

# **Issues paper to guide submissions on the Review of the Civil Legal Aid Scheme**

## **Introduction**

The Minister for Justice established a Group in June 2022 to review the Civil Legal Aid scheme. The Review Group is chaired by former Chief Justice, Mr. Frank Clarke, and comprises members with a range of expertise and experience in relation to the Scheme and broader access to justice issues. The full membership of the Group is listed in [Appendix 1](#).

The [terms of reference](#) for the Group's work include a requirement to undertake a comprehensive programme of consultation and engagement with relevant stakeholders, Government Agencies and Departments, and persons with unmet legal needs. This document is in part fulfilment of that term of reference, and invites submissions from relevant stakeholders on issues, which the Group is required to consider. It also sets out the submission process for stakeholders to make submissions and the deadline for their submission.

In undertaking its work, the Group is adopting a principles-based approach, emphasising in particular a user-centred approach and the importance of access to justice. Indeed, the Group is acutely aware of access to justice as a fundamental principle, and a necessary one to support people to realise their rights. While acknowledging that civil legal aid is only one aspect of enabling access to justice, it is nonetheless important to the Group's purpose, its consideration of the current scheme and recommendations for its future. In addition, any future developments regarding the scheme should be user-focussed, aimed at helping a growing and diverse population address their legal needs. In making any recommendations, the Group will seek to ensure that they are cognisant of equality and human rights standards and the public sector duty.

## **The Current Scheme**

The Civil Legal Aid scheme was established in 1979 on an administrative basis, before being placed on a statutory footing by way of the Civil Legal Aid Act 1995. The Scheme is administered by the Legal Aid Board. The

scheme is governed by the 1995 Act (as amended), and the Civil Legal Aid Regulations 1996-2021.

The scheme provides for legal advice and legal representation for eligible individuals for civil proceedings (other than certain excluded matters) in the District, Circuit, High and Supreme Courts as well as the Court of Appeal and on foot of certain referrals to the European Court of Justice. With the exception of representation of persons seeking International Protection before the International Protection Appeals Tribunal, legal aid is not currently available for the conduct of proceedings before an administrative tribunal.

The Civil Legal Aid Scheme currently constitutes two parts: legal advice; and legal aid/representation. Eligibility for the scheme is determined by way of two main tests:

- A means test, for which the income threshold is currently €18,000 net of certain allowances, including providing for spouse/partner, each dependent, child care costs, PRSI, income tax, pension deductions etc., and the capital threshold is currently €100,000, and
- A merits test, which involves the Legal Aid Board assessing whether an average person would be willing to go to court if they were paying for it with their own money, whether a solicitor or a barrister acting reasonably would recommend that the person would go to court, knowing that the applicant was paying for it and based on the facts of the case.

The Legal Aid Board also examines whether the applicant has grounds for taking the case, or defending the case being taken against him/her; whether litigation is the best way of solving the dispute; the likelihood of the applicant succeeding in the case and the cost to the taxpayer against the benefit accruing to the applicant were they to be successful in the case. The latter two of these criteria will not be applied in cases involving child welfare or custody.

Civil Legal Aid is not a free service and eligible applicants are expected to make a contribution, in line with their means, to the cost of the service provided. In all cases, the minimum contribution requested by the Board is €30 for legal advice and €130 (inclusive of the initial €30) in cases

where full legal representation is provided. Fees are waived in domestic violence and child care cases.

The scheme caters for a range of civil law issues, but the majority of persons who have presented to the Board over the past number of years have done so in relation to family law or child care proceedings. Many of these are prioritised by the Board, including domestic violence, child care, child abduction and cases which have a statutory time limit nearing expiry.

There are a number of areas of civil law for which the Legal Aid Board will not provide representation, for example, defamation, most property disputes and alcohol licensing applications. In addition, the Board will not take on cases that are taken by groups of persons, or cases where the benefit to the applicant is limited to a positive outcome that can impact many other persons. The scheme does not extend to administrative or quasi-judicial tribunals (such as social welfare appeals or discrimination cases before the Workplace Relations Commission), with the exception of the International Protection Appeals Tribunal (IPAT).

Legal Aid and Advice is delivered through a number of Legal Aid Board-operated Law Centres (30 fulltime and a number of part-time law centres), from which it provides legal aid services. In addition, the Board operates panels, to which cases are allocated.

The Civil Legal Aid Scheme in 2020 in numbers:

- 13,209 applications for civil legal aid
- 16,235 legal aid and advice cases handled in Legal Aid Board Law Centres
  - 11,061 family law cases (=68% of civil legal aid cases)
  - 3,314 other civil matters
  - 1,860 child care cases
- 1,588 people on the Legal Aid Board waiting list at 31 December
- 7,325 cases referred to private solicitors panels

*Source: Legal Aid Board Annual Report 2021*

## **Other forms of publicly funded legal assistance**

The Review Group is aware that there is a range of other, publicly funded or part-funded initiatives, schemes and services which provide some form legal assistance or information, which are not part of the current Civil Legal Aid scheme (for example the Citizens Information Services, the independent law centres, and the Irish Human Rights and Equality Commission (IHREC)). It is not the function of the Group to review these forms of assistance, but it does have a remit to examine the relationship between them and the Civil Legal Aid scheme.

## **Key Issues**

The terms of reference require the Group to examine all aspects of the current operation of the scheme and make recommendations regarding the future legal assistance needs of those who cannot afford to access legal advice and representation privately. The terms of reference also require the Group to recognise the finite resources available for meeting the legal needs of those on low incomes into the future.

As part of the Group's work, it is interested to hear from relevant stakeholders regarding the current operation of the scheme and its potential into the future. It is also keen to hear about any examples of best practice of how similar services are delivered.

In order to frame this process, the Group has identified a preliminary set of issues to be used by stakeholders to guide their response.

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## **ACCESSING THE SCHEME**

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### **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.

**Questions:**

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?
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?

**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).

**Questions:**

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

**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.

- 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?
  - i. How should the financial eligibility threshold be determined to access the scheme or any successor in the future?
  - ii. Is there a particular figure which you would set?
  - iii. What is your rationale for that figure?
5. Are there other allowances or considerations, which should be made in determining eligibility (financial or otherwise) for the scheme?
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?
7. Should some form of merits test apply to the cases at 7? If so, what should that look like?
8. Do you agree with how merit is defined and what matters should be included in the merits test?

### **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.

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.

### **Questions:**

- 9.** How appropriate are the current levels of financial contributions?
- 10.** Should the financial contribution be assessed differently in respect of different types of subject matter?
- 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?

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## **OPERATION**

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### **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.

### **Questions:**

- 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?

### **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.

### **Questions**

- 13.** What are key barriers to accessing the service?
- 14.** How can the administration and delivery of the service be made to work better for the individual users, NGOs and communities?

### **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?
- 16.** What are its challenges?
- 17.** What are its advantages?
- 18.** What are its disadvantages?

### **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.

## Questions:

- 19.** How can an individual's awareness and understanding about justiciable problems or legal disputes be raised?
- 20.** How should individuals on low incomes and other marginalised groups be supported to access justice in the future?
- 21.** What should the aim of a civil legal aid scheme be?
- 22.** What values should underpin it?
- 23.** How can the service best be targeted or prioritised for recipients in the future?
- 24.** What should the scheme's relationship be to other forms of publicly-funded/part publicly-funded legal assistance initiatives?
- 25.** What additional roles should or could the Legal Aid Board have, if any, in relation to public legal assistance?
- 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?

## **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](mailto:legalaidcivil@justice.ie). Submissions should be received no later than **Tuesday 28 February 2023**.

## **Appendix 1: Membership of the Civil Legal Aid Review Group**

1. Mr Frank Clarke (Chair), Retired Chief Justice
2. Ms Eilis Barry, CEO, Free Legal Advice Centre (FLAC)
3. Prof Niamh Hourigan, Sociologist and Vice-President of Academic Affairs, Mary Immaculate College, Limerick
4. Mr Thomas (Tod) O'Mahony, Legal Aid Board
5. Ms Sara Phelan SC, Bar of Ireland
6. Ms Áine Hynes, Law Society
7. Prof Frances Ruane, Economist and former Director of the Economic and Social Research Institute
8. Mr Tom O'Malley, Senior Lecturer in Law, NUI Galway
9. Mr Bernard Joyce, Director of the Irish Traveller Movement
10. Mr Liam Coen, Principal Officer, Department of Justice
11. Mr Cillian McBride, Department of Public Expenditure and Reform

## **Appendix 2: Terms of Reference of Civil Legal Aid Review**

1. To review the current statutory civil legal aid scheme currently administered by the Legal Aid Board, with particular emphasis on examining the flexibility and responsiveness of the scheme to the legal needs of those for whom it is intended to serve, while giving due recognition to the limited resources available to fund the scheme.
2. The evolution of civil legal aid in Ireland and how the scheme operates today, including an examination of:
  - a. Whether the scheme remains or should remain primarily a family law service and the appropriateness of this;
  - b. The categories of civil law for which legal aid and advice is available and whether these reflect the predominant legal issues faced by persons of limited means who seek to avail of the legal aid scheme;
  - c. The modes of delivery of legal aid and advice provision under the scheme;
  - d. The appropriateness of the current eligibility thresholds, particularly those related to means, including an analysis of what should be deemed means by the Legal Aid Board in determining eligibility for legal aid and advice;
  - e. The role of the Civil Legal Aid Scheme and the Legal Aid Board and their relationship to, and the overall architecture of State supports for litigants in public and private law civil litigation, e.g. the Guardian Ad Litem Service.
  - f. The relationship between mediation and the current scheme;
  - g. The types of legal determination for which legal representation should be provided, i.e. should representation be available solely for court proceedings or whether it is appropriate for civil legal aid to be provided for certain proceedings before quasi-judicial fora, which were generally established as a more informal route than the courts to resolve disputes;
  - h. The future for the Civil Legal Aid Scheme – the development of a flexible service that has the capacity and resources to respond to the priority legal assistance needs of those of insufficient means.
3. To undertake a comprehensive programme of consultation and engagement with relevant stakeholders, NGOs, relevant Government

Departments and persons with unmet legal needs and undertake and/or commission research to support the Review, as required.

4. To report progress periodically to the Minister for Justice.
5. To make recommendations arising regarding the future of the Scheme and related systems to effectively meet the priority legal assistance needs of those of limited means who require legal advice and representation in addressing a range of civil law matters, as well as recommendations related to the effective resourcing of the scheme to achieve this.