Submission to the Civil Legal Aid Review Group

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Table of Contents

Introduction **......5**

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? 6*

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? 19*

Question 3 - *Should the current exclusion of proceedings before quasi-judicial settings continue to apply? Why?/Why not? 22*

Question 4 *- How appropriate are the current eligibility thresholds? 26*

i) *How should the financial eligibility threshold be determined to access the scheme or any successor in the future? 26*

ii) *Is there a particular figure which you would set? 26*

iii) *What is your rationale for that figure? 26*

Question 5 *- Are there other allowances or considerations, which should be made in determining eligibility (financial or otherwise) for the scheme? 28*

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? 28*

Question 7 *- Should some form of merits test apply to the cases at 6? If so, what should that look like? 31*

Question 8 *- Do you agree with how merit is defined and what matters should be included in the merits test? 31*

Question 9 *- How appropriate are the current levels of financial contributions? 31*

Question 10 *- Should the financial contribution be assessed differently in respect of different types of subject matter? 33*

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? 33*

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? 33*

Question 13 *- What are key barriers to accessing the service? 38*

Question 14 *- How can the administration and delivery of the service be made to work better for the individual users, NGOs and communities? 41*

Question 15 *- In relation to the current scheme, what are its benefits? 42*

***Question 16** - In relation to the current scheme, what are its challenges?* 42

***Question 17** - In relation to the current scheme, what are its advantages?* 45

***Question 18** - In relation to the current scheme, what are its disadvantages?* 45

***Question 19** - How can an individual's awareness and understanding about justiciable problems or legal disputes be raised?* 45

***Question 20** – How should individuals on low incomes and other marginalised groups be supported to access justice in the future?* 46

***Question 21** - What should the aim of a civil legal aid scheme be?* 50

***Question 22** - What values should underpin it?* 50

***Question 23** - How can the service best be targeted or prioritised for recipients in the future?* 51

***Question 24** - What should the scheme's relationship be to other forms of publicly funded / part publicly funded legal assistance initiatives?* 51

***Question 25** - What additional roles should, or could the Legal Aid Board have, if any, in relation to public legal assistance?* 52

***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?* 52

Introduction

The right of access to justice is accepted as a constitutional principle and a right under the ECHR. Without it, citizens are unable to have their voice heard, to exercise their rights, to challenge discrimination, or to hold decision-makers to account.

The availability of an effective system of civil legal aid which ensures that citizens of limited means can access legal advice and representation is a core tenet of a functioning, democratic society.

This submission is provided in response to the consultation process announced by the Civil Legal Aid Review Group ("the **Group**") in December 2022. The work of the Group, and the willingness of the Minister to review the operation of the Civil Legal Aid Scheme for the first time in its forty-year history, is appreciated.

Various of the Society's Committees and Task Forces have considered the questions arising from the Group's preliminary identification of issues. This submission presents a synthesis of responses from those Committees and Task Forces, each of which are comprised of experts in their chosen areas of legal practice.

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?

The Civil Legal Aid Act 1995 (‘the **1995 Act**’) and Regulations 1996-2017 (‘the **Regulations**’) established the Civil Legal Aid Scheme (‘the **Scheme**’) which has been administered by the Legal Aid Board (‘the **Board’**), pursuant to statute, since 1995.

Under the Scheme, civil legal aid is available - in theory - to all persons who satisfy the eligibility criteria[1] and whose case: (1) does not fall within designated matters outlined in section 28(9)(a); and (2) does not come within the exceptions to these exclusions set out in section 28(9)(b) or 28(9)(c).

Designated Matters

Section 28(9)(a) of the 1995 Act, as amended, provides that legal aid or advice[2] shall not be granted in respect of any of the following “designated matters”:

1. Defamation;
2. Disputes concerning rights and interests in/over land;
3. Small claim cases in the District Court;
4. Alcohol/club licensing applications;
5. Conveyancing;
6. Election petitions – where a person challenges the result of an election;
7. Applications made in a representative, fiduciary or official capacity; and
8. Proceedings which, in the opinion of the Board, are brought by the applicant as a member of a group for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest; or
9. Any other matter brought by/on behalf of a person who is a member and acting on behalf of a group of persons having the same interest in the proceedings concerned.

Exceptions

Section 28(9)(c) of the 1995 Act provides various exceptions to the above exclusions, providing that legal aid may be granted in respect of “designated matters” in the following circumstances:

[1] Section 29 provides that, in order to be entitled to legal advice and representation under the Scheme, an applicant must:

1. have an annual disposable income of less than €18,000
2. have disposable assets of less than €100,000
3. be willing, in most cases, to pay some form of contribution towards the legal assistance.

In considering whether to grant legal aid, the Board must be satisfied that it is reasonable to take/defend proceedings having regard to the merits of the case. The stated criteria include an assessment of the probable cost to the Board of providing legal services, measured against the likely benefit to the applicant in the event of success (section 28(2)).

[2] Per section 26(2)(b) of the 1995 Act

i. Disputes concerning rights and interests in/over land being designated matters, legal aid may be granted in respect of proceedings under *inter alia* the Landlord and Tenant Acts insofar as they relate to residential property, and the Residential Tenancies Act 2004.

ii. Disputes as to property between persons who are, or had been, living together as husband and wife, or who have/had agreed to marry.

iii. Where the subject matter of the dispute is the applicant's home and the applicant suffers from an infirmity of body or mind, or may have been subjected to duress, undue influence or fraud and in circumstances where a refusal to grant legal aid would cause hardship to the applicant.

iv. Where a grant of representation is at issue and a refusal to grant legal aid would cause hardship to the applicant.

v. In respect of licencing matters, legal aid may be provided where the granting of the licence would cause hardship to the applicant.

vi. In respect of a conveyancing matter connected to a matter in which legal aid/advice has already been granted.

vii. In respect of an inquest under Part III of the Coroner's Act where a request for legal aid has been made to the Board by a coroner pursuant to section 60 of that Act.

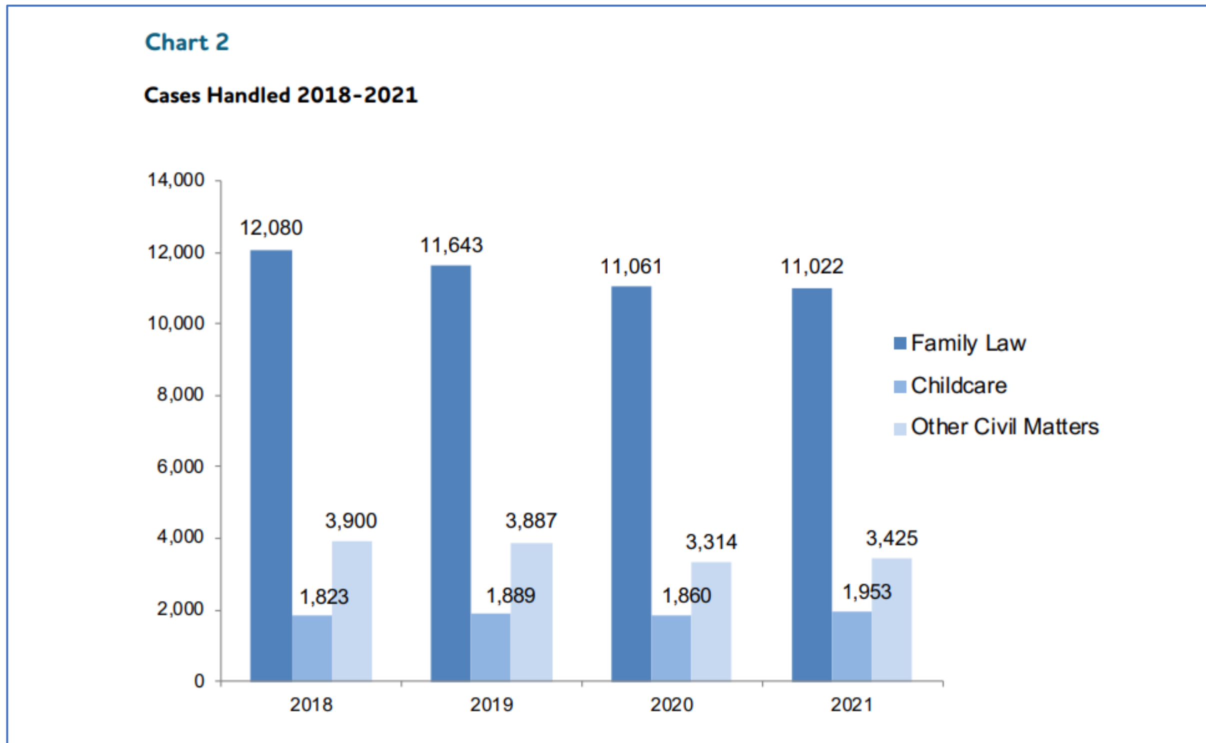
Section 28(9)(b) of the 1995 Act provides that a person making a counterclaim in defamation proceedings may be provided with a legal aid certificate. Section 28(9)(d) provides that a legal aid certificate shall not be refused solely by reason of the fact that a successful outcome to proceedings for the applicant would benefit persons other than the applicant.

In the UK, Schedule 1, Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**the 2012 (UK) Act**") broadly mirrors the excluded matters in section 28(9)(a) of the 1995 Act. However, the 2012 (UK) Act introduced, in some respects at least, a more restrictive civil legal aid regime than the Scheme. For instance, in the UK, personal injury claims, judicial review proceedings, and a range of other torts (namely assault, battery, false imprisonment and trespass) are excluded from the remit of the civil legal aid regime.

As set out above, a theoretical possibility exists, under the legislation, for the provision of legal aid for most types of civil law cases. However, given the limited resources which are available to the Board, the reality is that an application for legal aid by, for instance, a litigant involved in personal injuries litigation, would almost certainly be unsuccessful.[3]

The available data suggests that family and child law are the overwhelmingly predominant areas in which legal aid is sought and received. The most recently available annual report - the Legal Aid Board Annual Report 2021 ('the **Board's 2021 Report**') - highlighted that 11,022 (67%) of the cases handled in 2021 related to family law; 1,953 to childcare and 3,425 in other civil matters.[4] As the chart below (extracted from the Board's 2021 Report[5]) demonstrates, these figures are reflective of the more general trend towards family and child law representing the two overwhelming areas of law in which civil legal aid is provided in this jurisdiction.

[3] Law Reform Commission, *Report on Multi-Party Litigation* (LRC 76-2005) para 3.13
[4] Legal Aid Board, *Annual Report 2021* page 27
[5] ibid.



The Board's 2021 Report notes that:

> *"the type of problems for which the Board provides legal services extends to most areas of civil law although in 2021, as has been the case since the Board's inception in 1980, the majority of applicants sought services in relation to family problems."*

While family and child law are, of course, incredibly important areas of the law, where parties often have a lot at stake, there is a concern that an overemphasis on these two areas of law has led to the exclusion of litigants in other vital areas.[6] Consequently, these litigants are faced with either representing themselves or abandoning the prospect of litigation altogether.

The available data appears to suggest that a not insignificant number of persons opt to represent themselves e.g. the Report of the Review of the Administration of Civil Justice[7] presented data indicating that, in cases before the Court of Appeal and the Supreme Court, approximately 30% of proceedings initiated involved at least one lay litigant. MacMenamin J recently commented extra-judicially that in some courts, up to one third of all cases involve one side without legal representation, resulting from a lack of means.[8] While, of course, not all lay litigants choose to represent themselves solely for this reason, it is suggested that a substantial element of the 30% mentioned above arise from financial considerations, together with the lack of meaningful access to legal aid.

The contention is supported by the Board's 2021 Report which records 15,291 new applicants for legal aid in 2021, with only 5,025 new cases being taken on.[9] A comparison of annual figures between Table 1 and 3 below (extracted from the Board's 2021 Report) suggests that this is part of a general trend.

[6] FLAC *Access to Justice: A Right or A Privilege? A Blueprint for Civil Legal Aid in Ireland* (July 2005) page 35
[7] *Review of the Administration of Civil Justice: Report* (October 2020) page 344
[8] John MacMenamin *Access to Justice* Brian Lenihan Memorial Lecture, 2020
[9] Legal Aid Board, *Annual Report 2021*, pages 26-27

Table 1	2016	2017	2018	2019	2020	2021
Number of applicants						
General	14,991	15,611	16,169	15,458	13,209	13,827
International Protection	1,658	1,489	2,079	2,539	1,174	1,464
Total	16,649	17,100	18,248	17,997	14,383	**15,291**

Table 3	2016	2017	2018	2019	2020	2021
New cases in law centres						
Total	6,119	6,299	6,221	5,717	5,261	**5,025**

These concerns have also been highlighted by the judiciary e.g. in *SPV Osus Ltd v HSBC International Trust Services*[10] where Clarke J stated that:

> *"I remain very convinced that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. […] It does seem to me that this is an issue to which the legislature should give urgent consideration."*

Similarly, in his judgment in *Persona Digital Telephony Ltd v Minister for Public Enterprise*[11] Clarke J observed that:

> "[due to] *the increasing complexity of litigation…it may well be the case that there has been a very material increase in the number and types of cases where the undoubted right to run the case as a litigant in person might be argued not to represent effective access to the Court in any meaningful sense".*

Arising from the above, it is clear that the Scheme only covers certain vital areas of the law. In that regard, the Irish Courts have held that the adoption of the Scheme by the State does not impose any obligation on it, constitutional or otherwise, to provide legal aid to <u>*any*</u> individual litigant.[12]

Similarly, the European Court of Human Rights (**ECtHR**) has held that it is not for an international court to decide how a State should respond to its obligations under Article 6 of the European Convention on Human Rights (**ECHR**) in respect of the provision of legal aid. By extension, the ECtHR will not raise a difficulty with reference to the ECHR provided that Member States do not act arbitrarily or disproportionately.[13] Nevertheless, as noted by the High Court in *M. C. v. The Legal Aid Board,*[14] there is an obligation on the State to ensure that the Scheme is implemented fairly to all eligible persons and in a manner which fulfils its declared purposes. Similarly, in *Donoghue v Legal Aid Board & Ors,*[15] Kelly J noted that:

> *"The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning".*[16]

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[10] [2015] IEHC 602
[11] [2017] IESC 27
[12] *M. C. v. The Legal Aid Board* [1991] 2 I.R. 43 at p. 55; also *Sahil v. General Fire and Life Assurance Company* [1987] I.R.628
[13] *Airey v Ireland* No. 6289/73, 9 October 1979; *P., C. and S. v. the United Kingdom* no. 56547/00, 16 July 2002
[14] [1991] 2 I.R. 43 at p. 55. cited with approval by Kelly J in *Donoghue v Legal Aid Board & Ors* [2004] IEHC 413 at page 21
[15] [2004] IEHC 413
[16] *ibid* at page 44

The above analysis suggests that obtaining legal aid is not a reality for persons involved in several areas of the law which are, in theory at least, not excluded by the provisions of section 28(9)(a). Practically, defining the areas which should be covered by the Scheme is less relevant than having an effective and sufficiently resourced scheme. Therefore, extending the Scheme to other areas of civil law, without a substantial increase in State funding to support same, will not assist either the public or those providing legal services.

Without prejudice to the foregoing, the below comments constitute the Society's submissions as regards the possible expansion of the scope of the Scheme.

Suggested Expansion of Scope of the Scheme – Eight Areas for Consideration

1. Local Authority Housing Disputes

As above, section 28(9)(a)(ii) of the 2005 Act excludes from the remit of the Scheme "disputes concerning rights and interests in or over land" and, as such, repossession and eviction proceedings are currently excluded from the Scheme.

Section 28(9)(c)(i) carves out an exception to this exclusion by providing that legal aid may be extended in respect of proceedings *inter alia* under the Landlord and Tenancies Acts (insofar as they relate to residential property) and the Residential Tenancies Act 2004. However, this exception is quite limited in its application in that it only applies to the Landlord and Tenants Acts and the Residential Tenancies Act 2004 i.e.. it only extends to private tenants in dispute with their landlord. In other words, by expressly referring to the Landlord and Tenant Acts and the Residential Tenancies Act 2004, proceedings relating to the provisions of the Housing Acts (the legislation governing Local Authority Housing in Ireland) are, by implication, excluded. This stands in contrast to the position in England and Wales, where paragraph 34 of Schedule 1 Part 1 of the 2012 (UK) Act expressly provides that civil legal aid is provided to an individual who is facing eviction from local authority housing under Part 6 of the Housing Act 1996.

Pursuant to section 12 of the Housing (Miscellaneous Provisions) Act 2014,[17] a tenant in local authority housing may, on application by the housing authority to the District Court, be the subject of a possession order by the Court, if satisfied that the authority has reasonable grounds for the recovery of possession, having regard to all of the circumstances of the case.

In *Byrne v Scally and Dublin Corporation*[18]*,* the High Court refused legal aid under the previous (non-statutory) scheme which was in force at the time on the basis that applications under section 62(3) of the Housing Act 1966 ('the **1966 Act**') were *"straightforward and relatively simple".* This view was provided on the basis that, under the previous regime (under section 62 of the 1966 Act and the accompanying case law[19]), the District Court did not have any discretion to examine the underlying merits of the application as long as formal proofs were in order.

Section 62 of the 1966 Act was subsequently repealed - following the finding of the Supreme Court in *Donegan v Dublin City Council & Ors*[20] - that the procedure was incompatible with Article 8 of the ECHR . Nevertheless, while section 12 of the 2014 Act (outlined above) now vests the District Court judge with a discretion to consider the merits of the application by a Housing Authority, this arguably increases the need for a respondent in such proceedings to have access to legal representation. After all, the fact that the Court is no longer required to grant the order once formal proofs are in place renders it highly likely, inevitable even,

[17] And its predecessor, the (now repealed) section 62 of the *Housing Act 1966*
[18] [2000] IEHC 72
[19] The State (Kathleen Litzouw) v Dublin Corporation [1981] ILRM 273; The State (O'Rourke) v Kelly [1983] IR 58; Dublin Corporation v Hamilton [1999] 2 IR 486 and Byrne v Scally Unreported Judgment of the High Court, 12 October 2000
[20] [2012] IESC 18

that the Court will be presented with (sometimes complex) legal argument by counsel for the Housing Authority, thereby heightening the need for the respondent to be legally represented.

This is particularly so in circumstances where people living in local authority housing may not have the means to fund legal representation and where the consequences which flow from an order for possession are extreme e.g. s16 of the Housing Act 1997 empowers the HSE to determine that an individual who has been evicted is not entitled to a payment of rent supplement allowance in respect of any future private accommodation. Further, as noted by the High Court in *Pullen & Others v Dublin City Council,*[21] a standard local authority tenancy agreement provides that a tenant evicted for breach of the tenancy agreement will be:

> *"deemed for the purpose of re-housing, to have deliberately rendered himself homeless…may not be provided with another home by the [local authority] until such time as the [local authority] is satisfied that the evicted tenant and his family are capable of living and are agreeable to live in the community without causing a further breach of this condition."*

Given these extreme consequences, it is submitted that consideration should be given to amending the scope of the Scheme to ensure that tenants of public authority housing are entitled to legal aid when they are the subject of an application for repossession by the housing authority in question. As noted above, this is the position in the UK.

2. Mortgage Possession Proceedings

Legal aid[22] also seems to be largely excluded is in the area of mortgage possession proceedings.

Again, such proceedings fall within the "designated matters" outlined at section 28(9)(a) of the 1995 Act. Such persons could, in theory at least, fall within the exception laid out in section 28(9)(c)(iii) which provides for the provision of legal aid in circumstances where the subject matter of the dispute is the applicant's home. However, in practice, this exception is quite narrowly defined and will only apply where:

- the applicant suffers from an infirmity of the body or the mind due to old age or some other circumstance, **or;**
- he or she have been subjected to duress, undue influence or fraud, **and;**
- a refusal would cause hardship to the applicant.

In other words, if the applicant for legal aid does not suffer from a physical or mental infirmity; or has not been subjected to duress, undue influence or fraud, then they will not be able to avail of this exception and so, quite a large number of those facing repossession proceedings will inevitably see themselves excluded from the Scheme.

The Report of the Review of the Administration of Civil Justice includes research by the Centre for Housing Law, Rights and Policy at NUI Galway where, in the 2,396 cases examined, the home loan debtor had no recorded legal representation in 70% of cases and in 7% of these cases the home loan debtor represented themselves.[23] It must be assumed that a significant proportion of these debtors would have sought to avail of the Scheme, had it been available to them.

[21] [2008] IEHC 379

[22] It is acknowledged that Regulation 13(9) allows the Board to provide legal advice (as opposed to legal aid) to an insolvent person who is in arrears on a loan secured on his/ her home and who has been served with possession proceedings in respect of same.

[23] *Review of the Administration of Civil Justice: Report* (October 2020) page 346

It is acknowledged that, separate from the Scheme, access to legal advice is also available under the *Abhaile* scheme. *Abhaile* is operated by the Money Advice and Budgeting Service (**MABS**) to provide assistance to eligible home mortgage holders who are at risk of losing their homes. It provides the services of a duty solicitor who is located in the courthouse building where the possession proceedings are listed. The duty solicitor provides advice and help to unrepresented borrowers at court, which may include explaining to the borrower what is happening in the proceedings, speaking for the borrower in Court to explain what steps are being taken to deal with their arrears, and applying for the proceedings to be adjourned in certain circumstances. However, the service does not extend to acting as the borrower's legal aid solicitor or defending the repossession proceedings on the borrower's behalf. As such, the extent of the legal assistance provided is somewhat limited. In our submission to the Review Group on the Review of the Administration of Civil Justice, the Law Society has expressed concern around the effectiveness of the scheme in providing an appropriate level of legal representation and advice required. We also reported that the payment of legal fees associated with the scheme has frustrated practitioners to the extent that most are reluctant to take on *Abhaile*-related work.[24]

Consideration should be given to ensuring that those facing possession proceedings, particularly proceedings of a complex nature, should to be given meaningful access to the Scheme. *This could perhaps be achieved by broadening the exception in section 28(9)(c)(iii) of the 1995 Act so that not only those who are suffering from some form of infirmity, or who have been subject to some form of duress, undue influence or fraud, are also eligible to apply for legal aid.*

3. Multi Party Actions

Section 28(9)(a)(ix) of the 1995 Act lists as a designated matter *"any other matter brought by or on behalf of a person who is a member, and acting on behalf of a group of persons having the same interest in the proceedings concerned."* Where section 28(8)(d) provides that: *"an application for a legal aid certificate shall not be refused by reason only of the fact that a successful outcome to the proceedings for the applicant would benefit persons other than the applicant"*, these provisions, when taken together, effectively prohibit the provision of legal aid in multi-party litigation.

As noted by the Law Reform Commission (**LRC**) in its Report on Multi-Party Actions, section 28(9)(a)(ix) has traditionally been used to exclude representative actions from the general ambit of civil legal aid and has arguably contributed to the under use of that form of multi-party litigation.[25]

In its report, the LRC notes that the principle of access to justice has traditionally formed a central rationale behind the introduction of multi-party procedures. On this basis, the LRC considers that *"meaningful access to justice would be strengthened by reform of this area of the law"*.[26] While recognising the constraints within which the Board operates in this area, the LRC notes that where the possibility of legal aid is open to those litigating in an individual capacity, there seems no sound basis for its blanket exclusion where the same individuals propose to take advantage of cost efficiencies offered by a multi-party action.[27]

In this context, the LRC stressed that it was merely recommending that, in any collective costs order made by the Court, each group litigant be held liable for an equal share of the costs and that legal aid would only go to cover the share due from member(s) who were

[24] *ibid* page 348
[25] Law Reform Commission, *Report on Multi-Party Litigation* (LRC 76-2005) para 3.43
[26] *ibid* para 1.57
[27] *ibid* para 3.48

deemed eligible for such aid. On that basis, the LRC recommended that the 1995 Act be amended to make provision for the funding of an otherwise eligible group member for his proportion of any eventual costs order.[28]

In its 2003 Consultation Paper, the LRC noted that the Irish legal system lacks a comprehensive procedure to tackle class claims in a uniform and consistent fashion – an assertion that has been characterised as valid as late as December 2020.[29] Subsequently, calls for the introduction of a Multi-Party Litigation scheme in Ireland have increased, with the introduction of the Private Member's Multi-Party Actions Bill 2017 on foot of which government agreed to refer the issue for consideration as part of the Review of the Administration of Civil Justice which found a clear need to legislate for a comprehensive multi-party action procedures in Ireland.[30]

It is submitted that if section 28(9)(a)(ix) of the 1995 Act be amended so as to allow for such litigants who would be otherwise eligible to apply for legal aid.

4. Defamation

It is submitted that, depending on the circumstances of the case at hand, the exclusion in respect of defamation section 28(9)(a)(i) may not be justified.

Again, the constraints, both from a resources and financial perspective, within which Board operates must be acknowledged as is the fact that some of the designated matters raised earlier in this submission arguably present more severe consequences than those faced by a person alleging that their good name has been defamed.

It is also notable that defamation proceedings are excluded from the remit of Civil Legal Aid in Scotland,[31] England and Wales,[32] and the Australian province of New South Wales.[33] However, depending on the severity of the defamation, this wrong may also carry grave consequences for the person in question, calling into question his or her good name, personal and professional integrity and potentially affecting employment prospects etc.[34] The potential for unfairness is exacerbated where there is an inequality of arms between the parties i.e. in circumstances where a large media organisation or political party has posted something potentially defamatory about an individual of limited means.

It is submitted that, as opposed to having a blanket ban in respect of these designated matters – subject to the somewhat limited exceptions in section 28(9)(c) - consideration be given to reframing these designated matters so that that they are presumptively, as opposed to absolutely, excluded.

5. Tribunals

Under the 1995 Act, the remit of the Board does not extend to providing people with legal representation before quasi-judicial tribunals and bodies, including the Workplace Relations Commission (**WRC**).

This is particularly concerning where many employers, service-providers, or public bodies will have legal representation during these cases, with those challenging discrimination in

[28] *ibid* paras 3.48-3.49
[29] *ibid* page 232
[30] *ibid* page 232
[31] *The Legal Aid (Scotland) Act 1986*, Schedule 2, Part II, para 1
[32] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 2. Part 7
[33] New South Wales Legal Aid Policy 6, item 26
[34] See below the discussion of the ECtHR in *Steel & Morris v United Kingdom* No. 68416/01, 15 February 2005

the workplace/in accessing services often having to navigate complex employment and equality laws without legal assistance.[35] Legal representation before the WRC is necessary in such cases in order to ensure an equality of arms between the parties; where particularly complex issues fall to be determined in the context of the complaint; the difficulty for the complainant or respondent to be objective on their own behalf and, notably, the increased formality of proceedings that is likely to result from the decision of the Supreme Court in *Zalewski*.

Employment law queries were among the most prevalent on FLAC's Information Line in 2021, after family law. However, as Scheme does not offer legal aid for employment or discrimination claims, irrespective of how complex the issue or vulnerable the claimant, there is nowhere to send people for further advice and representation. Typically, this leaves people unable/unlikely to pursue employment law claims.

While the right to legal aid is not absolute, the courts have held that the question of whether the provision of such aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case which will depend on matters such as the:

- Importance of what is at stake for the applicant[36], taking into account their vulnerability[37]
- Emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court[38]
- Complexity of the relevant law or procedure[39]
- Need to establish facts through expert evidence and the examination of witnesses[40]
- Applicant's capacity to represent him or her effectively[41]

Any one of these points alone provides a clear rationale for the extension of the Scheme to include employment and equality law, and matters coming before the WRC.

Outside the family relationship, the employment relationship is often where people invest most. Any individual's capacity to represent themselves in such matters is impacted, not only by what is at stake, but by their emotional involvement in the issue.

In cases which involves EU law, Article 47 of the ECHR provides that *"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."* As such, it is of note that much of our employment and equality legislation emanates from EU law and, as such, written submissions in WRC cases involving employment law, equality and anti- discrimination invariably involve aspects of EU law.

Article 47 is directly applicable in this jurisdiction and we therefore submit that there is a ECHR obligation to provide legal aid if a claim involves EU law and it is necessary in order to ensure effective access to the court. This clear, directly applicable right is not reflected in the current provision of legal aid which requires immediate reform.

[35] Submission from Independent Law Centres to the Anti-Racism Committee's Public Consultation on a new National Action Plan against Racism for Ireland (14 July 2021)
[36] Steel and Morris v The United Kingdom, no 68416/01, 15 February 2005
[37] *Nemov v Bulgaria*, no 33738/02, 16 July 2002
[38] *Airey v Ireland* 32 ECtHR Ser A (1979): [1979] 2 E.H.R.R. 305
[39] Ibid.
[40] Ibid.
[41] Ibid.

There are also clear economic benefits to expanding the Scheme to include employment and equality law. In 2019, Access to Justice and Legal Aid Committee at the International Bar Association (**IBA**) and the World Bank jointly published a report - A Tool for Justice: A Cost Benefit Analysis of Legal Aid[42] which notes that *"legal aid is intrinsically tied to the concept of the state and its duty to guarantee equality of arms as an element of equality under the law."*[43]

International research shows that legal needs are predominately civil in nature with the most common areas in which legal aid is sought relate to family, consumer rights, government benefits, housing, employment issues, land and property disputes, conflicts with neighbours, and debt relief.[44] Several studies demonstrate that legal aid can deliver substantial savings to government by reducing expenditure on other public services or avoiding/limiting the use of state resources. For example, a UK study examines how adverse consequences associated with civil justice problems, and the downstream costs for other public services, can be mitigated by legal advice.[45] Using data from the justice survey and the outcome data from legal aid work, the study finds - specifically in relation employment law - that for every £1 of legal aid expenditure on employment advice, the state saves £7.13.

The above point is underscored by the Supreme Court's finding in the *Zalewski* case that the WRC is indeed engaged in the administration of justice. The following quote by Justice McMenamin in that case is pertinent - referring to the employee litigant, he said:

> "*Throughout the process he has been ably represented by his lawyers. The events in this case prompt a question as to how the appellant could have vindicated his rights if he had not been legally represented?*".[46]

The Supreme Court in *Zalewski* positioned the WRC far above an "*administrative or quasi-judicial tribunal*", holding that the functions of the WRC are the administration of justice, pursuant to Article 37. (Then) Mr Justice O'Donnell stated that in such proceedings *"the standard of justice administrated under Article 37 cannot be lower of less demanding than the justice administered in courts under Article 34".*

If the standard of justice administered under Article 37 cannot be less than the standard delivered under Article 34 then it must follow that the rules relating to legal aid should also be the same. If legal aid is available, as it is, for matters pertaining to Article 34, then it should be available to matters pertaining to Article 37.

In this context, we see no legal rationale for the exclusion of employment and equality law from a State-funded scheme which is specifically constituted to *"make provision for the grant by the state of legal aid and advice to persons of insufficient means in civil cases."*[47]

As such, we propose that the Scheme be expanded to include cases taken to the WRC under employment, employment equality and equal status legislation.

Our submission on a New National Action Plan Against Racism for Ireland highlighted the absence of State-funded legal aid to represent complainants before the WRC, irrespective of the complexity of the case, the vulnerability of the complainant or whether the respondent

[42] A Tool for Justice: A Cost Benefit Analysis of Legal Aid
[43] Ibid, p. 7
[44] Pascoe Pleasence, Nigel J. Balmer and Rebecca L. Sandefur, Paths to Justice: A Past, Present and Future Road Map, 2013
[45] See The National Association of Citizens Advice Bureau, Towards a business case for legal aid, July 2010
[46] Zalewski -v- Adjudication Office & Ors [2021] IESC 24, para. 54
[47] 1995 Act

is legally represented. We believe that civil legal aid should be extended to persons of limited means seeking to take case to the WRC and that consideration is given to increasing the institutional capacity of the Irish Human Rights and Equality Commission (**IHREC**) to enable it to significantly increase the legal assistance it provides to victims of discrimination.[48]

6. Adoption Authority

It would be hugely helpful if legal aid was extended to Adoption Authority hearings.

7. Social Welfare Appeals

As seen year on year, there is a high success rate in overturning decisions to refuse social welfare payments, particularly where it involves an oral hearing by the Social Welfare Appeals Office. While there is limited knowledge/understanding around the appeals system, this high success rate raises serious questions about the adequacy of decision-making in the first instance.

The availability of legal information and advice on social welfare is essential to ensure that people are protected against poverty and social exclusion. However, the availability of supports is currently limited to Citizen's Information Offices, MABS, NGOs and the very limited number of independent law centres working in this area. Support is not available generally to the public and is far from consistent across the country.

In terms of legal representation in social welfare appeals, as with the WRC, the quasi-judicial organ of the DSP – the Social Welfare Appeals Office/SWAO – falls outside of the remit of the Board.

This situation requires urgent reform, and ***civil legal aid should be made available for social welfare appeals where representation is necessary – for oral hearings, written submissions or both.***

8. Additional Areas of Note

It is necessary to consider additional areas which currently operate outside the Scheme as well as one of vital importance which will operate under the Scheme once operational i.e. section 52 of the Assisted Decision-Making (Capacity) Act 2015 (as amended) ("the **2015 Act**").

i. The Mental Health Legal Aid Scheme 2005

This scheme provides for legal aid for a patient within the meaning of the Mental Health Act 2001 ("**the 2001 Act**") in order to provide them with legal representation before a tribunal in proceedings under that Act.

This scheme is currently administered by the Mental Health Commission (**MHC**) but is intended to be administered by the Board when the enabling provision (section 52 of the Assisted Decision-Making (Capacity) Act 2015) is commenced. The provision would entitle a patient requiring legal representation before a tribunal under the 2001 Act to a legal representative without the application of eligibility criteria pursuant to section 28(2) of the 1995 Act. This scheme is provided exclusively by private practitioners, with 81 solicitors currently on its panel.

[48] It is noted that the Irish Human Rights and Equality Commission has a statutory function to provide legal assistance to individuals to bring complaints of discrimination to the Workplace Relations Commission. However, this is done on a strategic basis - within the limited legal resources of that organisation. As such, it cannot meet the needs of the Traveller and Roma population more generally, as currently constituted.

ii. ***Legal Aid - Custody Issues Scheme*** (formerly, the AG's Scheme)

This scheme was put in place during the *habeas corpus* application in *Application of Woods* [1970] IR 154 in which the Attorney General provided an assurance to the Supreme Court that an applicant for *habeas corpus* would have their legal costs paid where they were not in a position, due to personal reasons, to retain the services of a legal team.[49] In 2013, the Board began to administer this scheme under the Legal Aid - Custody Issues Scheme.

While *habeas corpus* applications were generally thought to relate to criminal matters, there is also a civil dimension in circumstances where an applicant is deprived of their liberty, not as a criminal sanction but - for example - where they are subject to a detention order pursuant to the 2001 Act.

An applicant for this type of legal aid must request same from the Judge hearing the application for *habeas corpus* at the earliest opportunity when it is invariably granted. It is not an alternative to costs and the applicant must elect whether to proceed under the scheme, in which case they cannot apply for their costs at the end of the case, or not to seek the application of the scheme, in which case they may, if successful, recover their costs.

There is no set scheme of fees - they are negotiated with the Board following completion of the case however, they are generally considerably less than would be secured by an order for costs against the respondent.[50]

iii. The 2015 Act

Once commenced, section 52(c) of the 2015 Act (which inserts paragraph 3A into section 28 of the 1995 Act) will provide that legal aid will be available for an application under Part 5 of the 2015 Act relating to the matter referred to in section 37 (1) of that Act - Declarations as to Capacity and as to lawfulness of an intervention.

Section 3A states that the following requirements do not apply to those seeking legal aid for such applications:

- ***Section 28 (2)(c)*** - the applicant is reasonably likely to be successful in the proceedings, assuming that the facts they put forward in relation to the proceedings are proved before the court/tribunal concerned; and

- ***Section 28(2)(e)*** - having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it.

If, and only if, the applicant is a relevant person does the requirement under paragraph 28(2)(a) not apply i.e. financial eligibility.

Section 36(1) states that *"a relevant person, or any person who has attained the age of 18 years and who has a bona fide interest in the welfare of a relevant person, may make an application to the court under this Part [which includes section 37(1)]".*

[49] See Whyte, Gerry Social Inclusion and the Irish Legal System p427
[50] See also Legal Aid Board - Custody Issues Scheme Provisions & Guidance

A relevant person is defined in section 2 of the 2015 Act as:

(a) a person whose capacity is in question or may shortly be in question in respect of one or more than one matter,
(b) a person who lacks capacity in respect of one or more than one matter, or
(c) a person who falls within paragraphs (a) and (b) at the same time but in respect of different matters, as the case requires;

Section 52(e) of the 2015 Act, once commenced, will allow for a clawback of legal aid by inserting section 7A after section 33(7) of the Civil Legal Aid Act 2015 *"(7A) Where a legal aid certificate has been granted to an applicant who is a relevant person who does not satisfy the criteria in respect of financial eligibility specified in section 29, the Board may seek to recover some or all of the costs of providing the legal aid to the relevant person concerned."*

Part 6 of the 2015 Act concerns the review by the wardship court, and discharge from wardship of current wards of court. The wardship court may also appoint a decision-making representative.

Legal aid will be available to the relevant person and the ward in these cases, and there is no requirement to satisfy some of the usual pre-conditions, including the financial criteria, although the 2015 Act provides for the subsequent recovery of costs if the relevant person or ward is deemed to have means.

In relation to the provision of legal aid under Part 5 and Part 6 - when the applicant is someone other than the relevant person or ward - in many cases, the applicant will be a family member of the relevant person or ward who seeks to resolve the question of capacity and secure appropriate decision support arrangements for their loved one.

Like the relevant person or ward, the applicant is not required to satisfy the merits criteria in order to qualify for legal aid however, the applicant will have to satisfy the financial criteria, based on their own means rather the means of the relevant person or ward, even though they are not seeking to secure a benefit for themselves. The threshold for the financial criteria is currently very low and many applicants who are family carers of relatively modest means will not qualify. This may make it difficult for family carers to obtain representation in relation to these new and complex applications to the Circuit Court and High Court and to source documentation to support the application, including expert statements in relation to capacity, where required.

If family member applicants are inhibited from bringing applications on the grounds of cost, ultimately this will deny, or at least delay, access by the relevant person or ward to the processes/supports available under the 2015 Act.

As such, the financial criteria for legal aid should be modified, or dispensed with, in respect of the applicant and/or linked to the means of the relevant person or ward, with provision for recovery of costs from the applicant in appropriate circumstances.

We would ask that the Group might consider the following as an alternative approach to eligibility for civil legal aid:

Transparent criteria in lieu of a prescriptive list

It is universally recognised that legal aid is an essential element of a fair, humane and efficient justice system that is based on the rule of law. In particular, access to justice is a basic principle of the rule of law and civil legal aid is a tool which enables disadvantaged members of society to seek justice and remedies for wrongs perpetrated against them, where that would otherwise not be possible.

While the Scheme provides that civil legal aid is available for all types of civil court proceedings, unless they are expressly excluded, it is important that criteria be drawn up to allow principled decisions to be taken on issues around scope and eligibility for civil legal aid, following consideration of the views expressed by relevant stakeholders.

Rather than prescribing a list of types of claims to be excluded from scope, the criteria should consider the complexity of the case, whether the need for legal support is urgent, the consequences for failing to provide legal aid and the status of the potential claimant. This approach has been adopted by the UN Principles and Guidelines on criminal legal aid.

The criteria, which should be reviewed from time to time, should be clear and transparent, while maintaining flexibility.

Assuming that a basic cornerstone of any civil legal aid system is equal access to justice for all, with the most disadvantaged being positioned to raise the same legal issues as those with the deepest pockets, then it would be arbitrary to deny those deserving claimants the opportunity to pursue claims (or counterclaims) by reference to an exclusionary list based on what are considered to be acceptable types of claims.

It should be generally open to an eligible candidate to seek aid in respect of any civil, administrative and family law matter, subject to a narrow list of excluded areas, provided that they meet set qualifying criteria.

There is an inherent artificiality in adopting a prescriptive list - whereby certain types of claims are excluded from aid - which could be viewed as constituting an attempt on behalf of policymakers to determine that certain legal services have greater priority or importance when that is, of course, an entirely subjective matter and one which very much depends on the circumstances of the applicant for aid.

2. ***It is submitted that the availability of legal aid should be determined by need, rather than area of law. 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?***

Possible Criteria for Priority

The constraints within which the Scheme currently operates is acknowledged and, as such, there must be scope to exclude certain claims from the Scheme. However, given the fact that no two cases are the same, it is submitted that any “designated matters” are subject to a *presumption of exclusion* capable of being rebutted by the facts of a particular case. In this regard, the principles developed by the ECtHR are potentially instructive.

For instance, in *Steel and Morris v. the United Kingdom*,[51] it was held that a key factor in determining whether the provision of legal aid is necessary to protect the right to a fair trial - as enshrined in Articles 6 and 13 of the ECHR - is the importance of what is at stake for the applicant in question;[52] the complexity of the relevant law and procedure and the applicant's ability to represent him or herself effectively. In this case, the applicants were accused of libel by McDonald's, they applied and were refused legal aid it as it was not available for defamation proceedings in UK. The Court found that: the financial consequences for the applicants would be quite severe if they were to be found liable for defamation; the applicants lacked legal knowledge, and; the case itself was legally and factually complex. Thus, the Court ruled that the denial of legal aid deprived the applicants of the opportunity to present their case effectively and contributed to an inequality of arms, in violation of their right to a fair trial.

In *Airey v Ireland*,[53] the Court highlighted a number of circumstances which cumulatively led to a finding that Mrs Airey had been denied an effective right of access to a court by the State's refusal of legal aid. Firstly, the proceedings (which concerned an application for a decree of judicial separation from the applicant's husband) were commenced by petition and conducted in the High Court, where the procedure was complex. Secondly, litigation of this kind, in addition to involving complicated points of law, necessitated proof of adultery, unnatural practices or cruelty, which might have required the tendering of expert evidence or the calling/examination of witnesses. The Court drew attention to the fact that the applicant was from a humble background, had worked as a shop assistant from a young age before marrying and having four children, and had been unemployed for much of her life. In all of the circumstances, the Court considered it most improbable that Mrs Airey could effectively present her own case.[54] The Court has also held that the vulnerability of the applicant, in tandem with some of the above factors, may have dictated that the person be entitled to legal aid.

In *Nenov v Bulgaria,*[55] the applicant, who was suffering from mental health problems, repeatedly referred to low income and a lack of legal expertise in their requests for legal assistance before the domestic court. This request was rejected on the basis that the law at this time did not provide free legal aid in civil proceedings. The applicant lost the case (domestically) and lodged an application with the Court. Given the importance of the outcome of the case, the complexity of the procedures, the principle of the equality of arms, and the mental health problems suffered by the applicant, the Court concluded that legal aid was required and consequently found a violation of Article 6(1) of the ECHR.

We would ask that the Group might also consider the following principles which can be gleaned from the above case law:

ECtHR - Five Guiding Principles

1. Importance of what is at stake for the applicant.
2. Emotional involvement of the applicant which may impede the degree of objectivity required by advocacy in court.
3. Complexity of the relevant law or procedure.
4. Need to establish facts through expert evidence and the examination of witnesses.
5. Applicant's capacity to represent him or herself effectively.

[51] No. 68416/01, 15 February 2005
[52] See also *P., C. and S. v. the United Kingdom* no. 56547/00, 16 July 2002
[53] No. 6289/73, 9 October 1979
[54] See also: *McVicar v. the United Kingdom*, no. 46311/99, 7 May 2002, §§ 48-62
[55] No. 33738/02, 16 July 2009

It is further submitted that priority for aid should be afforded based on the urgency of the case, taking into consideration any adverse consequences that delay in providing legal representation would cause the civil legal aid applicant.

The Court has consistently held that the procedure by which legal aid schemes select the types of cases which qualify for aid are considered justifiable, provided that they offer individuals substantial guarantees to protect applicants from arbitrariness.[56] As noted by the Court in *P., C. and S.*:[57]

> *"[…] although the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice".*

According to the Court, this selection procedure falls to the State, and will not raise a difficulty with reference to the ECHR provided that Member States do not act arbitrarily or disproportionately.[58] In *Airey*, the Court emphasised that it was not for an international court to decide how a State should respond to its obligations under Article 6 of the ECHR. As such, the above discussion is not proffered an attempt to demonstrate that the current scope of the Scheme is incompatible with EU Law. Rather, the above case law affords the Irish Government a wide margin of discretion. These cases, and the principles they establish, could provide a framework through which the areas of the law currently excluded by section 28(9)(a) could, in appropriate circumstances, be departed from.

What is proposed is not wholly dissimilar to the provision in section 28(5)(a) of the 1995 Act, which provides that legal aid may be granted to a person in circumstances where the State is, by virtue of an international instrument, under an obligation to provide civil legal aid to the applicant. However, that provision is narrow and it only seems to apply in circumstances where the International Instrument (i.e. the ECHR) obliges the State to provide legal aid to citizens. Again, the Court has given Member States a wide margin of discretion in determining what categories of litigants ought to be entitled to legal aid. By way of comparison, section 10 of the 2012 (UK) Act empowers the Director of Legal Casework to determine that legal services should be provided to a person in respect of a type of case which is not generally covered in circumstances where, *inter alia,* a failure to do so would be a breach of the individual's ECHR rights or any rights of the individual to the provision of legal services that are enforceable EU rights; or that it would be appropriate to do so in the particular circumstances of the case, having regard to the risk that failure to do would be a breach of the above rights.[59]

It is clear that the "exceptional funding" provision in the 2012 (UK) Act is broader in scope than section 28(5)(a) of the 1995 Act. ***Consideration should be given to perhaps broadening the scope of section 28(5)(a) - borrowing both from the UK legislation and perhaps, the principles established by the ECtHR. Such an approach could strike a balance between acknowledging the limited resources of the Board and the need, when the justice of a case so demands, to provide litigants with legal aid in the types of cases which are generally (or presumptively) excluded from the Scheme.***

In its Guide on Legal Aid Principles, the IBA submits that cases should be prioritised for civil legal aid in accordance with the interests of justice, which in turn considers the importance of the matter to the individual and the importance of the matter of others in society (particularly

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[56] See *Gnahore ́ v. France*, cited above, § 41; *Essaadi v. France*, no. 49384/99, 26 February 2002, § 36; *Del Sol v. France*, no. 46800/99, 26 February 2002

[57] No. 56547/00, 16 July 2002

[58] ibid.

[59] This provision in effect replaces the previous terminology under the *Access to Justice Act 1999* whereby services as a whole were either in scope or excluded.

disadvantaged groups), as well as the complexity of the matter, the availability of satisfactory alternative methods of achieving justice and the likelihood of success. It also provides that, in some instances - such as family law matters, the likelihood of success will not be relevant.

The likelihood of success criterion should be treated with caution, since it will generally involve an early estimate of the outcome of litigation which is not based on a full appraisal of the facts or available evidence. As such, it should not be used to deprive individuals of access to justice which is available to those who can afford to pay their own legal costs.

As part of this matrix of considerations, priority should only be given to matters which are clearly justiciable and not trivial as it is vital that resources are deployed for deserving candidates and cases. Setting down rules for prioritising support, advice and representation under the Scheme must ensure sufficient flexibility, so that its operators can prioritise their limited resources to the most deserving of cases.

Categories of cases which should attract priority

Without prejudice to the responses to Q1, family law cases must be prioritised under any scheme of civil legal aid, given the constitutional status of the family and voice of the child.

As it stands, domestic violence cases, gender-based violence cases and child protection matters have priority under the Scheme which should be maintained.

Cases pursuant to the 2015 Act should be prioritised for support, advice and representation. It will not be possible for the Board to deliver legal aid via its Law Centre structure and a private practitioners panel of solicitors will have to be put in place to provide representation. As the 2015 Act represents a fundamental change in existing law, support and advice will also need to be provided - whether by the Board itself or by delegating this function to a private practitioner panel.

The only provision for legal aid currently proposed for applications under the 2015 Act are in relation to section 37(1) (Declarations as to Capacity and as to lawfulness of an intervention).

Management of resources to assist in prioritisation-based decision making

This Review should consider whether civil legal aid should be managed solely by the Board through Law Centres and perhaps how the Private Practitioner's Scheme (PPS) can be made more attractive to practitioners

The Group should take this opportunity to ascertain what other non-legal community-based services they could link in with the Board with to assist and support Applicants e.g. in family law cases, could local Family Resource Centres assist with mediation and parenting classes? If Boards are making such decisions it's a question of having appropriate training, resources and time. Having suitably qualified staff to screen legal aid applications is essential. At case screening stage, qualified practitioners can ascertain the urgency of a case or whether a matter is more suited to alternatives (e.g. ADR or court).

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

The Society favours expansion of the scope of the Scheme to include certain quasi-judicial matters (see response to Q1). It is less than ideal that an impecunious individual cannot avail of civil legal aid before a quasi-judicial body. Under the current system there is an inequality of arms – as previously mentioned, often in WRC cases - where an employee of limited means must represent themselves in a claim against an employer who is often/always legally

represented. Arguably, if legal aid was to be provided for representation before Tribunals, this could make the focus more adversarial, but, if one side has legal representation, then the other side is at an immediate disadvantage in not being legally represented.

By Ministerial Order, the Scheme can be extended to apply to proceedings before any prescribed tribunal although, to the best of our knowledge, that has only happened in the case of applicants appearing before the International Protection Appeals Tribunal (**IPAT**)[60]. The apparent rationale for this exclusion is that tribunals are intended to be relatively informal, that legal representation works against the objective of accessibility to users[61] and that tribunal costs are reduced if legal representation is excluded. However, even those who make such arguments recognise that there will always be cases where the requirements of justice demand legal representation. The Leggatt Report, commissioned by the UK government, although advocating for a reduction in the number of cases where legal representation is needed, accepted that some tribunal decisions had serious consequences, and that *"a complex and rapidly developing body of case law meant that few appellants could realistically be expected to prepare and present their cases themselves"*.[62]

In 1991, our Report on Civil Legal Aid recommended that the remit of the Board be extended to include all tribunal work. It was also critical of the fact that legal representation was confined to the courts and excluded representation at what was then the EAT, stating:

> *"We are strongly of the view that the scheme should be extended to cover representation of persons before tribunals, particularly the Employment Appeals Tribunal. This is in accordance with the recommendations of the Pringle Committee. It seems to us that the Tribunals are operating under various statutory provisions which have jurisdictions and powers that can substantially affect individual rights. It is important that persons appearing before such tribunals should have adequate legal representation and that, where such persons cannot afford the cost of solicitors, legal aid is available. The Government should bear in mind in considering this recommendation, that while it would necessitate additional finance to extend the scheme to tribunals, the availability of legal assistance at the tribunal stage could so affect the outcome of a case as to render an appeal to the Circuit Court unnecessary."*[63]

These arguments arguably carry more significance today given the ever increasingly complex nature of legal arguments and factual scenarios presented before tribunals. The current blanket exclusion (with the exception of IPAT proceedings) is difficult to justify given that many hearings before these tribunals present complex issues of law and fact to be decided.

In terms of the WRC, while its website states that there is "*an element of informality about the hearings*", in practice, it functions very similarly to a court. Free Legal Advice Centres (**FLAC**) has noted that:

> *"A substantial body of employment law now springs directly from increasingly complex European Union law. Claims in the area of dismissal may encompass issues such as transfer of undertakings, unfair selection for redundancy, procedural fairness and maternity protection. In these circumstances, there is a risk that certain individuals, particularly when making complex and technical claims, may not be able to present their cases in the manner that fairness demands"*[64]

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[60] Civil Legal Aid (International Protection Appeals Tribunal) Order 2017 (SI No 81 of 2017)
[61] Leggatt (2001) A Tribunal For Users – One System, One Service : Report of the Review of Tribunals
[62] *ibid* at page 150 as cited in FLAC *Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland* (July 2005) page 26
[63] Law Society Committee on Civil Legal Aid (1991) Report on Civil Legal Aid, para. 17
[64] FLAC *Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland* (July 2005) page 27

The often-complex nature of employment law is highlighted by the fact that, in 2020, 1,305 people appearing before the WRC had representation (see footnote 65). Perhaps more concerning is that, in the same year, 1,255 parties self-represented – 716 (57%) of whom were complainants and 539 (43%) respondents. None of those who self-represented were entitled to legal representation under the current Scheme. We cannot know how many people, with a legitimate employment-related grievance, were dissuaded from bringing a case to the WRC on the basis that (1) they did not have the legal background to bring their own case; (2) they did not have the financial means to hire legal representation, and; (3) they were not eligible for Legal Aid under the Scheme.

In 2020, the CEO of FLAC, Eilis Barry, noted that:

> *"complaints before the Workplace Relations Commission are excluded from the civil legal aid system … as a result, too few employment equality cases ever see the light of day when the complainant cannot afford representation".*[66]

Further, in a submission to the WRC, FLAC criticised the blanket nature of this exclusion, as failing to take into account individual nuances, such as the complexity or sensitivity of the issue, the capacity of the person to represent him or herself, and the resources of the individual.[67] Community Law Mediation has also noted the major barriers this creates for vulnerable persons seeking to enforce their employment rights.[68]

While a stated aim of the establishment of the WRC was to remove the need for lawyers - in reality, the vast majority of respondents (i.e. employers, service providers and public bodies) will always have the resources to engage legal representation. Again, this raises serious concerns around an equality of arms and natural/constitutional justice.

Again, social welfare appeals can also be highly complicated. As noted by FLAC in its Report on Access to Justice, a complex issue which often arises in these cases is in relation to the "Habitual Residence Condition". Since 1 May 2004, an applicant for child benefit or social assistance payments - including carer's allowance, disability allowance, non-contributory old age pension, unemployment assistance or normal supplementary welfare allowance - has to satisfy the Department of Social Protection that they meet the Habitual Residence Condition. If a person cannot satisfy the Department that they have been resident in Ireland for the previous two years, they may be refused assistance. This applies whether the person is originally from Ireland, another EU state or a third country. Such a refusal may be appealed to the Social Welfare Appeals Office. At the appeal, the Appeals Officer will assess the legal issue of "habitual resident", a question which is often complicated by the fact that the term itself is not defined in Irish law. Rather, as noted by FLAC:

> *"This assessment will be based on five criteria established by the case law of the European Court of Justice, as well as on the facts of the case. These criteria are:*
>
> 1. *applicant's main centre of interest;*
> 2. *length and continuity of residence in a particular country;*
> 3. *length and purpose of absence from a country;*
> 4. *nature and pattern of employment in a country; and*
> 5. *future intention of applicant concerned as it appears from all the circumstances."*[69]

[65] Workplace Relations Commission 2021 Annual Report page 40
[66] Órla Ryan, ''She was left vulnerable': 64-year-old woman awarded €10,000 after being fired over age and illness' (The Journal.ie, 26 June 2020)
[67] 'FLAC Submission to The Workplace Relations Commission on the "Consultation Paper on Remote Hearing and Written Submissions Dealing with Adjudication Complaints During the Period of Covid-19 related Restrictions"' (FLAC, April 2020) 9
[68] 'Annual Report 2019' (CLM, 2020) page 32
[69] FLAC *Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland* (July 2005) page 27

Despite the fact that the determination of this issue is at least as complex as many types of cases currently which are currently within scope of the Scheme, the Board is not authorised to provide representation on the basis that it is before a tribunal.

It is also of note that The Legal Aid (Scotland) Act 1986, Schedule 2, Part I, para 1 provides that civil legal aid shall be available in proceedings before the Employment Appeals Tribunal and in appeals before the Social Security Commissioners. Similarly, New South Wales permits persons appearing before the NSW Civil and Administrative Tribunal to apply for, and obtain, legal aid.[70]

It has been suggested[71] that the recent decision of the Supreme Court in *Zalewski v Adjudication Office & Ors*[72] will pre-empt the further expansion of quasi-judicial statutory bodies in Ireland. This expansion, if realised, will further strain the resources of the Scheme, in the event that persons appearing before quasi-judicial bodies were considered potentially eligible. However, the finding in *Zalewski* - which held that the WRC was involved in the administration of justice but in a manner that was constitutionally permissible within Article 37 of the Constitution - strengthens the argument that persons appearing before tribunals such as the WRC ought to be legally represented.
In the case, McMenamin J noted that:

> *"in industrial relations law, as in equality law, there are areas which would be challenging, even for legally qualified persons, not to mind those not so qualified"*[73]*,* and questioned, given the complex issues arising in this case, how "*the appellant in this case could have vindicated his rights if he had not been legally represented?*[74]*"*

While many quasi-judicial bodies were established for the purposes of reducing both costs and the necessity for the involvement of lawyers, in reality these bodies often operate under a complex set of rules and adopt similar formalities to court settings and increasingly, involve the participation of lawyers. Moreover, many disadvantaged persons who are eligible for civil legal aid on a financial means tested basis are not properly equipped to adequately navigate through quasi-judicial settings.

It appears illogical to create a barrier in terms of civil legal aid for such persons where their case falls within the jurisdiction of a quasi-judicial body and eliminate that barrier where their case falls within the jurisdiction of the ordinary courts. In both situations, the eligible individual is deserving of civil legal aid and often requires it in order to achieve access to justice. Civil legal aid should not distinguish between judicial and quasi-judicial settings in terms of its ambit since legal assistance and representation can be just as necessary in a quasi-judicial setting and the outcome of that process can be just as important for the individual concerned.

Again, we believe that employment and equality matters must be covered by the Scheme. Employment and equality laws are complex and technical and, in practical terms, often inaccessible to people who do not have an advocate, union representative or legal assistance. Concepts to be dealt with include reaching the standard of a *prima facie* case, establishing a comparator employee, and the operation/application of various EU Directives (e.g. the Race Directive). These are matters which require expert advice.

[70] New South Wales Legal Aid Policy 620A, and 6.8
[71] Hugh Gallagher, Legal aid and Quasi-Judicial Bodies Post-*Zalewski* Trinity College Law Review (2018)
[72] [2021] IESC 24
[73] [2021] IESC 24 (McMenamin J) para 138
[74] *Ibid* para 54

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?

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

Barriers which prevent or obstruct a citizen with limited resources from accessing justice must be eroded but equally, any assistance provided to those of limited means must be applied so that the scales of justice are not disproportionately tilted to disadvantage a party which does not qualify for legal aid.

It is important that, in considering eligibility for legal aid, the unpalatable situation does not arise where access to courts is either for the well off or the extremely less well-off - leaving a significant middle group caught in a legal conundrum, determined by economics rather than justice.

It is submitted that, in order to provide equality to all citizens, Regulation 14 (4) should be revoked in full. Each citizen's eligibility for both income and capital should be considered individually and, where parties are married or co-habiting with joint assets and liabilities. a division of such assets or liabilities should be based on a rebuttable presumption[75] of a 50:50 split. All adult applicants should be assessed on their personal disposable income - it is unconscionable that a citizen's assessment would be disadvantaged on the grounds of relationship status. Deductible expenses for a spouse should be limited to a spouse who is in receipt of allowances/pensions payable under the Social Welfare Acts or the Health Acts.

Merit & General Criteria

Section 28 requires that, subject to the merit and means tests being fulfilled[76], the board shall grant a legal aid certificate when they are satisfied that:

- the applicant has locus standi to bring the litigation.
- the applicant is likely to be successful based on the information available.
- the litigation itself is the most economic or outcome based means of providing re-dress for the issues the applicant has presented as requiring litigation.
- taking all circumstances on board including the cost of litigation measured against the benefit to the applicant, it is reasonable to grant the application.

Section 28 (4) provides a discretion to the Board to refuse to grant a legal aid certificate in a list of 5 circumstances ((a)- (e)). It is noted that Category E provides a discretion to the Board for refusal if it is of the opinion that the applicant may obtain the cost of the litigation from, or be provided with legal representation by, a body or association of which he or she is a member *or any other source*.

[75] Applicants may rebut the presumption by providing contrary evidence and, upon receipt of such evidence, the Board may - at its discretion - apply a division of assets as it deems appropriate to the individual circumstances presented. It is also submitted that the Board should, in determining the issue of the assets split and at its discretion, be entitled to consider a hypothetical claw back of joint assets transferred out of the applicant's name in favour of a spouse within 5 years from the date of the application.

[76] With exception to the specific exemptions in the circumstances referenced in subsection 2A, 3 and 3A along with the directions in subsection 5, 5 A, 5B, 5C,5D.

Review of Deductible Benefits

- Travel expenses for the employed applicant which are reasonably required in order to fulfil their contract of employment. It is important that where the income of the employed is assessed, that income is a true reflection of the net income to the applicant, taking account of expenses to which they have no discretion.

- Unsecured debts to which the applicant is contractually obliged to discharge should be included in the deductions as the applicant's disposable income without such re-payment is inaccurate - it provides a false assessment as to whether the applicant can afford private legal services.

Removal of arbitrary maximum deductible figures

Maximum capped deductible allowances should be replaced with the average cost for the applicant's region based on approved statistical data[77], reviewed every three years.

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

While the Scheme recognises certain allowances against income, these have not been reviewed in some time. They should be reviewed on an annual basis and by reference to the cost of living. For example, the maximum allowance for rent/mortgage payments is €8,000 and childcare facilities is €6,000 per child regardless of where the applicant resides. There should be continuous review of the eligibility criteria in the annual budget by the Departments of Justice and Public Expenditure & Reform.

Again, the current eligibility thresholds are inappropriate and outdated. They result in people with low incomes who cannot afford a solicitor - but also do not meet the current thresholds for free legal aid - being denied access to justice. The Board's 2021 Report states that:

> *"The financial eligibility criteria for legal aid and advice have not been substantially changed since 2006. There is no discretion or capacity to provide services to persons who may be marginally outside the financial limits. This effectively reduces access to our services over time."*

For present purposes, using the November 2022 increase, legal aid would not be available for applicants with a disposable income exceeding €22,212 per annum or capital income exceeding €123,400.

The monetary limits in the legislation should be re-set based on the changes in the Consumer Price Index (**CPI**) and reviewed every three years. The change in the CPI from the last revision in 2006 to November 2022 is 23.4 %.

The updated figure should be set at the date of the amended regulation, based on the percentage increase at that time.

[77] Approved statistical data to be set out in regulations and, where there are more than one set of approved statistical data for a particular region, the data which most benefits the applicant is to be preferred.

iii. What is your rationale for that figure?

The linking of the figure to the CPI is an unbiased, widely accepted method of fairly assessing the economic climate and the availability of resources to citizens to fund their own litigation.

The income threshold of €18,000.00 disposable income is too low - either that figure should be raised to reflect the true cost of living expenses or allowances should be increased.

According to the CSO, the average weekly earnings in Ireland for Q3 of 2023 were €864.32 which is €43,280.64 pa. This figure has increased from €717.55 in Q3 2017 or €37,312.26.

Currently the allowance for housing is €6k per annum which is massively unrealistic given the current rent or mortgage levels. Applicants can be deemed financially ineligible for civil legal aid because the amount they are pay on rent/mortgage far exceeds the allowance allocated in the means test.

Additional allowances should include:

- Travel expenses to work for employees; and
- Payment of insurance premia which are statutorily mandated such as car insurance, also health insurance.

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

In addition to previously outlined suggestions:

- Allowance should be made for location e.g. accommodation allowance is higher in Dublin and larger urban areas.
- Changes to childcare allowances and housing allowances need to be considered.
- Many people fail the eligibility criteria by a small margin - a 10% uplift should be allowed.

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?

Cases which are fundamental to the right of an individual should meet the criteria given the discretions built into the Scheme, as such there is no need for additional special categorisation.

Currently, a person is entitled to legal aid without undergoing a means test where:

- *they are applying for relief under the Hague Convention relating to child abduction*[78]
- *they are a rape complainant who may be questioned on her sexual history*[79]

[78] Section 28(5) of the 1995 Act relating to the Hague Convention on the Civil Aspects of International Child Abduction
[79] Section 28(5A) of the 1995 Act as inserted by Section 35(3) of the Sex Offenders Act 2001

- *the legal aid to be provided relates to an inquest to be held pursuant to a direction issued to the Dublin District Coroner on the 19th day of December 2019 into a death which occurred –*

  (a) at the premises known as "Stardust", situate at Kilmore Road, Artane, Dublin 5 on the 14th February 1981, or
  (b) after that date as a result of injuries sustained at that premises on that date.[80]

- *the applicant is unable to pay their debts as they fall due and has made a proposal for a Personal Insolvency Arrangement (within the meaning of the Personal Insolvency Act 2012) which includes the home in which he or she normally resides and which has been rejected by his or her creditors;*[81]
- *the applicant is a relevant person in proceedings the subject matter of the application under this section concern an application under Part 5 of the Assisted Decision-Making (Capacity) Act 2015 relating to the matter referred to in section 37 (1) of that Act.*

Cases which should fall into this category:

1. Sexual assault - where the prior sexual history of the complainant is being raised
2. Child abduction
3. Adoption
4. Childcare proceedings
5. All Domestic Violence applications
6. Housing, for cases other than those in the *Abhaile* Scheme e.g. where a tenant is at risk of being made homeless
7. Social welfare
8. Employment equality claims involving discrimination and/or harassment/sexual harassment
9. Any non-criminal civil law cases relating to deprivation of liberty.

   Applications under the 2005 Act - section 52(c) provides that legal aid will be available for an application under Part 5 of the 2015 Act relating to the matter referred to in section 37 (1) of that Act (Declarations as to Capacity and as to lawfulness of an intervention).

   Section 3A states that the following requirements do not apply to those seeking legal aid for such applications:

   - ***Section 28 (2)(c)*** that the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned; and
   - ***Section 28(2)(e)*** having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it.

[80] S.I No. 248 of 2021
[81] S.I. No. 272 of 2016

If, and only if, the applicant is a relevant person does the requirement pursuant to paragraph 28(2)(a) not apply i.e. financial eligibility. Section 36(1) states that *"a relevant person, or any person who has attained the age of 18 years and who has a bona fide interest in the welfare of a relevant person, may make an application to the court under this Part [which includes section 37(1)]".* A relevant person is defined in section 2 of the 2015 Act as:

(a) a person whose capacity is in question or may shortly be in question in respect of one or more than one matter,
(b) a person who lacks capacity in respect of one or more than one matter, or
(c) a person who falls within paragraphs (a) and (b) at the same time but in respect of different matters, as the case requires;

However, Section 52(e) of the 2015 Act, when commenced, allows for a clawback of aid granted by inserting section 7A as follows:

> *"(7A) Where a legal aid certificate has been granted to an applicant who is a relevant person who does not satisfy the criteria in respect of financial eligibility specified in section 29, the Board may seek to recover some or all of the costs of providing the legal aid to the relevant person concerned."*

Recommendations in Respect of the 2015 Act

1. There should be no financial eligibility test in relation to applications under section 37(1) - currently it is intended that there should be no financial eligibility test in relation to "relevant persons" only. This exception should be broadened to include all applicants.

2. Even though it is not currently planned to provide legal aid for the following applications under the 2015 Act, it must be provided, together with an exemption from financial eligibility, as each relates to the fundamental rights of liberty and the right to review wardship:

   - ***Section 49(1)*** - applications to review a declaration as respects capacity pursuant to section 49(1) of the 2015 Act.

   - ***Section 54*** - applications to review capacity of wards who are adults.

   - ***Section 55*** – declarations following review and discharge from wardship.

   - ***Sections 106, 107, 108*** - applications to review detention orders in certain circumstances (approved/non-approved centres).

   - ***Applications pursuant to Part 11 Convention on International Protection of Adults.***

7. Should some form of merits test apply to the cases at 6? If so, what should that look like?

No merit test should apply as these are specific categories of cases requiring special circumstances.

No merit test is applied in relation to applicants for legal aid pursuant to the 2001 Act and applicants for legal aid in relation to matters covered by the 2015 Act as amended, should be exempt from the merits test - that Act protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by those who may have capacity issues. The State ratified the UN Convention for the Protection of Human Rights and Fundamental Freedoms in March 2018. In the Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities (prepared by the Department of Children, Equality, Disability, Integration and Youth), paragraph 168 confirms that *"The Government is working to ensure the right of people with disabilities to effective access to justice on an equal basis to others."*

Effective access to justice does not involve either a merits test or a financial eligibility test for applications pursuant to the 2015 Act. The purpose of that legislation is to reform the law relating to persons who require, or who may require, assistance in exercising their decision-making capacity, whether immediately or in the future - having regard to the Convention on the Rights of Persons with Disabilities.

Without prejudice to the above, if there have been earlier legal aid applications which have been withdrawn, or, if the applicant has proven criminal behaviour in relation to the circumstances for which he or she is applying for legal aid, legal aid should not be provided.

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

It is imperative that a merit test is utilised to deter frivolous/vexatious actions at the cost of the taxpayer. Public funding should not be used in cases where the costs to be incurred significantly outweigh the benefits of taking a case.

Currently, the consideration given on the merits of a case is whether you would be willing to go to court if you were paying for the case with your own money - the premise is not dissimilar to gambling. As resources for civil legal aid are limited, if a paying client would not take a case themselves, then why should it be permissible under the Scheme?

9. How appropriate are the current levels of financial contributions?

In all cases, the current 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. 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 €4k.

We believe the above minimum financial contribution figures have been in existence for a number of years and would submit that the existing contributions should be increased to a new base figure - CPI linked and in line with inflation from the date the current minimum contribution figures were set and reviewed every three years.

In addition to above comments on Issue 3, it is submitted that the existing capital contribution payable when the individual's disposable capital exceeds €4k should be reviewed upwards, as should the qualifying €4k threshold (both amounts should be index linked from the date the current figures were set, should be in line with inflation and reviewed every three years). The

current means-tested Income threshold of €18k net of certain allowances and the capital threshold of €100k should both also be reviewed and increased to new base figures (index linked, in line with inflation from the date the current figure was set and reviewed every three years).

In principle, no contribution should be required from individuals, once they satisfy the financial eligibility test and the merits test. Once a means test has been applied, a financial contribution is not justifiable and should not be required. In this regard, we welcome the removal of the financial contribution in cases of domestic violence.

However, if they are to subsist as part of the Scheme, it is submitted that the minimum financial contributions should be assessed differently in respect of different types of subject matter and that an individual should pay a contribution based on the complexity of the subject matter, in instalments over the length of the case, as it is progressed on their behalf. It would be prudent to fully assess the case at the outset of the process and the individual should be given an estimate of the legal costs/financial contributions involved, together with a maximum figure for financial contributions which details the extent of their maximum financial exposure.

Current costs can be prohibitive and can deter people from accessing the Scheme. They can also create further monetary difficulties for applicants living on basic incomes and/or social welfare, where the minimum contribution for representation would be significant. If legal aid applicants are struggling to pay the contribution, they can apply for a waiver which can be granted in part/full or an instalment plan can also be agreed. Little is done to make the public aware of this waiver, and there is ambiguity as to what is deemed to constitute 'undue hardship' when granting same.

There should be no financial contribution in relation to applications under the Mental Health Legal Aid Scheme 2005 ('the **2005 Scheme**') once commenced. The 2005 Scheme relates to representation for adults who have been involuntarily detained under the 2001 Act . Pursuant to section 17(1)(b) of the 2001 Act, the MHC must *"assign a legal representative to represent the patient concerned unless he or she proposes to engage one".* As the patient will be detained in a locked ward with very little outward communication, it is not practical to suggest that they could retain their own legal advisor. In circumstances where the patient is assigned a legal representative for the purposes of representing them before a statutory tribunal pursuant to the 2001 Act (to enquire into the lawfulness of their detention), no financial contribution should be required. That is the current position and should remain so.

Therefore, applications relating to matters covered by the 2001 Act Custody Issues Scheme (formerly known as the Attorney General's Scheme) and 2015 Act should continue to be excluded.

Expert Reports

The legal aid provided to a legally aided person should be sufficient to cover any necessary expert reports and attendance at court.

In the District Court, the Board will fund reports to c.€350. Section 32.9 of the Guardianship of Infants Act 1964 permits a judge to decide what proportion of an expert report will be paid by parties. While this is not a formal contribution to legal aid, it involves legally aided clients contributing to legal costs if they have to supplement the report.

Those in receipt of legal aid may not be in a position to source an expert to do the work for their €350 share and may have to supplement the figure or forego the assessor altogether (which creates constitutional issues).

Further, those not in receipt of legal aid may not be able to afford an expert report which can vary from €650 to €4000 plus fees for attendance of the expert in court. Again, significant constitutional issues arise if the voice of the child cannot be heard, as well as substantial concerns around the welfare of child.

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

No. Currently the financial assessment is based on the legal aid applicant's capacity to pay, rather than the type of case.

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?

It is not always possible to assess the complexity of a case at the outset. It would therefore be unfair if a legally aided recipient was penalised based on the complexity of the litigation.

Furthermore, the length of time a case takes can be impacted by the way the case is managed by the court or the other party to proceedings or other legal representatives. As such, it would not be fair for an individual to pay a contribution in such circumstances.

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?

The current delivery model of civil legal aid is not working to its optimum level.

The 1995 Act empowers the Board to maintain the PPS however, in some areas, solicitors are not staying on the PPS and, like the UK, "legal aid deserts" have emerged. Withdrawal of solicitors from the PPS has an immediate impact on access to justice, as individuals must then remain on a waiting list for legal representation, which in turn creates delay in the commencement and resolution of proceedings.

The fees for the PPS need to be reviewed upwards to a minimum basic fee of € 750 + VAT, with daily retainer fees thereafter for court attendance in order to attract more solicitors. This is particularly important in areas where there is not a huge volume of family law cases in the District Court, so that local solicitors can act in local legal aid cases rather than solicitors for the Board having to travel long distances to conduct the work. The PPS is not economically viable, and no practitioner can be expected to make monthly court appearances, sometimes over the course of a year or more, for a flat fee of €339 + VAT (child access case). The harsh reality is that there is no commercial sense in private practitioners taking legally aided family law cases at current PPS rates.

The situation is not much better for Law Centres which struggle to recruit and retain staff because salary levels are so low. Low rates of pay must be addressed in line with recent extortionate increases in the cost of living.

In terms of modes of delivery of civil legal aid, there should not be any reason why a practising solicitor cannot accept a legal aid certificate if they are willing to take instructions for a legally aided client. In other jurisdictions, the legally aided client can choose their own solicitor, if that solicitor is willing to accept the legally aided case.

In order to comprehensively address this question, a working knowledge of the current modes of delivery of civil legal aid is required and a useful information is available in the Board's Annual Reports and on its website.

According to the Issues Paper, legal aid and advice is delivered through a number of Board-operated law centres, of which there were 30 full time and a number of part time centres in 2020. In addition, the Board operates panels to which cases are allocated. The figures provided in the Issues Paper are taken from the Board's Annual Report 2021 (which also contains figures for that year).

The Annual Reports provide broad breakdowns of the number of applications for aid in any one year and the number of applications which were successful. In addition, details of the number of cases handled by Law Centres, the number of new cases p.a. and the number of completed cases are provided.

Applications for the Board's Services in 2020

The Legal Aid Board 2020 Annual Report ("the **Board's 2020 Report**") confirms a total of 18,522 applications for services in 2020, of which 13,209 were for civil legal aid. When the number of applications for international protection services is included, this figure increases to 14,383 (substantially less than the preceding year's figure of 17,997 for civil legal aid and international protection). In 2021, the figures increased to 15,291 - still short of pre-pandemic levels.

The number of applications p.a. are set out in Table 1 on page 26 of the 2020 Report as follows:

Table 1	2016	2017	2018	2019	2020	2021
Number of applicants						
General	14,991	15,611	16,169	15,458	13,209	13,827
International Protection	1,658	1,489	2,079	2,539	1,174	1,464
Total	16,649	17,100	18,248	17,997	14,383	**15,291**

Table 2 of the Board's 2020 Report confirms the number of cases handled in Law Centres over the same period. The term "handled", is not defined, therefore it is not clear if this includes files which were just opened and no further action taken. In 2020, the number of civil legal aid and international protection cases handled in Law Centres was 16,235. The actual number of civil legal aid cases, excluding international protection cases, handled in law Centres has not been provided.

Of these 16,235 cases handled in the law centres in 2020, 4,841 were completed.

Table 2	2016	2017	2018	2019	2020	2021
Cases handled in law centres						
Total	17,213	18,170	17,803	17,419	16,235	**16,400**

In 2021, 16,400 cases were handled in law centres.

Table 4 provides a breakdown of this figure by reference to the year in which the application was made.

Table 4	2016	2017	2018	2019	2020	2021
Cases handled in 2021: year of application						
Total	1,851	1,301	2,107	3,224	4,153	**3,764**

Method of Application

All applications for civil legal aid services are via a Law Centre. This is a two-step process. There is no direct access to a panel solicitor.

The first stage of the application process is to satisfy the financial eligibility test. The amount of time this takes depends, to a large extent, on how quickly the applicant provides the paperwork which is needed to prove financial eligibility.

The second stage is the merits-based test. This is done when the applicant attends for first consultation. Arising from that, the centre can either recommend that legal aid is provided or refused.

There might also be another stage in the process if the area of law in which services are sought are not normally provided by the particular centre or within the expertise of the person handling the file. This is discussed in more detail below.

Subject to satisfying the financial eligibility test, the merits-based test and payment of a small contribution, the service is free.

Access and Mode of Delivery of Services

The Board's 2021 Report states that:

> *The Board seeks to ensure that a person who qualifies for civil legal aid (legal services) will be offered an appointment with a solicitor within a maximum period of four months from the time the application is completed or will be offered earlier legal advice if it is not possible to provide full legal services within four months. A priority service is provided in certain cases including cases involving domestic violence, child abduction, applications by the State (Tusla) to take children into care or under supervision, and cases that have statutory time limits close to expiry.*

The Report identifies a number of issues as being likely to militate against the aims of the Board e.g. the recruitment and retention of solicitors in Law Centres. Workloads and rates of pay for qualified solicitors and staff generally are relevant factors in the context of retention of staff. As a rule, solicitors/legal executives are expected to take 70 new cases and finish 70 cases each year, this number might be impacted when additional files have to be taken over due to other staff being on leave or departing the workplace.

When considering the mode of delivery of services, a closer scrutiny of the waiting time experienced by applicants must be considered to include:

1. Date of application to date of acceptance; and
2. Wait until first consultation in a Law Centre.

Page 30 of the Board's 2021 Report contains details of the wait times per centre as at end December 2021. The longest wait was 54 weeks, the shortest - 3 weeks.

The following October 2022 information is also of interest:

Management Information
As at 31st October 2022

Law Centre	No of solicitors	Number of Applications		Waiting for 1st Consultation			Waiting For 2nd Cons		Appointments Held YTD			Referrals to Private Solicitors YTD	
		This Month	YTD	Max Waiting Time (wks)	Priority	Numbers Waiting	Max Waiting Time (wks)	Numbers Waiting	1st Cons	2nd Cons	Priority	District Court Private Family Law	Circuit Court Judicial Separation and Divorce
Athlone	3.2	19	258	5	0	9	0	0	112	0	12	133	0
Blanchardstown	3.0	15	170	16	1	40	0	0	88	0	8	54	29
Castlebar	2.0	42	259	27	5	97	0	0	92	0	36	64	0
Cavan	1.8	15	202	13	6	39	0	0	92	0	26	62	2
Clondalkin	2.0	7	109	14	0	18	0	0	59	0	11	22	20
Cork Popes Quay	6.6	102	886	8	0	32	0	0	231	0	84	220	1
Cork South Mall	6.5	48	516	14	4	34	0	0	157	0	54	259	14
Dundalk	2.0	34	354	28	2	57	0	0	76	0	16	208	15
Ennis	3.0	26	302	12	4	32	0	0	116	0	17	155	0
Finglas	3.0	18	185	9	1	16	0	0	87	0	16	60	5
Galway Francis St	5.8	40	491	5	1	15	0	0	234	0	29	279	7
Galway Seville House	4.2	139	760	5	1	9	0	0	646	0	227	41	0
Jervis Street	5.6	28	232	17	6	59	0	0	180	0	34	47	7
Kilkenny	4.0	36	432	5	0	9	0	0	97	0	24	225	18
Letterkenny	2.8	38	361	11	1	24	0	0	126	0	16	150	0
Limerick	5.0	75	693	19	0	89	0	0	171	0	40	351	0
Longford	1.8	14	278	24	3	33	0	0	32	0	9	190	3
Monaghan	2.7	25	210	11	0	19	0	0	108	0	29	95	0
Navan	3.0	50	425	16	0	31	0	0	85	0	7	222	6
Nenagh	3.8	29	306	16	2	24	0	0	114	0	28	133	1
Newbridge	3.0	21	275	24	0	50	0	0	73	0	10	129	56
Portlaoise	3.0	42	323	19	0	28	0	0	43	0	15	176	5
Sligo	3.0	23	236	9	0	24	0	0	91	0	15	98	2
Smithfield	9.8	604	4862	12	4	41	0	0	648	0	500	22	3
Tallaght	1.8	10	161	17	2	37	0	0	100	0	12	28	10
Tralee	4.0	57	463	9	5	31	0	0	154	0	27	262	0
Tullamore	2.0	9	197	14	0	14	0	0	86	0	4	80	0
Waterford	3.0	32	319	14	6	44	0	0	97	0	33	116	4
Wexford	2.6	35	338	12	2	33	0	0	104	0	19	159	0
Wicklow	3.0	16	282	12	3	29	0	0	77	0	14	183	0

Having to wait so long for a first consultation cannot be in the best interests of the any person in need of legal assistance. Consideration should be given to how the application process and administrative procedures can be expedited.

Reports indicate that the greatest percentage of work handled by Law Centres is in family law. Generally, in rural centres, every area of law is handled by the Law Centres, whereas in the greater Dublin area, some centres only provide services in specific areas (e.g. Chancery – Child Care, Montague – Medical Negligence and Smithfield – Child Abduction).

Difficulties often arise where applicants require advice/services which are outside the expertise of persons working in the centres. In such circumstances, it is usual to retain Counsel to provide an opinion on the merits of the case. Based on such opinion, a decision will be made on whether to legal aid will be provided. A question arises as to whether it is in the best interests of clients or the most efficient use of legal aid resources to take on a case in circumstances where there is a lack of expertise in dealing with such matters. While it is appreciated that service delivery depends on the funding and resourcing of the service, an effective legal aid service requires stricter time frames within which an applicant can be assessed and seen and greater use of specialties in terms of the allocation of in house or panel resources to qualifying applicants.

The other method of delivery of services is through panel solicitors in private practice. When a legal aid certificate issues the applicant is given a list of the solicitors named on the panel and they choose who they wish to engage. Consideration might be given to ensuring that solicitors with expertise in specific areas of law, are added to the panel so that matters outside the usual area of work can be referred to them rather than that they remain in the law centre.

Details of the matters handled by private practitioners is set out in Table 10 of the Board's 2021 Report on page 33 as follows:

Table 10	2016	2017	2018	2019	2020	2021
Number of referrals per year						
District Court Private Family Law	5,208	6,002	7,154	7,839	6,042	6,961
District Court Child Care	103	88	94	71	47	55
Circuit Court	89	30	63	10	7	145
International Protection	810	1,035	1,479	2,061	941	918
Coroner's Inquest	16	11	4	14	7	50
Total	6,226	7,166	8,794	9,995	7,044	**8,129**

With regard to mental health and capacity law, below commentary relates to the following, private practitioner based, schemes:

1. The Mental Health Legal Aid Scheme 2005
2. The Attorney General's Scheme
3. The 2015 Act

Scheme 1 has been in operation since November 2006 and Scheme 2 for over 50 years. We believe it is worthwhile to consider both in advance of the imminent introduction of a scheme in accordance with the 2015 Act.

Scheme 1 - Mental Health Legal Aid Scheme 2005

The Mental Health Legal Aid Scheme 2005 was introduced in November 2006 by the MHC to assign legal representatives, solicitors and barristers, to appear for detained patients held under the 2001 Act. It is a sophisticated system and differs from the Legal Aid Board PPS for District Court matters in a significant number of ways which are:

1. It is a closed scheme - entry is by way of an application and interview process.

2. The panel is relatively small – as a result, legal representatives get more work and develop expertise in the area. On its website, the MHC reports 81 legal representatives for the entire country whereas the last report from the MHC (2021) confirms that there were 2548 involuntary detention.

3. The MHC assigns legal representatives to patients [clients]. If a legal representative has previously acted for a client they will be assigned to that client if they present as a detained person under the Act in future. Patients may choose a different solicitor from the MHC's panel of legal representatives than the one assigned to their case. Forty-five patients chose to be represented by another legal representative from the panel in 2021. Patients are also entitled to be represented by their own private solicitor or represent themselves (in line with the Constitution). Five patients chose a private solicitor to represent them, and none chose to represent themselves in 2021.

4. Intensive training was provided to legal representatives after appointment to the panel and ongoing training is provided. In addition, the MHC has carried out audits of the legal representative's file.

5. The client does not have to apply for legal aid, they are automatically assigned a legal representative when they are involuntarily detained pursuant to section 17 of the 2001 Act.

   In its Preliminary Submission on the operation of the District Court PPS (excluding childcare cases), the Law Society highlighted the challenges facing this scheme, emphasising that unrestricted access to the PPS is not working.

The Society advocated for a new restricted PPS to be set up, to be reviewed every three years and open to all solicitors but with a limit to the number of solicitors to be appointed to act in each (geographical) area.

Some benefits of a restricted panel are that it:

1. Encourages specialisation and expertise leading to increased benefit for clients.

2. Permits the Board to engage in training and monitoring of those on the panel leading to an increase in competence and expertise and further increased benefit to clients.

3. Removes those from the panel who are not committed to doing the work and developing a specialism.

It is submitted that the Private Practitioners Family Law Scheme should be reconstituted along the lines of the 2001 Act legal aid scheme.

In addition, given the imminent creation of a scheme under the 2015 Act, it is submitted that a closed scheme similar to that under the 2001 Act but tailored to the aims of the new legislation (e.g. rather than being assigned a legal representative, potential clients could select a legal representative from the list which would be publicly available) should be put in place.

13. What are key barriers to accessing the service?

For Applicants, they include a lack of knowledge about legal aid and how to access legal assistance, the eligibility threshold being too low, language and cultural barriers and lack of accessibility to private practitioners.

How courts administer cases can also cause delay. Currently the time taken in obtaining S32 Reports has put increased pressure on the courts system and adjournments have created delays in concluding many cases, which in turn causes frustration for clients. A case which previously required 1/2 court appearances, now requires multiple attendances with no recognition for this additional work within the legal aid fee structures

Court delays are generally much shorter than the applicant's delay in accessing legal aid from date of completion of an overly bureaucratic application process, to meeting a solicitor, to issuing proceedings. The latest Board figures speak for themselves and the delay in accessing legal aid is undoubtedly a barrier to accessing legal services.

Waiting Times

A snapshot of waiting times countrywide, as at end December 2021, is available here.

The initial financial contribution can be viewed as a barrier to accessing service for those at the lowest rung of the economic ladder or those who have no access to spending money for themselves in their individual family household, irrespective of notional income

For practitioners, fees and salaries are unrealistically low. Practitioners on the PPS have to fund their own outlays and travel costs. Many practitioners on the PPS have withdrawn from legal aid work, increasing the workload for Law Centres which has created further delays for clients.

The fees and availability of court experts/professionals (e.g. child psychologists for the preparation of reports) also creates challenge and delay.

Under the Regulations, the following qualifying criteria applies:

1 The grant of a legal aid certificate in respect of the legal aid sought[82];

2 Satisfaction of the financial eligibility which effectively requires a disposable income of less than €18,000 per annum[83]; and

3 Payment of a contribution to the cost of providing the legal aid or advice[84].

If, in the opinion of the Board, the behaviour of the applicant is such as is likely to increase the costs of the aid sought, the Board can refuse to grant the aid or advice or increase the cost of the contribution sought by an equivalent of the likely increased cost. If such a person is already in receipt of legal aid that aid can be revoked or terminated. If the person is already in receipt of legal advice the Board may cease that advice or increase the contribution payable

Relevant definitions are set out in the Regulations as follows:

(8) In this Regulation —

*"**capital**", in relation to an applicant, means the value of every resource of a capital nature and includes the matters specified in Regulation 18;*

*"**disposable capital**", in relation to an applicant, means the amount of his or her capital after making such deductions and allowances as are specified in Regulation 19;*

*"**disposable income**", in relation to an applicant, means his or her income after making such deductions and allowances as are specified in Regulation 16; and*

*"**income**", in relation to an applicant, means the income which he or she may reasonably expect to receive from all sources during the year succeeding the date of application but shall, in the absence of what the Board considers to be a satisfactory means for ascertaining it, be taken to be the income actually received during the year immediately preceding the date of application and shall include the matters specified in Regulation 15 or such income as is ascertained by the Board to be the income in accordance with Regulation 14.*

As can be seen, such a low income threshold is a direct barrier to accessing legal aid. It clearly needs revision upwards to take account of inflation and the cost of living.

Added to this, people of such low means generally - by definition - cannot contribute to the cost of the service they are seeking. Though minimum contributions apply i.e. €30 minimum to a maximum of €150 for advice and €130 for legal aid (being €100 if you paid €30 already for advice), these are not insubstantial amounts to these applicants. Whilst there are some

[82] 5. (1) A person shall not be granted legal aid unless the person is granted a legal aid certificate in respect of the legal aid sought.

[83] (2) An applicant's financial eligibility shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital and the contribution payable by the applicant pursuant to these Regulations shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital, as prescribed in these Regulations. (3) An applicant whose disposable income exceeds €18,000 per annum shall not be eligible to obtain legal aid or advice. (4) An applicant whose disposable capital exceeds €100,000 shall not be eligible to obtain legal aid or advice.

[84] 13. (1) Subject to sections 24, 26, 28 and 29 of the Act of 1995 a person shall not qualify for legal aid or advice unless he or she —

(a) satisfies the requirements in respect of financial eligibility specified in this Part, and

(b) pays to the Board a contribution towards the cost of providing the legal aid or advice determined in accordance with these Regulations.

exceptions to the requirement for this minimum contribution[85], the fact of its existence and the limited category of exceptions needs to be examined.

The delay in accessing legal aid is often a barrier to availing of aid and the reasons for this delay must also be examined. Is it the process alone or the lack of availability of practitioners**?**

A significant barrier to accessing legal aid contracted out by the Board is the diversity of practitioner that the applicant can access – does that depend on the level of legal fees paid?

It is clear that, where the fees offered to legal practitioners are too low, practitioners may have no choice but to seek to do this work in bulk which may affect the quality of the service provided. This is a clear disincentive to suitably qualified - often senior - practitioners whose experience is required for the seriousness of these cases. An increase in fees to take account of these factors and current rates of inflation needs to be implemented as a matter of urgency.

Accessing legal aid for repossession cases and Abhaile

The experience of the role played civil legal aid in the repossession crisis is reportedly very disappointing.

Before the *Abhaile* scheme was introduced, there was assurance offered that those with genuine defences could access legal aid by contacting the service. Furthermore, it was stated that branches outside an applicant's area would be contacted if the local branch did not have capacity - reportedly this rarely occurred. One solicitor who is very experienced in this area recalls only one family who received genuine assistance and otherwise, applicants were rejected either on income technicalities, even though they were clearly insolvent, or because of staff shortages. There was a significant concern that if the Board had actually agreed to defend more families facing repossession, they were lacking lawyers with the skill set and specific expertise required to do this.

When the *Abhaile* scheme was introduced all of the work was done by private practitioners, but the fees were very low and – somewhat incredibly - reduced further sooner after introduction. The legal support given to those seeking insolvency was far greater than that given to those defending family home repossession. In fact, it is arguable that the failure to provide any representation to those facing family home repossession flies in the face of the *raison d'etre* of any system of civil legal aid.

There is well documented experience of families finding no support even though their home was being repossessed.

There is a feeling that the adverts around what users could expect from the scheme were misleading which, in turn, generated disillusionment among those who required genuine representation but could not afford it.

85 Where Tusla is seeking to take an applicant's children into care or requires supervision on the children's home. Where the individual is the applicant or respondent to proceedings in the District Court for a barring order, safety order, protection order, or interim barring order.

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

1. Payments to professionals for court reports must be increased as it is a huge barrier to the resolution of matters which adds to delays and costs in resolving family disputes.
2. Court based provision of services such as mediation, family psychologists, legal aid, domestic violence support would assist users and streamline services.
3. S32 Reports should be fully funded by legal aid as otherwise the voice of the child is not heard in family law proceedings, in breach of the constitutional imperative.
4. Administration can be done online through a basic and easily accessible system for all case users to avoid duplication of data entry.
5. Resourcing and funding must include provision for more legally qualified staff in the Law Centres, and technological integration between the Board, private practitioners, the Courts Services, the Department of Social Protection and the Revenue Commissioners.
6. Consideration should be given to the provision of night-time clinics - jointly held by Board and NGOs.
7. Payment to solicitors on the PPS must be substantially increased so that it becomes viable for solicitors to provide legal services to support the Law Centres.
8. District Court Judges, as Legal Costs Adjudicators, certifying costs in District Court civil legal aid cases, to include appropriate judicial training in the area.

In October 2019, the Joint Committee on Justice and Equality's Report on Reform of the Family Law System recommended a national public information campaign which could increase awareness of rights and include information about legal aid.

> *"12. The Committee believes that there is insufficient knowledge of and dissemination of general information about the family law system. There is a significant gap in knowledge and understanding of the system, not only amongst the general public, but even amongst members of the legal profession, An Garda Síochána, social workers and the Judiciary.*
>
> *In order to address this issue, the Committee recommends:*
>
> > a. *The launch of a national public information campaign, similar to that introduced in Australia, in order to ensure better provision and dissemination of information to the public, as well as ensuring better access to information regarding the process, and rights and supports for those entering into proceedings;*
> >
> > b. *That the website of the Courts Service be significantly updated and modernised, with guides and visual aids to provide easy and efficient access to information for members of the public in respect of family law in particular; and*
> >
> > c. *That professionals employed by agencies involved in family law matters are provided with specialist training to ensure they have the knowledge and understanding of the system to provide parties to proceedings with the relevant and necessary supports and services."*

15. In relation to the current scheme, what are its benefits?

1. The current system provides nationwide access to justice for people on low incomes, who could not otherwise afford legal representation.
2. It prioritises cases such as childcare, DV, child abduction and urgent matters.
3. Some users of the Scheme can access support locally.
4. The service has acknowledged expertise, particularly in family law and childcare law.
5. Family law applicants are provided with excellent legal representation once admitted to the system.
6. There is a benefit to an identifiable source of legal advice for those that come within the parameters of the services

16. In relation to the current scheme, what are its challenges?

1. Not all areas of civil law are legally aided which presents a challenge for members of the public seeking to avail of legal aid.
2. There is limited state funding for the Board and Law Centres struggle to retain legally qualified staff as salaries are poor - the knock-on effect being delays in administration, in particular, the assessment legal aid applications.
3. The lack of autonomy of the Board and the fact that any request for change must go to the Minister is too time consuming which makes any change difficult.
4. Regarding the PPS, it used to be the case that a client's file would come from the Law Centre, the PP solicitor read the file, took the client's instructions, and then provided court representation. However, more recently, applicants contact the PP solicitor to enquire if they will take their case. If the solicitor agrees, the client confirms this to the Law Centre, the certificate will issue, and minimal paperwork comes from the Law Centre. The solicitor will have to take instructions from the client, prepare the court application, issue the proceedings, serve the proceedings, attend at court to conduct talks and/or contest the case, attend as many adjournments as are necessary which can be 10-12 (e.g. in applications to see how access is progressing or in enforcement of maintenance applications where payments of arrears can be drip-fed), draft the court order, have it engrossed by the court and then serve the order on the respondent - all for a fixed fee which, for example – in an access case, t is €339 + VAT.
5. District Court fees for a practitioner on the PPS range from €339 + VAT for an access application, to €508 + VAT for DV and access and/or maintenance. The commercial reality is that opening a file and taking instructions from a client exceeds the greater of these figures.
6. There is no recompense from the Board to a PPS solicitor for office outlays such as registered post, swearing fees, travel, parking, or sustenance.

   Judges very often review cases in different courts in their district. This means that the PPS solicitor can be required to travel significant distances to have cases reviewed. Currently, they are expected to do so at their own expense. By way of a memorable example, in a child access case in 2010, a solicitor in District 18 (West Cork which is widely dispersed from Bantry to Macroom or Bandon - a drive of up to 90 minutes) representing a vulnerable

client with mental health challenges, made 15 contested court appearances at a minimum of 1 hour per appearance; engaged with medical professionals throughout proceedings; travelled a total of 828 miles between three disperse court venues throughout the district for the 15 court appearances which were necessary, for a total legal aid payment of €294.96 + VAT or €19.66 per court attendance. Their request for travel costs in respect of the 1333 kms was declined.

7. If this case was under the Public Law Child Care Solicitors Panel, proceedings on foot of Part III and Part IV of the Child Care Criminal Legal Aid Scheme, the practitioner would have recovered €900 with an additional sum of €400 for each subsequent hearing day. Fees are allowed under that scheme for briefs to Counsel and ancillary applications and fees for appeal are allowed at the first instance rate. It is illogical that the fees paid to solicitors under the civil legal aid private practitioner family law scheme is not commensurate. The work is family law litigation and the solicitors doing the work have the same qualifications i.e. they are all practicing solicitors.

   Based on current criminal legal aid rates, which have also been reduced since 2010, the following fees would be recovered by a practising solicitor for the above case:

Fee	**€906.96** (based on first day rate €201.50; daily uplift €50.39 x 14)
Subsistence	**€252.15** (subsistence daily rate €16.81x 15)
Travel	**€317.95** (1333 kms X 0.24c per km)
Total	**€1,477.06**

   In several towns, only one PPS solicitor is taking civil legal aid family law District Court cases. This leaves the other legally aided party struggling to get local representation and likely to return to the Board's solicitors - already over stretched and will have to travel to provide representation. The situation is mirroring that in the UK where they now have legal aid deserts i.e. few/no solicitors in private practice willing to act for legally aided clients.

   The most marginalised and vulnerable in society, who are dependent on legal aid (and usually other state services) suffer because, even if they are granted legal aid, they often fail to secure PPS solicitor in their local area to represent them.

   In order to properly advocate for children in access applications, matters must - as a rule - have at least one review in court, although the number is very often many more. The PPS rate of remuneration is fixed irrespective of how many appearances are made by the PP Scheme solicitor.

8. Many District Court Judges are directing that S32 Reports must be provided in child access cases. There is a lack of Experts, Psychologists/Child Psychologists prepared to take on this work as the fees paid by the Board are too limited to cover an assessment of the family, the provision of a report and if necessary, a court appearance. A fee of €325 applies where a report is written and a maximum €250.00 in expenses where the expert is called as a witness.

9. The Board should consider establishing panels of experts to prepare S32 and S47 Reports which must be fully funded by the Board, always with the voice of the child as a constitutional imperative. Currently, these reports are only partially funded by the Board, with the balance of fees to be shared/discharged by the parties. When a party refuses to pay, proceedings are stalled which, in its effect, represents one party holding the other to ransom i.e. one parent is denied access with their child, while the other holds up proceedings by not paying the balance of fees due.

   All members of the judiciary should be aware of this tactic and, before a judge directs that a report be prepared in a legally aided case, perhaps they might consider obtaining an undertaking from legally aided parties to determine who will discharge the balance of the expert's fee and by what date. The point becomes moot if fees for reports will be discharged by the Board.

10. Not all access and child welfare cases require the provision of a S32 Report. It may benefit matters for judges to receive specialist training so that they can interview the child and hear their voice directly in order to ascertain their wishes.

11. Circuit Court Civil Legal Aid for Family Law for solicitors on the PP Circuit Court Scheme for Judicial Separation or Divorce are fixed. The rate of remuneration was recently reduced for judicial separation/divorce proceedings without notification or warning to the PP solicitors from €3,680 + VAT to €3,386 + VAT which covers all work in these cases irrespective of whether proceedings are contested or on consent. This can include consultations, drafting or settling pleadings, preparatory work, settlement negotiations and/or court appearances, and any interim applications.

12. The PP Circuit Court Civil Legal Aid fixed rate includes any outlays the solicitor incurs including Counsel and office outlays. Travel, parking, postage, photocopying and swearing fees for PPS family law solicitors are not recoverable. It is not commercially viable to remain on the PP Circuit Court scheme or to take instructions in complex family law cases where there could be several ancillary applications before a hearing. Of particularly note is that *Case Progression* is a relatively new introduction to family law cases in the Circuit Court – it was not in existence at the time of setting the current fees and it requires additional court appearances by practitioners.

Eight Measures to Attract and Retain Solicitor Participation in the PPS

The following suggestions offer solutions to attracting/retaining solicitors to participate in the Circuit Court PPS:

1. Set fee for on consent Divorce /JS cases.
2. Increased fee for contested Divorce/JS cases.
3. Fee for attendance at Case Progression hearings.
4. Fee for attendance at each ancillary application.
5. Office outlay allowance for registered post, swearing fees and photocopying.
6. A subsistence and travel allowance.
7. A certificate for Counsel in contested cases.
8. Allowances for interpreters.

Each of the above to be considered with the assistance of a Legal Cost Accountant.

17. In relation to the current scheme, what are its advantages?

1. Accessibility to legal advice and court representation for certain areas of law.
2. No fees/contributions payable by applicants for DV or childcare cases for which the applicants receive expert legal representation.
3. Improved accessibility in the area of family law (subject to concerns around resources identified above).
4. There is a functioning website and brand familiarity. Many solicitors in private practice refer those who come within the necessary criteria to the website which, in turn, provides a route to access legal services.
5. They are a nationwide body and have a number of solicitors available in certain locations throughout the country, together with centrally located administrative staff.

18. In relation to the current scheme, what are its disadvantages?

1. Delays in accessing representation.
2. Long waiting lists due to the volume of applicants and lack of resources available to providers.
3. Court waiting times and queues.
4. Inequality of arms for impecunious or disenfranchised applicants when taking cases to quasi-judicial boards e.g. WRC or Department of Social Protection.
5. Law Centres can be inadequately staffed, with long waiting lists and services can vary greatly between centres.
6. Limited resources to deal with work outside family law, particularly with regard to third party reports and advice which appears to lag behind market rates.

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

With regard to what is perhaps a perceived lack of resources which aim to increase awareness and understanding of justiciable problems and legal issues, considerable online resources are available, one of which is the Citizens Information website, run by the Citizens Information Board (**CIB**).

While the remit of the CIB is to provide information and services regarding social services, (see below) its website provides a wealth of legal information to citizens who have access to online services. For those without access such access, Citizen Advice Centres provide an invaluable information service around justiciable problems and legal disputes. However, as is clear from Section 7(1) of the Comhairle Act 2000 (as amended by the Citizens Information Act 2007) dealing with the functions of the CIB, its primary purpose is to provide information in respect of access to social services. [86]

[86] Section 7 (1) (a) - to support the provision of or, where the Board considers it appropriate, to provide directly, independent information, advice and advocacy services so as to ensure that individuals have access to accurate, comprehensive and clear information relating to social services and are referred to the relevant services.

Other providers, such as FLAC and voluntary bodies/charities provide excellent information services. There is also a wealth of other legal information resources, managed by other statutory organisations, such as IHREC, PILA, Office of the Ombudsman, Director of Decision Support Services etc., which provide excellent information.

Legal Information Board

The provision of free legal information can be better organised and coordinated.

As such, we would recommend consideration of the establishment of a State funded Legal Information Board to take the lead on the coordination and provision of legal information and education and, in particular, raising public awareness around the existence of relevant services in the State.

Such a body could better disseminate information which is already available and educate the public in respect of same. Legal education providers - such as the Law Society - could also be approached to assist in providing outreach services to schools and voluntary bodies. Consideration could also be given to the provision of a module of legal education in secondary schools, to include training on ADR.

Again, the previously referenced Joint Committee on Justice & Equality Report on Reform of the Family Law System (2019 (which recommended a national public information campaign) is relevant in this regard.

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

1. Education on access to justice should be made available in schools, in the first instance, so that citizens have a basic understanding of how to access justice.

2. Outreach information services could also be provided to marginalised groups.

3. The establishment of a dedicated Legal Information Board could best co-ordinate the provision of legal education and those willing to provide free legal information by way of lectures etc.

4. Support in family law matters can best be provided by creating a specialised family justice system, offering integrated supports and wrap around services, with a child-centred focus on resolving family law issues.

Homelessness and Housing

The 1995 Act provides that legal aid shall not be granted in "*disputes concerning rights and interests over land*". This provision is unclear as regards social housing rights which has led to a huge unmet legal demand in the area of housing, which is felt most acutely by vulnerable and socially excluded communities and those most acutely impacted by the ongoing housing crisis. These communities include lower income households, households which are in receipt of social housing supports, people who are homeless/at risk of being made homeless, members of the Traveller community and individuals fleeing domestic violence.

The 1995 Act provides an exception where the subject matter of the dispute is the applicant's home and the Board considers that the applicant suffers an infirmity of mind/body or may have been subjected to duress, undue influence or fraud, and the refusal to grant legal aid would cause hardship to the applicant.

Increasing levels of unmet legal need are evident around unlawful evictions, unlawful refusals of emergency accommodation, inadequate and substandard living conditions (particularly in social housing) and discrimination in accessing social housing supports. It is hugely concerning that no civil legal aid is available for people navigating these complex areas of law.

A particular difficulty is the absence of civil legal aid for people facing eviction, whether in private rented accommodation or social housing. People who lack the financial resources to access legal representation during eviction proceedings are more likely to rely on State resources (i.e. emergency accommodation) once evicted. In the last week of November 2022, 11,542 people accessed local authority managed emergency accommodation.

It is crucial that legal aid be expanded to provide advice and representation in housing-related matters. Civil legal aid should include issues relating to social housing supports, emergency accommodation and disputes before quasi-judicial bodies, including the Residential Tenancies Board.

WRC

The Employment Equality Act 1998 and the Equal Status Act 2000 ("the **Equality Acts**") prohibit discrimination in employment and access to goods and services respectively across nine grounds, which include race, nationality, ethnicity and membership of the Traveller community

The absence of civil legal aid for quasi-judicial tribunals presents a significant barrier, in particular for Travellers and Roma seeking to challenge discrimination in the provision of accommodation and other goods/services under the Equality Acts under which complaints of discrimination are dealt with by the WRC, being a quasi-judicial tribunal.

In July 2021, the Society made a submission to the public consultation on a new National Action Plan Against Racism For Ireland which examined the number of complaints being made on the Race and Traveller community ground to the WRC under the Equal Status Acts.

The below table, which has been updated to include 2021 figures, confirms a growing decline in complaints of discrimination being brought to the WRC by Travellers, Roma and people covered by the Race ground until 2020, however these figures rose significantly in 2021. The initial findings contrast with evidence that incidents of racism, including anti-Gypsyism, remained relatively consistent over the same period.

The absence of legal aid for bringing such complaints is likely to be a factor in inhibiting Roma and Travellers from seeking redress. These cases are complex and the absence of legal aid creates a huge barrier to achieving equality. The strict time limits which apply under the Equality Acts also mitigate against Travellers and Roma accessing appropriate legal advice in sufficient time to bring complaints.[87]

Equal Status Complaints	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Member of Traveller Community	416	408	124	97	51	61
Race	462	363	292	159	76	85

[87] Section 21 of the Equal Status Acts requires a complainant to notify a respondent of an allegation of prohibited conduct (under the legislation) within 2 months of the incident complained of. Thereafter, a complaint must be referred to the WRC within 6 months of the incident.

Employment Equality Complaints	2016	2017	2018	2019	2020	2021
Membership of the Traveller Community	5	7	6	2	6	20
Race	154	189	213	183	201	181

Social Welfare Appeals Office

The absence of legal aid for bringing appeals before the Social Welfare Appeals Office poses a particular difficulty for Roma who, along with other EU nationals, must prove that they have a right to reside in the State before being eligible for many of the means-tested assistance payments available through the Department of Social Protection.

For Roma, proving that they have a right to reside can be difficult as a result of language barriers and a lack of documentation. In addition, issues regarding rights of residency raise not only evidential issues but complex issues of EU law. However, the absence of legal aid for such appeals is a significant disadvantage for the Roma community.

Accommodation

The Traveller community is disproportionately impacted by the absence of legal aid in disputes concerning land. According to FLAC's Annual Report 2021, 42% of case files which were opened during 2021 were on behalf of clients of FLAC's Traveller Legal Service. Cases involving housing and accommodation constituted 62.2% of all open FLAC Traveller Legal Service Case files in 2021.

Civil legal aid in the form of specialist advice and representation in the areas of forced evictions and discrimination experienced by Travellers should be provided in order to ensure equal access to justice in the area of accommodation.

Access to Justice for International Protection Applicants

The Society has consistently called for early access to legal advice for international protection applicants and welcomes the commitment in the Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process ("the **Catherine Day Report**") that legal advice be provided at reception stage. The Report notes that "*[W]here applicants for protection have access to legal advice early in the process, both the quality and the timeliness of decision-making are improved*."

The White Paper on Ending Direct Provision further recommends that the Board provide legal aid throughout the international protection process - reception stage through to final decision. The Paper notes that "*this would help to ensure that the principles of fair, fast and consistent decision-making are implemented and help the IPO and IPAT to meet the case deadlines.*

Waiting times for consultation with a Board solicitor are significant across the country, in part due to under resourcing. This has made access to early legal advice, and access to justice in general, significantly difficult for asylum seekers. Legal advice at the preliminary stage is essential to assist applicants in understanding the process, in accurately completing the questionnaire, and disclosing all necessary information at all stages. Applicants are often criticised for any omissions (in their questionnaire and initial interviews) which can be detrimental to their overall case and often results in appeals, leading to increased costs to be met by the State.

Environmental Issues

Access to environmental justice is recognised as a right in international environmental law.

Principle 10 of the Rio Declaration, the Aarhus Convention, judgments of the European Court of Justice and European Commission communications all afford central importance to access to justice as a primary goal in achieving environmental protection.

While individuals are not specifically excluded from legal aid in environmental matters, certain exclusions within the Scheme may prevent such aid from being granted. These include disputes relating to rights and interests over land, actions representing a group and actions looking to establish precedents on a particular point of law. Furthermore, the Scheme, as confirmed by the High Court in *Friends of the Irish Environment v Legal Aid Board* [2020] IEHC 454 (currently on appeal) does not provide legal aid for organisations, including Environmental NGOs.

The Scheme should be amended to allow legal aid to be provided to complainants, including environmental NGOs, who seek to challenge environmental decisions to ensure effective access to justice - in accordance with the Aarhus Convention, Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6 and 13 of the ECHR. Such amendment should address the restriction on civil legal aid being granted in public interest and multi-party actions (section 28(9) of the 1995 Act) as multi-party/representative actions can be an effective way for marginalised persons to vindicate their rights in court.

Legal aid contributions and court fees

Existing level of Court fees may prove prohibitive to those on a low wage or social welfare. Although Court fees are not applied in some areas such as family law, domestic violence and wardship, all other court applications attract stamp duty, irrespective of the means of the person concerned. Such fees can be considerable - for example, the cost of issuing a summons in the High Court is €190 and the minimum cost of lodging a Judicial Review application is €330.

These costs can act as substantial barriers to access to justice for low income or unemployed persons.

Community Law Centres

Community law centres such as Community Law & Mediation (CLM) and Ballymun Community Law Centre continue to meet significant unmet legal need through the provision of advocacy and representation in areas of law either not catered, or not catered adequately, for by the Scheme (i.e. housing, debt, social welfare, equality, employment) and where, due to a lack of resources, there are lengthy delays or other difficulties in accessing the services of the Board.

The Society notes FLAC’s recommendation for a reformed flexible legal aid system which could provide small local independent services, prioritising advice and information services in accessible ways for people who do/do not yet know that they may have a legal problem. This should include a network of community law centres and people with expertise in housing, social welfare, debt, and discrimination.

"Clustered Injustices"

Vulnerable persons requiring legal support often have complex and wide-ranging requirements and may need assistance in multiple legal areas, suggesting that often a lack of cohesiveness between services can exacerbate the problem. For example, 70% of the Ballymun Community Law Centre's clients are identified as having some form of disability.

FLAC also reports that the people most likely to experience multiple legal problems include lone parents, people in local authority housing, adults with longstanding illnesses or disabilities, adults on means tested payments, people with significant debt problems, homeless people, children with disabilities, people living in direct provision, people who fall foul of the immigration system, ethnic minorities, and people who have difficulty meeting the habitual residency test.

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

To promote equal access to justice, and equality in access to justice, and to ensure that each party can have a fair determination of rights, and a fair trial.

These principles are set out in various constitutional cases and in Article 6 of the ECHR which highlights the right to a fair trial in civil and in criminal matters.[88] This Guide on Article 6 of the ECHR provides excellent guidance around the principles which should be applied.

It should also provide the public with an efficient legal service which allows access to justice and dispute resolution, in a timely, cost-efficient, and sustainable manner, underpinned by the principles of equity, accountability and integrity, promoting quality in the delivery of legal aid while treating all those involved with dignity and respect.

22. What values should underpin it?

1. ***Accessibility, efficiency, professionalism and transparency.***

2. ***A child-centred focus in relevant family law cases.***

3. ***Fairness is a fundamental value of an effective civil legal aid system.***

   In her paper "*Reflecting on Access to Justice from ECHR and EU perspectives*"[89], Judge Siofra O'Leary notes that, in order to register as a right, an entitlement must be capable of actually being exercised and enjoyed.[90]

   She states that:-

   > *"the reality is that if meritorious cases are not being brought nationally or at European level for fear of financial – and indeed financially ruinous consequences (consider the cost of standard or more complex judicial review) – then the "organisation of justice" in the broad sense – to borrow the terminology of the CJEU – may be in need of closer attention."*

[88] Article 6 of the European Convention on Human Rights provides that: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[89] https://www.flac.ie/assets/files/pdf/access_to_justice_conference_-_final_report.pdf

[90] https://www.flac.ie/assets/files/pdf/access_to_justice_conference_-_final_report.pdf, 43

Judge O'Leary further notes that:

> *"The Strasbourg court has proceeded at times boldly but overall carefully in weeding out restrictions which, in effect, impair the very essence of a party's right of access to court. It has proceeded in a fact sensitive manner in individual cases while laying down general principles which States must adhere to in their national systems, thereby embedding Convention principles in the 47 national systems to which it applies. The roadmap laid down in Airey was both remarkably clever and flexible. The CJEU's approach in the recent rule of law cases, where potential interference as a result of the manner in which a State has organised its justice system with EU values and the principle of effectiveness have been the basis for the EU's legal responses, points to the possibility of a more systemic engagement with access and legal aid questions in the future."*[91]

The ECtHR has confirmed that there will be no violation of Article 6.1 of the ECHR if an applicant falls outside a legal aid scheme because his/her income exceeds the financial criteria, provided that the essence of the right of access to a court is not impaired. Further, Member States are not obliged to spend public funds to ensure total equality of arms between the assisted person and the opposing party, provided that *"[...] each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis- à-vis the adversary."*[92]

The Society recommends that the Scheme should be reviewed to reconsider the designated matters outlined in section 28(9)(a), and the exceptions to those exclusions as set out in section 28(9)(b) or 28(9)(c). Our response to Issue 1 is relevant in this regard.

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

In addition to our earlier recommendations:

1. The service must remain flexible to changes in society and legislation e.g. the Regulations around financial thresholds and financial contributions must be reviewed more regularly.

2. Public information campaigns must be undertaken and information about civil legal aid should be available in Garda Stations, Social Welfare offices, hospitals etc.

3. If the civil legal aid system is technologically integrated with the Courts Service, the Department of Social Protection, the Revenue Commissioners and the PPS, it will lead to increased time and resources efficiencies by avoiding duplication in the processing of information and alleviating waiting lists.

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

This question requires a full examination of all other forms of publicly funded/part publicly-funded legal assistance initiatives in the State.

All such bodies should be aware of the services provided by other organisations, agencies etc. so that referrals can be made between them to ensure the best use of public resources. For example, the Board has power to make enquiries of the Department of Social Welfare and the Revenue Commissioners regarding a legal aid applicant's benefits/earnings, but how fast

[91] https://www.flac.ie/assets/files/pdf/access_to_justice_conference_-_final_report.pdf, 44
[92] Steel and Morris v. the United Kingdom, no. 68416/01, 15 February 2005

exchanges of communication can be made and exchanged between these entities has a bearing on the provision of legal aid to the recipient.

It is clear that there is a role – either via the establishment of a central body or by extension of the current remit of the Board - to review, co-ordinate and, where possible, enhance, all such initiatives.

Again, investment in technology is necessary so that the Board, the Courts Service, the PPS, the Department of Protection and the Revenue Commissioners can liaise to avoid duplication of processing information.

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

If adequately resourced, the Board could perform a full review of free legal services and public legal assistance across the State.

It could also be empowered and resourced to provide an information service (such as the Legal Information Board suggested above).

The Board has developed specialities in family and child law - other areas of public law are supported by other agencies - but where new areas of law evolve such as the incoming 2015 Act which require access to justice for the most vulnerable in society (often with limited means), the Board has a significant role and requirement to adapt to the changing environment. However, its restricted statutory basis and authority creates substantial difficulty in that regard and, as such, we would ask that the Group consider how the Board can have more autonomy to develop and evolve to meet the needs of our changing society.

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?

If mediation is available and accessible through the Scheme, it can play an important role in dispute resolution in respect of some family cases e.g. issues around access but not DV.