the service?

Answer:

Lack of awareness that there is a Legal Aid service. This is mainly caused by the limited service that is provided. The view is that the Legal Aid Board only provides a 'limited' family law service, some service in relation to employment law and criminal law and a service in relation to groups such as Travellers, asylum seekers and refugees. As already suggested, the Legal Aid Board needs to provide a comprehensive Legal Aid Service. This is particularly required in order for the State to meet its obligations to respect the right of each person to have appropriate and timely access to justice.

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A further barrier - there is little communication with Groups or response to Groups (such as NGOs) who are trying to assist their clients when legal issues arise. The Legal Aid Board should collaborate with bodies and agencies who provide services to those on low incomes or are disadvantaged. An example would be that currently the Rape Crises Centre would quickly make referrals to the Legal Aid Board but other organisations are not in that position because of the limitations of the services being provided, or a lack of knowledge of a service, or lack of jurisdiction of certain issues.

Yet another barrier is that there is limited expertise in some areas of law by Legal Aid Board legal practitioners and the panels of private legal practitioners are very limited in the areas of law that they deal with. It is important that the Legal Aid Board provide a comprehensive service.

Safeguarding Ireland also suggest that, where a person is being informed of his/her right to appeal a decision of a body (for example in the case of appealing a decision of a financial institution to the Financial and Pension Services Ombudsman), there should be a further note to say that 'you may be entitled to obtain advice/legal representation from the Legal Aid Board depending on your financial situation.' Contact details, to obtain relevant information, should be given in the communication.

Every Citizen Information Board Office should have a poster confirming that if you need legal assistance/advice you may be eligible for Legal Aid and give details of the local Legal Aid Board Office or access to the centralised register.

Question 14: How can the administration and delivery of the service be made to work better for the individual users, NGOs and communities?

Answer:

There should be much more collaboration, communication, public awareness information, particularly between public bodies and NGOs, than at present. Organisations tend to work in silos with a single focus which leads to duplication of effort and cost but does not address major gaps in the legal aid service. The co-location of services of the Legal Aid Board and Citizen Information Centres (for example Donegal County Council) should be seriously considered.

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The Legal Aid Board should take a lead public awareness role to ensure individuals are aware of their right to access to the justice system. The Board should also give details of services available with confirmation that the Legal Aid service is not limited to legal representation in court proceedings but includes legal support and advice about the exercise of individual rights.

The Legal Aid Board should be more vocal in stating that its important role is to provide a service to fulfil the State's obligations to meet its public sector duty to provide access to justice. Public bodies also need to be reminded of their public sector duty.

Memoranda of Understanding by the Legal Aid Board with a number of public bodies, who provide services, should be entered into to inform individuals who are dissatisfied with public service provision that they have the option of discussing or getting advice on their rights from the Legal Aid Board.

Issue 7 – Awareness and assessment of the current scheme

The Group is keen to hear about all aspects of the current scheme as it engages in its review. This issue asks you to identify the benefits, challenges, advantages and disadvantages of the current scheme, particularly those that may not have been raised in previous responses. In relation to the current scheme:

Questions 15: What are its benefits?

Answer:

The current scheme has an established Legal Aid scheme in relation to family law and criminal law.

Question 16: What are its challenges?

Answer:

The main challenge is the expansion of the scheme to provide a comprehensive service with a range of legal expertise for a much wider grouping in society, but this is a very necessary service.

Question 17: What are its advantages?

Answer:

The scheme has the advantage of having inhouse legal practitioners and at the same time has access to legal practitioners in private practice. This has the advantage that the Legal Aid Board can tap into a diverse range of legal expertise but this mode of operation needs to be developed.

Question 18: What are its disadvantages?

Answer:

There has been a lack of vision, strategic planning and investment by the State in providing a very necessary Legal Aid service. The current service has seen little development since it was established. The scheme has not kept abreast with new or reformed legislation. As stated, the provision of an easily accessible holistic legal service has the potential to promote social and economic benefit, both to the individual and to the taxpayer. There is a lack of joined up thinking and planning and it is not evident that the Legal Aid Board has developed relationships with other bodies or agencies who have an interest in supporting and assisting people to resolve issues that affect their lives.

There is huge frustration with the delays in the present system where people are left living in worry and distress and without a legal service.

Issue 8 – The future

In undertaking its work, the Review Group is required to examine how the legal aid scheme fits with other schemes existing in Ireland to support individuals with issues of legal advice and representation (for example, children in child care cases who may be assigned a guardian ad litem). It is also required to consider the future of the Scheme and how individuals' legal needs can be best met. To this end, the Group is interested to canvass views on how access to justice can be promoted and ensured for those on low incomes, including on particular mechanisms which may support this. This may include enhancing awareness, reform to the current scheme, or something else.

Question 19: How can an individual's awareness and understanding about justiciable problems or legal disputes be raised?

Answer:

See response to Question 13 above.

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In addition, it is important that public awareness of access to legal aid services is informed through interaction with public bodies but, in particular, there should be close collaboration of the Legal Aid Board with the Citizen Information Service. This would be greatly facilitated by the co-location of both services with a developed information and advice service.

Question 20: How should individuals on low incomes and other marginalised groups be supported to access justice in the future?

Answer:

By having a fully comprehensive scheme with a quick response time and ensuring that there is a constant public awareness campaign so that individuals and organisations are aware that there is a prompt service that they have access to.

Waiting times, in excess of about two weeks, are too long a time in some cases to deal with urgent matters.

Question 21: What should the aim of a civil legal aid scheme be?

Answer:

To provide a comprehensive expert Legal Aid scheme for those who are on low incomes or to defend fundamental individual rights.

The issue of equality before the law should be a paramount aim of the Legal Aid Board.

To strengthen the democratic life of society by ensuring the vindication of rights of citizens who are at risk of injustice and failure of accountability by public bodies and agencies of the State. In this regard, there should be a particular obligation on public service bodies to alert individuals of their right to access to justice.

Question 22: What values should underpin it?

Answer:

Respect for the rights and integrity of all people.

To strive to ensure that each individual attains Equality before the law.

Ensuring that every citizen has access to justice.

Question 23: How can the service best be targeted or prioritised for recipients in the future?

Answer:

It is necessary to make Legal Aid Board services easily contactable and accessible by colocation with other relevant services such as Citizens Information Civic Offices.

It is also necessary to ensure that all public bodies are aware, as part of their public sector obligation, to give information on the right to access to legal aid services.

Question 24: What should the scheme's relationship be to other forms of publicly-funded/part publicly-funded legal assistance initiatives?

Answer:

There should be Memoranda of Understanding with such other initiatives. For example, the Irish Human Rights and Equality Commission (IHREC) offer legal assistance in some legal matters but it is not clear to the public the divide between the legal assistance that will be provided by the Legal Aid Board and IHREC. Memoranda of Understanding should clarify what are the thresholds for each organisation.

The Legal Aid Board should also clarify if it provides Legal Aid to persons who have exhausted their remedies in the Irish domestic courts but wish to pursue matters concerning their individual rights in the European Court of Human Rights. This is a necessary aspect of access to justice.

Question 25: What additional roles should or could the Legal Aid Board have, if any, in relation to public legal assistance?

Answer:

It is noted that the Legal Aid Board does carry out a research function but it is not clear if it highlights areas of law that need updating and reform. There must be many points arising in cases where systemic issues arise and it is important that this information is captured and passed on to the Department of Justice and other relevant bodies such as the Law Reform Commission.

The Legal Aid Board should take the lead in organising an Annual Conference jointly with bodies such as the Law Reform Commission, the Citizens Information Board, FLAC, Advocacy Organisation and others to highlight legal issues that need to be addressed.

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Question 26: Is there a role for mediation and/or other alternative dispute resolution processes as part of a civil legal aid scheme or similar support system in the future? If not, why not? If so, what should the role be?

Answer:

Absolutely, mediation should be used in most cases where there is conflict. As stated above, it is very necessary in the area of family law dealing with coercive control where adult children are making decisions against the wishes of their aged parents.

It is not necessary to repeat here the enormous advantages of mediation but it should be very much promoted and a service provided and managed by the Legal Aid Board.

Issue 9 – Anything else?

The Group is aware that stakeholders may have views on other aspects of the scheme or its remit. Please feel free to highlight other matters which you feel we have not asked you about in the previous questions.

Process and timeline for submission

Submissions should be sent to legalaidcivil@justice.ie. Submissions should be received no later than Friday 3rd February 2023.
