



206 The Capel Building  
Mary's Abbey  
Dublin 7

# **Submission of Dublin Solicitors' Bar Association to The Review Group on Civil Legal Aid**

## **January 2023**

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## Introduction

***"..Justice is open to all – like the Ritz Hotel,"<sup>1</sup>***

The DSBA welcome this opportunity to contribute to the important work of the Review of the Civil Legal Aid Scheme. Legal aid is an essential element of access to justice, which is, itself, a universal human right according to the IBA. Principle 1 of the IBA's Civil, Administrative and Family Justice Systems states that:

*Legal aid service delivery generates significant social and economic benefits. In the budget formulation process governments should estimate the social and economic costs and benefits of legal aid service delivery, including by taking into account the social and economic costs of failure to deliver services.*

The IBA go on to comment that *"contrary to the prevailing narrative that legal aid is a drain on limited resources, research shows that provision of access to justice and legal aid can prevent adverse consequences on the health, employment and well-being of individuals and their families. It is for this reason that we suggest that legal aid should be seen as an important element in an integrated justice policy that also includes, for example, preventative action, public legal education and the provision of information to the public. The reference here to preventative action, for example, seeks to recognise that 'prevention is better than cure'. Over time the costs of the justice system could be reduced if health, education and social support for disadvantaged families were improved."*

Historically legal aid in Ireland has suffered from two major defects:

1. Lack of resources
2. Lack of operational independence of the Legal Aid Board to set the level of fees payable for its private practitioner scheme. Both the Minister for Justice and the Minister for Finance must approve the terms and conditions of any private practitioners' panel. In addition, the solicitors employed by the Legal Aid Board have historically been paid less favourably than comparably experienced solicitors employed in the offices of the Director of Public Prosecution or the Chief State Solicitors Office.

Section 30(3) of the Civil Legal Aid Act, 1995 provides:

*"The Board may establish and maintain— (a) a panel (to be known as "the solicitors' panel") containing a list of names of solicitors who are willing to provide legal aid and advice, and (b) a panel (to be known as "the barristers' panel") containing a list of names of barristers who are willing to provide legal aid and advice, on such terms and conditions as the Board may, with the consent of the Minister and the Minister for Finance, from time to time determine."*

Unless these two fundamental defects are remedied any reform of the Civil Legal Aid system will run into the sand.

Our commentary on the legal aid scheme should not be taken as in any way critical of the staff of the Legal Aid Board who do excellent work under the most trying of conditions. DSBA

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<sup>1</sup> Irish Judge and former solicitor, RE Megarry, *Miscellany at law*, (1955) Stevens, London

wishes to confirm our solidarity with them. Recognition must also be given to the ongoing work and leadership provided in this area by FLAC and other NGOs.

It is clear that the current system of Civil Legal Aid is broken and is not adequately addressing the unmet legal needs of many of the less well-off and more vulnerable of our community and action must be taken immediately to remedy this.

As the Review Group has framed this process by identifying a preliminary set of issues to be used by stakeholders to guide their response, DSBA submission will follow the preliminary issues and have responded to the Civil Legal Aid Review Group. We start with Recommendations.

### **Recommendations:**

#### **1. Sufficient independent resourcing of civil legal aid**

Legal aid in Ireland has suffered from two major defects:

- i. Lack of resources
- ii. Lack of operational independence of the Legal Aid Board to set the level of fees payable for its private practitioner scheme. Both the Minister for Justice and the Minister for Finance must approve the terms and conditions of any private practitioners' panel. In addition, the solicitors employed by the Legal Aid Board have historically been paid less than comparably experienced solicitors employed in the offices of the Director of Public Prosecution or the Chief State Solicitors Office.

Unless these two fundamental defects are remedied any reform of the Civil Legal Aid system will run into the sand.

#### **2. Additional areas of civil law to be covered immediately by the Civil Legal Aid Scheme are:**

Employment and Equality Law and it is submitted that access to justice is not achievable for many people without legal aid in relation to employment and equality cases. In the great majority of cases there is no equality of arms between the employer and employee.

#### **3. It is submitted that a flexible, concise and transparent system of prioritisation be adopted by the Civil Legal Aid Review Group. The factors could include the following:**

- Loss of liberty
- Risk to bodily integrity, health psychological welfare of the applicant or dependent children – childcare cases, domestic violence cases, child abduction
- Right to a good name, right to defend allegations of domestic violence
- Statutory time limits close to expiry

- Imminent full hearing date
  - Imminent interim hearing date
  - Irrevocable economic loss
4. Legal aid should also be extended into the following areas due to their importance to the person involved and the complexity of the law as well as the very negative economic and other consequences of a failure to vindicate their rights:
    - Social welfare appeals
    - Residential Tenancy Board (tenants)
    - Inquests – If the cause of death is unnatural, or other issues surrounding the death are unknown, the Coroner carries out an inquest. Currently limited legal representation under the legal aid scheme is permitted in limited situations and on an ad-hoc basis. If an inquest is required, it is submitted that it is in the interest of the family members and society as whole to identify the cause of death and legal aid should be available.
  5. In the short term, cases pursuant to the Assisted Decision-Making (Capacity) Act 2015 should be prioritised for support, advice and representation as the Act is due to be commenced shortly
  6. Proceedings before quasi- judicial settings should not continue to be excluded from legal aid.
  7. The current eligibility thresholds should be determined on a parity with the minimum living wage as the net “base” figure. The current base figure is €18,000.00 and which would then be increased to the 2023 figure of €26,566.80 and would rise with the increases in the minimum living wage which is set at 60 % of the median wage and published annually by the government.
  8. In allowances for financial eligibility, a weighting should be provided for Dublin given the disparity in the cost of living between Dublin and the rest of the country. Allowances must be made for costs of necessary travel to and from work and payment of insurance premia such as for car, house.
  9. The following types of cases should be granted legal aid without a financial eligibility test as they are so fundamental to the rights of an individual:
    - a. Applications pursuant to the Domestic Violence Act 2018

- b. Applications under Mental Health Act, 2001 for legal representation for review of detention
  - c. The Legal Aid - Custody Issues Scheme (Attorney General's Scheme)
  - d. Applications under the Assisted Decision Making (Capacity) Act 2015
10. There should be no merits test applied to the above cases granted legal aid without a financial eligibility test as they are fundamental rights.
11. Merit
- The following criteria are relevant to eligibility for legal aid: the interests of justice (which in turn will be affected by the importance of the matter to the individual – considered objectively) – and the importance of the matter to others in society, particularly disadvantaged groups, as well as the complexity of the matter and the availability of satisfactory alternative methods of achieving justice, including alternative funding and the likelihood of success.
12. All financial contributions should be removed for applicants for legal aid. It is an unnecessary barrier faced by those accessing justice.
13. The current delivery of civil legal aid is hampered by the inadequacy of the financial remuneration available for solicitors employed by the Legal Aid Board and the level of fee payable to the panel of private practitioner solicitors neither of which are remotely related to the market rate for solicitors. The Legal Aid Board should be permitted to set the rate of pay for its own solicitors and also to set the rate of payment for private practitioners. Currently it cannot do so.
14. In addition to increased remuneration, the private practitioner panel should be restructured to reflect the increasing complexity of family law cases in the District Court and the new reality of multiple court appearances in all applications and the Panel should be a closed one restricted by an open interview process to a certain number of specialist solicitors who will increase their skill levels and benefit those seeking legal aid as is currently used in the Mental Health Legal Aid Scheme 2005. A set of proposals for such a scheme is set out in the submission.
15. Key barriers to accessing the legal aid service are
- i. Inadequate resourcing of the Legal Aid Board causing long delays
  - ii. Lack of availability of solicitors on the Private Practitioners Panel due to uneconomic rates of payment
  - iii. Financial contribution currently required.
  - iv. Financial eligibility criteria.
  - v. Merits test if applied inflexibly.
  - vi. Lack of public knowledge of individual rights and the legal system and the legal aid system

16. The administration and delivery of the service can be made to work better for the individual users, NGOs and communities by:
- i. The provision of resources to the Legal Aid Board and the restructuring and resourcing of the private practitioner panel
  - ii. Removal of the barriers set out above.
  - iii. The inclusion of an ongoing public information campaign by the Legal Aid Board.
  - iv. The repurposing of the Legal Aid Board as a co-ordinating body and resource for relevant NGOs and Community Law Centres to provide better access to information about rights and legal aid and to provide legal advice and information.
  - v. There is a case to be made that the Community Law Centre network would be resourced and expanded to provide legal advice on a greater scale than currently.
17. An individual's awareness and understanding about justiciable problems or legal disputes could be raised by:
- i. Ongoing public campaigns
  - ii. The creation of a resourced role for the Legal Aid Board in organising NGOs, government departments, the Gardai, the Courts Service and others in the justice system to promote information on an ongoing basis regarding individual rights, access to justice and access to the legal aid system.
18. The aims of a civil legal aid scheme should cover:
- i. a service delivery aim, as the Legal Aid Board currently does,
  - ii. a strategic aim of raising awareness of legal rights, overcoming psychological/cultural barriers to access legal profession and to include longer term aims such as research, reform and education and
  - iii. A basic aim or principle of being operationally independent of government but accountable and a further aim to provide information to government, the Oireachtas and the public to assist in ensuring efficiency of the justice system as a whole
19. The values underpinning a civil legal aid scheme should include: equity, equality, dignity and respect, effectiveness, confidentiality, accountability, transparency and integrity, quality, evaluation and collaboration.
20. The civil legal aid service can best be targeted or prioritised for recipients in the future by:

- i. by increasing funding for the Legal Aid Board and
  - ii. by increasing operational independence so that the Legal Aid Board can set its own rates of remuneration for its solicitor employees and members of its Private Practitioner panel
  - iii. by increasing public awareness and by developing more strategic aims
21. There is an important role for mediation and/or other alternative dispute resolution processes as part of a civil legal aid scheme but not as an alternative to it and those availing of mediation should at the same time be able to avail of legal advice so they are aware of their legal rights while attending mediation.

### **Issue 1 - Types of civil law cases**

**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?**

a. The current operation of the scheme and areas of civil law

While civil legal aid is, in principle, available for anyone. However, those successful applicants will be parties who satisfy the eligibility criteria, i.e., have an annual disposable income of less than €18,000.00, disposable assets of less than €100,000.00 and can afford to pay some contribution towards legal aid., In practice, according to the latest report of the Legal Aid Board [2021],

“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.”

The number of applications by case type in 2021 were as follows:

General family law matters	59.6 % .
Divorce/separation/nullity	19.5 %
Cases involving possible state care of children	4.7 %
International Protection and Human Trafficking	9.7%
Other civil matters	6.5 %

83.8 % of applications relate to family law, divorce/separation/nullity and state care of children. Only 6.5 % relate to other civil matters.

b. Civil Legal Aid operating outside the Civil Legal Aid Scheme

It is necessary to consider two additional areas which currently operate outside the Civil Legal Aid Scheme and one which will operate under the Civil Legal Aid Scheme when the statutory provision is commenced namely section 52 of the Assisted Decision-Making (Capacity) Act 2015.



1. The Mental Health Legal Aid Scheme 2005 and
2. The Legal Aid - Custody Issues Scheme (Attorney General's Scheme)
3. The Assisted Decision-Making (Capacity) Act 2015

#### 1. The Mental Health Legal Aid Scheme (2005)

This scheme provides for legal aid for a patient<sup>2</sup> within the meaning of the Mental Health Act 2001 for the purpose of providing that person with legal representation before a tribunal in proceedings under that Act. This scheme is currently administered by the Mental Health Commission but is intended to be administered by the Legal Aid Board soon when the enabling section is commenced – that is, Section 52 of the Assisted Decision-Making (Capacity) Act 2015 which would entitle the patient requiring legal representation before a tribunal under the 2001 Act to a legal representative without any eligibility criteria pursuant to section 28(2) of the Civil Legal Aid Act 1995.

This scheme is provided exclusively by private practitioners and currently has 81 private solicitors on its legal representative panel. The Terms and Conditions of the Mental Health Legal Aid Scheme (2005) is attached at **Schedule 1** to this submission and it is submitted that this scheme could be used a model scheme for private practitioners with some modifications as it is superior to the current model of delivery of private practitioner services.

Section 52(d) of the Assisted Decision-Making (Capacity) Act 2015, when commenced will insert section 28(5)(e) in the Civil Legal Aid Act 1995 which will provide that notwithstanding any other provision of the 1995 Act the Legal Aid Board shall grant a legal aid certificate to a person—

*(e) who is a patient, within the meaning of the [Mental Health Act 2001](#), for the purpose of providing that person with legal representation before a tribunal in proceedings under that Act.*

#### 2. Legal Aid - Custody Issues Scheme (formerly known as the Attorney General'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<sup>3</sup>. In 2013 the Legal Aid 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 when the applicant is deprived of their liberty not as a criminal sanction but for example when they are subject to an

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<sup>2</sup> Section 14 Mental Health Act, 2001

<sup>3</sup> Cf page 427 Whyte, Gerry; *Social Inclusion and the Irish Legal System: Public Law in Ireland*; Institute Public Administration 2015

order detaining them in an approved centre pursuant to the Mental Health Act 2001.

The applicant for this legal aid must request it of the Judge hearing the application for habeas corpus at the earliest opportunity and 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 scheme, in which case they may, if successful, recover their costs.

There is no formal set scheme of fees and they are negotiated with the Legal Aid Board following completion of the case. They are generally considerably less than would be secured by an order for costs against the respondent.

**Schedule 2** attached hereto contains Legal Aid - Custody Issues Scheme Provisions & Guidance Document from the Legal Aid Board

### **3. The Assisted Decision-Making (Capacity) Act 2015**

Section 52(c) of the Assisted Decision-Making (Capacity) Act 2015, when commenced, will insert paragraph 3A into section 28 of the Civil Legal Aid Act 1995, and will provide legal aid for 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 [Declarations as to Capacity and as to lawfulness of an intervention].

Section 3A of the 1995 Act provides that the following requirements do not apply to those seeking legal aid for such applications - that is, the requirements pursuant to:

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

*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 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;

Section 52(e) of the 2015 Act, when commenced, will allow for the clawback of the legal aid granted to a relevant person by inserting section 7A after section 33(7) of the Civil Legal Aid Act 2015

*33“(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.”*

### **What areas of civil law do you think it should cover?**

While in principle the Legal Aid Board can deal with many different areas of civil law, as can be seen from the figures quoted above from the Legal Aid Board Report, 2021, in practice it primarily deals with family law. One practical guide to the most acute current unmet legal need arises from the evidence gathered by FLAC as part of its work to address unmet legal need.

Examining the 2021 FLAC Annual Report, we can see that applicants approach FLAC in two ways:

1. Via their telephone lines
2. At their in-person clinics

Examining FLAC statistics as follows, taken from 2021 FLAC report:

1. Via telephone lines

Family Law	<p>29.6 %</p> <p>3,895 family law queries were answered on FLAC’s telephone information and referral line, more than any previous year, accounting for almost one third of all calls received. Family law queries rose by 13% compared with the previous year. Almost 44% of family law queries were in relation to a divorce or separation, 29% in relation to custody, access or guardianship, 17% in relation to maintenance, almost 12% in relation to domestic violence and 11% in relation to the family home. Calls about a divorce or separation rose by 29.3% compared with the previous year, while calls about custody/access/guardianship rose by 17.8%. Calls about maintenance rose by 9.8%, and calls about domestic violence rose by 8.6%.</p>
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Employment 15%

1,968 employment law calls were logged in 2021, which is almost identical to the record number of employment law calls received the previous year. One third of all employment law queries were in relation to contract terms. Calls about grievance procedures, redundancy and dismissals each represented 14% of employment queries. Contract related queries rose by almost 13% compared with the previous year, while calls about grievance procedures rose by 47.2%. Redundancy queries dropped by 16% compared with the previous year. Covid related employment queries were common in 2021. 11% of employment law queries were COVID related. Many callers queried whether employers were entitled to know their vaccination status while other callers queried whether they were obliged to return to work in circumstances where co-workers may not have been vaccinated.

Civil Law 8.1%

This category of calls includes civil law queries that do not fall under the predefined list of areas of law. In 2021, eight per cent of calls were logged in this category. Of these

- 23% were requiring information about court proceedings.
- 21% had a query about tort.
- 10% had a data protection related query.
- 6% had a query regarding Power of Attorney.
- Other civil law queries included queries about defamation (6%), Covid related (4%), deed poll (4%), wardship (4%) and freedom of information (3%)

Criminal	7.4 %
Wills	6.9 %
Housing	5.8 %
Consumer	4.6 %
Property	3.4 %
Credit/debt	3.1 %
Other	remainder

2. In person clinics

Family Law	<p>Around one third of all consultations in FLAC clinics in 2021 were in relation to a family law query. This suggests that notwithstanding the current emphasis on family law in Legal Aid that there is a need for further assistance in the area of family law.</p>
Employment	<p>Almost one third of all consultations in FLAC Clinics in 2021 were in relation to an <u>employment law</u> query.</p> <p>Around one third of service users with an employment law query were seeking advice in relation to an employment contract.</p> <p>Almost 22% of service users with an employment law query were seeking advice in relation to dismissal.</p> <p>Around 16% had a query about redundancy and a further 16% in respect of discrimination.</p>
Will/Probate	4.9 %
Other	4.8 %
Consumer	4.9 %
Housing	
Landlord/Tenant	4.5 %
Property	3.8 %
Credit and debt	2.4 %
Criminal	2.2 %
Negligence/PI	2.2 %
Various other issues – note social welfare was 0.4%	

#### **AREAS WHICH LEGAL AID SHOULD COVER IMMEDIATELY in addition to current areas**

##### **i. Employment Law**

The FLAC statistics indicate a significant unmet legal need for advice and representation in relation to employment law issues and this should include representation before the WRC, the Labour Court for employees. Of particular concern is the unmet legal need in relation to issues concerning termination of employment which have very serious implications for the employee and can result in economic hardship, stress and many other consequences for those losing their employment. While other areas are also of importance, Civil Legal Aid should immediately be put in place to cover employment law and in particular matters relating to termination of employment.

##### **ii. Equality Law**

A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland was prepared for the Free Legal Advice Centres by the LLM Human Rights Law Clinic (LA7131) module of the 2021 Hilary term at the Trinity College Dublin of the University of Dublin on the 21 April 2021.

The report is appended at **Schedule 3**.

It examined employment equality cases before the WRC, source - decisions taken by the WRC under the Employment Equality Act in the period from 1 January 2018 to 31 January 2021 as published in the WRC's website. The % of cases won by employees was as follows:

1. Professionally represented	30.41 %
2. Union representation	32.65 %
3. Self-represented	13.95 %
4. Other	24.05 %

Other representation includes representation by FLAC, Citizen Information Centres, consultants, family members and other third parties.

The Report at para 9 states:

*Overall, unrepresented claimants had a success rate of less than 14%, indicating that legal representation more than doubles a claimant's chance of success.*

The Report at para 11 states:

*An additional challenge faced by those bringing an employment equality claim before the WRC is that the complainant must provide evidence of unlawful discrimination. Providing evidence of unlawful discrimination is not a simple or a straightforward task, and the average layperson would face difficulty in determining the sort of evidence required by the WRC adjudicator.*

The Report offers a series of conclusions and recommendations, with the foremost being that the Irish government should enable employment equality hearings held before the WRC and Labour Court to be eligible for state-funded legal aid. This would ensure compliance with the state's obligations under the Irish Constitution, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter).

The Report at paragraph 4 states:

*The lack of legal aid for employment issues means that valid cases of discrimination, bullying, or harassment in the workplace may not have the opportunity to be remedied in the courts due to claimants' lack of personal funds to access the judiciary. Vulnerable communities are often the most at-risk group for discrimination in the workplace and, without access to legal aid to defend their rights, are at a further disadvantage when seeking access to justice. For equality and human rights in the workplace*

*to truly be protected, Irish workers must have access to justice and legal aid when their rights are infringed upon.*

It is submitted that there is a clear and compelling case that legal aid for employment and equality cases should be introduced immediately to provide access to justice for employees. It is submitted that access to justice is not achievable for many people without legal aid in relation to employment and equality cases.

See also para 3 below re: inclusion of quasi-judicial settings for legal aid.

**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?**

It is submitted that a flexible, concise and transparent system of prioritisation be adopted by the Civil Legal Aid Review Group. The factors could include the following:

- a. Loss of liberty
- b. Risk to bodily integrity, health psychological welfare of the applicant or dependent children – childcare cases, domestic violence cases
- c. Right to a good name, right to defend allegations of domestic violence
- d. Imminent full hearing date
- e. Imminent interim hearing date
- f. Irrevocable economic loss

If a case is not prioritised then the applicant for legal aid should have the right to review or appeal this decision in a transparent manner and by an external reviewer or appeal.

In the short term, cases pursuant to the Assisted Decision-Making (Capacity) Act 2015 should be prioritised for support, advice and representation as the Act is due to be commenced shortly. In the remaining time before the act commences, it will not be possible for the Legal Aid Board to deliver services via its Law Centre structure and a private practitioners panel of solicitors will have to be put in place to provide representation. As this Act represents a fundamental change to the existing law, support and advice will also need to be provided whether by the Legal Aid Board itself or by delegating this function to a private practitioner panel.

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

1. Applications to review a declaration as respects capacity pursuant to section 49(1) of the 2015 Act should also be eligible for legal aid

Applications to the High Court pursuant to 2015 Act as follows:

2. Applications pursuant to Part 6 section 54 – review of capacity of wards who are adults and section 55 – declarations following review and discharge from wardship
3. Applications pursuant to Part 10 section 106, 107, 108 Review of detention orders in certain circumstances (approved centres), (non approved centres)

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

**3. Should the current exclusion of proceedings before quasi-judicial settings continue to apply?**

It is unclear why quasi-judicial settings are treated differently to judicial settings as both deal with individual rights particularly in the case of the WRC and Labour Court but also in Social Welfare Appeals. The man or woman in the street may be indifferent to whether they must go to court or to a quasi-judicial setting to vindicate their rights and it is submitted they will be equally fearful of both without legal representation and the distinction between judicial and quasi-judicial settings is an artificial one and should be removed immediately. Justice is justice to the service user, regardless of the mode of delivery.

If the basis for the treatment is that these bodies are less formal and there is less need for legal representation, it is submitted that the increasing complexity of the law in all these areas as well as the lack of understanding of basic procedural issues such as the right to be heard, the importance of testing prevent adequate access to justice for those who would otherwise qualify for legal aid. The recent Supreme Court case of *Zalewski* has laid bare the operation of the WRC and the substantive and procedural complexity of an unfair dismissal case for a retail worker.

The Mental Health Legal Aid Scheme (2005) provides for legal aid for a patient within the meaning of the Mental Health Act 2001 for the purpose of providing that person with legal representation before a tribunal in proceedings under that Act. This is an administrative tribunal and legal aid is provided.

Based on the current acute unmet legal need for employment law and the argument made based on research evidence by FLAC as set out above for equality law, the exclusion of proceedings before the WRC and the Labour Court should immediately cease and legal aid should be available to those employees' seeking advice and representation before these fora.

In addition a public awareness campaign in relation to employment and equality law rights should be an ongoing feature of any changes to the legal aid system.

The Law Society of Ireland's Report on Civil Legal Aid 1991 recommended that civil legal aid would be extended to cover representation of persons before tribunals especially the EAT as this was in accordance with the recommendations of the Pringle Report.

*"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”.*

While this may have been correct in 1991, if anything the case has become more compelling in 2023 and particularly given the volume and complexity of employment law introduced since 1991.

The Workplace Relations Commission in their Annual Report 2021 at page 37 noted:

*“In terms of impact, the Supreme Court judgment in *Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24 represented the most significant administrative, procedural and operational development with regard to the adjudication service of the WRC since establishment. The judgment in this landmark constitutional challenge was handed down in April 2021 by the Supreme Court finding that the WRC was ‘administering justice’ but that this was permissible under Article 37 of the Constitution which creates a stratum of bodies exercising limited powers and functions of a judicial nature. Such bodies (of which the WRC is one), whilst still creatures of statute, must operate fair procedures in the same way as a court.”*

Mr. Zalewski worked for Buywise Discount Store as an assistant manager at its North Strand store and was summarily dismissed. When he brought his case to the WRC, the adjudication officer dismissed his case without a full hearing. Judge McMenamin at para 6 of his judgement described the situation as “truly Kafkaesque”.

McMenamin J in Zalewski noted at para 54 of his judgement:

*“Ultimately, under the Constitution, the courts provide the forum to right wrongs, and administer justice. 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?”*

At paragraph 138 McMenamin J. quotes the comments of Advocate General Wahl that

*“bodies, such as the WRC, might be better placed than courts to provide low cost, speedy and effective solutions to conflicts of that nature (paras 87-88). But I think this comment also raises the question as to whether, in industrial relations law, as in equality law, there are areas which would be challenging, be it said, even for legally qualified persons, not to mind those not so qualified.”*

This observation from a Supreme Court Judge with over 45 years legal experience, indicates the difficulties facing not just adjudicators but those seeking to represent themselves before the WRC. Another obvious issue arising is the access to legal representation enjoyed by employers compared to those workers who are not members of unions. This represents a basic equality of arms issue which can be remedied by provision of legal aid to cases before the WRC and the Labour Court.

In addition, it is submitted that legal aid should be extended into the following areas due to their importance to the person involved and the complexity of the law as well as the very negative economic and other impact of a failure to vindicate their rights:

- i. Social welfare appeals
- ii. Residential Tenancy Board
- iii. Inquests – If the cause of death is unnatural, or other issues surrounding the death are unknown, the Coroner carries out an inquest. Currently limited legal representation is permitted in limited situations. If an inquest is required, it is submitted that it is in the interest of the family members and society as a whole to identify the cause of death and legal aid should be available.

#### Why? /Why not?

The unmet legal need as illustrated by the latest FLAC report, 2021 indicates a very serious level of need for employment and equality law advice and representation. The report at Schedule 3 of this submission sets out starkly the difference between being legally represented by a professional and not being legally represented before the Equality Tribunal and it is submitted that similar considerations apply to representation/non representation before other fora, both judicial and quasi-judicial.

It is further submitted that in many employment and equality law cases, the employer will have professional legal advisors representing them or will be represented by an employers' body. In the case of social welfare appeals the appellant faces an employee of the state with expertise in this area while in the RTB the tenant faces a landlord who has the means to engage legal representation. The current housing crisis has escalated in importance in defending tenants' rights.

Article 6 of the ECHR guarantees a right to a fair trial. The case can be made that legal representation is required in order to guarantee equality of arms before a quasi-judicial body and to ensure a fair trial.

#### **4. How appropriate are the current eligibility thresholds?**

**The Joint Committee on Justice and Equality Report on Reform of the Family Law System, 2019 at recommendation 24 states:**

*"The Committee recommends that a full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society. It believes that the current threshold for legal aid needs to be raised significantly."*

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

The Family Law & Civil Legal Aid Committee of the Law Society of Ireland in its Report on Legal Aid of February 2000 states at page 16

that “the [financial] eligibility criteria should be regularly reviewed in accordance with increases in the Consumer Price Index”.

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 per week in Q3 2017 or €37,312.26.

The current disposable income figure to qualify for legal aid is €18,000.00 or €346.16 per week.

The living wage as calculated by the government is set at 60% of the median wage which in 2023 is estimated as €13.10 per hour. €510.90 per week based on a 39-hour week and €26,566.80 per annum gross.

<https://enterprise.gov.ie/en/news-and-events/department-news/2022/november/tanaiste-announces-introduction-of-national-living-wage.html#:~:text=It%20will%20be%20introduced%20over,to%20%E2%82%AC11.30%20per%20hour.>

#### What is a living wage ?

The authors of the Maynooth University research discuss the differences between a living wage and a minimum wage stating that a living wage is “an income floor, like the minimum wage, but one that allows employees to afford the essentials of life.” This definition therefore suggests that earnings below a living wage result in employees being forced to do without certain essentials and cannot make ends meet. Eurofound provides further clarification between the concept of a living wage and the concept of a minimum wage by pointing out that a living wage tends to be “significantly higher” than a minimum wage. The reason cited for this tendency is that a living wage is “set at a level to allow a worker to attain a socially acceptable living standard...If existing minimum wages were perceived to be effective in this regard, the rationale for living wage campaigns would disappear.”

The living wage is the minimum amount that workers could be expected to live on and it is submitted that this figure, based on the government figure of 60 % of the median wage in any given year be used as the minimum “base” figure in place of the current figure of €18,000.00.

In addition, it is submitted that there is a strong equality argument to be made for having an increased weighting for Dublin given the additional housing costs involved.

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

The national minimum living wage as set by the government i.e., currently €13.10 per hour based on a 39 hour week giving a gross figure of €26,566.80

**iii. What is your rationale for that figure?**

It is almost impossible to agree on a suitable figure which would achieve a level of fairness for those seeking legal aid.

The national minimum living wage is a figure approved by government as the minimum amount that workers could be expected to live on. It appears to be a fair figure.

For this figure to be appropriate it must be used as the minimum base figure for legal aid ie corresponding to the current figure of €18,000.00.

*"It should be noted that the calculation of the living wage, as set out in the terms of reference for the report, the Low Pay Commission (LPC) notes that a living wage "may be defined as the minimum income necessary for a single adult worker in full time employment, with no dependents, to meet his or her basic needs and afford a minimum acceptable standard of living."*<sup>4</sup>

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

Current allowances should be retained and a weighting should be provided for Dublin given the disparity in the cost of living between Dublin and the rest of the country.

Allowance must be made for costs of necessary travel to work and payment of insurance premia such as for car, house.

**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?**

1. Applications pursuant to the Domestic Violence Act 2018

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<sup>4</sup> Thursday 31 March 2022 Research on the Introduction of a Living Wage in Ireland Final Report Dr. Aedin Doris, Prof. Donal O'Neill and Dr. Olive Sweetman Department of Economics, Maynooth University, page 5;

<https://www.gov.ie/pdf/?file=https://assets.gov.ie/226963/abf64971-90ba-4f77-966e-4e403ca4fd65.pdf#page=null>

At the present time there is an exemption from the financial contribution for those who meet the financial eligibility criteria in relation to Domestic Violence applications but only if this is the only application they are dealing with. Those who do not meet the financial eligibility criteria are excluded from legal aid for Domestic Violence applications except for one category as set out in Section 28(5D) of the Civil Legal Aid Act 1995 as amended:

*“Notwithstanding any other provision of this Act”... “where an applicant or respondent (within the meaning of the Domestic Violence Act 2018) is prevented from conducting a cross-examination referred to in section 16 of that Act, the Board shall grant a legal aid certificate to the applicant or respondent, as the case may be, for the purpose of his or her being represented in relation to such a cross-examination.*

*[s5D inserted by s46 Domestic Violence Act 2018]*

This section was introduced to prevent parties to an application for Domestic Violence being cross examined by the other party in person if they were not legally represented.

This exemption from the financial eligibility test was done on the basis, presumably, that if a party to an application under the Domestic Violence Act represented themselves and wished to cross examine the other party and this was refused then, there would be in breach of natural justice and the party's constitutional rights. The alternative solution arrived at by the drafters of the legislation was that the unrepresented person could apply for legal aid without any restriction such as merit or financial eligibility or financial contribution.

While the right to cross examine is a very important procedural safeguard, it is hard to justify how those who seek relief under the Domestic Violence Act 2018 should have to be subject to financial eligibility when there is no such financial eligibility for the party who wishes to cross examine the other.

#### *Chapter VI – Investigation, prosecution, procedural law and protective measures of the Istanbul Convention*

##### *Article 49 – General obligations*

*1 Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings*

##### *Article 50 – Immediate response, prevention and protection*

*1 Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to*

*all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.*

*Article 57 – Legal aid*

*Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.*

In light of the very significant potential safety issues arising for victims of domestic violence and their dependent children as well as the defendant's right to a good name in such applications, it is submitted that all applications under the Domestic Violence Act, 2018 should be exempt from the financial eligibility criteria and the merit criteria as this will remove almost all administrative burdens facing an applicant under the Domestic Violence Act 2018 and which gives real effect to the Istanbul Convention-Council of Europe Convention on preventing and combating violence against women and domestic violence.

2. Currently, applications under Mental Health Act, 2001 for legal representation for review of detention while involuntarily detained in a psychiatric hospital do not require a financial eligibility test. A formal scheme which is now administered by the Legal Aid Board and was formerly administered by the MHC is in place for this.

Neither do habeas corpus applications [require financial eligibility] pursuant to the Legal Aid - Custody Issues Scheme which is available for civil matters such as where the person is involuntarily detained in a psychiatric hospital and wishes to bring a constitutional challenge to their detention via the High Court.

All non-criminal civil law cases relating to deprivation of liberty should have legal aid without a financial eligibility test.

3. In addition, there should be no financial eligibility test for applications under the new Assisted Decision Making Acts.

1. Declarations as to Capacity etc.

Section 52(c) of the Assisted Decision-Making (Capacity) Act 2015, when commenced, which inserts paragraph 3A into section 28 of the Civil Legal Aid Act, 1995, provides that legal aid will be available for 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 [Declarations as to Capacity and as to lawfulness of an intervention].

Section 3A provides that the following requirements do not apply to those seeking legal aid for such applications- the requirements pursuant to section 28 (2)(c)- the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned and 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 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 clawback of the legal aid granted 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.”*

There should be no financial eligibility test in relation to applications under section 37(1) of the Assisted Decision Making (Capacity) Act 2015 as amended. Currently it is intended that there should be no financial eligibility test in relation to “relevant persons” only and this exception should be broadened to include any applicants.

In addition, although no provision is currently planned for legal aid for the following applications under the 2015 Act, legal aid needs to be provided together with an exemption from financial eligibility as they relate to fundamental rights of liberty and rights of review of wardship.

4. Applications to review a declaration as respects capacity pursuant to section 49(1) of the 2015 Act should also be eligible for legal aid

Applications to the High Court pursuant to 2015 Act as follows:

- i. Applications pursuant to Part 6 section 54 – review of capacity of wards who are adults and section 55 – declarations following review and discharge from wardship
- ii. Applications pursuant to Part 10 section 106, 107, 108 Review of detention orders in certain circumstances (approved centres), (non approved centres)
- iii. Applications pursuant to Part 11 Convention on International Protection of Adults

**7. Should some form of merits test apply to the cases at 7 [6]?**

No, as these cases all contain such fundamental rights that the merits test is not appropriate.

**If so, what should that look like?**

There is no merit test applied in relation to applicants for legal aid pursuant to the Mental Health Act, 2001 and it is submitted that applicants for legal aid in relation to matters covered by the Assisted Decision Making Act 2015 as amended, should be exempt from the merits test as the 2015 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 at paragraph 168. *“The Government is working to ensure the right of people with disabilities to effective access to justice on an equal basis to others.”*

It is submitted that effective access to justice does not involve either a merits test or a financial eligibility test for applications pursuant to the Assisted Decision Making (Capacity) Act 2015 as amended. The purpose of the Assisted Decision Making (Capacity) Act 2015 as amended is to reform the law relating to persons who require or may require assistance in exercising their decision-making capacity, whether immediately or in the future having regards to the Convention on the Rights of Persons with Disabilities.

In relation to other family law cases, which are not Domestic Violence Act cases, it is generally accepted, following the decision of the Supreme Court in the case of *MF v the Legal Aid Board* [1993] 13 ILRM that, *“the merits test can be somewhat redundant in many family law cases”*.



At page 16 of the 2000 Report on Civil Legal Aid in Ireland by the Family and Civil Legal Aid Committee of the Law Society they outline that: the Supreme Court held that in cases involving issues of custody/access to children the Legal Aid Board should not interpret the requirement of being 'reasonably likely to be successful in the proceedings' strictly but should grant Legal Aid where there is a reasonable likelihood that points of view and submissions of the person wishing to take the proceedings, with regard to the welfare and custody of the child concerned, would be amongst the material fact which would be relied by the Judge in determining the issues concerning the child. The resulting 'benefit to the applicant' should be taken as being satisfied where the applicant had an interest in the welfare of the child.'

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

See comments in relation to non-applicability of merits case to family law cases above.

Merit is also not appropriate where the legal aid relates to applications under the Mental Health Act 2001 or the Assisted Decision Making (Capacity) Act 2015.

Regard should be taken of Principles 9, 10,11 of the IBA Guidelines on Legal Aid Principles on Civil, Administrative and Family Justice Systems and its Commentary Prepared by the IBA Access to Justice and Legal Aid Committee and the Bar Issues Commission Approved on 25 May 2019 by the Council of the International Bar Association

<https://www.ibanet.org/document?id=Guide-on-legal-aid-principles-2019>

**Principle 9**

*"The following criteria are relevant to eligibility for legal aid: the interests of justice (which in turn will be affected by the importance of the matter to the individual – considered objectively) – and the importance of the matter to others in society, particularly disadvantaged groups, as well as the complexity of the matter and the availability of satisfactory alternative methods of achieving justice, including alternative funding and the likelihood of success."*

**Principle 10**

*"The 'interests of justice' is a more important eligibility criterion than the 'likelihood of success' in civil, administrative and family legal aid. In family law matters, the prospects of success will often not be relevant."*

**Principle 11**

*"General eligibility for initial advice should be available when there are no other satisfactory sources for this advice."*

In relation to other civil cases, it is worth considering the following case of the CJEU which was a reference for a preliminary ruling under Article 234 EC from the Kammergericht (Germany), made by decision of 30 June 2009, received at the Court on 22 July 2009, in the proceedings DEB Deutsche Energiehandels- und

*“The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.*

*In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.*

*In making that assessment, the national court must take into consideration*

- i. the subject-matter of the litigation;*
- ii. whether the applicant has a reasonable prospect of success;*
- iii. the importance of what is at stake for the applicant in the proceedings*
- iv. the complexity of the relevant law and procedure; and*
- v. the applicant’s capacity to represent himself effectively.*

*In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.”*

These are also the factors the European Court of Human Rights identified in its judgements dealing with the obligation to provide legal aid in the cases of *Airey*, 1979 and *Steel and Morris*, 2005.

It is submitted that it is not possible for an applicant to represent themselves competently in relation to a family law or employment law matter given not only the complexity of the law and procedures but also the parties own involvement in the proceedings and the emotional involvement they will have with the subject matter of the case. In addition, the current complexity of most areas of Irish law means that only in rarest of circumstances would an Applicant be in a position to represent themselves effectively.

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

All financial contributions should be removed for applicants for legal aid. It is an unnecessary barrier faced by those accessing justice.

In addition, the current minimum threshold levels for legal aid are so low that in order to qualify the applicant must be living on a very minimal income in which any level of expenditure may cause them significant hardship. Even if this

threshold is raised there is still a very serious concern that the financial contribution will act as a barrier to accessing legal services.

The Joint Committee on Justice and Equality Report on Reform of the Family Law System, 2019 at page 32, 33 [underlining added]

*“The Civil Legal Aid Act 1995, in practice, does not cover many areas of law, and the current under-funding of the Legal Aid Board has created lengthy waiting lists for initial consultations, which adds to delays in the courts system as well as a backlog of work, and delays in granting applications due to under-resourcing. In addition, many applicants will be excluded from eligibility, despite having low disposable income, due to issues with allowances in the means assessment. Given the disparity in rent and childcare costs across Ireland, there is geographic inequality whereby some people are unfairly penalised by living in an area where they pay higher rent.*

*Contrary to criminal legal aid, civil legal aid is not free, and clients are expected to pay a contribution based on income and assets assessed in the means test. The contribution for receiving advice through legal aid ranges from €30 to €150, depending on income. If representation is provided, a minimum contribution of €130 is required, though if a person has disposable income and capital after the 46 Family Law Reporting Pilot Project, Dr Carol Coulter, P 42 various allowances are deducted, then their contribution for legal aid will be calculated on both means and capital and may come to several thousand euro. These costs can be prohibitive and deter people from accessing the scheme, and can also create further monetary difficulties for those applicants living on basic incomes and/or social welfare, where the minimum contribution for representation would be significant. This issue has been exacerbated by an amendment to the Civil Legal Aid Act in 2008, whereby the Legal Aid Board can only waive contribution if it would cause “undue hardship” to the applicant. FLAC expressed concern that little is done by way of making the public aware of this waiver, and that there is ambiguity as to what is categorised as ‘undue hardship’ when granting the waiver. The Committee agreed that a review of the legal aid scheme was needed, particularly with regard to means testing and eligibility.*

**The Joint Committee on Justice and Equality Report on Reform of the Family Law System, 2019 at recommendation 24 state:**

*“The Committee recommends that a full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society. It believes that the current threshold for legal aid needs to be raised significantly.”*

#### Mental Health Legal Aid Scheme 2005

Currently there are no financial contributions under this scheme. The 2005 Scheme relates to representation for adults who have been involuntarily detained under the Mental Health Act 2001 before Mental Health Tribunals. Pursuant to section 17(1)(b) of the 2001 Act the Mental Health Commission 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 communication with the outside world, it is not practicable 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 Mental Health Act 2001 to enquire into the lawfulness of their detention, it is submitted that there should be no level of financial contribution required. That is the current position and should remain so.

Custody Issues Scheme (formerly known as the Attorney General's Scheme  
Currently there are no financial contributions under this scheme and applications relating to matters covered by Custody Issues Scheme (formerly known as the Attorney General's Scheme) as amended should continue to be excluded.

Assisted Decision Making (Capacity) Act 2015

Applications pursuant to the Assisted Decision Making (Capacity) Act 2015 when commenced should also be excluded not just for a "relevant person" but

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

No financial contributions ought be required.

**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?**

Not applicable

**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?**

1. Inadequacy of financial remuneration

The biggest problems with the current modes of delivery of civil legal aid through family law centres and private panel of solicitors is as a result of:

- a. the remuneration payable to employed solicitors in the family law centres [which is less than other public bodies much less than private sector comparators] and
- b. the level of fee payable to the private panel of solicitors

Neither of which are remotely related to the market rate for legal services in either the public or private sector.

In the latest report of the Legal Aid Board,[2021] Nuala Jackson SC, Chairperson of the Legal Aid Board at page 19 states:

*“A significant challenge the Board experienced in 2021 was around recruitment and in particular the recruitment of solicitors. The Board was compelled by public pay policy to advertise for new solicitors on the first point of the applicable pay scale and in a manner and at a remuneration level distinct from other public bodies that employ solicitors. As a result, the Board found it increasingly difficult to recruit solicitors. As we emerge from the pandemic and demand for the Board’s services return to pre-pandemic levels, it is of the utmost importance that recruitment is promoted and facilitated, as otherwise the resultant challenges will lead to longer waiting times for those requiring legal aid to access justice. I welcome the support of the Department of Justice on this matter and I very much welcome the positive developments in this regard in recent times. The Legal Aid Board, however, remains greatly dependent upon its private practitioner panels in the provision of services, especially at District Court level. I would like to thank the legal practitioners who participate in these panels and invite others to consider such participation. We will continue using our best endeavours to ensure that the service conditions of all those providing this important assistance to the Board are appropriate and reasonable.”*

There remains a serious shortage of available solicitors who will accept the reduced payment available in the Legal Aid Board. The problem is both recruitment and retention of suitable solicitors to staff the legal aid board and provide legal services to clients. In addition, a negative feedback loop has been created where the lack of staff means those who remain are over worked, yet paid the same leading to a reduction in morale.

The Legal Aid Board does not have the power in itself set the rate payable to private practitioners which must be approved by the Department of Public Expenditure and Reform. The current rate of payment bears is far below the market rate for solicitors and in the latest report of the Legal Aid Board,[2021] John McDaid CEO at page 23 states:

*“I should re-state that for civil legal aid services we operate a mixed model of delivery involving both our law centres and private solicitors who are paid on a fee per case basis. The contributions of those private solicitors who often work for fees that could in no way be described as generous, is very significant and the civil legal aid system depends on them. Our model of delivery is also dependent on barristers whose work is critical to the provision of legal aid and they have shown great commitment and agility to meet the needs of the Board’s clients in the exceptional circumstances that prevailed again in 2021.*

The rate of payment for the Legal Aid Board Private Practitioner scheme in the District Court is completely uneconomical for solicitors and has led to a flight of solicitors from the Legal Aid Board panel and caused a significant difficulty for litigants in accessing legal services.

In the Dublin region there is one firm of solicitors who have dedicated themselves to the District Court and will appear there every day. There are a small number of other firms of solicitors who appear with regularity in the District Court.

It is simply not possible for solicitors to deliver the service required in the District Court on the current rates of legal aid on the private practitioner scheme.

Proposed solution- remuneration and private practitioner scheme:

1. Law Centres:

The Legal Aid Board is permitted to set the rate of pay for solicitors it requires to employ or alternatively that rate of pay is linked to the rate of pay for solicitors in the Attorney General's office or the Chief State Solicitors office or the DPP's office. Currently it is much less for similarly qualified solicitors.

2. Private Practitioner Scheme

The Legal Aid Board is permitted to set the rate of remuneration for solicitors and barristers on its private practitioner scheme. In order to be viable this fee should be increased and the scheme itself should be restructured. See suggestion for restructure below:

Restructuring the Private Practitioner Scheme

In 2018 the Law Society of Ireland wrote to the Legal Aid Board and identified a number of structural issues with the Private Practitioner Scheme as it operated in the District Court in family law cases and proposed solutions. We set out below an extract from the said submission which we endorse:

**Part 1: Structural issues**

1.1 Increasing complexity of family law cases in the District Court

Following the introduction of the 42A into the constitution and the enactment of the Child and Family Relationships Act 2015, District Court family law cases have become longer and more complex. The detailed consideration of the best interests of the child as well as the necessity to hear the voice of the child have led to :

- Frequent use of expert witnesses which can lead to contested interim applications, considerable additional work in identifying suitable section 32 assessors, liaising with them, taking further instructions, attending Court for release of report and also attending court for a further hearing date.
- Much more frequent adjournments to facilitate appointment of experts
- The introduction of new District Court Rules (SI 17 of 2016) which require the completion and exchange pre hearing of a Statement of Arrangements, a complicated list of 27 questions relating to the welfare of the child or children.

These changes affect access, custody and guardianship cases.

New District Court Rules to implement the new Domestic Violence Act 2018 will shortly be introduced and this will lead to further complexity in this area coupled with the requirements under the 2015 Act and the new Article 42A.

#### 1.2 Lack of any change to the structure of the private practitioners' scheme

The current private practitioners' scheme has not altered at all in the last 12 years except for a reduction in the rate of fees paid to the legal practitioners by 12 %. The system where a flat fee is paid to the solicitor regardless of how many occasions they must attend the District Court or how many interim issues must be decided on these various dates makes the scheme unworkable and unviable for solicitors. While it may have been possible to tolerate the exceptionally unattractive rates of remuneration for solicitors prior to 1st October 2010, the reduction of 12 % was, for most solicitors unviable.

Further damage to the fabric of the scheme was caused by the greatly increased workload facing the District Family Court in all cases involving children by the changes outlined above.

#### 1.3 Unrestricted access to the Private Practitioners Panel is not working

The Private Practitioners Panel was historically too large leading to an occasional case for many practitioners but no economies of scale permitting specialisation in District Court practice save in exceptional cases. If a solicitor has to attend the court for the adjournment of one case, then the cost to that firm is significant, however this declines where there is a greater caseload. A serious issue arising for those attempting to access the panel was the number of solicitors who remain on the panel but who do not accept cases as they are too busy with other work or do not consider it a viable prospect.

### Part 2 Proposed solutions

#### **2.1 The Private Practitioner Scheme should reflect the increasing complexity of family law cases in the District Court and the new reality of multiple court appearances in all applications**

It is proposed that the current scheme be overhauled to reflect the new reality of multiple court appearances in all applications with a fee payable for additional court appearances after the initial one.

#### **2.2 Restricted access to the Private Practitioners Panel to a certain number of specialist solicitors who will increase their skill levels and benefit those seeking legal aid**

- it is suggested that a new restricted PPP be set up which would be reviewed every 3 years by the PAC and be open to all solicitors however a limited number of solicitors would be appointed to act in each area. Provided sufficient cases were made available to the panel it would encourage specialisation and lead to a better service for clients.

- a smaller PPP would permit the LAB to engage in training and monitoring of compliance with the terms and conditions of the scheme as well as quality assurance in relation to the service provided

by the PPP. Currently there is very little quality assurance or training of the PPP. This would have the added benefit of increasing the quality of service as well as allowing for the monitoring of service providers and an example of a closed panel is to be found in the current Mental Health Commission panel for legal representatives.

It is worth highlighting the following legal aid schemes which operate/will operate differently:

1. The Mental Health Legal Aid Scheme 2005 and
2. The Attorney General's Scheme
3. The Assisted Decision-Making (Capacity) Act 2015

Schemes 1-3 are all private practitioner based and scheme 1. has been in operation since November 2006 and scheme 2. for over 50 years, it is worth commenting on both schemes in advance of the introduction of a scheme for legal aid pursuant to the 2015 Act which will have to be introduced shortly.

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

1. It is a closed scheme.
2. Entry into the scheme is by way of an application and interview process. The initial scheme envisaged an application process every 3 years to remain on the panel. [Due to a legal difficulty arising with the scheme which is unique to this scheme and which could be avoided in another scheme, there has been no new process of application and re-application to this scheme for over 10 years.]
3. The panel is relatively small and legal representatives consequently get more work per head and develop an expertise in the area. According to the Mental Health Commission website there are currently 81 legal representatives for the entire country. The last report from the Mental Health Commission confirms that in 2021 there were 2548 involuntary detentions.
4. The Mental Health Commission 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 represent 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 that was 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 under the Constitution. Five patients chose a private solicitor to represent them, and none chose to represent themselves in 2021.
5. The MHC are scrupulous in dividing the work out evenly and if a legal representative refuses a case, they go to the end of the queue and the case is offered to the next legal representative.



6. Legal representatives are invited to choose which geographic regions they will cover and they are not offered work outside these areas.
7. Intensive training was provided to legal representatives after appointment to the panel and ongoing training is provided. In addition, the Mental Health Commission has carried out audits of the legal representative's file.
8. The morale on the panel is high and there is a high degree of enthusiasm for the work generally. The panel members organised themselves into a group called the Mental Health Lawyers Association which provides CPD for members. In addition, panel members were responsible for setting up the Mental Health and Capacity committees of the DSBA and Law Society.
9. 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 in relation to the operation of the District Court Private Practitioner Scheme (excluding childcare cases) the Law Society highlighted the challenges facing this scheme and pointed out that unrestricted access to the Private Practitioners panel is not working. The Law Society advocated for a new restricted Private Practitioners Panel to be set up which would be reviewed every 3 years and be open to all solicitors but with a limit to the number of solicitors to be appointed to act in each [geographical] area.

To reiterate the benefits of a restricted panel are:

- Encourages specialisation and expertise leading to increased benefit for client
- Permits Legal Aid Board to engage in training and monitoring of those on the panel leading to an increase in competence and expertise leading to increased benefit to client
- Removes those from the panel who are not committed to doing the work and developing a specialism

Note Principle 26, 27 of the IBA Report referred to above:

- “ 26.        *The body administering legal aid should put in place an effective system to measure the quality of work. This should consider the merits of outputs (assessed, for example, by audit or peer review) rather than inputs (for example, years of qualification or specific training) as the best way of assuring quality.*
27.        *Those providing exclusively or mainly legal aid services should be paid according to industry norms so as to attract high quality providers and to allow for the development of expertise in the sector and therefore create value for money, whether in a salaried service or through private practice.”*

**It is submitted that the features required in a successful private practitioners' panel are:**

1. Adequate and fair remuneration for the work done. Without this, any future structural changes will make no difference.

2. A closed panel of solicitors which is appointed and re-appointed at 3 or 5 yearly intervals by means of open application and interview by the Public Appointments Service.
3. The requirement for ongoing CPD on an annual basis exclusively for panel members provided by the Legal Aid Board tailored to the needs of the panel.
4. The panel would be constituted with geographical factors in mind to ensure that all areas of country were covered.
5. All panel members would receive one day training together after appointment and re-appointment
6. A system of audit and quality control would be put in place using peer auditing.
7. Refusal to take cases would lead to removal from panel.
8. The applicants would be allocated a solicitor from the panel. As far as possible a fair distribution of cases among the panel would occur. The reality at the moment is that applicants for legal aid are calling many different solicitors none of whom are available to take work from the panel. If the client does not want the assigned solicitor, they are free to choose another from the panel but it is hoped this would only occur in exceptional circumstances.
9. Any new panel should be encouraged to set up its own representative and training group which would increase commitment to the work.
10. The private practitioners' scheme must be flexible to identify and address legal aid "blackspots" where there is a disincentive for private practitioners to provide legal aid. The Legal Aid Board would monitor the provision of legal aid work and address any deficiencies in provision of service to applicants e.g., there is an obvious issue with the provision of legal aid for remote District Courts where the cost of travel to and from the Courts as well as the waiting time at the court would render the provision of legal aid uneconomic. Another example of a "blackspot" is where a private practitioner is given a client whose partner has allegations of child sex abuse which are historic or ongoing. This case will take much more work than other cases whether acting for the person accused or the partner/spouse. If the case involves access/guardianship/custody there may, in addition to the usual section 32 report, there may be a forensic report and the input of Tusla. The number of experts and witnesses in these cases is always more, the number of interim applications more and the time for the plenary or final hearing is more. However, without flexibility this case would be paid the same as a routine access/custody application.

It is submitted that the Private Practitioners Family Law Scheme should be reconstituted as above and along the lines of the Mental Health Act, 2001.

In addition, given the imminent creation of a legal aid system under the Assisted Decision-Making Act 2015 as amended, it is submitted that a closed scheme similar to that under the Mental Health Act 2001 be put in place with necessary amendments e.g., rather than being assigned a legal representative, potential clients could select a legal representative from the list which would be publicly available.

### **13. What are key barriers to accessing the service?**

- i. Inadequate resourcing causing long delays - these will only be resolved by adequate resourcing of the Legal Aid Board and by permitting it to set the remuneration levels of its own staff and private practitioner panels.

The Joint Oireachtas Committee Report on Reform of the Family Law System at recommendation 25 states: *"Given the delays and volume of cases facing the Legal Aid Board, and the barriers to access facing the public, the Committee strongly recommends that a thorough needs analysis and review be conducted of the funding requirements of the Legal Aid Board, with a view to reducing waiting times for consultations with a solicitor and ensuring that cases are progressed within acceptable timeframes that minimises stress on children in particular."*

The Legal Aid Board in its 2021 Report set out the delays for applicants seeking legal services with a solicitor as set out below. These delays cannot help applicants for legal aid and problems can become more difficult and less likely to resolve leading to further litigation. Legal Aid applicants must be seen as soon as possible with a view to resolving their legal issue.

# Waiting Times

**A snapshot as of the 31st December 2021 for the longest wait in weeks, for legal services with a solicitor at each law centre.**

Table 9	Waiting Times (weeks)
Waiting times in law centres on the 31st December 2021	
Athlone	54
Blanchardstown	21
Castlebar	13
Cavan	16
Clondalkin	24
Cork - Pope's Quay	17
Cork - South Mall	10
Dundalk	17
Ennis	33
Finglas	21
Galway - Francis Street	28
Galway - Seville House	12
Jervis Street	21
Kilkenny	13
Letterkenny	5
Limerick	10
Longford	14
Monaghan	13
Navan	22
Nenagh	10
Newbridge	27
Portlaoise	16
Sligo	10
Smithfield	27
Tallaght	22
Tralee	13
Tullamore	3
Waterford	26
Wexford	13
Wicklow	16

- ii. For the private practitioners' panel  
Accessing a solicitor can be very difficult given the reduction in the number of solicitors willing to work for an uneconomic rate of return.
- iii. Financial contribution  
For the reasons set out above the financial contribution should be abolished as it can be a barrier to access to legal aid.

- iv. Financial eligibility  
The current financial eligibility criteria are so high as to remove most potential applicants for legal aid.  
The Joint Oireachtas Committee Report on Reform of the Family Law System at recommendation 24 state:  
*"The Committee recommends that a full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society. It believes that the current threshold for legal aid needs to be raised significantly."*
- v. Merits test  
The merits test if applied inflexibly will also operate as a barrier to accessing legal aid.
- vi. Lack of public knowledge of individual rights and the legal system and the legal aid system  
As long ago as 1977, the Pringle Report's first recommendation was:  
*"A comprehensive scheme of legal aid and advice should be concerned not only with the provision of legal advice and legal representation but also with the dissemination of information about the law and with research aimed at establishing the nature and extent of hidden legal needs."*  
  
We still await the dissemination of information about the law to a wider public and the research by the Legal Aid Board on the nature and extent of hidden legal needs.  
Important work is done by the Community Law Centres, NGOs and FLAC to provide legal advice and to disseminate information about the law, legal representation and legal aid but more resources and greater involvement from the Legal Aid Board is required. Currently the Legal Aid Board is concerned, as it always has been, with the provision of legal aid. The public information element is an important part of a legal aid system which is currently lacking and which would improve access to legal aid by informing the public of their entitlements under the law and to legal aid.  
  
The Joint Oireachtas Committee Report on Reform of the Family Law System at recommendation 24 states:  
  
*"The Committee, in acknowledging the information gap that exists at present, recommends that the Legal Aid Board and Courts Service both work to promote increased public knowledge of the Legal Aid Scheme, providing greater visibility and accessibility to such information so that the public are fully aware of the supports available, and the extent and limits of those supports."*
- vii. While Kristel Juriloo in her 2015 article "Free Legal Aid – a Human Right", Nordic Journal of Human Rights states:

*“The former Special Rapporteur on the independence of judges and lawyers has affirmed that socio-economic factors have a major bearing on effective access to justice. Appalling living conditions, homelessness, unemployment, illness or disability, inadequate education, and marginalisation are deprivations that exacerbate each other in a vicious circle, preventing people from exercising any of their human rights. Physical barriers also impair access to justice. For example, for persons with disabilities and people living in rural areas, inaccessibility and physical distance may restrict the effective exercise of access to justice. While it is outside of the scope of this article to address all these different barriers to justice, it is nevertheless important to note that it is not only financial means that impair access to justice.”* It is submitted that these factors could also constitute barriers to accessing legal aid.

- viii. Geographic issues- in Value for Money and Policy Review of the Legal Aid Board OCTOBER 2011 <https://www.legalaidboard.ie/en/about-the-board/press-publications/value-for-money/value-for-money-and-policy-review.pdf>  
at para 4.12 *“It is perhaps important to note that the locations of the Board’s services are relatively fixed, so if regional demand exceeds local service capacity, its scope for responding is currently limited largely by the availability of Private Practitioners locally and the resources available to engage them.”* While the staff problem in 2011 was due to a moratorium on hiring staff, the current challenge is finding staff who are willing to work for the rates of pay offered and so where the applicant lives will affect the length of time they must wait for the service and the quality of the service provided by the Legal Aid Board.

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

- i. The provision of resources to the Legal Aid Board and the restructuring and resourcing of the private practitioner panel
- ii. Removal of the barriers set out above.
- iii. The inclusion of an ongoing public information campaign by the Legal Aid Board.
- iv. The repurposing of the Legal Aid Board as a co-ordinating body and resource for all those NGOs and Community Law Centres to provide better access to information about rights and legal aid and to provide legal advice and information.
- v. There is a case to be made that the Community Law Centre network would be expanded to provide legal advice on a greater scale than currently.

**Issue 7- Awareness and assessment of the current scheme**

In relation to the current scheme:

**15. What are its benefits?**

There is an established network of Law Centres around the country providing legal aid with dedicated staff who have acquired experience and expertise in family law in particular. It has offices around the country.

It has an excellent Board and management structure.

**16. What are its challenges?**

The Legal Aid Board is not adequately resourced and it does not have the power to set the remuneration for its own solicitors which is a very significant structural problem which is leading to problems of recruitment and retention.

The private practitioner panels are currently not fit for purpose and need to be both properly resourced and restructured.

The Legal Aid Board will struggle to cope with the influx of additional new areas such as the Assisted Decision Making (Capacity) Act 2015. The increase in International Protection cases is also a problem.

Under the heading "Recommendations (Efficiency related)" Value for Money and Policy Review of the Legal Aid Board October 2011, p98, :

*"It is also noteworthy that HQ costs are influenced by the need to maintain two HQ locations, one in Cahirciveen and one in Dublin. The dual location of HQ came about as part of the Decentralisation programme and is effectively outside of the control of the Legal Aid Board but it does contribute to higher costs."*

The proposed solution in 2011 was to move more staff from HQ in Dublin to Cahirciveen to save on rent in Dublin.

**17. What are its advantages?**

For those applicants lucky enough to pass its financial eligibility test, its merits test, pay the financial contribution, wait for a lengthy period on its waiting list and eventually receive legal representation it provides a good service. However, for those who fall at any of these hurdles it represents a further demoralising failure.

**18. What are its disadvantages?**

It has not attracted sufficient resources and freedom of expenditure to allow it to properly pursue its objectives. It is overly bureaucratic and focused on means testing, waiting lists, issues of administration.

The Legal Aid Board will never function effectively without the power to set the rate of return for private practitioner panels and remuneration for its own solicitors.

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

Ongoing public campaigns as advocated above. The creation of a resourced role for the Legal Aid Board in organising NGOs, government departments, the Gardai, the Courts Service and others in the justice system to promote information on an ongoing basis regarding individual rights, access to justice and access to the legal aid system.

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

- i. Removal of financial contribution to legal aid
- ii. Easing of financial eligibility criteria and bureaucratic barriers
- iii. Localised access to justice via an increase in the Community Law Centre network
- iv. Specialised Law Centres for marginalised groups e.g., the Traveller Legal Support Service is already operated by the Legal Aid Board. Consideration could be given to a specialist law service for the hearing impaired, for those lacking capacity and their families, for social welfare queries, housing list queries/access to housing/RTB, employment, equality and discrimination legal services, debt services.
- v. Expansion of Legal Aid Scheme as set out above to include employment and equality law, RTB cases, social welfare appeals

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

1. A service delivery aim

The aim of the Legal Aid Board as stated in their 2021 Report is:

*“Our Mission is to deliver timely, effective, inclusive and just resolution of family and civil disputes to those most in need of our assistance, through high quality legal representation and advice and / or mediation and to manage other aspects of legal aid which have been entrusted to us.”*

One could argue that the word “most” could be deleted were the Board properly resourced. It is clear that this aim cannot be achieved without adequate resources and a more independent Legal Aid Board. However this is a part of a suitable aim for a civil legal aid scheme.

2. A strategic aim of raising awareness of legal rights, overcoming psychological/cultural barriers to access legal profession and to include longer term aims such as research, reform and education

It is submitted that the aim of a civil legal aid scheme should also encompass a strategic aim, as set out by Gerry Whyte in his Submission to the Oireachtas Committee on Justice and Equality, based on a strategic model which would include “ a focus on raising awareness of legal rights and an attempt to overcome the psychological/cultural barrier that exists between low income individuals and communities, on the one hand, and the legal profession, on the other”. He proceeds to reference Zemans, "Recent Trends in the Organization of Legal Services" (1985) *Anglo-American Law Review* 283, pp.292-3 as follows:

*“...While dealing with the inevitable daily problems, a strategic legal services programme attempts to develop a long-term approach of research, reform and education to deal with the more fundamental issues. Rather than handling cases which are relevant to the lawyer's experience, a strategic programme sets priorities in one or several areas of concern to a particular community such as the environment, housing, land-ownership, occupational health, or immigration. In concert with the geographic community or the*



*community of interest, the professional will consider collective issues or the complaints of a class of individuals."*

3. A basic aim or principle of being operationally independent of government but accountable and a further aim to provide information to government, the Oireachtas and the public to assist in ensuring efficiency of the justice system as a whole

In its overview of its service in the 2021 Report, the Legal Aid Board states:

*"OUR PURPOSE We are an independent statutory body responsible for the provision of civil legal aid and advice, family mediation and vulnerable witness related services and for the administration of a number of ad hoc legal aid schemes. We are a key strategic partner and a civil agency of the Department of Justice."*

While the Legal Aid Board may be an independent statutory body it lacks the operational ability to set the rate of remuneration for solicitors and for its private practitioner scheme and must instead seek the consent of the Department of Public Expenditure and Reform. It is submitted that this effectively reduces the ability of the Legal Aid Board's to deliver on its own mission statement set out above.

In addition the phrase:

*"We are a key strategic partner and a civil agency of the Department of Justice"* may be correct but it is submitted that there is an inequality in the relationship between the Legal Aid Board and the Department of Justice which means they can never be partners as the Legal Aid Board appears dependent on the Department to implement its operational decisions and presumably in relation to submissions made to the Department of Public Expenditure and Reform and other issues.

Operational independence has been identified by the IBA in its Report referred to above as one of its principles and we set out the relevant principles below:

*Principle 12*

*The body administering legal aid must be operationally independent of government, subject to its accountability obligations.*

*Principle 13*

*The body administering legal aid should consult with professional bodies of lawyers, to benefit from their relevant expertise. The risk of conflicts of interest will generally preclude professional bodies of lawyers controlling legal aid.*

*Principle 14*

*The body administering legal aid must be legally answerable for the quality of the service it administers. It must answer to the sponsoring ministry, which provides its funding, but also to Parliament, as the representatives of the people who pay for, and benefit from, legal aid.*

### *Principle 15*

*The body administering legal aid – as with other groups and bodies involved in the justice system – has an important role to play in providing information to government, Parliament and the public that will assist in ensuring the efficiency of the justice system as a whole. This includes information on where the system is failing to provide access to justice.*

The body administering the civil legal aid scheme namely the Legal Aid Board should be operationally independent of all government departments. That is currently not the case and should be changed, failing which no matter what aims the Legal Aid Board have in principle, they cannot deliver them in practice.

## **22. What values should underpin it?**

A number of the values set out in the Terms and Conditions of the Mental Health Legal Aid Scheme (2005) seem appropriate and we have amended and added to, to suit the Legal Aid Board:

Equity	this value will be manifest by the prioritisation of activities of greatest need in accordance with the aims of the Legal Aid Board. In addition, the Legal Aid Board will interpret its rules and regulations in a flexible and fair manner to benefit the applicant for legal advice.
Equality	
Dignity and	
Respect	it is a core value of the Legal Aid Board to treat all those in contact with the organisation equally, fairly and with dignity and respect
Effectiveness	The Legal Aid Board will ensure effective delivery of its service and to all aspects of its management.
Confidentiality	This value underpins the work and activity of the Legal Aid Board
Accountability,	
transparency	
and integrity	these values will be expressed through the work of the Legal Aid Board and its private practitioner panels by operating at all times in a professional and transparent manner
Quality	the Legal Aid Board is committed to striving for continuous improvement of its activities
Evaluation	the Legal Aid Board is committed to ongoing review and monitoring of its activities and incorporating the required changes

Collaboration        the Legal Aid Board is committed to collaborate for improvement through ongoing partnership, consultation and teamwork

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

First of all by increasing funding for the Legal Aid Board and secondly by increasing operational independence so that the Legal Aid Board can set its own rates of remuneration for its solicitor employees and members of its Private Practitioner panel. Thirdly by increasing public awareness as set out above, by developing more strategic aims

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

As set out above there is a role for the Legal Aid Board to co-ordinate legal assistance initiatives which would prevent duplication and ensure effectiveness and value for money. This would involve increased resources for the Legal Aid Board.

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

See above for public information and strategic roles as well as providing information to government, public and others on reform and improving the efficiency of the justice system.

**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?**

Yes, but not as an alternative to it. It is important that those availing of mediation should also be able to avail of legal advice via legal aid so that they are adequately informed of their legal entitlements. The Family Mediation Service provided free by the Legal Aid Board is an excellent service to assist separating couples and parents whose relationship has broken down to negotiate their own agreement.

It is important to point out that mediation is not the only ADR available and collaborative law, lawyer assisted settlements and arbitration should be considered as part of the greater suite of ADR available to resolve disputes.

The principle of voluntariness is very important in mediation and other ADR systems and should be observed in any civil legal aid scheme.

**Final comments**

This submission started by pointing out that historically legal aid in Ireland has suffered from two major defects:

1. Lack of resources
2. Lack of operational independence of the Legal Aid Board to set the level of fees payable for its private practitioner scheme. Both the Minister for Justice and the Minister for Finance must approve the terms and conditions of any private practitioners' panel. In addition, the solicitors employed by the Legal Aid Board have historically been paid less than comparably experienced solicitors employed in the offices of the Director of Public Prosecution or the Chief State Solicitors Office.

We went on to state that unless these two fundamental defects were remedied any reform of the Civil Legal Aid system will run into the sand.

If the system of civil legal aid is expanded as it must be with the introduction of the Assisted Decision Making (Capacity) Act 2015 cases and, as it should, with the addition of quasi-judicial bodies then this will compound the pre-existing major defects and there is every possibility that the quality of legal aid will diminish. In addition, the numbers of those with unmet legal needs will increase and most of them will not be in a position to access legal assistance privately so that their legal issues will remain unresolved with the consequent personal and societal consequences.

END

See schedules attached 1-3



**Terms and Conditions**

**Pursuant to the**

**Mental Health Legal Aid Scheme (2005)**

**MENTAL HEALTH COMMISSION**

**MISSION**

*The Mental Health Commission is committed to fostering and promoting high standards in the delivery of mental health services, to promoting and enhancing the well-being of all people with a mental illness and ensuring that the interests of those involuntarily admitted under the provisions of the Mental Health Act 2001 are protected.*

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## Guiding Principles

The guiding principles and core values of an organisation define its ethos and culture. The fundamental principles informing the Mental Health Commission in the implementation of its mandate are:

- Promoting quality in the delivery of mental health services.
- Promoting the interests of all persons availing of mental health services
- Protecting the interests of persons involuntarily admitted under the provisions of the Mental Health Act 2001.

The Commission is guided in particular by the principles enunciated in the Mental Health Act 2001, the UN Universal Declaration of Human Rights, International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.

## Values

The core values which define the Commission's ethos and culture and shape how we deliver our services, include:

- **Equity:** This value will be manifest by the prioritisation of activities of greatest need and in accordance with the Commission's mandate.
- **Accountability and Integrity:** These values will be expressed through the work of the Commission by operating at all times in a professional and transparent manner.
- **Quality:** The Commission is committed to striving for continuous improvement of its activities.
- **Dignity and Respect:** It is a core value of the Commission to treat all those in contact with the organisation with dignity and respect. The

Commission is committed to providing services that are culturally and linguistically appropriate.

- **Empowerment and Advocacy:** The Commission is committed to facilitating the realisation of the full potential of those availing of mental health services and promoting their best interests.
- **Confidentiality:** This value underpins the work and activity of the Commission.
- The Commission is committed to handling confidential and personal information with the highest level of professionalism and will take due care not to release or disclose information outside the course of that necessary to fulfil our legal and professional requirements.
- **Achieving Together:** It is our commitment to collaborate for improvement through ongoing partnership, consultation and teamwork.
- **Evaluation:** The Commission is committed to ongoing review and monitoring of its activities and incorporating the required changes.



## Introduction

1. The Mental Health Act, 2001 ("the Act") requires the Mental Health Commission ("the Commission") to put in place an independent review system for persons who are involuntarily admitted to an approved centre (as defined by the Act) on the basis that they suffer from a mental disorder as provided for in the Act. Following receipt by the Commission of a copy of any order made by a consultant psychiatrist, which requires consideration by the mental health tribunal ("the tribunal"), the Commission shall assign a legal representative to represent the patient concerned at the tribunal hearing, unless he or she proposes to engage one at his or her own expense (and actually proceeds to engage one). Such hearings will occur within the required statutory timeframe.
2. The Act provides that the Commission make or arrange for the making, with the consent of the Minister for Health and Children and the Minister of Finance, of a scheme or schemes for the granting by the Commission of legal aid to patients, which involves representation before a mental health tribunal and representation in appeals before the Circuit Court or the High Court, where appropriate.
3. The arrangement through which the Commission provides legal services is referred to as the Mental Health Legal Aid Scheme 2005 ("the Scheme"). The Scheme operates in relation to the provision of representation before the mental health tribunal and, in certain circumstances, an appeal to the Circuit Court or the High Court. This document details the terms and conditions pursuant to the Scheme.
4. The Commission shall provide legal services through legal representatives in private practice or by individual solicitors within firms who support the Commission's mission, guiding principles and values.

## Panel of Legal Representatives

5. The Commission may establish and maintain a panel of legal representatives or law firms who satisfy the criteria outlined in these terms and conditions and are willing to provide legal services in accordance with the provisions of the Mental Health Act, 2001 and the Mental Health Legal Aid Scheme, 2005 and that panel will be known as ***The Mental Health (Legal Representatives) Panel*** and is referred to in this document as “**the Panel**”. The Commission shall assign a legal representative from the Panel to act on behalf of each patient before a mental health tribunal and, in certain circumstances, in appeals before the Circuit Court or the High Court.
6. The Panel will be maintained on a national basis and will comprise the names of law firms / legal representatives, with the necessary experience, knowledge and interpersonal skills, whose applications for placement on the panel have been approved.
7. The Commission may, at its discretion, subdivide the panel on a regional geographic basis in order to facilitate the effective and efficient operation of The Scheme.

## Conditions

8. Any legal representative who wishes to have his or her name placed on the Panel shall:-
  - hold a current practising certificate from the Law Society of Ireland in the case of a solicitor; be currently subscribing to the Law Library, Ireland in the case of a barrister

- have professional indemnity insurance to cover an individual claim of up to €2.5m; and
- be a practising solicitor or barrister who has had not less than three years' experience as a practising solicitor or barrister ending immediately before application.

At the time of application and at all times throughout their tenure the legal representative must be practising. Any law firm which wishes to participate in the Scheme must provide the above details for each legal representative who proposes to provide legal services on behalf of the firm under the Scheme.

9. Any law firm / legal representative who meets the conditions in the Scheme and who wishes to have his or her name placed on the Panel must:
- apply in writing to the Commission on the approved application form which is attached to this document;
  - undergo a qualifying interview process;
  - participate in a training course provided by the Commission if they are successful at the interview process;
  - give consent to enable the Commission to obtain police clearance on their behalf; and
  - give an undertaking in the form appended hereto, that he or she will, comply with these Terms and Conditions and the provisions of the Act when providing legal aid.

In the case of a law firm, the above conditions apply to each legal representative who may provide legal services under the Scheme on behalf of the firm.

10. Legal representatives will be expected to act in a fiduciary manner in relation to all patients and to provide a service in keeping with the code of practice of their profession, (e.g. in the case of solicitors, the Guide to Professional Conduct as is issued from time to time by the Law Society of Ireland) and any

specific practice directions issued by either the Commission or their professional body in relation to the provision of a service in this area of law.

11. Legal representatives on the Panel must comply with the tax clearance procedures specified in the Department of Finance Circular 22/95 entitled 'Tax clearance Procedures-Public Sector Contracts' or any such circular amending or replacing that circular. A copy of this circular can be obtained from the Department of Finance.
12. It is the policy of the Commission to obtain police clearance in relation to all persons who may have contact with patients on its behalf. Legal representatives are therefore required to complete the necessary application form(s) to enable the Commission to obtain such consent so that the Commission can obtain such police clearance on their behalf. Police vetting currently involves checking the police records for any convictions a person may have had.
13. Legal representatives / law firms on the Panel must have access to email facilities and must have IT software that is compatible with Microsoft Office software in order to ensure the effective and efficient administration of the Scheme.
14. Members of the Panel may be requested to undergo a medical examination at the request of the Commission during any period of their tenure on the Panel.
15. The Panel will be reviewed formally by the Commission every three years or as considered necessary by the Commission. In order to remain on the Panel it will be necessary for the Commission to be satisfied that law firms / legal representatives are providing a professional service. Membership is initially on a 12 month probationary period after which time confirmation will be issued, subject to satisfactory performance.

16. Every legal representative who has been accepted for membership of the Panel will be allocated a number to be known as a Legal Representative Number which must be quoted on all correspondence with the Commission.

17. Nothing in these Terms and Conditions shall give rise to, or be construed as giving rise to, a relationship of employer and employee between the Commission and any legal representative on The Panel.

### **Training**

18. Legal representatives must participate fully in the mandatory training course, provided by the Commission prior to having their names placed on the Panel. In addition, the Commission will require legal representatives on the Panel to keep their skills updated by undergoing relevant and appropriate training as required in order to keep abreast of developments in this area so as to ensure that they remain on the Panel.

### **Withdrawal of Legal Representatives from the Panel**

19. Legal representatives who wish to withdraw from the Panel must inform the Commission in writing of their intention to withdraw, so that the Panel may be amended accordingly. Legal representatives are required to give a minimum of one month's notice of their intention to withdraw from the Panel subject to their obligation to either complete their involvement in existing mental health tribunal cases, Circuit or High Court appeals or in the alternative, to satisfactorily enter into an arrangement with the Commission to hand over the conduct of such matters in a manner that is entirely satisfactory to the Commission. Any such hand over would be, if legal aid is to continue, to another Panel member.

### **Scope of the Mental Health Legal Aid Scheme**

20. The Mental Health Legal Aid Scheme will apply in relation to:-

(i) representation before a mental health tribunal, established by the Commission to consider:

- a. an admission or renewal order under Section 15 of the Act;
- b. a proposal to transfer a patient to the Central Mental Hospital under Section 21 of the Act;
- c. a proposal to perform psycho-surgery on a patient, under Section 58 of the Act;
- d. the review under Section 72 of the Act of a detention of a patient who was admitted under the 1945 Act; and
- e. an admission order for the detention, reception or treatment of a patient, under Sections 23 or 24 of the Act, who has been re-graded after being voluntarily admitted.

(ii) representation, where appropriate, in appeals before the Circuit Court under Section 19 of the Act; and

(iii) representation, where appropriate, in appeals before the High Court on a point of law under Section 19 (16) of the Act.

21. Legal representatives from the panel may also be engaged in appeals before the Circuit Court and the High Court. The legal representative who was assigned by the Commission to represent a patient before the mental health tribunal will be required to provide a statement to the Commission indicating whether or not, in his /her opinion, legal representation should be provided for an appeal to the Circuit or the High Court, as appropriate. Payment for the provision of this information shall be included in the all in case fee paid to the legal representative for representation before the mental health tribunal.

### **Nature and Extent of Legal Services to be Provided**

22. Legal representatives on the Panel must take due regard of the patient's circumstances and mental health. Patients are admitted on an involuntary

basis due to a mental disorder. In the Mental Health Act, 2001 “mental disorder” means mental illness, severe dementia or significant intellectual disability where :—

(a) because of the mental disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or

(b) (i) because of the severity of the mental disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and

(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.

23. The legal service provided will generally involve the following activities:
- taking instructions from the patient on a number of occasions. In some instances, patients may have communication difficulties due to their mental disorder. The legal representative will be expected to take time in such cases to ensure the patient is well informed and adequately represented;
  - carrying out any necessary research, including;
    - ensuring that the procedures were correctly followed in relation to the specific order being considered by the mental health tribunal;
    - finding out the facts of the case and obtaining corroborating evidence of these facts, either from the patient’s medical records or by interviewing witnesses if necessary;

- carrying out a detailed review of the medical reports by consultant psychiatrists and any other expert reports which have been produced in relation to the case, including the independent medical report arranged by the Commission, in order to identify the patient's current medical diagnosis and the past medical history;
  - looking at the medical diagnosis and the proposed treatment;
  - researching relevant case law, if necessary; and
  - considering any other issues relevant to the particular situation;
- representing the patient before either the mental health tribunal, the Circuit Court or the High Court, (whichever is appropriate), within the required statutory timeframe, which may take place either in the presence or in the absence of the patient; and
  - communicating and explaining a mental health tribunal's decision to the patient, and in the event that the decision is that the patient should remain at the approved centre, advising the patient and the Commission whether or not, in his or her opinion, there are any grounds for an appeal to the Circuit Court or the High Court.
24. Given that the patient will probably be residing at the approved centre, it will generally be necessary for the legal representative to visit the patient there in order to take instructions.
25. Depending on the nature and extent of the mental health disorder from which a patient may suffer, it may be necessary to visit a patient on more than one occasion in order for the legal representative to satisfy him/herself that proper instructions have been obtained. Legal representatives will be expected to take time in such cases to ensure the patient is well informed and adequately represented.



## **Operation of the Scheme**

26. The Commission shall assign a legal representative from the Panel to represent each patient under the Scheme, before the mental health tribunal and in certain circumstances at an appeal to the Circuit and / or the High Court. The assignment of legal representatives will generally be done using a rota system. The Commission will, however, endeavour to assign the same legal representative to a patient on subsequent occasions unless the patient requests a different legal representative to be assigned, or the legal representative is unavailable. Due to the strict legal time limits which apply in mental health tribunal cases, the Commission will contact the legal representative by phone or email to confirm whether he/she is in a position to take the case before forwarding papers. Once the legal representative confirms that he/she will take the case, the Commission will assign the legal representative to the case and the necessary papers will be forwarded with a letter of authority outlining the patient's details and the matter authorised.
27. The letter of authority shall be the legal representative's authority to provide legal aid on behalf of the Commission under the Scheme.
28. Legal services may not be provided under the Scheme without a prior letter of authority from the Commission.

## **Appeals before the Circuit Court or the High Court**

29. Patients who require representation to institute proceedings in the Circuit Court or the High Court in relation to an appeal of an order of the mental health tribunal, must notify the Commission if they require legal aid. Such an appeal under Section 19 of the Act shall be brought by the patient by notice in writing within 14 days of the receipt by him or her or by his or her legal representative of notice under *Section 18 of the Act* of the decision concerned.

Section 19(1) of the Act states that: *"A patient may appeal to the Circuit Court against a decision of a tribunal to affirm an order made in respect of him or her on the grounds that he or she is not suffering from a mental disorder."*

Section 19(16) of the Act states that: *"No appeal shall lie against an order of the Circuit Court under this section other than an appeal on a point of law to the High Court."*

30. The legal representative who was assigned by the Commission to represent the patient before the mental health tribunal will be required to provide a statement to the Commission indicating whether or not in his/her opinion legal representation should be provided for an appeal to the Circuit Court or the High Court.
31. In cases where the Commission provides legal representation for an appeal to the Circuit Court or the High Court, the same legal representative who represented the patient before the mental health tribunal will, in general, be engaged to represent the patient at the appeal.
32. Legal services may not be provided in the Circuit Court or the High Court under the Scheme without a prior letter of authority from the Commission.
33. Any patient who wishes to be granted legal aid for an appeal to the Circuit or the High Court shall notify the Commission in writing, or in such other manner, being in writing, as the Commission may accept as sufficient in the circumstances of the case. Every notification for legal aid in relation to an appeal to the Circuit or High Court under this Scheme shall be accompanied by such information as the Commission deems necessary. In particular a statement from the previously assigned legal representative as to whether or

not, in his or her opinion, legal representation should be provided for the appeal to the Circuit / High Court, shall be provided to the Commission.

### **Professional /Witness Fees**

34. An independent medical report by a consultant psychiatrist, a member of the panel of consultant psychiatrists established under Section 33(3)(b) of the Act, in relation to the patient shall be obtained by the Commission and provided directly to the legal representative by the Commission. The legal representative will also be given access to the medical notes in relation to the patient at the approved centre, provided the consent of the patient is obtained.
35. The Commission shall only be liable for outlays or professional services, which have been approved in advance.
36. Legal representatives on the Panel shall be responsible for the outlay of any necessary viaticums to secure the attendance of witnesses, but shall be entitled to a refund of such outlay in due course if expenditure for attendance of the relevant witness has been authorised by the Commission in advance.
37. In the event of legal aid being granted by the Commission for an appeal to the Circuit Court under the Act, the Commission may, having regard to the particular circumstances of the case, authorise the services of a barrister / barristers. In the event of legal aid being granted by the Commission for an appeal to the High Court, under the Act, the Commission may authorise the services of a barrister / barristers. The Commission shall not be liable for any barrister's fees that have not been approved in advance.

## **Payment**

38. Once the case has been determined, the legal representative may apply to the Commission for payment of the fee using the claim form, as approved by the Commission from time to time. Care should be taken in completing claim forms, as incomplete or improperly completed claim forms will be returned without payment.
39. A case shall be deemed to be determined when a mental health tribunal has delivered its determination or in the event of a case not going before the tribunal when the Commission has confirmed that the case will not be proceeding. In the event of a case not going before the tribunal a part payment may be made by the Commission, if appropriate, in accordance with Schedule 1.
40. In the case of an appeal before the Circuit Court or the High Court, a case shall be deemed to be determined when the Court has delivered its determination.
41. The completed claim form, together with the letter of authority provided to the legal representative by the Commission should be returned to the Commission's head office, at The Mental Health Commission, St Martin's House, Waterloo Road, Dublin 4, when the services specified in the letter of authority have been provided and the case has been either completed or is not proceeding. The Commission proposes to pay legal representatives on a monthly basis through its accounts system, which will issue payments on a particular fixed date each month. It will be necessary for the Commission to receive completed claim forms two weeks in advance of that particular date (which will be notified to the legal representatives) in order to ensure that payments are made that month.

42. Patients in receipt of legal services must not be charged any fees and must not be asked to discharge any expenses, costs or outlays by any legal representative on the Panel in relation to a case before the mental health tribunal or appeals to the Circuit Court or the High Court for which legal aid has been granted by the Commission.

### **Fees Payable**

43. There shall be a standard scale of fees (set out in Schedule 1 below) payable per case to legal representatives on the Panel for the provision of services in each mental health tribunal case.
44. In the event that the case does not proceed, the Commission may pay a proportion of the total fee depending on the work that has been done and such fees are outlined in Schedule 1.
45. There shall be a standard fee payable per case to solicitors on the Panel for the provision of services in appeals to the Circuit Court. The fees payable are outlined in Schedule 1.
46. Where legal aid is granted by the Commission for an appeal to the High Court under the Scheme, the Commission shall agree a fee in advance for the solicitor and barrister in the case. Such fees shall be subject to the approval of the Minister for Health and Children and the Minister for Finance.
47. Travel and subsistence expenses are not payable to legal representatives in mental health tribunal cases, or in appeals before the Circuit Court or the High Court.

## **Removal from the Panel**

48. The Commission may remove a legal representative from the Panel if it considers that:-

- (a) the legal representative's conduct when providing legal services or his/her professional conduct generally render him or her unsuitable, in the opinion of the Commission, to provide such services; or
- (b) the legal representative has failed to comply with these Terms and Conditions; or
- (c) the legal representative has not participated in the Scheme to a satisfactory level, including but not confined to, his/her refusal on a regular basis to accept a patient as a client or to give a patient appropriate legal representation within the required statutory timeframe; or
- (d) the legal representative has a medical condition that would render him or her unfit to provide the required service. Legal representatives must declare that they have no medical condition that would render them unfit to provide the required service. The Commission reserves the right at all times to refer legal representatives to a medical practitioner in order to confirm their fitness in this respect or
- (e) the legal representative has not participated in the mandatory training programmes organized by the Mental Health Commission.

49. The Commission shall, at its sole discretion, be entitled to remove legal representatives from the Panel where the Commission is of the opinion that the services of such legal representatives are no longer required for the efficient administration of the Panel, provided that when removing legal representatives from the Panel under this section, the Commission shall provide at least one month's notice, in writing, to the legal representatives.

50. If the Commission decides to exercise its right to remove a legal representative from the Panel, the legal representative will be notified in

writing of the grounds for the decision. The legal representative may, within a period of one month from the date of such notification, appeal in writing to the Commission querying the decision, setting out the grounds of appeal in full. The Commission will take a decision on the appeal and advise the legal representative of that decision. Depending on the particular circumstances, the Commission reserves the right to remove cases already assigned to the legal representative and / or not to refer other cases to the legal representative whilst the appeal is under consideration.

51. The Commission reserves the right, where an allegation comes to light that professional misconduct has taken place, to suspend the legal representative from The Panel. In such instances the Commission shall report the allegation to the appropriate body or bodies responsible for professional regulation, and to the Gardaí if there are reasonable grounds to suspect that a criminal act has been committed.

### **Quality Service**

52. The Commission is committed to the provision of a quality legal service to patients. Legal representatives should not take on a case unless they can provide a quality service within the specified time limits. If the work of an individual legal representative is considered not to meet the required standard, the legal representative will be notified of the issues of concern and if these are not resolved the Commission will consider removing the legal representative from the Panel.
53. Legal representatives shall keep a proper note and record of consultations, instructions, advice and of what transpires at mental health tribunal hearings or at court. The work of legal representatives on the Panel in respect of cases assigned by the Commission may be reviewed on an on-going basis by the Commission, or a person nominated by the Commission.

54. Legal representatives are required to comply with any Best Practice Directions that are issued by the Commission from time to time to ensure that an effective, efficient, and professional legal service is provided to patients in mental health cases.

### **Fees for Legal Representatives in the Circuit Court or the High Court**

55. Cases in the Circuit Court may require Junior Counsel and in very rare occasions may require Senior Counsel in addition to Junior Counsel. Where legal aid is granted by the Commission for an appeal to the High Court under the Scheme, the Commission shall agree a fee in advance for the solicitor and barristers in the case, depending on the particular circumstances of the case. Such fees shall be subject to the approval of the Minister for Finance. Cases in the High Court may require both Junior Counsel and Senior Counsel.

### **Taxation**

56. It is each panel member's responsibility to declare any payments to the Revenue Commissioners for the purposes of Income Tax. All successful applicants will be requested to furnish either a statement from their accountant/tax adviser that their tax affairs are up-to-date and in order **or** produce a Tax Clearance Certificate issued by the Revenue Commissioners. The Mental Health Commission operates the professional services withholding tax system for fees.

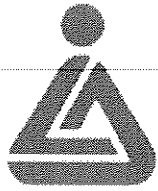


## Schedule 1

<b><i>Fees for representation before a mental health tribunal (exclusive of VAT)</i></b>	Currently
Representation before the mental health tribunal in relation to an admission order	€1,385
Representation before the mental health tribunal in relation to a renewal order	€388
<b>Preparatory Work for Mental Health Tribunal in Relation to an Admission Order</b>	
In the event that the mental health tribunal hearing is cancelled prior to hearing, and not reconvened, and all of the necessary preparatory work has been carried out by the legal representative on the case.	€776
In the event that the mental health tribunal hearing is cancelled and not reconvened, and some but not all of the preparatory work has been carried out by the legal representative, partial payment, which may not exceed the full case fee payable, will apply as follows:	
- A consultation with the patient has taken place	€222
- A second or more consultations with the patient have taken place	€166
- The papers in relation to the admission / renewal order have been reviewed	€194
- The required research has been carried out, including interviewing of all appropriate witnesses	€194
In the event that the mental health tribunal hearing is cancelled on the day of the hearing and not reconvened, and all of the necessary preparatory work has been carried out by the legal representative on the case.	€1,108
In the event that the mental health tribunal hearing is cancelled before any preparatory work has been carried out by the legal representative	Nil payment

## Fees for solicitors and barristers in the Circuit Court

<b><i>Fees for appeals to the Circuit Court (exclusive of VAT)</i></b>	<b><i>Fee</i></b>
Solicitors: All inclusive case fee for representation in the Circuit Court	See separate schedule
Senior Counsel: All inclusive case fee for representation in the Circuit Court	See separate schedule
Junior Counsel: All inclusive case fee for representation in the Circuit Court	



(/)

# **Legal Aid - Custody Issues Scheme Provisions & Guidance Document**

**Part 1 (Sections 1-7) of this document provides an introduction to, and outlines the scope of, the Scheme.**

## **1. General**

This document sets out the provisions of the Legal Aid – Custody Issues Scheme and provides guidance on the administration of the Scheme by the Legal Aid Board.

## **2. Commencement and administration of the Scheme**

The Legal Aid - Custody Issues Scheme (formerly known as the Attorney General's Legal Aid Scheme) provides payment for legal representation in the High Court and the Supreme Court for certain types of cases not covered by civil legal aid or the Criminal Legal Aid Scheme. The cases covered include Habeas Corpus (Article 40.4.2) Applications, High / Supreme Court Bail Motions, certain types of Judicial Review, Extradition and European Arrest Warrant Applications (see Section 4 below). It is an ex-gratia scheme set up with funds made available by the Oireachtas.

The Scheme was previously administered on behalf of the Attorney General by the Department of Justice and Equality. However, from 1st June 2012 the remit for the administration of the Scheme was transferred to the Legal Aid Board.

The budgetary responsibility for the Scheme, which formerly rested with the Chief State Solicitor's Office was, with effect from the 1st January 2013, transferred to the Department of Justice and Equality. The Scheme, which was formerly known as the 'Attorney General's Legal Aid Scheme', was renamed by the Department on the 1st January 2013 as the 'Legal Aid – Custody Issues Scheme'.

## **3. Purpose and application of the Scheme**

The purpose of the Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. For this reason it is necessary for the application for access to the Scheme to be made at the outset of the proceedings.

Such access is not automatic and the applicant must satisfy the Court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. The applicant must receive from the Court a recommendation to the Legal Aid Board that the provisions of the Scheme be applied to their specific case. Members of the public should obtain their own legal advice as to whether the litigation involved falls under the provisions of the Scheme and also as to their entitlement (if any) under the Scheme.

There is no obligation on a person requiring him or her to make an application for access to the Scheme. A person may elect to fund his or her legal representation privately and from personal funds. However, a person who elects to apply for assistance under the Scheme will, if successful with their application, only be provided with legal representation within the provisions of the Scheme.

(<https://livechat.boal>)

In addition, legal practitioners who elect to provide representation to the Scheme's applicants will only be reimbursed in accordance with the Scheme's provisions as set out in this document. It is recommended that legal practitioners should by the earliest possible date satisfy themselves that both their client and the litigation involved are encompassed by the provisions of the Scheme.

## 4. Scope of the Scheme

The Legal Aid - Custody Issues Scheme is an administrative, non-statutory arrangement whereby payments are made from the Vote of the Department of Justice and Equality in respect of certain legal costs in the types of litigation set out below in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible for the Scheme).

The Scheme applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid):

- (i) Habeas Corpus (Article 40.4.2) Applications (see Part 2).
- (ii) Supreme Court Bail Motions (see Part 2).
- (iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition and concerning criminal matters or matters where the liberty of the applicant is at issue (see Part 2).
- (iv) Applications under Section 50 of the Extradition Act 1965, Extradition Applications and European Arrest Warrant Applications (including Bail Applications directly related to these cases) (see Part 2).
- (v) High Court Bail Motions related to criminal matters (see Part 3).

The Scheme only applies to proceedings of the type referred to above, conducted in the High Court and the Supreme Court. Where the proceedings are of a type which fall outside the scope of the

Scheme, as for example in family law cases, the Scheme cannot be applied to those proceedings because public funds may only be applied for the purpose for which they have been provided by the Oireachtas. It is not within the discretion of the Legal Aid Board to apply public funds to other purposes.

## 5. Tax compliance

All legal practitioners making a claim for fees under the Scheme must be tax compliant. Any practitioner applying for fees under the Scheme who is not currently on the Criminal Legal Aid Panel must submit a current Tax Clearance Certificate with their claim for fees. Practitioners on the Criminal Legal Aid Panel must ensure that they hold a current Tax Clearance Certificate to enable their claims to be considered for payment. In a case where a solicitor is providing representation as an employee of a solicitor's firm, a Tax Clearance Certificate in respect of that firm, rather than the individual, must be submitted.

## 6. The processing of claims

To process cases under the specific types of litigation set out above, two separate administrative systems operate under the Scheme. One distinct process deals with claims relating to Habeas Corpus (Article 40.4.2), Judicial Review, Extradition, European Arrest Warrant Applications and Supreme Court Bail Motions while a separate process deals with High Court Bail Motions related to criminal matters.

For the purposes of this Guidance Document, Part 2 (Sections 8 to 17) provides information on claims pertaining to Habeas Corpus, Judicial Review, Extradition, European Arrest Warrant Applications and Supreme Court Bail Motions while Part 3 (Sections 18 to 26) provides information on the processing of claims pertaining to High Court Bail Motions related to criminal matters.

## 7. Further information

The relevant forms pertaining to the Legal Aid – Custody Issues Scheme are available from the Board's website or by directly contacting the Board. All queries in relation to the general implementation of the Scheme should be addressed to the Board at the contact details set out below. In that regard, the Legal Aid Board welcomes feedback on the Scheme from all involved in its day to day implementation. (<https://livechat.boai>)

**The Legal Aid Board,**

**Legal Aid - Custody Issues Scheme, Criminal Legal Aid Section,  
48/49 North Brunswick Street,  
George's Lane,  
Smithfield,  
Dublin 7.**

**DX 1085 FOUR COURTS**

**Ph: (01) 6469644**

**[cla@legalaiddboard.ie](mailto:cla@legalaiddboard.ie)** (<mailto:agscheme@legalaiddboard.ie>)

**[www.legalaiddboard.ie](http://www.legalaiddboard.ie)** (<http://www.legalaiddboard.ie/>)

## **Part 2 (Sections 8-17) of this document pertains to Habeas Corpus, Judicial Review, Extradition, European Arrest Warrant and Supreme Court Bail Motions.**

### **8. Claims administration process**

As stated in Section 6, a separate administration system is in place under the Legal Aid – Custody Issues Scheme to process claims pertaining to Habeas Corpus, Judicial Review, Extradition, European Arrest Warrant Applications and Supreme Court Bail Motions. Accordingly, persons wishing to apply for legal aid in respect of such types of litigation and legal practitioners wishing to provide such aid should refer to Sections 9 to 17 to access relevant information pertaining to the process.

### **9. Eligibility under the Scheme and application procedure**

The purpose of the Legal Aid - Custody Issues Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. It should be noted that access to the Scheme is not automatic and a person wishing to obtain from the Court a recommendation to the Legal Aid Board that the Scheme be applied shall:

- (a) make his or her application (personally or through his or her lawyer) at the commencement of the proceedings,
- (b) obtain the Court's acknowledgement of such an application at the commencement of such proceedings, and
- (c) at the end of the proceedings receive a recommendation in the final Court Order that the Scheme be applied to the applicant.

It is advisable for a person wishing to obtain from the Court a recommendation that the provisions of the Scheme be applied, to make his / her application (personally or through his / her lawyer) at the commencement of the proceedings as legal aid will only be considered for reimbursement from the date of the making of the first Order acknowledging the application (and not for services provided prior to such an Order).

The applicant must receive the above mentioned recommendation from the Court and this will be considered by the Legal Aid Board taking into account the provisions of the Scheme and, where deemed appropriate, the advice of the Chief State Solicitor's Office, the Office of the Director of

Public Prosecutions or, as required, the Office of the Attorney General. However, it should be noted that in all instances only reasonable legal and related expenses will be considered for payment and only in circumstances where both the applicant and the litigation involved are specifically covered by the provisions of the Scheme.

The term "the commencement of the proceedings" refers to the commencement of the proceedings in a particular Court. In other words, an applicant would not be prejudiced from seeking the benefit of the Scheme to be applied to him or her in respect of Supreme Court proceedings by reason of the fact that he or she had not

made such an application in relation to the High Court proceedings. However, in these circumstances, the Scheme does not apply retrospectively to persons claiming costs under the Scheme in respect of the High Court proceedings. It should be noted that when a case progresses to a higher Court, a new application must always be made for a recommendation that the provisions of the Scheme be applied.

The applicant must satisfy the Court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. To assist the Court in considering the applicant's financial means from an informed position the applicant must, when applying for access to the Scheme, submit to the Court a fully completed Form CI 3 Application for Legal Services / Declaration of Financial Means. The information provided by the applicant must be accurate and substantially complete. It should be noted that, in the event of it transpiring that misleading or substantially incomplete information was submitted by the applicant to the Court, the policy of the Legal Aid Board is that it would **not** be appropriate to consider payment of the applicant's legal fees etc. In such circumstances, the applicant will be deemed to be responsible for the funding of his / her own legal expenses.

The Court must be satisfied that the case falls within the scope of the Scheme as set out in Section 4 and also that it warrants the assignment of counsel and / or a solicitor. If the Court considers that the complexity or importance of the case requires it, the recommendation for counsel may also include one senior counsel. In that regard, to enable a payment to be made in respect of senior counsel, the final Court Order must certify that recommendation.

## 10. Solicitor / counsel costs and fees

Where the applicant and the litigation involved are encompassed by the Scheme's provisions, appropriate legal fees are payable to a solicitor, junior counsel and / or senior counsel as recommended by the Judge. The exact details of who should be paid under the Scheme will, as

recommended by the Judge, be stipulated in the final Court Order. A claim for payment cannot be considered or processed for any legal representative who is not specified on the Court Order. If the final Court Order neglects to mention someone whose costs were in fact recommended by the Judge, the responsibility rests with the relevant solicitor to apply to have the Court Order formally amended to include that person.

The calculation of the fees which will apply to counsel and solicitors representing the legally aided person will be made in accordance with the "parity" mechanism which is in operation under the Criminal Justice (Legal Aid) Act, 1962 and the Regulations (including S.I. 234 / 76) made under that Act. The fees payable to counsel under the Scheme are, at most, those which would be payable to counsel appearing for the State in each individual case. In effect, the representatives for the legally aided person will, with all necessary modifications applied, be paid fees on a parity basis with the State. The fees payable to a solicitor are related to those payable to junior counsel.

To comply with this parity principle, the Legal Aid Board will, on receipt of a claim for fees from the applicant's legal representatives, consult with either the Chief State Solicitor's Office or the Office of the Director of Public Prosecutions to determine what level of fees were paid on the State side in relation to that specific case. Where considered necessary, the Board will also seek the advice of the Attorney General's Office in relation to the levels of fees (if any) which may be paid in any specific case. Further to the "parity" arrangement, when the Legal Aid Board is advised as to the level of fees which had been paid on the State side, arrangements will be made to have similar fees paid to the applicant's representatives.

In instances where there is no State involvement in a set of proceedings but the Legal Aid – Custody Issues Scheme is being applied, the above process will be adhered to and advice will be sought as to what level of fee would be paid in the same circumstances had State counsel been involved. The advice on the appropriate level of fees to be applied will be sought from the Chief State Solicitor's Office, the Director of Public Prosecutions' Office or the Attorney General's Office, as required.

Where there is more than one applicant, but only one matter is at issue before the Court, the solicitor and the counsel assigned shall represent all the applicants.

It should be noted that it will not be possible to pre-sanction payments under the Scheme in advance of the final Court Order and any recommendation that might be made by the Court to the Legal Aid Board will be made on an individual case basis. (<https://livechat.boai>)

## 11. Prison Visits

Where it is essential to the preparation and conduct of the client's case that a solicitor or a barrister must visit that person in prison in respect of litigation as specified in Section 4, a Prison Visit Claim Form CLA 11 should be fully completed and the attendance certified with the signature and stamp of the prison authorities. The fully completed and certified CLA 11 Form should be submitted to the Legal Aid Board along with the solicitor's / barrister's fee note which should record the visit as part of the client's representation.

For the purposes of calculating the fees payable to the legal practitioner, a payment authorised in respect of a prison visit is deemed to incorporate a consultation fee for the same date (i.e. a single payment only will be considered rather than a fee in respect of both the prison visit and also a consultation fee where both are claimed for the same date).

## 12. Translation and interpretation costs

Under the Scheme, the services of a translation or interpretation service provider may only be engaged by the solicitor on record when it is deemed essential to the preparation and conduct of the client's case. A provider of either translation or interpretation services should ensure that a [CI 4 Translator / Interpreter Attendance Form \(/en/Our-Services/Criminal-Legal-Aid/Criminal-Legal-Aid-and-Ad-hoc-Schemes-Further-Information/CI-4-Form-1st-Oct-2015-1-.pdf\)](#) is fully completed and certified by the relevant solicitor in respect of all activities associated with the case. The solicitor who engages an interpretation / translation company is responsible for certifying their involvement in accordance with the provisions of Section 14 below.

Where the costs for translation and / or interpretation services are likely to be in excess of €2,000, solicitors must obtain at least three quotations for the provision of the service and submit evidence of same with their claim for fees at the conclusion of the case.

## 13. Expert witnesses / report commissioning costs

Under the Scheme, the services of an expert witness (eg. a medical expert) or the commissioning of a report should only be sought where it is essential to the proper preparation and conduct of the client's case. It should be noted that reimbursement in respect of such costs is not automatic under the Scheme and a person or their legal representative wishing to obtain from the Court a recommendation that the Scheme would be applied for such costs shall formally notify the Court (personally or through his or her lawyer) at the earliest possible opportunity in the proceedings of the necessity for, and their intention to, seek the services of an expert witness or to commission a report.

At the end of the proceedings, if the Court is satisfied that the services of the expert witness(es) or the commissioning of a report(s) were essential to the proper preparation and conduct of the case, the Court shall include in its final Order a recommendation to the Legal Aid Board specifying which witnesses and / or reports were essential and should be covered by the Scheme.

When considering a claim for payment in respect of an expert witness or the commissioning of a report the Board will, taking into account the provisions of the Scheme, have regard to the Court's recommendation and will only authorise the payment of reasonable costs and in circumstances where the engagement has been recommended as essential to the proper preparation and conduct of the client's case. The relevant solicitor should submit for consideration (with their claim for fees) a copy of the Final Court Order which should include the relevant recommendation.

The solicitor who engages the expert witness or commissions a report is responsible for certifying the involvement in accordance with the provisions of Section 14. For auditing purposes, the solicitor should retain evidence of the services commissioned including copies of any relevant reports etc.

Further information in relation to the engagement of expert witnesses and the rates of fees that are payable under the Scheme is available in the [Procedures and Guidelines for claiming Expert Witness Fees. \(/en/Our-Services/Criminal-Legal-Aid/Guidance-Documents/Expert-Witness-Fees-Procedures-and-Guidelines-Documents.html\)](#)

(<https://livechat.boai>)

## 14. Solicitor certification of claims for payment

Where fees are being claimed in respect of interpretation, translation, expert witness or other costs, the claim for such fees must be submitted through the relevant solicitor who engaged with the individual / company to provide the services to assist in matters associated with the preparation of their client's case. A solicitor who engages an interpretation, translation or other company or individual is responsible for:

- certifying that the service was necessary and that the person or company providing the service has the appropriate competence to provide a professional service,
- where appropriate, certifying that the service provider attended on the dates and times directed by the solicitor and also certifying the accuracy of the hours worked and the amount claimed,
- certifying that the interpretation or translation costs refer only to the client's specific case and that it does not pertain to any services provided for in the Courts that are the subject of a separate contract arranged by the Courts Service,
- ensuring that an original invoice from the interpretation or translation service provider (which must include full details of the services provided) is submitted for consideration and is accompanied by a fully completed CI 4 Translator / Interpreter Attendance Form,
- ensuring that an original invoice from the expert witness, which must include full details of the service provided along with all relevant dates and the fees being claimed for each item, is submitted for consideration,
- where appropriate, certifying that the service provider prepared and produced a report and clarifying if the report was utilised in the Court setting,
- ensuring that for audit purposes, they retain evidence of the services commissioned (including copies of reports),
- ensuring that in all instances the unique Court Record Number is quoted, that the name of the applicant is accurately recorded and that the service provider specifies a unique invoice number with each claim.

## 15. Documents to be included with a claim

In addition to the responsibilities set out in Section 14, the solicitor on record is also responsible for the collation and finalisation of the entire claim along with its submission on behalf of all parties (solicitor, counsel, translators, interpreters, expert witnesses etc.) to the Legal Aid Board for consideration and processing.

Accordingly, all parties who wish to make a claim under the Scheme in respect of Habeas Corpus (Article 40.4.2), Judicial Review, Extradition, European Arrest Warrant and Supreme Court Bail Motions should, by the earliest possible date, forward to the relevant solicitor all the appropriate invoices etc. pertaining to the services they provided to the client to ensure that their claim may be included with the solicitor's submission of the overarching claim for fees.

Each invoice, in addition to the amounts claimed, should contain a specific invoice number and an invoice date. The invoice should provide an itemised account of the services provided along with the relevant dates and the specific amount being claimed for each item covered by the invoice. Each invoice submitted should relate to one client / case only and that client's name and the Court Record Number(s) must be clearly referenced.

In turn, the relevant solicitor should ensure that only original invoices (and where appropriate a CI 4 Translator / Interpreter Attendance Form) in respect of the various services provided for the representation of the client are submitted with their own claim for legal fees to the Legal Aid Board.

The claim should be submitted along with the relevant Court Orders which, (a) acknowledged the original application for access to the Scheme and, (b) recommended that the Legal Aid – Custody Issues Scheme should be applied. It should be noted that claims for fees may not pre-empt the final Court Order recommending that the Scheme be applied.

Claims for payment should not be submitted piecemeal as this may result in unnecessary delays in the overall consideration of a claim.

(<https://livechat.boai>)

## 16. The submission of claims under the Scheme - further information

A claim for fees must be submitted on a fully completed [Legal Aid – Custody Issues Scheme Claim Form CI 1 \(/en/Lawyers-and-Experts/Legal-professionals-in-criminal-legal-aid-Ad-hoc-cases/Legal-Aid-Custody-Issues-Scheme/Form-CI1-NEW-LA-CIS.pdf\)](https://en/Lawyers-and-Experts/Legal-professionals-in-criminal-legal-aid-Ad-hoc-cases/Legal-Aid-Custody-Issues-Scheme/Form-CI1-NEW-LA-CIS.pdf). While the CI 1 Claim Form should be signed and dated by all the relevant legal practitioners, it is the relevant solicitor who should collate, finalise and formally submit the claim on behalf of all parties to the Legal Aid Board for consideration.

It should be noted that incomplete or illegible claim forms or claims submitted without the required accompanying documentation will be returned to the solicitor for proper completion and re- submission. Fully completed and legible claim forms along with all required accompanying documentation should be sent by the earliest possible date to the Legal Aid Board at the contact details set out below. Such claims must be submitted no later than twelve months from the date on which the case was finalised. It should be noted that claims submitted after this deadline will not be considered or processed for payment by the Legal Aid Board.

## 17. Querying the status of a claim or seeking further information

All parties who participated in the representation of the client (counsel, translators, interpreters, expert witnesses etc.) should direct all queries in relation to their claim for payment to the relevant solicitor firm by whom they were engaged and to whom they submitted their claim. Solicitor firms should direct any queries they have in relation to a claim directly to the Legal Aid Board.

**Legal Aid Board,**

**Legal Aid - Custody Issues Scheme,**

**Criminal Legal Aid Section,**

**48/49 North Brunswick Street,**

**George's Lane,**

**Smithfield,**

**Dublin 7**

**DX 1085 FOUR COURTS**

**Ph: 01 6469644**

[cla@legalaidboard.ie](mailto:cla@legalaidboard.ie) (<mailto:cischeme@legalaidboard.ie>)

[www.legalaidboard.ie](http://www.legalaidboard.ie/) (<http://www.legalaidboard.ie/>)

## Part 3 (Sections 18-26) of this document pertains to High Court Bail Motions (related to criminal matters)

### 18. Claims administration process

As stated in Section 6, a separate administration system is in place under the Legal Aid – Custody Issues Scheme to process High Court Bail Motions related to criminal matters. Accordingly, persons wishing to apply for legal aid in respect of a High Court Bail Motion and legal practitioners wishing to provide such aid should refer to the following Sections to access relevant information pertaining to the process.

### 19. Eligibility under the Scheme and application procedure

The purpose of the Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. It should be noted that access to the Scheme is not automatic. A person making a High Court Bail Motion and wishing to obtain from the Court (https://livechat.legalaidboard.ie) the Legal Aid Board that the Scheme be applied shall:



(a) make his or her application (personally or through his or her lawyer) at the commencement of the proceedings, and

(b) at the end of the proceedings receive a recommendation from the Court that the Scheme be applied to the applicant.

It is important for the person wishing to obtain from the Court a recommendation that the provisions of the Scheme be applied to ensure that the application is made at the commencement of the proceedings. Claims will only be considered for payment in circumstances where the applicant is specifically covered by the provisions of the Scheme. Subject to its consideration as to the complexity or importance of the case, the Court may recommend the assignment of a solicitor and / or counsel to the applicant.

The term "the commencement of the proceedings" refers to the commencement of the proceedings in a particular Court. In other words, an applicant would not be prejudiced from seeking the benefit of the Scheme to be applied to him or her in respect of Supreme Court proceedings by reason of the fact that he or she had not made such an application in relation to the High Court proceedings. However, in these circumstances, the Scheme does not apply retrospectively in respect of the High Court proceedings. It should be noted that when a case progresses to a higher Court, a new application must always be made for a recommendation that the provisions of the Scheme be applied.

The applicant must satisfy the Court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. To assist the consideration of the applicant's financial means from an informed position, the Court may request the applicant to submit such information about his or her means as the Court deems appropriate. This may include the Court requesting the submission of a fully completed [Form CI 3 Application for Legal Services / Declaration of Financial Means \(/en/Our-Services/Criminal-Legal-Aid/Guidance-Documents/Form-CI-3-Legal-Aid-Custody-Issues-Scheme-Declaration-of-Financial-Means.docx\)](#). The information provided by the applicant to the Court must be accurate and substantially complete.

It should be noted that, in the event of it transpiring that misleading or substantially incomplete financial information was submitted by the applicant to the Court, the policy of the Legal Aid Board is that it would **not** be appropriate to consider payment of the applicant's legal fees etc. In such circumstances, the applicant will be deemed to be responsible for the funding of his / her own legal expenses.

## 20. Solicitor / counsel costs and fees

Claims for legal practitioners' fees in respect of High Court Bail Motions are made by way of the [Claim Form CI 2 High Court Bail Application. \(/en/Our-Services/Criminal-Legal-Aid/Criminal-Legal-Aid-and-Ad-hoc-Schemes-Further-Information/Form-CI-2-Legal-Aid-Custody-Issues-Scheme-High-Court-Bail-Application-For-Payment-1-.pdf\)](#) Fees are only payable to a solicitor and / or counsel who were present in Court at the Hearing to provide legal representation to the applicant. Such fees are paid at a set rate as established by the Minister for Justice and Equality.

## 21. Translation and interpretation costs

Under the Scheme, the services of a translation or interpretation service provider may only be engaged by the solicitor on record when it is deemed essential to the preparation and conduct of the client's High Court Bail Motion. A provider of either translation or interpretation services should ensure that a [CI 4 Translator / Interpreter Attendance Form \(/en/Our-Services/Criminal-Legal-Aid/Criminal-Legal-Aid-and-Ad-hoc-Schemes-Further-Information/CI-4-Form-1st-Oct-2015-1-.pdf\)](#) is fully completed and certified by the relevant solicitor in respect of all activities associated with the case. The solicitor who engages an interpretation / translation company is responsible for certifying their involvement in accordance with the provisions of Section 23 below.

Where the costs for translation and / or interpretation services are likely to be in excess of €2,000, solicitors must obtain at least three quotations for the provision of the service and submit evidence of same with their claim for fees at the conclusion of the case.

(<https://livechat.boai>)

## 22. Expert witnesses / report commissioning costs

Under the Scheme, the services of an expert witness (e.g. a medical expert) or the commissioning of a report should only be sought where it is essential to the proper preparation and conduct of the client's case. It should be noted that reimbursement in respect of such costs is not automatic under the Scheme and a person or their legal representative wishing to obtain from the Court a recommendation that the Scheme would be applied for such costs shall formally notify the Court (personally or through his or her lawyer) at the earliest possible opportunity in the proceedings of the necessity for, and their intention to, seek the services of an expert witness or to commission a report. At the end of the proceedings, if the Court is satisfied that the services of the expert witness(es) or the commissioning of a report(s) were essential to the proper preparation and conduct of the case, the Court shall include in its final Order a recommendation to the Legal Aid Board specifying which witnesses and / or reports were essential and should be covered by the Scheme.

When considering a claim for payment in respect of an expert witness or the commissioning of a report the Board will, within the provisions of the Scheme, have regard to the Court's recommendation and will only authorise the payment of reasonable costs and in circumstances where the engagement has been recommended as essential to the proper preparation and conduct of the client's case. The relevant solicitor should submit for consideration (with their claim for fees) a copy of the Final Court Order which should include the relevant recommendation.

The solicitor who engages the expert witness or commissions a report is responsible for certifying the involvement in accordance with the provisions of Section 14. For auditing purposes, the solicitor should retain evidence of the services commissioned including copies of any relevant reports etc.

Further information in relation to the engagement of expert witnesses and the rates of fees that are payable under the Scheme is available in the [Procedures and Guidelines for claiming Expert Witness Fees \(/en/Our-Services/Criminal-Legal-Aid/Guidance-Documents/Expert-Witness-Fees-Procedures-and-Guidelines-Documents.html\)](#).

## 23. Solicitor certification of interpretation, translation or expert witness costs

Where fees are being claimed in respect of interpretation, translation or expert witness costs, the claim for such fees must be submitted through the relevant solicitor who engaged with the individual / company to provide the services to assist in matters associated with the preparation of their client's case. A solicitor who engages an interpretation, translation or other company or individual should submit the claim to the Financial Shared Services Section of the Department of Justice and Equality at the contact details set out in Section 26 and in doing so is responsible for:

- certifying that the service was necessary and that the person or company providing the service has the appropriate competence to provide a professional service,

- where appropriate, certifying that the service provider attended on the dates and times directed by the solicitor and also certifying the accuracy of the hours worked and the amount claimed,

- certifying that the interpretation or translation costs refer only to the client's specific case and that it does not pertain to any services provided for in the Courts that are the subject of a separate contract arranged by the Courts Service,

- ensuring that an original invoice from the interpretation or translation service provider (which must include full details of the services provided) is submitted for consideration and is accompanied by a fully completed CI 4 Translator / Interpreter Attendance Form,

- ensuring that an original invoice from the expert witness, which must include full details of the service provided along with all relevant dates and the fees being claimed for each item, is submitted for consideration, where appropriate, certifying that the service provider prepared and produced a report and clarifying if the report was utilised in the Court setting,

- ensuring that for audit purposes, they retain evidence of the services commissioned (including copies of reports), <https://livechat.boai>

- ensuring that in all instances the unique Court Record Number is quoted, that the name of the applicant is accurately recorded and that the service provider specifies a unique invoice number with each claim.

## 24. Prison Visits

Where it is essential to the preparation and conduct of the client's case that a solicitor or a barrister must visit that person in prison in respect of a High Court Bail Motion, a Prison Visit Claim Form CLA 11 should be fully completed and the attendance certified with the signature and stamp of the prison authorities. The fully completed and certified CLA 11 Form should be attached to High Court Bail Application Claim Form CI 2 and submitted to the Court Registrar for submission to the Financial Shared Services (FSS) Section of the Department of Justice and Equality for processing, as set out in Section 25.

For the purposes of calculating the fees payable to the legal practitioner, a payment authorised in respect of a prison visit is deemed to incorporate a consultation fee for the same date (i.e. a single payment only will be considered rather than a fee in respect of both the prison visit and also a consultation fee where both are claimed for the same date).

## 25. The submission of claims for High Court Bail Motions

A single [Form CI 2 High Court Bail Application Claim Form \(/en/Our-Services/Criminal-Legal-Aid/Criminal-Legal-Aid-and-Ad-hoc-Schemes-Further-Information/Form-CI-2-Legal-Aid-Custody-Issues-Scheme-High-Court-Bail-Application-For-Payment-1-.pdf\)](/en/Our-Services/Criminal-Legal-Aid/Criminal-Legal-Aid-and-Ad-hoc-Schemes-Further-Information/Form-CI-2-Legal-Aid-Custody-Issues-Scheme-High-Court-Bail-Application-For-Payment-1-.pdf) should be completed and the declaration signed on the day of the Hearing by the solicitor and / or counsel who were present in Court to represent the applicant and should be submitted to the relevant Court Registrar for certification. Subject to certification, it will be forwarded by that Registrar directly to the Financial Shared Services (FSS) Section of the Department of Justice and Equality in Killarney for processing.

Should it not prove possible to present a fully completed Claim Form on the day of the Hearing, the legal practitioner should present the Claim Form CI 2 to the Court Registrar at the earliest possible date thereafter.

It should be noted that it will not be possible for the Court Registrar or the Financial Shared Services Section of the Department of Justice and Equality in Killarney to process incomplete or illegible claim forms. Such claims will be returned to the solicitor / counsel for proper completion and re- submission which may result in a delay in payment.

## 26. Querying the status of a claim or seeking further information

All parties who participated in the representation of the client for a High Court Bail Motion should direct any queries in relation to the processing of their claim to the Financial Shared Services Section of the Department of Justice and Equality at the contact details set out below. All queries pertaining to the administration of the Scheme in respect of High Court Bail Motions should be forwarded to the Legal Aid Board at the contact details set out below.

**Financial Shared Services Section,**  
**Department of Justice and Equality,**  
**Deerpark Road,**  
**Killarney, Co. Kerry.**  
**Ph: 064 6670300**

**Legal Aid Board,**  
**Legal Aid - Custody Issues Scheme,**  
**Criminal Legal Aid Section,**  
**48/49 North Brunswick Street,**  
**George's Lane,**  
**Smithfield,**  
**Dublin 7**

(<https://livechat.boai>)

**DX 1085 FOUR COURTS**

**Ph: 01 6469644**

**[cla@legaidboard.ie](mailto:cla@legaidboard.ie)** (<mailto:cischeme@legaidboard.ie>)

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(<https://livechat.boai>)

# A Report on the Absence of Legal Aid for Employment Equality Cases in Ireland

## **Lecturers:**

-David Fennelly

-Colin Smith

## **Master in Laws (LLM) Students:**

-Julia Donnelly

-Thomas Hofer

-Holly Korn

-Jocelyn LeBlanc

-Niamh Stallings

-María Victoria Trebucq

-James Webb



Dublin, Ireland

21 April 2021

**A Report  
on the Absence  
of Legal Aid  
for Employment Equality Cases  
in Ireland**

prepared for the  
**Free Legal Advice Centres**

by the  
**LLM Human Rights Law Clinic (LA7131) module**  
of the 2021 Hilary term  
at the Trinity College Dublin  
of the University of Dublin

on the  
**21 April 2021**

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# Executive Summary

Since the establishment of the Civil Legal Aid Act of 1995, legal aid has been provided to individuals in Ireland for a variety of proceedings before the courts. The Workplace Relations Commission (WRC) and the Labour Court are not included within the eligible tribunals under Section 27(2) of the Act of 1995 and therefore proceedings before these bodies do not qualify for legal aid. The WRC and Labour Court, however, are responsible for hearing cases regarding nine grounds of discrimination found under the Employment Equality Act.

This Report offers an examination of law applicable in the Irish context to determine whether there is an obligation for Ireland's legal aid scheme to include eligibility for employment equality cases. Potential repercussions of the lack of provision for legal aid in employment equality cases are widespread, with statistical data collected from the WRC and the Labour Court indicating that claimants without representation face a loss rate of more than 86% before the WRC.<sup>i</sup> Additionally, the complexities of employment equality cases brought before the WRC are discussed to demonstrate the likely obstacles faced by those seeking protection from workplace discrimination.

The Report presents its analysis in the context of three central documents: the Irish Constitution, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter). The right to equality and the right to earn a livelihood, as substantive rights under the Constitution, are demonstrated to result in the right to equality at work. The right of access to justice and the right to fair procedures build upon the right to equality at work and should ensure that individuals can access a fair judicial remedy. The protections found under the ECHR are codified in domestic law under the European Convention on Human Rights Act 2003. Under the Act of 2003, state organs and courts must ensure that Irish law is compatible with the ECHR. The exclusion of employment equality cases from legal aid, therefore, appears to contravene both the Constitution and the ECHR. The Irish state is bound by the EU's fundamental rights set out in the Charter whenever the state implements Union law. The Employment Equality Act transposes EU directives on employment anti-discrimination, and, as a result of EU law supremacy, all proceedings under the Act should comply with the Charter's right to legal aid as found in Article 47(3). This

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<sup>ii</sup> See table in Section 1.1.1 of this Report and the Appendix.

obligation applies to the legislator as well as to every administrative body applying the Employment Equality Act.

This Report offers a series of conclusions and recommendations, with the foremost being that the Irish government should enable employment equality hearings held before the WRC and Labour Court to be eligible for state-funded legal aid. This would ensure compliance with the state's obligations under the Irish Constitution, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter).

# 1.0 Introduction

1. The Free Legal Advice Centre (FLAC Ireland) has consistently found that employment law issues are one of the most common queries from their clients. Data collected during the Covid-19 pandemic revealed that employment law was the most frequent query. While FLAC offers an array of legal advice clinics, they possess limited resources for providing full legal representation. The primary recourse for those who wish to bring a case before the Irish courts without having sufficient personal funds is to apply for legal aid through the Irish Legal Aid Board.
2. Legal aid from the state is provided for by the Civil Legal Aid Act of 1995 (the Act of 1995), which established the Legal Aid Board to manage applications for funding appropriation for legal counsel. The Civil Legal Aid Act delineates which proceedings are eligible for a grant of legal aid<sup>1</sup>, meaning representation may be provided by a solicitor or barrister at a free or reduced cost. According to Section 27(2) of the Act of 1995, legal aid shall primarily be allotted for matters conducted in front of explicitly mentioned courts.<sup>2</sup> Section 28 of the Act of 1995 outlines the criteria that must be met for a grant of legal aid to be made, while section 29 establishes the guidelines, or a ‘means test’, to determine financial eligibility for legal aid. Section 28 neither explicitly includes, nor explicitly excludes, issues of employment law from eligibility for legal aid. Section 27.2(b) of the Civil Legal Aid Act 1995 states that outside of the explicitly delineated courts, legal aid may be awarded for a case ‘conducted in any court or before any tribunal for the time being prescribed by the Minister, with the consent of the Minister for Finance, by order under this section, if provided by a ministerial order’. As of April 2021, a ministerial order for producing legal aid before a tribunal has only been made for the International Protection Appeals Tribunal.<sup>3</sup> While a ministerial order for producing legal aid before the WRC would effectively allow for legal aid to be awarded for employment issues, the current legal framework denies the Legal Aid Board any discretion to grant legal aid for proceedings before the WRC as the WRC has not been deemed a prescribed tribunal under the

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<sup>1</sup> When legal aid is granted, the money is sourced from the Legal Aid Fund, established by Section 19(1) of the Civil Legal Aid Act of 1995.

<sup>2</sup> The District Court, the Circuit Court, the High Court, the Court of Appeal, the Supreme Court.

<sup>3</sup> Civil Legal Aid (International Protection Appeals Tribunal) Order 2017, S.I. No. 81/2017 (This Order prescribes the International Protection Appeals Tribunal for the purposes of Section 27 (2(b)) of the Civil Legal Aid Act, 1995 (No. 32 of 1999) as a body at whose proceedings legal aid may be provided by the Legal Aid Board).

Act of 1995. The same is true for the Labour Court, which – despite its name – is another tribunal, that has not been prescribed according to Section 27.2(b) of the Act of 1995.

3. The current legal framework provided by the Act of 1995 means that the state will not aid workers in mitigating the often prohibitive costs of taking a case to court. This gap in the law is particularly concerning, as those seeking redress for issues in the workplace may be especially vulnerable to financial insecurity, or the fear of financial insecurity if they were to bring their case to court and lose. In 2019, the Central Statistics Office recorded that there were 689,000 people living in poverty in Ireland.<sup>4</sup> Additionally, there is an inherent imbalance of power in the employer-employee relationship. As many employees fear becoming financially unstable, they may be reluctant to take an employment equality claim to the WRC or even appeal to the Labour Court. For the employees that choose to make a claim in the WRC or appeal against a decision by it, many of them cannot afford legal representation. The concern around financial insecurity is particularly pertinent since the claimant might be let go as a consequence of bringing an employment equality case before the WRC and thus lose the income necessary to pay legal costs.
4. While the seemingly extensive demand for legal aid for employment issues is one compelling reason to direct the government's attention towards creating solutions to bridge this gap, there are further human rights implications that make the need for legal aid in the employment context clear and urgent. The lack of legal aid for employment issues means that valid cases of discrimination, bullying, or harassment in the workplace may not have the opportunity to be remedied in the courts due to claimants' lack of personal funds to access the judiciary. Vulnerable communities are often the most at-risk group for discrimination in the workplace and, without access to legal aid to defend their rights, are at a further disadvantage when seeking access to justice. For equality and human rights in the workplace to truly be protected, Irish workers must have access to justice and legal aid when their rights are infringed upon. In response to this need, FLAC Ireland has become increasingly involved in attempting to secure the right to equal treatment in workplace relationships, which is protected under the Employment Equality Act 1998 (the Act of 1998).

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<sup>4</sup> 'More than 689,000 living in poverty in Ireland, over 200,000 are children,' (Social Justice Ireland, 28 November 2019), <<https://www.socialjustice.ie/content/policy-issues/more-689000-living-poverty-ireland-over-200000-are-children>> accessed 19 April 2021.

5. In the 2021 Supreme Court case of *Zalewski v Adjudication Officer*, the Court found that the WRC involves the administration of justice.<sup>5</sup> The case concerned the constitutionality of the procedures set out in the 2015 Act. In particular it was argued that the blanket private hearings in the WRC; the absence of hearing evidence on oath; the lack of any legal qualification obtained by adjudication officers and by persons adjudicating in the appeals process were unconstitutional. O'Donnell J found that the absence of a provision to give evidence on oath and the requirement that hearings are to be held in private without the possibility of a public hearing were unconstitutional. Additionally, the dissenting judges opined that the determinations allowed under the 2015 Act by adjudication officers was unconstitutional and should be struck down. The diverse opinions by the different judges illustrate the controversial nature of the procedures set out in the 2015 Act. Furthermore, it was held by Charleton J that the protection of the right to work should be at the core of WRC decisions which may 'ruin a career or devalue those individuals in the struggle to earn an honest living'.<sup>6</sup> This statement shows the significance of protecting the right to earn a livelihood. The case is important because it acknowledges that the WRC involves the administration of justice and therefore, illustrates the seriousness of matters being decided before the WRC. This case assists the argument that there should be a possibility of legal aid in the WRC because it demonstrates that employment cases are not simple inquisitions, they are complex adversarial cases that involve the administration of justice.
6. The Employment Equality Act outlaws certain discrimination in the workplace-related areas based on the following nine grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race, or membership in the travelling community. Any discrimination falling within the scope of the Act may be subject to a complaint made to the Workplace Relations Commission (WRC),<sup>7</sup> a Tribunal established under the Workplace Relations Act of 2015.<sup>8</sup> Section 77 of the Employment Equality Act details the appropriate forum for complainants to seek redress. According to the Act, all claims must first be directed to the WRC.<sup>9</sup> Claims in relation to discrimination, remuneration, benefits under an equality clause and victimisation are referred to the Director of Equality Investigations,<sup>10</sup> whilst those relating

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<sup>5</sup> *Zalewski v Adjudication Officer* [2021] IESC 24.

<sup>6</sup> *Zalewski v Adjudication Officer* [2021] IESC 24 (Charleton J) [71].

<sup>7</sup> Employment Equality Act 1998, s 77.

<sup>8</sup> Workplace Relations Act 2015, s 10; Schedule 3.

<sup>9</sup> Employment Equality Act 1998, s 77.

<sup>10</sup> Employment Equality Act, s 77 (1).

to dismissals are referred to the Labour Court.<sup>11</sup> The Labour Court is also competent to decide over appeals against decisions by the WRC.<sup>12</sup> Additionally, gender-<sup>13</sup> which could enable the possibility of obtaining legal aid under section 27.2(a) of the Act of 1995 though one would incur the legal costs of making the claim. Importantly, Section 82 of the Employment Equality Act outlines the types of redress available for employment-related disputes. These will vary according to the particulars of the claim.

## 1.1 The Need for Legal Aid in Employment Equality Claims

7. In Ireland the cost of legal representation is extremely high.<sup>14</sup> Éilis Barry, the Chief Executive Officer of FLAC, has remarked that the absence of free legal aid in employment equality cases in the WRC has meant that many of the cases were not being taken.<sup>15</sup> Additionally, the judiciary has recognised that the cost of legal representation can in fact, act as a barrier to access to justice. In the case of *MacGairbhith v Attorney General*, the Court acknowledged that the costs of litigation which includes legal aid are ‘frightening’ and are a ‘major deterrent’ to bringing a case.<sup>16</sup>
8. Employees in Ireland who wish to take an employment equality claim to the WRC must pay for their own legal representation if they wish to be legally represented and have a better chance of being successful. Therefore, professional representation by solicitors, barristers, unions, FLAC or by a Citizen Information Centre is subject to the good will of an organisation, membership in a union, or substantial financial commitment by the claimant. Given that only about 26%<sup>17</sup> of the Irish labour force are union members and organisations such as FLAC and the Citizen Information Centres have limited resources available, many potential claimants must rely solely on the service of solicitors or barristers to obtain professional representation.

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<sup>11</sup> Employment Equality Act, s 77 (2).

<sup>12</sup> Employment Equality Act, s 77 (12).

<sup>13</sup> Employment Equality Act, s 77 (3).

<sup>14</sup> Kelly Review Group, *Review of the Administration of Civil Justice Report* (2020) 267ff <<https://www.gov.ie/en/publication/8eabe-review-of-the-administration-of-civil-justice-review-group-report/>> with reference to World Bank Group, ‘Doing Business 2020 - Country Profile Ireland’ (2020) <<https://www.doingbusiness.org/en/data/exploreeconomies/ireland>> both accessed 19 April 2021.

<sup>15</sup> Kitty Holland, ‘Taking workplace equality cases ‘out of many people’s reach’ (2021) *Irish Times*, <<https://www.irishtimes.com/news/social-affairs/taking-workplace-equality-cases-out-of-many-people-s-reach-1.4503722>> accessed 19 April 2021.

<sup>16</sup> *MacGairbhith v Attorney General* [1991] IR 412.

<sup>17</sup> Central Statistics Office, ‘Labour Force Survey (LFS) Time Series - Union Membership Q2 2005 - Q2 2020’ (2020) <[https://www.cso.ie/en/media/csoie/statistics/lfstimeseries/Employees\\_15\\_years\\_by\\_sex\\_and\\_trade\\_union\\_membership\\_-\\_TO\\_ISSUE.xls](https://www.cso.ie/en/media/csoie/statistics/lfstimeseries/Employees_15_years_by_sex_and_trade_union_membership_-_TO_ISSUE.xls)> accessed 19 April 2021.

This problem is aggravated by the fact that the WRC has no jurisdiction to make awards of legal costs and therefore claimants will have to bear their legal costs even if they win their case. Moreover, a lack of reimbursement of costs hinders potential claimants in obtaining legal representation under a contingency agreement.

9. It is very difficult to win an employment equality case before the WRC. Of the cases brought before the WRC between the 1<sup>st</sup> of January 2019 and the 31<sup>st</sup> of January 2021, complainants lost over 75% of the cases.<sup>18</sup> From January 2018 to the end of January 2021, claimants with professional representation won more than 30% of the cases before the WRC and claimants with union representation won 32.6% of their cases.<sup>19</sup> For those claimants without representation, there was a loss rate of more than 86% before the WRC.<sup>20</sup> Overall, unrepresented claimants had a success rate of less than 14%, indicating that legal representation more than doubles a claimant's chance of success.<sup>21</sup> While this Report acknowledges its limited data set, the discrepancies in the rate of success strongly indicate that professional legal representation significantly improves the chance of winning an employment equality dispute before the WRC. The table below provides an overview of the cases taken into consideration:

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<sup>18</sup> See Table 1 and the Appendix.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

### 1.1.1 Table – Employment equality cases before the WRC

10.

	<b>Total Cases</b>	<b>Number of cases Won</b>	<b>% of cases Won</b>	<b>Number of cases lost</b>	<b>% of cases lost</b>
<b>Professionally represented</b>	148	45	30.41%	103	69.59%
<b>Represented by a union</b>	49	16	32.65%	33	67.35%
<b>Self-represented</b>	172	24	13.95%	148	86.05%
<b>Other representation*</b>	26	10	38.46%	16	61.54%
<b>Total</b>	395	95	24.05%	300	75.95%

\* Other representation includes representation by FLAC, Citizen Information Centres, consultants, family members and other third parties.

**Source:** decisions taken by the WRC under the Employment Equality Act in the period from 1 January 2018 to 31 January 2021 as published in the WRC's website. For the complete data set see the Appendix.

11. An additional challenge faced by those bringing an employment equality claim before the WRC is that the complainant must provide evidence of unlawful discrimination. Providing evidence of unlawful discrimination is not a simple or a straightforward task, and the average layperson would face difficulty in determining the sort of evidence required by the WRC adjudicator. The case studies below illustrate the high evidentiary threshold which must be met before a WRC adjudicator will find in favour of the applicant.



### 1.1.2 Case Study no. 1

The case of *Krzysztof Tryka v Thermal Insulation Distributors Ltd* highlights the complexity of employment equality cases in the Work Relations Commission.<sup>22</sup> In that case, the complainant argued that he had been discriminated against on the grounds of nationality when he was refused sick pay. He argued that two of his Irish colleagues in a similar situation had received sick pay.

The burden of proof was on the complainant to prove that he had been discriminated against. This required the complainant to establish facts from which discrimination may be inferred. The facts pointing to discrimination must be established through credible evidence.

The adjudicator in this case found that the complainant lacked substantial evidence of discrimination and found in favour of the employer. The adjudicator found that the complainant's claim was based on an assumption rather than real evidence of discrimination. The adjudicator noted the absence of witnesses to corroborate the complainant's claim when alluding to an assumption being made. The adjudicator stated that the applicant could have specifically requested information from the respondent as to why he was denied sick pay. So far, this indicates the high level of evidence needed to establish discrimination in the Work Relations Commission. A person with no legal background, especially someone who is unfamiliar with the Irish legal system, would be unaware that witnesses may be needed in the Work Relations Commission. A massive difficulty with needing witnesses is that there is an imbalance of power and the two Irish employees who received sick pay, probably would not want to speak out against their employer who gave them sick pay. Without a lawyer, an employee may not think of requesting information from their employer and again, there is an imbalance of power which leads to the employee's reluctance to ask for such information in fear that their employer may be unhappy with such a request.

To conclude, *Krzysztof Tryka v Thermal Insulation Distributors Ltd* highlights the complexity of employment equality cases in the Work Relations Commission. It is clear from this case that the evidential requirement in the Commission is similar to that of a regular court, where witnesses may be required to confirm the statements made. As well, a high degree of research must be conducted by the applicant to build an employment equality case. This research may be foreign and bewildering to a lay man. Finally, the case demonstrates

the power imbalance between the employee and the employer. The employer holds all the information on the decision process for deciding sick pay. This decision to grant sick pay is discretionary and non-transparent. If the complainant had asked the employer for information on the decision to refuse sick pay, the employer could have simply denied the request. The complainant would have then had to request the Adjudicator to seek this information from the employer. It is unlikely that a lay person would have known that the option of asking the Adjudicator to obtain information from the employer was available.

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<sup>22</sup> *Krzysztof Tryka v Thermal Insulation Distributors Ltd* (ADJ-00027767).

### 1.1.3 Case Study no. 2

The case of *A Job Applicant v A Recruitment Service* demonstrates the legal complexities of an employment equality case.<sup>23</sup> The case concerned a man who had attention deficit disorder (ADD), a condition which makes it difficult to concentrate.

The complainant had several legal issues to prove before the Adjudicator which is especially difficult for someone with ADD. First, the complaint had to prove that he had a disability within the definition given under Section 2 of the Employment Equality Acts (the Acts). Section 2 states that a disability is -

*“(a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,*

*(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,*

*(c) the malfunction, malformation or disfigurement of a part of a person’s body,*

*(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*

*(e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,*

*and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future, or which is imputed to a person”.*

This is a very long definition and uses technical language such as “malformation” and “disfigurement” which may be difficult for lay persons such as the claimant to interpret.

Then the complainant had to prove that he had been discriminated against on the grounds of his disability. Section 6(1) of the Employment Equality Acts, 1998 to 2008 provides that discrimination shall be taken to occur where *“a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2).....”* Section 6(2)(g) of the Acts defines the discriminatory ground of disability as follows – *“as between any 2 persons, ... that one is a person with a disability and the other is not or is a person with a different disability”.*

After it has been established that the complainant had been discriminated against, it must then be proved that the employer had failed to provide reasonable accommodation as required under Section 16 of the Acts. Section 16(3) of the Acts sets out the obligations and requirements on employers to take appropriate measures, where needed in a particular case, to enable a person with a disability have access to, participate in or advance in employment.

The complainant gave an abundance of evidence to prove that he had been unlawfully discriminated against and the adjudicator awarded the complainant €5,000 in compensation. Although the complainant won in this case, the compensation appears minimal for the amount of work he would have had to put in to make his case. This case demonstrates the legal complexities of an employment equality claim, especially for those who already have additional stresses from their own disabilities.

12. Although inequality in the workplace is unlawful, it nevertheless remains a prevalent issue for employees in Ireland. Moreover, the intersectionality of these challenges in the workplace contributes to a multiplication of legal problems. This Report will make reference to Ireland's obligations under the Constitution, the European Union Charter of Fundamental Rights (the Charter), and the European Convention on Human Rights to argue that Ireland is mandated to respect and promote the human rights of all persons living within its territory. The present Irish legal framework, which excludes legal aid for issues surrounding employment and workplace discrimination, has the potential to be in breach of Ireland's positive domestic and international obligations and must be remedied through legislative reform to Ireland's legal aid system.

## 1.2 An Overview of the Procedure Before the WRC

13. Section 77 of the Employment Equality Act deals with redress under its scope. According to the Act, all claims must be directed first to the WRC. Additionally, gender-based claims have the option to be taken to the Circuit Court, which could enable the possibility of obtaining legal aid under Section 27(2)(a) of the Civil Legal Aid Act 1995.
14. As explained by a WRC guide, when a person believes there has been a contravention to the Employment Equality Act, they can make a complaint to the WRC within six months of the

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<sup>23</sup> *A Job Applicant v A Recruitment Service* (DEC-E2016-065).

alleged contravention. The adjudicator can extend the time limit for up to twelve months if the complainant can demonstrate there was a reasonable cause for the delay.<sup>24</sup> The Community Law Centre noted that this timeframe is extremely tight, especially for those emerging from a difficult experience.<sup>25</sup> A lawyer or representative is not needed for the proceedings, and it should be noted that the WRC does not have the ability to award legal costs, meaning that if the complainant wishes to have representation they must pay their own legal fees, regardless of the result of the complaint.<sup>26</sup>

15. The complaint is filed through the submission of a form which can be downloaded from the WRC website,<sup>27</sup> and requires details of the complainant, employment, pay and the employer's full legal and contact details. For employment equality cases, the complainant is required to provide a statement setting out 'the facts, the link between the ground(s) cited and the alleged discrimination, any other relevant information and, where appropriate, any legal points the complainant may wish to make'.<sup>28</sup> A WRC guide entitled 'Information for Practitioners/Representatives', provides further details, outlining that the written statement should, where possible, contain 'a) A summary of the factual background to the complaint. b) A summary of the evidence to be adduced by, or on behalf of the parties. c) A summary of any legal arguments that may be relied upon in the course of the hearing, appending case law where appropriate. d) Where relevant, the number and details/names of witnesses that it is proposed to call at the hearing'.<sup>29</sup> According to the Community Law Centre, the requirement for written statements in employment equality claims often creates 'an often-insurmountable barrier for claimants'.<sup>30</sup>
16. Once submitted, the complaint form will then be forwarded to the respondent, who has 21 days to send a statement to the WRC if they wish to raise any legal points. The WRC can decide to

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<sup>24</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

<sup>25</sup> Anonymous 'WRC procedures 'barrier' to low-paid workers – CLM' (2020) Law Society of Ireland Gazette, <<https://www.lawsociety.ie/gazette/top-stories/wrc-procedures-present-barrier-to-low-paid-workers-says-clm>> accessed 09 April 2021.

<sup>26</sup> <[www.workplacerelations.ie/en/what\\_you\\_should\\_know/equal-status-and-employment-equality](http://www.workplacerelations.ie/en/what_you_should_know/equal-status-and-employment-equality)> accessed 12 April 2021.

<sup>27</sup> <[https://www.workplacerelations.ie/en/complaints\\_disputes/refer\\_a\\_dispute\\_make\\_a\\_complaint](https://www.workplacerelations.ie/en/complaints_disputes/refer_a_dispute_make_a_complaint)> accessed 12 April 2021.

<sup>28</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

<sup>29</sup> Workplace Relations Commission, 'Information for Practitioners/Representatives' (19 January 2017).

<sup>30</sup> Anonymous 'WRC procedures 'barrier' to low-paid workers – CLM' (2020) Law Society of Ireland Gazette, <[www.lawsociety.ie/gazette/top-stories/wrc-procedures-present-barrier-to-low-paid-workers-says-clm](https://www.lawsociety.ie/gazette/top-stories/wrc-procedures-present-barrier-to-low-paid-workers-says-clm)> accessed 09 April 2021.

proceed with mediation if both parties consent. Otherwise, or if mediation is unsuccessful, the case is referred to an adjudicator officer for hearing. All information and documents the parties consider relevant to their case must be sent prior to the hearing. The adjudication officer can also require information and documentation before the hearing, as well as a list of proposed witnesses.<sup>31</sup>

17. During the hearing both parties will have the opportunity to call and question witnesses, question the other party, respond, address any legal points that have been raised, and provide evidence. The adjudication officer can ask questions to the witnesses and the parties. The decision can be appealed to the Labour Court within 42 days of the decision and after that time, if the decision was not appealed, it is legally binding and enforceable by the District Court.<sup>32</sup>
18. As provided by Section 85.1(a) of the Employment Equality Act, the complainant must prove the facts from which discrimination may be presumed, and once established it is on the respondent to prove the contrary. Establishing the facts can be challenging. Gathering evidence when most documentation is in the hands of the employer presents a difficulty for the complainant, who may even find it hard to know before filing the claim what kind of written documentation they can count on to support their complaint. Finding witnesses to build their case can also prove to be an obstacle, considering that the alleged discrimination would have most likely occurred in the workplace and potential witnesses would tend be other employees who can face pressure. In practice, as was previously analysed, many cases will fail on the grounds of not establishing sufficient evidence to prove discrimination.

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<sup>31</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

<sup>32</sup> Workplace Relations Commission, 'Procedures in the Investigation and Adjudication of Employment and Equality Complaints' (October 2015).

## 2.0 The Irish Constitution

### 2.1 Introduction

19. As the basic law of the state, the Irish Constitution, or Bunreacht na hÉireann in Irish, is responsible for identifying the rights afforded to all individuals in Ireland. Given the difficulties posed by the current system of redress for employment equality claims, it is important to first consider the manner in which the Constitution may provide for the right to legal aid in this context. Although it does not contain a provision explicitly identifying a right to legal aid, the Constitution nevertheless recognises a multitude of both enumerated and procedural rights that contribute to the overall argument in favour of the right. In particular, two basic human rights play an important role in the development of the right to legal aid for employment equality cases: the right to equality and the right to earn a livelihood.<sup>33</sup> Both of these rights are substantive, conferring their privileges upon all individuals in Ireland.<sup>34</sup> The right to an effective remedy and the right to fair procedures also serve as important touchstones for

### 2.2 The Right to Equality

20. The right to equality is applicable to this Report since it addresses the right to legal aid in employment equality claims in the WRC. There is an explicit right to equality in the Irish Constitution. Article 40.1 of Bunreacht na hÉireann states that, ‘All citizens shall, as human persons, be held equal before the law.’ Article 40.3.1 applies between individual actors and thus has a horizontal effect. There are several cases which support this position, for example, in *Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court commented that Article 40.3.1 is applicable in private law.<sup>35</sup> In the case of *Quinn Supermarket v Attorney General*, Walsh J in the Supreme Court elaborated on the right to equality by stating that it is a guarantee against any inequalities grounded upon a belief that individuals by reason of their ‘human attributes or their ethnic or racial, social or religious ground’ are to be treated differently.<sup>36</sup>

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<sup>33</sup> Article 40.3.1.

<sup>34</sup> Substantive rights are rights which are not purely of practice and procedure.

<sup>35</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

<sup>36</sup> *Quinn Supermarket v Attorney General* [1972] IR 1, 13-14.

## 2.3 The Right to Earn a Livelihood

21. Over the years, Article 40.3.1 of the Constitution has served as the foundation for the identification of a number of derived rights, with the right to earn a livelihood serving as one of these rights.<sup>37</sup> The right to earn a livelihood is immensely important in relation to employment equality cases, as it codifies the general idea that those present in Ireland should be entitled to pursue employment free from wrongful constraints. The derived rights related to property serve as the primary source of the right to earn a livelihood,<sup>38</sup> originating in the case of *Tierney v Amalgamated Society of Woodworkers*.<sup>39</sup>
22. In *Tierney*, the High Court considered the case of a carpenter whose membership application was rejected by a union after a resolution was passed that barred the plaintiff from membership due to false claims of carpentry skill.<sup>40</sup> The Court was asked to decide whether or not the provisions of the Trade Union Act of 1941 grant individuals a statutory right in relation to trade union membership or proceedings relating to such membership.<sup>41</sup> Although the plaintiff's case was dismissed from the High Court, the judge acknowledged his agreement with a statement by the plaintiff's attorney which argued that '...the right to work and earn one's livelihood is just as important a personal right of the citizen... as the right to property'.<sup>42</sup> *Tierney* was appealed to the Supreme Court, where the Judgement of the High Court was upheld.<sup>43</sup> In effect, *Tierney* served to connect the pre-existing body of law regarding property rights to the right to earn a livelihood.
23. In *Educational Company of Ireland v Fitzpatrick (No. 2)*, the High Court considered whether picketing by the defendants on the property of the plaintiffs in regard to a union membership dispute was unconstitutional.<sup>44</sup> The High Court ruled in favour of the plaintiffs, arguing that the picketing was unlawful because it did not occur in the context of a recognised trade dispute. The Supreme Court dismissed the defendant's appeal and noted that 'the right to dispose of one's labour and to withdraw it seem[s] to me a fundamental personal right'.<sup>45</sup> Although this

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<sup>37</sup> Hogan, Kelly: *The Irish Constitution* (5th edn, Bloomsbury 2018) 1683.

<sup>38</sup> *ibid.*

<sup>39</sup> *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254.

<sup>40</sup> *ibid.*, 254.

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*, 260.

<sup>43</sup> *ibid.*

<sup>44</sup> *Educational Company of Ireland Ltd and Another v Fitzpatrick and Others (No 2)* [1961] IR 345, 397.

<sup>45</sup> *ibid.*



judgement did not specifically recognise the right to earn a livelihood as a right provided for in the Constitution, it paved the way for greater recognition of the right under Article 40.3.1.<sup>46</sup>

24. *Murtagh Properties v Cleary* considered claims on behalf of the plaintiffs that their right to earn a livelihood under Article 40.3.1 was restricted as a result of gender discrimination.<sup>47</sup> The defendant was the secretary of a trade union representing workers employed in public houses. The public house was being picketed as a result of the plaintiffs' non-cooperation with a trade union objection to their employment of women, and the plaintiffs wished to receive an injunction to end the picketing.<sup>48</sup> The High Court upheld the plaintiffs' request for an injunction. Importantly, the High Court offered analysis of the Constitution in relation to the plaintiff's claim and noted that under Article 45 'the right to an adequate means of livelihood.... while this is not enforceable against the State, its existence logically involves that each citizen has the right to earn a livelihood.'<sup>49</sup> This aspect of the Court's judgement is crucial because it links the right to earn a livelihood to basic principles of equality and non-discrimination. Furthermore, the High Court clearly attempted to shield the government of liability in the enforcement of the right to earn a livelihood.
25. *NVH v Minister for Justice and Equality* concerned the claim of a Burmese man in direct provision who appealed a decision under the Refugee Act 1996, which prevented him from accepting an offer of employment.<sup>50</sup> The Supreme Court noted that work is a fundamental aspect of the individual and their general well-being under the Constitution, yet it did not go so far as to say that there is an explicit right to work in the case of non-citizens.<sup>51</sup> Rather, the Supreme Court focused on the lack of a temporal limit during the asylum process when it decided that such a system is incompatible with the Constitution and the right to seek employment.<sup>52</sup>
26. In *Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court received a referral from the President to decide whether the Employment Equality Bill was repugnant to the Constitution.<sup>53</sup> The Bill contained a multitude of provisions which were intended to promote

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<sup>46</sup> *ibid.*

<sup>47</sup> *Murtagh Properties v Cleary* [1972] IR 330.

<sup>48</sup> *ibid.*

<sup>49</sup> *Murtagh Properties v Cleary* [1972] IR 330, 336.

<sup>50</sup> *NVH v Minister for Justice and Equality* [2017] IESC 35.

<sup>51</sup> *ibid.*, 12.

<sup>52</sup> *ibid.*

<sup>53</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

equality in the workplace, as well as anti-discrimination measures.<sup>54</sup> The Court's analysis was mainly conducted in regard to Article 40 of the Constitution, and it found several provisions of the Bill repugnant to the Constitution. Most importantly, however, the Court in its reasoning acknowledged the right of citizens to earn their livelihood and its connection to property rights.<sup>55</sup>

## 2.4 Right to an Effective Remedy

27. The right to an effective remedy is an implied right in the Constitution. The right is closely related to the right of access to the courts under Article 40.3.1 of the Constitution. In *McCauley v Minister for Posts and Telegraphs* the right of access to the Courts was recognised as a constitutional right. In *McCauley*, Kenny J held that, 'there is a right to have recourse to the High Court to defend and vindicate a Legal Right and that is one of the personal rights of the citizen included in the General Guarantee in Article 40.3.'<sup>56</sup>
28. The case of *M.C. v Legal Aid Board* concerned a complaint that the Legal Aid Board had not considered the applicant's application for legal aid to assist her in defending or dealing with nullity proceedings brought by her husband.<sup>57</sup> The Legal Aid Board submitted that the delay was due to a lack of State funding. In the High Court, Gannon J held that the State had no duty under the Constitution to intervene by providing legal aid for civil litigation of a dispute with another citizen.<sup>58</sup> Nonetheless, the High Court found that the State has the responsibility to guarantee that the civil legal aid scheme was governed fairly and that it completed its objective.
29. In the case of *Kirwan v Minister for Justice, Ireland and the Attorney General*, the applicant argued that the legal aid had to be provided where prisoners sought a review of the detention, where such detention was of a person in the Central Mental Hospital following a plea of insanity.<sup>59</sup> The High Court held that considering the requirement 'to provide information and to formulate and present the appropriate information', there is a right to civil legal aid.<sup>60</sup> According to Laffoy J in *McCann v District Judges of Monaghan*, the *Kirwan* case establishes

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<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> *McCauley v Minister for Posts and Telegraphs* [2000] 2 IR 360.

<sup>57</sup> *M.C. v Legal Aid Board* [1991] 2 I.R. 43.

<sup>58</sup> *ibid.*, 55.

<sup>59</sup> *Kirwan v Minister for Justice, Ireland and the Attorney General* [1994] 1 ILRM 444.

<sup>60</sup> *ibid.*

that it is ‘incumbent upon the executive under the Constitution to afford such legal aid as is necessary to enable the citizen to defend themselves’.<sup>61</sup>

30. The case of *Stevenson v Landy* concerned wardship proceedings.<sup>62</sup> In the High Court, Lardner J held that the Legal Aid Board had a constitutional obligation to grant legal aid in wardship proceedings. This is significant because Lardner J concluded that the Government had a constitutional obligation to make legal aid available for wardship applications.
31. In the case of *O’Donoghue v Legal Aid Board*, it was argued that the failure of the Legal Aid Board to grant a certificate for legal aid in a timely fashion infringed upon the plaintiff’s constitutional right to legal aid in Ireland.<sup>63</sup> The High Court accepted that the delay was suffered due to the absence of resources to meet the demands of the Legal Aid Board. The Court addressed the current constitutional right to civil legal aid in Ireland. The Court found that fair procedures and the right of access to justice would require legal aid. The Court stated that the State must per Gannon J (in *M.C. v Legal Aid Board*) ensure that the scheme ‘is implemented fairly to all persons and in a manner, which fulfils its declared purpose’.<sup>64</sup> Kelly J expanded the scope of the right to civil legal aid by providing that the Civil Legal Aid Act of 1997 gives substance to the constitutional entitlement to legal aid for those who qualify. He acknowledged that the legislature was entitled to reasonably restrict that right. Nonetheless, the right could not be effectively empty for years as it had been in this case. In relation to the State’s argument that a decision in favour of the plaintiff would breach the principle of separation of powers, it was held that the Court was protecting a constitutional right and not granting mandatory relief against the State.<sup>65</sup> Finally, on the issue of what might be an acceptable delay in providing legal aid, it was held that the Legal Aid Board’s own target of two to four months was reasonable. Kelly J awarded the plaintiff damages for the loss she had suffered because of the excessive delay. Kelly J calculated the damages as the additional amount of maintenance the plaintiff would have received had the case come before the Court on time. According to Professor Gerry Whyte, this decision was the catalyst for the consequent improvement of the Civil Legal Aid Scheme.<sup>66</sup>

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<sup>61</sup> *McCann v District Judges of Monaghan* [2009] 4 I.R. 200 [142].

<sup>62</sup> *Stevenson v Landy* Unreported, High Court, 2 February 1993.

<sup>63</sup> *O’Donoghue v The Legal Aid Board, The Minister for Justice, Equality and Law Reform, Ireland & the Attorney General* [2004] IEHC 413.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*, [111].

<sup>66</sup> Gerry Whyte, *Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement* (IHRC Conference on Economic, Social and Cultural Rights, December 2005).

32. The case of *Magee v Farrell* substantially regressed the right of access to justice.<sup>67</sup> The case concerned a request for legal aid for an inquest into the death of Paul Magee who was found unconscious in Kilmainham Garda Station. Paul Magee's mother did not have the financial means to pay for legal aid and without legal aid the right to take part in the inquest was futile. She applied for legal aid but her request was denied as inquests did not fall under the legal aid scheme. As a result of the refusal, she then decided to challenge the scheme. The High Court referred to *Stevenson* and stated that 'fair procedures under the Constitution require that she be provided with legal aid for the purpose of being adequately represented'.<sup>68</sup>
33. The case was then appealed to the Supreme Court, where it was found that there is no constitutional right to state-funded legal aid in civil legal matters. The Supreme Court found that the case of *Stevenson* did not give rise to a constitutional right to state-funded legal aid, but the case was instead based on the inappropriate grounds of refusal used by the Legal Aid Board. The timing of the enactment of the European Convention on Human Rights Act 2003 was detrimental to the decision in *Magee*. Paul Magee died before the enactment of the Act and therefore, Article 2 of the ECHR could not be relied upon. Now, however, if a similar case was to come before the courts again, having regard to ECHR jurisprudence in Article 2, the result may be different.
34. Although the Supreme Court in *Magee* found that there was no constitutional right to state-funded legal aid in civil cases, its strength as a precedent is undermined by the fact that the State subsequently reached a friendly settlement in relation to a complaint by Ms Magee to the ECtHR.<sup>69</sup> The Government agreed to pay Magee for non-pecuniary losses that were incurred as well as for the cost of domestic proceedings. As part of the settlement, the Government also expressed the intention to enact the Coroners Bill (2007) and, in particular, Section 86 of the Bill which provides the right to legal aid in an inquest. In 2013, the Courts and Civil Law (Miscellaneous Provisions) Act 2013 amended the Coroners Act of 1962 so that there is a right to legal aid and legal advice in relation to coroners' inquests.<sup>70</sup> Therefore, despite the Supreme Court decision in *Magee v Farrell*, the Government subsequently expressed that there should be a right to legal aid in an inquest.

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<sup>67</sup> *Magee v Farrell & Ors* [2009] IESC 60.

<sup>68</sup> *Magee v Farrell* [2005] IEHC 388.

<sup>69</sup> *Magee v Ireland* Application no. 53743/09 (20 November 2012).

<sup>70</sup> Courts and Civil Law (Miscellaneous Provisions) Act 2013, s 24.

35. In addition to the fact that the government subsequently agreed that the absence of legal aid in inquests presented a problem, it is important to note that cases in the WRC are much more complex than that of coroner inquests and, therefore, the *Magee* Supreme Court decision may be distinguished on its facts. An inquest differs from the WRC in that it is an inquisitorial process. Most WRC cases, however, are adversarial, with parties obliged to present evidence for examination.<sup>71</sup> The adversarial nature of the WRC adds an additional layer of complexity to an already difficult legal process, standing in contrast to the more straightforward process found under inquests like that in *Magee*. As a result of the stark contrast between adversarial and inquisitorial proceedings, *Magee* may be distinguished on its facts from employment equality cases.

## 2.5 Right to Fair Procedures

36. Natural and constitutional justice is a concept which has been developed through case law as an aspect of the right to fair procedures. The right to fair procedures has two parts: *audi alteram partem* ('hear the other side') and *nemo iudex in causa sua* ('one must not be a judge in one's own cause'). As lawyers are an indispensable tool for a fair hearing, this section will therefore focus on the principle of *audi alteram partem*.
37. Constitutional justice is considered as an unenumerated right under Article 40.3 of the Irish Constitution. This was first established in *Re Haughey*, where the applicant had been denied the opportunity to cross-examine and to address his accusers in his defence in an investigation into the expenditure of the grant-in-aid for Northern Ireland relief. The Supreme Court opined that Article 40.3 was a guarantee of basic fairness of procedures and it was the duty of the Court to ensure that the words of Article 40.3 'provide a positive protection for the citizen and his good name'.<sup>72</sup> The *Re Haughey* decision was then confirmed by O'Higgins C.J. in the case of *Garvey v Ireland* where it was stated that 'the Constitution impliedly assures to the citizen basic fairness of procedure'.<sup>73</sup>
38. The principle of *audi alteram partem* requires the courts to guarantee that judicial procedures are carried out with strict fairness given to each party.<sup>74</sup> The absence of a possibility of state-funded legal aid in employment equality cases adversely affects the parties' right to fair

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<sup>71</sup> Workplace Relations Act (2015), s 41(5).

<sup>72</sup> *Re Haughey* [1971] IR 217 (SC) 264 (O'Dalaigh CJ).

<sup>73</sup> *Garvey v Ireland* [1980] IR 75 (Henchy J).

<sup>74</sup> *Nevin v Crowley* [1999 HC] 1 ILRM 376 and [2001] SC 1 IR 113.

procedures. The process in the WRC is mostly adversarial as it involves questions of law, examination of witnesses and cross-examination of witnesses. Legal representation, therefore, represents an indispensable tool for individuals to succeed under an adversarial system. Although many complainants before the WRC have a strong argument to make, without legal representation they may struggle to adequately present their case.

## 2.6 Unconstitutional Statutory Lacunas

39. Under the Irish Constitution, Article 15.4.1 and Article 15.4.2 provide that the Legislature cannot enact any laws that are ‘repugnant’ to the Constitution. Any laws which are ‘repugnant’ to the Constitution are invalid. There are two ways in which a statute can be found invalid: a positive statutory provision or a lacuna in a statutory provision which is ‘repugnant’ to the Constitution. For example, in the case of *Zalewski v Adjudication Officer*, Section 41(13) of the Workplace Relations Act was held to be repugnant to the Constitution, as it positively infringed upon the constitutional guarantee that the administration of justice shall be done in public.<sup>75</sup> The Supreme Court also held that the absence of the capacity for an adjudication officer to require that certain evidence be provided under oath was an unconstitutional lacuna.<sup>76</sup>
40. The Civil Legal Aid Act 1995 confines the application of state-funded legal aid to cases in the District Court, High Court, and Supreme Court. Employment equality cases are taken in the WRC and any appeals are then brought to the Labour Court. Therefore, the Civil Legal Aid Act does not apply to employment equality cases. The blanket exclusion of employment equality cases denies deserving people of their right of access to justice and fair procedures. Insofar as the Act does not provide for legal aid in non-court cases, Section 27 may contain an unconstitutional lacuna.

## 2.7 Conclusion

41. The Constitution is the basic law of the State, and it describes the fundamental rights of every individual. As there is a constitutional right to equality and to earn a livelihood, as well as a right of access to justice and fair procedures, there should be a right to access legal aid in employment equality cases. In *O'Donoghue v Legal Aid Board*, the High Court held that the plaintiff's constitutional right of access to the courts and right to fair procedures included an

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<sup>75</sup> *Zalewski v Adjudication Officer* [2021] IESC 24.

<sup>76</sup> *ibid.*

entitlement to be provided with legal aid. While *Magee v Farrell* serves as the authority for the viewpoint that there is no constitutional right to legal aid for inquests, the State settled with the applicant rather than defend itself in an ECtHR appeal. As a result, the strength of *Magee v Farrell* as a precedent is significantly undermined.

42. There is a presumption that Irish law is compatible with the ECHR, and flowing from such compatibility, the Constitution should be interpreted in terms of its ECHR obligations. In *Byrne v Conroy*, the Supreme Court furthered this idea of the inherent link between national measures and EU law obligations. The case concerned an extradition for conspiracy to defraud the British Intervention Board of money due under the Common Agricultural Policy.<sup>77</sup> The appellant contended that the offences in question were revenue offences which were exempt under Section 50 of the Extradition Act 1965.<sup>78</sup> The Supreme Court held that where legislation is ambiguous, legislation must be interpreted in a manner which would allow the State to comply with its obligations under EU law.<sup>79</sup>
43. Additionally, there is a general presumption that the Oireachtas intends to uphold international legal obligations when it implements domestic legislation. This presumption was considered in *Ó Domhnaill v Merrick*, where the Court examined the extent of the ECHR's operation in Ireland.<sup>80</sup> A Court of Appeal majority stated that there is an assumption that enacted statutes would be interpreted and applied, 'in consonance with the State's obligations under international law, including any relevant treaty obligations'.<sup>81</sup>
44. These rules relating to the interpretation of Irish law in accordance with the ECHR and EU law mean that the content of the relevant constitutional rights will be informed by the rights discussed in the following sections.

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<sup>77</sup> *Byrne v Conroy* [1998] 3 IR 1.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid*, para 23.

<sup>80</sup> *Ó Domhnaill v Merrick* [1984] IR 151.

<sup>81</sup> *ibid*, para 159.

## 3.0 The European Convention on Human Rights

### 3.1 Introduction

45. Ireland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1953.<sup>82</sup> Ireland is bound to uphold its treaty obligations under international law, but also gave ‘further effect’ to many of its ECHR obligations through the passage of the European Convention of Human Rights Act of 2003 (ECHR Act 2003).<sup>83</sup> Furthermore, Ireland was the respondent in the landmark case *Airey v Ireland*, which was heard in front of the European Court of Human Rights (ECtHR) in 1979. *Airey v Ireland* is one of the most significant and oft-cited disputes in the Article 6 case law, and effectively precipitated the creation of more demanding obligations on states to provide legal aid. Article 6 is the key substantive right that is violated through Ireland’s exclusion of legal aid eligibility for employment equality issues.
46. The ECHR, the ECHR Act 2003, and the ECtHR’s jurisprudence give rise to obligations of the Irish state to ensure that the rights contained therein are practical and effective. Ireland must ensure that it implements and maintains a domestic legal framework that provides effective protection of Convention rights, which would include providing legal aid for employment equality issues where this is necessary to ensure access to justice and an effective remedy.

### 3.2 Employment Disputes as Civil Rights & Obligations

47. Article 6.1 of the ECHR provides for the right to a fair trial within a reasonable time in the determination of civil rights and obligations or when facing criminal charges.
48. The reference to civil rights and obligations has to be interpreted as an ‘autonomous concept deriving from the Convention’ and it does not depend on the legal classification of the dispute or the nature of the court deciding the dispute, but rather on its ‘substantive content and effects’.<sup>84</sup> To come within the scope of Article 6, there must be a genuine and serious dispute that concerns a right that exists under national law. It can relate to the existence of a right, to

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<sup>82</sup> ‘Chart of Signatures and Ratifications of Treaty 005: The Convention for the Protection of Human Rights and Fundamental Freedoms’ (*Treaty Office, Council of Europe*, status as of 11/04/2021) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 8 April 2021.

<sup>83</sup> European Convention on Human Rights Act 2003, preamble.

<sup>84</sup> Council of Europe, *European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)*, 6.



its scope or manner of exercise, and the outcome of the dispute has to be directly decisive for the right in question.<sup>85</sup>

49. Employment rights fall within the scope of civil rights and obligations under Article 6 of the ECHR. This includes issues such as the right to continue professional activities,<sup>86</sup> disciplinary proceedings that decide on the right to continue to exercise a profession,<sup>87</sup> access to a liberal profession,<sup>88</sup> decisions that affect the possibility of access to employment and therefore earning a living,<sup>89</sup> the lawfulness of a dismissal,<sup>90</sup> suspensions<sup>91</sup> or reinstatements,<sup>92</sup> and compensation claims for inability to work due to work-related illness or accidents.<sup>93</sup>
50. The Court considers that the protection Article 6.1 provides also applies to ‘proceedings which, in domestic law, come under ‘public law’ and whose result is decisive for private rights and obligations or the protection of ‘pecuniary rights’.<sup>94</sup> Accordingly, Article 6.1 is also applicable to ordinary labour disputes even in the case of civil servants, regardless of the special relationship with the State.<sup>95</sup>
51. Furthermore, equal access to employment and to the civil service, if recognised under domestic law, could also enjoy the protection of Article 6.<sup>96</sup> Additionally, the court has established that ‘[e]mployment disputes by their nature call for expeditious decision’.<sup>97</sup>

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<sup>85</sup> Council of Europe, ‘*European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)*’ 6.

<sup>86</sup> *König v Germany*, no. 6232/73, 28 June 1978.

<sup>87</sup> *Le Compte, Van Leuven and De Meyere v Belgium*, no. 6878/75;7238/75, 23 June 1981, *Philis v Greece* (no. 1), no. 12750/87, 27 August 1991.

<sup>88</sup> *Thlimmenos v Greece* [GC], no. 34369/97, 6 April 2000.

<sup>89</sup> *Pocius v Lithuania*, no. 35601/04, 6 July 2010, *Užukauskas v Lithuania*, no. 16965/04, 6 July 2010.

<sup>90</sup> *Buchholz v Germany*, no.7759/77, 6 May 1981, *Aleksandar Sabev v Bulgaria*, no. 43503/08, 19 July 2018.

<sup>91</sup> *Obermeier v Austria*, no. 11761/85, 28 June 1990.

<sup>92</sup> *Ruotolo v Italy*, no. 12460/86, 27 February 1992.

<sup>93</sup> *Chaudet v France*, no. 49037/06, 29 October 2009.

<sup>94</sup> Council of Europe, ‘*European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)*’, 12.

<sup>95</sup> In *Regner v the Czech Republic*, the ECtHR stated that “Employment disputes, especially those concerning measures terminating employment in the private sector, concern civil rights within the meaning of Article 6.1 of the Convention.” On that basis, they found that the revocation of a public servant’s security clearance affected his duties and employment, and even if he was regarded to be a civil servant those disputes would in principle fall under the protection Article 6 (*Regner v the Czech Republic* [GC], no. 35289/11, 19 September 2017, para 121). The State could argue that the applicant’s status as a civil servant is outside the scope of Article 6 if two conditions are met: access to courts for the servant has to be expressly excluded by the national law of the State, and there must be objective grounds in the State’s interest for that exclusion (*Vilho Eskelinen and Others v Finland* [GC], no. 63235/00, 19 April 2007).

<sup>96</sup> *Tinnelly & Sons Ltd and Others and McElduff and Others v the United Kingdom*, no. 20390/92;21322/92, 10 July 1998.

<sup>97</sup> Council of Europe, ‘*European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)*’, 86.

### 3.3 Article 6: Right to a Fair Trial & *Airey v Ireland*

52. The European Court of Human Rights decided the case of *Airey v Ireland*<sup>98</sup> in 1979, with the Court finding that there had been a breach of Ms Airey's Article 6 rights to a fair trial, in addition to a breach of her Article 8 right to family life. Ms Airey was seeking a judicial separation from her husband in Ireland, but did not have the money to pay for legal representation. At the time, divorce was illegal in Ireland and judicial separations could only be obtained in the High Court. Ms Airey cited her husband's physical abuse as one of the reasons she sought separation, while also remarking on his lack of cooperation signing the appropriate documents to enable the separation process to move forward. Ms Airey could not find a lawyer willing to take a case *pro bono*, nor had she the funds to obtain legal representation. She contended that legal aid for her case should be provided by the State in order to protect her Article 8 right to family life and her Article 6 right to a fair trial. The ECtHR found that 'Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation' and that there was a breach of her Article 6.1 rights'.<sup>99</sup> Amongst other evidence, the ECtHR was presented with the statistic that of all the judicial separation cases that were brought before the High Court in Ireland, every single applicant had retained legal representation.<sup>100</sup> This reality, in combination with the undue financial and emotional burden that would be placed on Ms Airey if she were to be forced to represent herself in court, contributed to the Court's ruling that a fair trial could not be ensured without legal aid being provided to Ms Airey by the State. Accordingly, her Article 6.1 right had been breached.
53. *Airey v Ireland* is considered a landmark case in the ECtHR's jurisprudence relating to Article 6, as the ruling elucidated the broader understanding of Article 6 and established the idea that the state may be compelled by the Court to provide legal aid to a greater extent than is provided for in their own domestic system.<sup>101</sup> Moreover, *Airey* set the precedent for the protection of Article 6 necessitating effective access to the courts. Importantly, the ruling was made in the

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<sup>98</sup> *Airey v Ireland*, no. 6289/73, 9 October 1979.

<sup>99</sup> *ibid*, para 28.

<sup>100</sup> *ibid*, para 24.

<sup>101</sup> Ireland ratified the Convention with the sole reservation that the government of Ireland did "not interpret Article 6.3c of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland." "Chart of Signatures and Ratifications of Treaty 005: The Convention for the Protection of Human Rights and Fundamental Freedoms" (*Treaty Office, Council of Europe*, status as of 11/04/2021) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 8 April 2021.

wake of another significant case involving Article 6, *Golder v the United Kingdom*, which was decided in 1975. *Golder* set the stage for the findings in the *Airey* case, as the Court was moved to consider the limitations of Article 6.1 and whether it secures the right of access to the courts for legal proceedings that have already begun or to all people wishing to commence an action in the interest of protecting a civil right or obligation.<sup>102</sup> In the *Golder* decision, the ECtHR came to the conclusion that Article 6.1 ‘secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal’.<sup>103</sup> On the heels of this decision, the ECtHR commented further on the bounds of Article 6.1 in their *Airey* judgment, stating that:

*The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.*<sup>104</sup>

54. The Court gave great consideration to the difficulties that Ms Airey would face in presenting her case for a judicial separation from her husband, which would have demanded significant emotional involvement, financial resources, and evaluation of complex law. These facets of Ms Airey’s case and circumstances persuaded the Court that having to represent herself in court, due to a lack of financial means to afford legal aid, would constitute an unfair trial. In order for Ms Airey’s Article 8 right to family life to be protected, her Article 6 right to a fair trial had to be protected, in this case through the provision of legal aid by the state. The Court’s emphasis on these rights needing to be both practical and effective speaks to the positive nature of these obligations and that state involvement in protecting these rights may be mandated when applicable.
55. It should be noted that the Court emphasised that the State has free choice of the means provided to guarantee effective access to justice, which can be achieved through legal aid schemes or other means, such as simpler procedures. Significantly, it was the particular circumstances of the claim in the *Airey* judgement that led the Court to the conclusion that there has been a breach of Article 6. The Court clarified its reasoning as follows:

*...it would be erroneous to generalise the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning "civil rights and obligations or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer’s assistance,*

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<sup>102</sup> *Golder v the United Kingdom*, no. 4451/70, 21 February 1975, para 25.

<sup>103</sup> *Golder v the United Kingdom*, no. 4451/70, 21 February 1975, para 36.

<sup>104</sup> *Airey v Ireland*, no. 6289/73, 9 October 1979, para 24.

*will meet the requirements of Article 6 para 1 (art. 6-1); there may be occasions when such a possibility secures adequate access even to the High Court.*<sup>105</sup>

56. As the Article 6 rights are not absolute, the applicability of positive state action has been clarified through both *Airey* and the case law from the following decades. The ECtHR has developed the consideration for the personal circumstances of an applicant, in addition to demonstrating a trend favouring the broader understanding of the civil nature of certain rights falling within the scope of Article 6. These trends illustrate a high likelihood that the Court would view the inclusion of employment equality cases in the eligibility criteria for Ireland's legal aid scheme as contributing to the practical and effective realisation of ECHR rights.

### 3.4 Article 6: Relevant ECtHR Case Law

57. Since *Airey*, the European Court of Human Rights has continued to consider the extent to which Article 6 may require legal aid in civil matters. In doing so, it has honed the scope of the right, in addition to elucidating the criteria for determining when state provision of legal aid is necessary to protect the right to a fair trial. The case law has established the considerations that must be taken into account when assessing whether States must provide legal aid, and through examination of the principles and guidelines consistently laid out in the case law built after the precedent set in *Airey*, the necessity of legal aid for employment equality issues can be further assessed.
58. The case of *P., C., and S. v the United Kingdom* was decided by the Strasbourg court in 2002, where the applicants were a mother (P.) and father (C.). The parents had been party to care proceedings in the UK regarding future contact with their child (S.) after the child was adopted by another family. P.'s legal team withdrew from the care proceedings, and the UK judge refused an adjournment for P. to have time to find new representation. The effect of the refusal of adjournment was that P. had to represent herself in the care proceedings. Taking her case to the ECtHR, she claimed that the refusal of adjournment violated her Article 6 right to a fair trial. In front of the ECtHR, it was argued that P. and C. could not be expected to appropriately represent themselves given the serious emotional considerations of the case. The judgment in favour of the applicants was supported and bolstered by reference to the previous rulings in *Golder v the United Kingdom*, as well as *Airey v Ireland*. The judgment expanded on the 'principle of fairness', with the Court stating that fairness is 'the key principle governing the

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<sup>105</sup> *ibid*, para 26.

application of Article 6' and further commenting that 'the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures'.<sup>106</sup> The principle of fairness was elaborated on further in *Tabor v Poland* (2006). Under Polish domestic law, the national courts were not obliged to provide reasons for the refusal of legal aid, but the ECtHR held that the principle of fairness dictates that courts must give reasons for the rejection of legal aid claims.<sup>107</sup>

59. Decided in 2005, *Steel and Morris v The United Kingdom* was another key case concerning the Article 6 right to a fair trial.<sup>108</sup> Two UK nationals were sued by McDonald's for defamation due to their contribution to an anti-McDonald's campaign, which culminated in the production of a six-page leaflet. One of the applicants was unemployed, whilst the other was either unemployed or on a low wage throughout the period of the case. Nevertheless, the applicants were refused legal aid, and had to represent themselves throughout the trial and appeal, with only sporadic help from volunteer lawyers. They consequently lodged an application before the Strasbourg Court that they were denied a fair trial due to the lack of legal aid made available to them.
60. The ECtHR noted that the question of whether legal aid was necessary for a fair hearing depended on a number of factors. Amongst other things, these depended on the 'importance of what was at stake for the applicant', 'the complexity of the law and procedure', and 'the applicant's capacity to represent him or herself effectively'.<sup>109</sup> Determining the case by reference to these factors, the Court proceeded to analyse the extent to which the applicants were able to effectively defend themselves. Importantly, the judgement operates as a restatement of the 'principle of effectiveness' as first articulated in *Airey*, with the Court reiterating that the purpose of the Convention is to guarantee, 'practical and effective rights'.<sup>110</sup> However, the Court stressed that the right of access to the court under Article 6 ECHR is not absolute, and it can accordingly be subject to restrictions, providing that they 'pursue a legitimate aim and are proportionate'.<sup>111</sup> For instance, such restrictions on the grant of legal aid could be justified according to the applicant's prospects of success or financial well-being. Significantly, though, these restrictions can only be justified insofar as a reasonable equality of

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<sup>106</sup> *P., C., and S. v the United Kingdom*, no. 56547/00, 16 July 2002, para 91.

<sup>107</sup> *Tabor v Poland*, no. 12825/02, 27 June 2006, para 45-46.

<sup>108</sup> *Steel and Morris v the United Kingdom*, no. 68416/01, 15 February 2005.

<sup>109</sup> *ibid*, para 61.

<sup>110</sup> *ibid*, para 59.

<sup>111</sup> *ibid*, para 62.

arms can be achieved and substantial disadvantage for one party is avoided. As the Court articulated:

*...it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.*<sup>112</sup>

61. The ECtHR concluded that the denial of legal aid to the applicants deprived them of the opportunity to effectively present their case whilst also contributing to an ‘unacceptable inequality of arms’ with McDonald’s.<sup>113</sup> In this case, the legal and procedural issues were very complex such that sporadic help from volunteer lawyers was insufficient. Indeed, the case amounted to the longest trial in English history, spanning a period of two years and six months, with over 313 days spent in court.<sup>114</sup> This was representative of the applicant’s lack of skill and experience in legal representation, and highlighted the importance of ensuring that the applicant was not at an unfair disadvantage when facing opposition with exponentially more resources and finances at their disposal.
62. Finally, another key case in the Article 6 jurisprudence is *Shamoyan v Armenia*, which was argued before the ECtHR in 2015.<sup>115</sup> The applicant, an Armenian national who was disabled and confined to a wheelchair, first brought proceedings against her neighbour seeking to have a construction dismantled, as she was planning to install a ramp for wheelchair access. However, during the court proceedings the applicant changed her claim, asking for the construction in question not to be dismantled, but rather allocated to her in order to install the ramp. She did not have legal representation when she filed the claim, which was first dismissed by a regional court, and then by a court of appeal. She then lodged an appeal on points of law before the Court of Cassation, which was not admitted because it was not lodged by an advocate licensed to act before that court. The applicant then claimed that because she could not afford a licensed advocate, she was being denied access to court. The ECtHR considered that the impossibility to apply for legal aid in this case, given the procedural requirement of an advocate licensed to act before the Court of Cassation, placed a disproportionate restriction on the applicant’s effective access to that court, and held that there was a violation of Article 6.1 of the Convention. In doing so the Court considered the difficult financial situation of the

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<sup>112</sup> *ibid*, para 62.

<sup>113</sup> *ibid*, para 72.

<sup>114</sup> *ibid*, para 49.

<sup>115</sup> *Shamoyan v Armenia*, no. 18499/08, 7 July 2015.

applicant, the lack of legal aid and the fact that the Government failed to prove that she could have obtained counsel willing to act *pro bono*.

63. These key cases, along with *Airey*, have drawn out the Court's understanding of the bounds and limitations of Article 6, and the judgments demonstrate that the Court's understanding of Article 6 disputes is heavily informed by the 'principle of fairness' and 'principle of effectiveness'. The principle of fairness, identified by the ECtHR as the key principle related to Article 6, begs consideration of whether the burden of self-representation 'in the teeth of... difficulties'<sup>116</sup> affects the fairness of the trial. The emotional burden of having no choice but to represent oneself in a case involving discrimination in the workplace is undoubtedly heavy. When examining the potential burden of self-representation in an employment equality dispute before the WRC, one consideration that must be made is for the applicant's fear of loss of livelihood or income, which can be related to the ability to provide for oneself and a family. This fear has the potential to be exacerbated by discriminatory practices in the workplace; the expectation that a complainant in the WRC would have to advocate for themselves and relive instances of discrimination that could be traumatic appears to fall within the Court's interpretation of contravention against the principle of fairness and a person's Article 6 right to a fair trial.
64. The implications of the *Steel and Morris* judgment also have relevance to an evaluation of fairness in the WRC. Just as the applicants in the *Steel and Morris* case were determined to be at an unfair disadvantage when self-representing against a corporate giant such as McDonald's, workers in Ireland may find themselves faced with an inequality of resources if pursuing a claim against a large company or wealthy employer with an abundance of resources. The nature of the relationship between a worker and whomever they are working for will often involve an unbalanced power dynamic, where an individual applicant would presumably have access to fewer resources than a company or employer in most cases. This imbalance could mean that self-representation in the WRC against a large corporate entity could be deemed an unfair trial based on a gross inequality of resources.
65. Additionally, the principle of effectiveness, which finds its foundations in the *Airey* judgment, and which was further developed in the *Steel and Morris* and *Shamoyan* judgments, asks for consideration of whether access to the courts is realised in an effective and practical manner.

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<sup>116</sup> *P., C., and S. v the United Kingdom*, no. 56547/00, 16 July 2002, para 91.

Notably, the *Shamoyan* judgment makes reference to the potential issues regarding effective access to the courts when there is an ‘absence of possibility to apply for legal aid’.<sup>117</sup> While this case referred specifically to the Cassation Court in Armenia, it would not be unreasonable to believe that the ECtHR would view disputes in the WRC and the Labour Court as similarly not realising effective access to the courts without at least the possibility to apply for legal aid, which is currently not an option for cases taken before the WRC in Ireland.

### 3.5 Additional Violations of ECHR Rights

66. While the right to legal aid arises primarily under Article 6 ECHR, these issues frequently arise in cases also alleging violations of other ECHR rights. Importantly, the Article 6 right to a fair trial often does not operate in a vacuum; its interaction with other ECHR rights may be seen to strengthen such cases and is revealing of their multifaceted nature. This is evident through Ms Airey’s claim that both her Article 6 right and Article 8 right to private and family life had been violated. As such, it is important to highlight that there are other ECHR rights violations that may be triggered through Ireland’s exclusion of legal aid for employment matters, depending on the particular nature of the employment dispute. ECHR rights that could be violated through discrimination in the workplace include Article 8 and the right to respect for private and family life, Article 10 and the right to freedom of expression, Article 14’s prohibition on discrimination, and Protocol No. 1, Article 1’s right to the protection of property, from which there is a derived right to earn an income.
67. Some or all of these rights may be relevant in employment equality disputes that involve common discriminatory practices. These practices could include discrimination on the basis of sexual orientation, race, gender, ability, or class - issues that were relevant to a majority of the cases taken before the Workplace Relations Commission in Ireland from 2018 to 2021.<sup>118</sup> The fact that employees in Ireland cannot apply for legal aid if they are discriminated against in the workplace has the potential to impinge upon the rights laid out in Article 8, 10, 14 and Protocol No. 1 by creating a barrier to accessing the courts. With the exclusion of legal aid for these cases, it may also be argued that there is a breach of Article 13 right to an effective remedy that is found in the Convention. In order to be guaranteed, people must in principle have unimpeded access to the judiciary to enforce laws and secure rights, and this cannot be done if

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<sup>117</sup> *Shamoyan v Armenia*, no. 18499/08, 7 July 2015, para 36.

<sup>118</sup> See the Appendix for data on dispute classifications.



complainants cannot afford, nor be awarded legal aid, to take their employment equality case before the WRC.

### 3.6 The European Convention on Human Rights Act 2003

68. The obligations laid out in the ECHR were further entrenched within the Irish domestic legal system through the passage of the European Convention on Human Rights Act 2003. The legislation's purpose was to 'enable further effect to be given, subject to the Constitution, to certain provisions of the Convention'.<sup>119</sup> Each of the articles from the ECHR that are referenced in this Report is protected by the ECHR Act 2003, including Article 1 of Protocol No. 1. The Act further requires interpretations of laws to be compatible with the ECHR,<sup>120</sup> whilst Section 3 places an obligation on organs of the state to perform their functions in a manner compatible with the Convention.<sup>121</sup> The Legal Aid Board is subject to this obligation.
69. Moreover, the Act of 2003 confers the High Court and Supreme Court with the power to issue declarations of incompatibility.<sup>122</sup> This judicial power comes from Section 5 of the Act, where it is stated that:

*In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.*<sup>123</sup>

70. In this way, Section 5 gives the Irish superior courts the power to issue a declaration of incompatibility if a statute or law contravenes Ireland's obligations under the ECHR. The ECHR Act has incorporated *inter alia* the Article 6, 8, 10, 13, and 14 rights laid out in the ECHR, in addition to the protection of property found in Article 1 of Protocol No. 1. Based on the manner in which these rights may be breached by the exclusion of legal aid for employment law cases, as has been expanded upon in this Report, the Irish courts could in principle have recourse to issue a declaration of incompatibility for the Civil Legal Aid Act 1995 in an appropriate case. This incompatibility could then be remedied through revision of the Act of 1995 to abide by Ireland's domestic and international obligations to the rights of the ECHR by

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<sup>119</sup> European Convention on Human Rights Act 2003, preamble.

<sup>120</sup> *ibid*, s 4.

<sup>121</sup> *ibid*, s 3.

<sup>122</sup> *ibid*, s 5.

<sup>123</sup> *ibid*, s 5(1).

providing for the opportunity to apply for legal aid when filing a complaint related to issues of employment law.

71. While the effects of a declaration of incompatibility under the ECHR Act 2003 are not as far-reaching as those provided by a declaration of unconstitutionality,<sup>124</sup> it could still be a valuable remedy. In fact, in *Foy v An t-Ard Chlaraitheoir & Others*, the High Court recognised that:

*Whilst it is correct to say that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the existing law, nevertheless it does have consequences and may be of value to an applicant. In the first instance, the Taoiseach is obliged to lay a copy of an order, containing such a declaration, before each House of the Oireachtas within the next twenty-one days on which that House sits. Secondly, as such a declaration can only issue from a constitutional court, such a court can have a reasonable expectation that the other branches of government (Article 6 of the Constitution) would not ignore the importance or significance of the making of such a declaration. Thirdly, a party in whose favour such a declaration is made, can apply to the Government through the Attorney General for an “ex gratia” payment under ss. 4 of s. 5 of the Act. And finally, the granting of such a declaration may have implications for the court’s discretion with regard to the costs of proceedings.<sup>125</sup>*

72. However, the question of compatibility would only arise if no other remedies are available, or if those available are not adequate to ensure full compliance with the ECHR. In *Foy*, the High Court found that in some cases an interpretation compatible with the Convention is not possible even under the scope of Section 2 of the Act of 2003,<sup>126</sup> and that ‘[w]hen the court finds itself so restricted the only remedy is a declaration of incompatibility’.<sup>127</sup> Additionally, in *Donegan v Dublin City Council & Others*, the Supreme Court issued a declaration of incompatibility after finding there was no other legal remedy.<sup>128</sup> In doing so, the Court noted that judicial review may not always be considered an adequate remedy.<sup>129</sup>
73. As analysed, when there are other available remedies, seeking a declaration of incompatibility would not be suitable. Still, considerations made in both *Foy* and *Donegan* could apply to employment equality issues. In *Foy*, the High Court has found that ‘...failure by the State,

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<sup>124</sup> Article 34 of the Irish Constitution gives the High Court with the power to strike down any law that breaches the Constitution.

<sup>125</sup> *Foy v An t-Ard Chlaraitheoir & Others* [2007] IEHC 470, 10 October 2007, para 110.

<sup>126</sup> European Convention on Human Rights Act 2003, section 2. Section 2(1) of the Act of 2003 provides: ‘In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions’.

<sup>127</sup> *Foy v An t-Ard Chlaraitheoir & Others* [2007] IEHC 470, 10 October 2007, para 56.

<sup>128</sup> *Donegan v Dublin City Council & Others* [2012] IESC 18, 27 February 2012, para 159.

<sup>129</sup> *ibid*, para 128-132. The Court explained ‘Any judicial review of this decision, save possibly where the District Court Judge patently failed to comply with the section itself, would be bound to fail. Certainly the court, on judicial review, could not enter into an assessment of the facts or personal circumstances behind the application, such matters are not even within the consideration of the District Court Judge. Judicial review of a s. 62 application could in no way be capable of resolving a conflict of fact between the Council and a person subject to the application’.

through the absence of having any measures to honour the convention rights of its citizens, is every bit as much a breach of its responsibility as if it had enacted a piece of prohibited legislation'.<sup>130</sup> The complexity of the procedure before the WRC and the imbalance of power in the work environment will, in most cases, make it very difficult for an individual to successfully bring forward their case, which in light of the absence of legal aid appears to be incompatible with Article 6 of the ECHR.

74. As we discussed earlier in this analysis, a fair trial and opportunity for an effective remedy cannot be guaranteed without a provision for legal aid for issues of employment equality. Without legal aid, vulnerable communities may be at the mercy of discriminatory practices in the workplace without the ability to fairly represent themselves in court or to be aided in producing the financial resources necessary to defend themselves and seek justice.

### 3.7 Conclusion

75. While Article 6 does not expressly guarantee a right to legal aid in civil matters, since its landmark judgment in *Airey*, the Court has recognised that, in order to be practical and effective, the right to a fair trial may require legal aid where this is necessary to ensure access to justice or to the courts. The ECtHR has identified which guiding principles may be used to determine when state-funded legal aid may be necessary; the principle of effectiveness and the principle of fairness have been developed through the jurisprudence of the ECtHR, offering a more comprehensive understanding of what truly constitutes the protection of the right to a fair trial. The Court has further clarified that considerations must be taken into account when determining whether it is fair for an applicant to represent himself in proceedings. These considerations may include the vulnerability of the applicant, their financial means, their chances of success, what is at stake for the applicant, and the complexity of the law at issue.
76. The treatment of Article 6 in the ECtHR case law provides support for the argument that restricting cases of employment equality from eligibility for legal aid offends both principles and contravenes the modern conception of a person's right to a fair trial under Article 6. A person's right to freedom of expression, protection of property, and prohibition of discrimination must also be protected through access to the courts when violations occur, and Ireland's current legal framework currently imposes a barrier to justice for those who have

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<sup>130</sup> *Foy v An t-Ard Chlaraitheoir & Others* [2007] IEHC 470, 10 October 2007, para 108.

been discriminated against in the workplace. The positive obligations that arise as a result of Ireland's commitment to the ECHR, and entrenchment of ECHR rights into domestic law through the ECHR Act 2003, mandate reform of Ireland's legal aid system to include access to legal aid for employment equality cases.

## 4.0 The Charter of Fundamental Rights of the European Union

### 4.1 Introduction

77. This Chapter shall investigate the right to legal aid under European Union law in general and the Charter of Fundamental Rights of the European Union (the Charter) in particular. With the entry into force of the Lisbon Treaty, the Charter has become legally binding and so has its Article 47.3, which expressly provides a right to legal aid.<sup>131</sup> Moreover, the principle of effective judicial protection, that is expressly mentioned in Article 19.1 of the Treaty on the Functioning of the European Union (TFEU) (and enshrined in Article 47 of the Charter) must be taken into consideration when examining to what extent EU law requires Ireland to provide legal aid for proceedings before the WRC and consequently appeal proceedings in front of the Labour Court.
78. There is no secondary EU legislation that provides for legal aid in civil matters in general.<sup>132</sup> However, the procedural guarantees provided for in the EU's equality directives, which have been transposed in the Employment Equality Act, must be taken into account when considering whether legal aid has to be provided by the State.
79. In this Chapter we will analyse the scope of the Charter of Fundamental Rights of the European Union and will establish that employment equality disputes before the WRC fall within the scope of the Charter (Chapter 4.2). We will then look at the Charter provisions regarding effective judicial protection and legal aid (Chapter 4.3) and the relevant case law of the CJEU regarding legal aid under the Charter (Chapter 4.4). Finally, we will consider the procedural implications of relying on the Charter to establish a right to legal aid before the WRC (Chapter 4.5), before presenting a brief conclusion (Chapter 4.6).

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<sup>131</sup> TEU, Article 6.1.

<sup>132</sup> Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41 only covers cross-border disputes and has therefore very limited scope for disputes before the WRC, where the claimant in most cases is an Irish resident.

## 4.2. Scope of the Charter of Fundamental Rights of the EU

80. Before considering whether the Employment Equality Act must conform with the requirements of the Charter of Fundamental Rights of the European Union (Charter), we must determine the scope of the Charter within national law. The scope is defined in Article 51 of the Charter, which states:

*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

*2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

81. The case law from the Court of Justice of the European Union (CJEU) has concluded that Member States' requirement to respect fundamental rights defined in the law of the EU only apply to national entities when they act in the scope of Union law.<sup>133</sup>

82. The CJEU has provided a judgment indicating the scope of the Charter in *Åklagaren v Hans Åkerberg Fransson*, reiterating that Article 51 has a binding effect on Member States 'when they act in the scope of Union law'<sup>134</sup> and that where EU law applies, the fundamental rights guaranteed by the Charter must also apply.<sup>135</sup> The *Åkerberg Fransson* case similarly used an EU Directive to demonstrate how the national law on VAT follows from Union law, therefore falling within the scope of the Charter.<sup>136</sup> Although the case law makes it clear that 'European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law,'<sup>137</sup> it does determine what prevails when there is a conflict between national law and the Charter. The CJEU states:

*[I]t is settled case law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means.<sup>138</sup>*

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<sup>133</sup> European Union Charter of Fundamental Rights, Article 51.

<sup>134</sup> Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 20.

<sup>135</sup> *ibid* para 21.

<sup>136</sup> *ibid* para 25.

<sup>137</sup> *ibid* para 44.

<sup>138</sup> *ibid* para 45.

83. Considering the scope of the Charter through Article 51, an analysis of whether the Employment Equality Act is considered as ‘implementing EU law’ must be conducted. The Charter, adopted in 2000, is legally binding since the entry into force of the Lisbon Treaty in 2009. If the scope of the Employment Equality Act falls under EU law, the Charter must be complied with under Irish law. The Employment Equality Act’s main provisions were meant to replace previous acts that implemented the EU equal pay and EU equal treatment Directives, and bring Irish legislation into line with decisions of the CJEU.<sup>139</sup> The Employment Equality Act outlaws discrimination on nine grounds: Gender; Family status; Sexual orientation; Religious belief; Age; Disability; Race, colour, nationality, ethnic or national origins; Membership of the Traveller community; Civil Status.<sup>140</sup> These grounds, with the exception of civil status, are based on sources of EU law and can be tied to several EU Directives.
84. Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)<sup>141</sup> evidently protects against discrimination based on gender.
85. Council Directive 2019/1158 on Work-Life Balance for Parents and Carers<sup>142</sup>, which replaced the revised Parental Leave Directive, covers the protection of workers on the grounds of family status. The intention of the Directive is to ‘address the issue of ‘women’s under-representation in employment’ and to provide for paid paternity and parental leave in order to allow more equal sharing of care responsibilities between men and women’, irrespective of workers’ marital or family status.<sup>143</sup> Directive 2006/54/EC also states the prohibition of discrimination on the basis of pregnancy at Article 2(2)(c), applying to EU law and consequently in the Member States.<sup>144</sup> The Pregnancy Directive 92/85/EEC<sup>145</sup> also supports the argument that EU

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<sup>139</sup> Employment Equality Act 1998.

<sup>140</sup> ibid s 6.

<sup>141</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>142</sup> Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

<sup>143</sup> European Parliament, ‘The scope of EU labour law’ 2020, p 20.

<sup>144</sup> European Commission, ‘Gender equality law in Europe’ 2016, p 31.

<sup>145</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

law outlaws discrimination on the basis of family status in the workplace. The inclusion of family status in the Employment Equality Act can be tied to these Directives.

86. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation<sup>146</sup> focuses on direct or indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation. This directive covers some of the grounds of discrimination outlawed in the Employment Equality Act.
87. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>147</sup> was implemented into national law through the Employment Equality Act to cover the grounds of race, colour, nationality, ethnic or national origins, as well as the membership of the Traveller Community. Although the EU Directive does not specifically mention the traveller community, a report by the Commissioner of Human Rights of the Council of Europe on *Human rights of Roma and Travellers in Europe* stated that:

*In EU member states, such discrimination [towards Roma and Travellers] violates the EU Racial Equality Directive (Directive 2000/43/EC). Measures to address Roma and Traveller unemployment must include assistance to victims of discrimination in claiming their rights through the courts so that employers who discriminate can be punished and impunity for discrimination in employment can be brought to an end.*<sup>148</sup>

88. These EU Directives cover most of the grounds of discrimination outlawed in the Employment Equality Act, with the exception of civil status which was added by Ireland to push further than what was prescribed by EU law. Member States are bound by the Charter when applying EU law in their national systems. It is safe to say that the Employment Equality Act is predicated on European law and that employment equality disputes, specifically on the basis of the 8 grounds, fall within the scope of Article 51. Therefore, the Charter applies to proceedings under the Employment Equality Acts, including the WRC and the Labour Court.
89. The Charter outlines equality and working provisions in chapters II, III and IV making it evermore clear that the scope of national labour law needs to conform with EU law. In the next section, we will delve into article 47 of the Charter that clarifies the right to an effective remedy and to a fair trial, which includes access to legal aid.<sup>149</sup> Although Ireland has brought national

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<sup>146</sup> Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>147</sup> Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>148</sup> Commissioner for Human Rights, *Human rights of Roma and Travellers in Europe*, 2012, 160.

<sup>149</sup> European Union Charter of Fundamental Rights, Article 47.



laws up to speed with EU equal pay and EU equal treatment Directives and the Charter through the adoption of the Employment Equality Act, Ireland is not applying the justice element of the Charter in regards to access to legal aid for those facing labour disputes and needing legal recourse due to discrimination in the workplace. This has an adverse effect on the progress of Ireland's equality laws, as those facing discrimination on one of the grounds listed in the Employment Equality Act cannot access legal aid, although it is guaranteed to citizens of the EU under the Charter. As stated by Equinet, 'Countries have the obligation not only to respect and apply the EU laws themselves, but to transpose them in their national legislation to ensure that all individuals and organisations respect and apply them as well.'<sup>150</sup> Ireland should therefore revisit its current legislation to bring it into conformity with EU law, by allowing access to legal aid to workers who face human rights violations, and ensure that all human rights violations are treated with due process.

### 4.3 The Right to Legal Aid Under Article 47 of the Charter

90. Article 47 of the Charter provides for the following:

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*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.*

91. The ECHR is the basis for the Charter as expressly stated in Article 52.3 of the Charter, according to which the ECHR functions as a foundation for the Charter where it provides the same rights. Therefore, the corresponding rights guaranteed under the ECHR define the minimum requirement of protection under Article 47 of the Charter. The scope and meaning of those rights are not only determined by reference to the text of the ECHR but also by reference to the relevant case law of the ECtHR.<sup>151</sup>

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<sup>150</sup> European Network of Equality Bodies <<https://equineteurope.org/equality-in-europe/eu-legislative-framework/>> accessed 20 March 2021.

<sup>151</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 35.

92. Article 47 of the Charter in its three paragraphs provides different rights, all promoting the principle of effective judicial protection. Their counterparts can be found in different provisions of the ECHR.
93. Article 47.1 of the Charter provides for an effective remedy as does Article 13 ECHR. However, whereas the ECHR only guarantees such remedy in front of a national authority, Article 47.1 of the Charter goes beyond that in requiring Member States to provide an effective remedy before a tribunal.<sup>152</sup>
94. Relating to Article 47.2 of the Charter the CJEU has found that this paragraph corresponds to Article 6.1 ECHR.<sup>153</sup> However, the scope of the right under the Charter goes beyond the ECHR, since the right to a fair trial is not limited to proceedings on civil law rights and obligations or criminal charges.
95. Article 47.3 of the Charter provides for legal aid. This right has no explicit counterpart for civil matters in the ECHR but only provides for a right to legal assistance in criminal matters.<sup>154</sup> Therefore, the wording of Article 47.3 of the Charter goes beyond the right provided in Article 6 ECHR. Nevertheless, starting with the decision in *Airey v Ireland*,<sup>155</sup> the ECtHR acknowledged that the ECHR requires access to legal aid, whenever the absence of access to legal aid would render the access to an effective remedy factually impossible. Article 47.3 of the Charter shall mirror this approach taken by the ECtHR.<sup>156</sup>
96. In summary, all rights granted in Article 47 of the Charter have a counterpart in the ECHR or the relevant ECtHR case law, which serve as minimum requirements for the level of protection and the rights guaranteed by Article 47 of the Charter. Therefore, the ECHR and the relevant case law of the ECtHR provide the basis to determine the scope and content of rights granted in Article 47 of the Charter.

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<sup>152</sup> Explanations relating to the Charter of Fundamental Rights [2007] OJ L303/17 (Charter Explanations), 29.

<sup>153</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 32.

<sup>154</sup> For criminal matters see ECHR, Article 6(3)(c): which grants the following right to anyone charged with a criminal offence: ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’.

<sup>155</sup> *Airey v Ireland* (1979) 2 EHRR 305, 11; Charter Explanations 30; see in more detail Chapter 3.3.

<sup>156</sup> Charter Explanations, 30.

## 4.3 The European Court of Justice's Case Law on Legal Aid – the *DEB* Case

### 4.3.1 Facts of the Case

97. The CJEU has given detailed consideration to the issue of legal aid in a 2010 case; in *DEB*,<sup>157</sup> the CJEU had to decide on a request for a preliminary ruling of the Kammergericht Berlin, Germany. The main question at issue was whether the principle of effectiveness requires a Member State to provide access to legal aid to legal persons.
98. In the national proceedings, Deutsche Energiehandels- und Beratungsgesellschaft ('DEB') has applied for legal aid in front of a German court to file a state liability claim under EU law, based on the delayed transposition of a directive. Due to a lack of funds, DEB was not able to make the advanced payment obligatory under German law, nor to hire legal representation legally required in the state liability claim proceedings.

### 4.3.2 Questions Referred to the European Court of Justice

99. The CJEU rephrased the question by the referring court, considering whether the fact that a legal person is unable to qualify for legal aid renders the exercise of its rights impossible in practice.<sup>158</sup> According to the CJEU this question has to be answered in the light of the principle of effective judicial protection established by Article 47 of the Charter.<sup>159</sup> Even though the question referred to the CJEU focuses on the access to legal aid for legal persons, the CJEU made some general remarks on the right to legal aid under EU law and in particular under Article 47 of the Charter.
100. The CJEU divided the question referred to it into two subsidiary questions: 1) does the right to legal aid cover assistance by a lawyer and exclusion from court fees and 2) are legal persons entitled to legal aid.

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<sup>157</sup> Case C-279/09 *DEB* [2010] ECR I-13849; confirmed in Case C-156/12 *GREP* [2012] ECLI:EU:C:2012:342; for a detailed analysis of the Case *DEB* and the interaction of this case law with general principles of EU law see Ágnes Váradi, 'The Concept of Legal Aid in the Most Recent Case Law of ECJ' (2015) 3 Hungarian Yearbook of International Law and European Law 461 and Johanna Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty' (2011) 4 Review of European Administrative Law 53.

<sup>158</sup> *ibid*, para 28.

<sup>159</sup> *ibid*, para 33.

### 4.3.3 Findings of the European Court of Justice

101. On the first question, after a review of the case law of the ECtHR on legal aid, the CJEU acknowledges that the right to legal aid could extend to both elements that *DEB* sought, namely the assistance of a lawyer and dispensation from payment of the costs of the proceedings.<sup>160</sup>
102. Secondly, on the question as to whether legal aid must be granted to legal persons, the CJEU found – again based on the case law of the ECtHR – that it is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned.<sup>161</sup>
103. In the light of its findings, the CJEU concludes that legal aid must be granted where a failure to do so would constitute a limitation on the right of access to the courts and would therefore undermine the very core of the right to effective judicial protection. Therefore, the CJEU follows that the national court must apply a proportionality test to any rule restricting legal aid. This test shall scrutinise whether such a rule pursues a legitimate aim and if so whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.<sup>162</sup>
104. Most importantly for the purposes of this Report, the CJEU outlined certain general criteria to be taken into consideration by national courts when assessing whether the access to legal aid is required under EU law:

*In making that assessment, the national court must take into consideration the subject matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.*<sup>163</sup>

105. The CJEU derives these criteria from the ECtHR jurisprudence, according to which the assessment of whether legal aid has to be provided depends on the importance of the case for the applicant, the complexity of the applicable law and the procedure, the applicant's capacity

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<sup>160</sup> *ibid*, para 48.

<sup>161</sup> *ibid*, para 52.

<sup>162</sup> *ibid*, para 60.

<sup>163</sup> *ibid*, para 61.

to represent himself effectively, as well as the financial situation and the prospect of success for the potential litigant.<sup>164</sup>

106. These criteria are to be applied to natural and legal persons likewise; however, the Court also recognised in paragraph 62 that the access to legal aid for legal persons might be restricted beyond the mentioned criteria.<sup>165</sup> Regarding legal persons the CJEU indicated that non-profit-making legal person might be treated more favourable than profit-making legal persons when it comes to legal aid.<sup>166</sup>

#### 4.3.4 The Principles of Effective Judicial Protection and of Effectiveness

107. None of the anti-discrimination directives transposed through the Employment Equality Act<sup>167</sup> provides for detailed procedural rules on remedies against alleged discrimination, nor makes any reference to the availability of legal aid. However, all three directives oblige the Member States to ensure adequate enforcement of obligations under those directives is available to persons who consider themselves wronged.<sup>168</sup> The preambles of all three directives point out that the effective implementation of equal treatment requires adequate judicial protection against victimisation.<sup>169</sup>
108. In addition to this emphasis on the importance of judicial protection to ensure equal treatment, any national procedural rule adopted in the implementation of these obligations has to be in line with the principle of effectiveness in EU law. This principle was developed in the early case law of the CJEU and has since become settled case law and is now explicitly expressed in the treaties.<sup>170</sup>

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<sup>164</sup> *ibid*, paras 46 and 47 with reference to the ECtHR's case-law in *Airey v Ireland* [1979] 2 E.H.R.R. 305; *Steel and Morris v the United Kingdom*, no. 68416/01, 15 February 2005; *McVicar v the United Kingdom*, no. 46311/99, 7 May 2002 and *P., C. and S. v the United Kingdom*, no. 56547/00, 16 July 2002; for a detailed analysis of the relevant case-law of the ECtHR see Chapter 3.4.

<sup>165</sup> See to that effect Peter Oliver, 'Case C-279/09, *DEB v Germany*, Judgment of the European Court of Justice (Second Chamber) of 22 December 2010' (2011) 48 *Common Market Law Review* 2036.

<sup>166</sup> Case C-279/09 *DEB* [2010] ECR I-13849, paras 44, 50 and 62.

<sup>167</sup> Directive 2006/54/EC of the European Parliament and of the Council; Council Directive 2000/43/EC and Council Directive 2000/78/EC.

<sup>168</sup> Directive 2006/54/EC of the European Parliament and of the Council, Article 17; Council Directive 2000/43/EC, Article 7 and Council Directive 2000/78/EC, Article 9.

<sup>169</sup> Directive 2006/54/EC of the European Parliament and of the Council, recitals 28 and 29; Council Directive 2000/43/EC, recital 20 and Council Directive 2000/78/EC, recital 30.

<sup>170</sup> TEU, Article 19.1 obliges Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

109. According to the principle of effectiveness, in the absence of detailed EU rules it is for the domestic legal system to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.<sup>171</sup> Therefore, the principle of effectiveness prohibits detailed procedural rules governing actions for safeguarding an individual's rights under EU law to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.<sup>172</sup>
110. This means that legal aid has to be provided for cases to be brought before the WRC and the Labour Court where without legal aid, the person seeking legal aid would be denied effective judicial protection.<sup>173</sup> In other words: where a failure to grant legal aid leads to a disproportionate restriction to access to the courts, it constitutes a violation of the principle of effective judicial protection and therefore of Article 47 of the Charter. Whether access to courts is restricted has to be decided on a case-by-case basis using the criteria provided in *DEB*.<sup>174</sup>

#### 4.4 The Principle of Supremacy and the Charter

111. Having established that there is in principle a right to legal aid in EU law, we will examine if and how a potential claimant may invoke this right in front of the Legal Aid Board.
112. The CJEU has confirmed in various cases that any national legislation that conflicts with EU law is automatically inapplicable. This principle of supremacy of EU law applies with no regard to whether the EU provision or the conflicting national provision came into force first.<sup>175</sup> This has two implications.
113. First, the conflicting national law stays in force and remains applicable in cases that have no EU element. Secondly, the supremacy of EU law and therefore the inapplicability of conflicting national law stems directly from EU law and does not require any act by either the national legislator or the supreme court or any other court.

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<sup>171</sup> Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5; Case C-268/06 *Impact* [2008] I-2483, para 44.

<sup>172</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 28.

<sup>173</sup> *ibid*, para 59.

<sup>174</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 61.

<sup>175</sup> Case 106/77 *Simmenthal* [1978] ECR 629, para 17.

114. Furthermore, the obligation to disapply EU law does not only concern national courts but also by all organs of the State that apply EU law — including administrative authorities.<sup>176</sup>
115. In *Minister for Justice and Equality and Commissioner of the Garda Síochána*, the CJEU made it clear that this is also true for Irish administrative authorities and explicitly stated that this applies to the Workplace Relations Commission:
- ...the Workplace Relations Commission, as a body upon which the national legislature has conferred the power to ensure enforcement of the principle — as given concrete expression by Directive 2000/78 and the Equality Acts — of non-discrimination in respect of employment and occupation, has before it a dispute involving observance of that principle, the principle of primacy of EU law requires it to provide, within the framework of that power, the legal protection which individuals derive from EU law and to ensure that EU law is fully effective, disapplying, if need be, any provision of national legislation that may be contrary thereto<sup>177</sup>
116. The CJEU made it clear that there is no room for 'national procedural autonomy' that only entitles the High Court to decide over disapplying national law as had been suggested in *An Taoiseach v Commissioner for Environmental Information & Fitzgerald*.<sup>178</sup> On the contrary, the principle of supremacy entitles any statutory body to disapply national law that is contrary to EU law.<sup>179</sup>
117. Since the entry into force of the Treaty of Lisbon on the 1<sup>st</sup> of December 2009, the Charter is binding EU law and has the same legal value as the Treaties<sup>180</sup> and therefore Irish administrative authorities are not only entitled but obliged to disapply any Irish law that is inconsistent with the State's obligations under the Charter in those areas falling within the scope of EU law.
118. The possibility to file complaints before the WRC was *inter alia* established to fulfil Ireland's obligations under various EU anti-discrimination regulations,<sup>181</sup> and the CJEU explicitly found that the WRC is entitled not to apply Irish law that is in conflict with EU law.
119. Where the Legal Aid Board must decide about granting legal aid for proceedings in front of the WRC, we suggest that the Legal Aid Board, just like the WRC, is applying EU law and therefore is bound by the principle of supremacy. As a result, the Legal Aid Board, as competent authority for awarding legal aid, must consider the criteria laid out in *DEB* as to

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<sup>176</sup> Case C-378/17 *Minister for Justice and Equality and Commissioner of the Garda Síochána* [2017] ECLI:EU:C:2018:979, para 38.

<sup>177</sup> *ibid*, para 45.

<sup>178</sup> *An Taoiseach v Commissioner for Environmental Information & Fitzgerald* [2013] 2 IR 510.

<sup>179</sup> Trevor Redmond, *Law of the European Union* (Clarus Press Ltd 2019) 13–50.

<sup>180</sup> TEU, Article 6.1 subpara 1.

<sup>181</sup> See in more detail, Chapter 4.2.

when legal aid must be provided to fulfil the obligations under Article 47.3 of the Charter. A failure to do so might unlawfully restrict the right to effective judicial protection and the right to legal aid according to Article 47.3. of the Charter. From an EU law point of view, the right to legal aid can therefore be enforced before the Legal Aid Board without involving the courts.

## 4.5 Conclusion

120. What becomes clear from *DEB* is that access to legal aid is fundamentally important to ensuring effective judicial protection in line with EU law. According to the Civil Legal Aid Act 1995 a claimant bringing a case of discrimination before the WRC or an appeal before the Labour Court has no possibility to get legal aid.<sup>182</sup> While Article 47 of the Charter as interpreted by the CJEU does not provide clear rules or guidelines on when legal aid has to be provided, the CJEU did define a list of criteria that must be considered when determining whether EU law requires access to legal aid in a certain case.<sup>183</sup> The absolute exclusion from any proceedings before the WRC and the Labour Court under the Employment Equality Act from access to legal aid is difficult to reconcile with EU law, since it gives the competent authority (the Legal Aid Board) no discretion for a case-by-case analysis. This is especially problematic in the light of the complex cases that employment equality gives rise to.<sup>184</sup> A detailed analysis of the criteria set out in the CJEU case law applied to equal employment disputes before the WRC is carried out in the following Chapter.

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<sup>182</sup> There has been no ministerial order issued according to Civil Legal Aid Act 1995, s 27.2(b); see in detail Chapter 1.

<sup>183</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 61.

<sup>184</sup> See already case studies 1 and 2 in Sections Chapter 1.1.2 and 1.1.3.



## 5.0 Conclusions and Recommendations

121. As has been detailed in this Report, the exclusion of issues relating to employment equality law from eligibility for state-provided legal aid presents a gap in Ireland's legal aid system with serious human rights implications. This absolute exclusion for cases concerning the WRC contravenes the commitments of the Irish state deriving from the Constitution, the European Convention on Human Rights (ECHR), and the Charter of Fundamental Rights of the European Union (the Charter).
122. As discussed in Chapter 2, the Irish Constitution, in its role as the basic law of the state, is responsible for outlining the fundamental rights provided to all individuals in Ireland. Furthermore, the Constitution contains a number of substantive rights— namely the right to equality and the right to earn a livelihood— which, when looked at together, support the view that there is a right to equality at work. Flowing from this right to equality at work, individuals should be able to seek out the realisation of this right through enforcement by the Courts or statutory tribunals. The right of access to justice and the right to fair procedures, therefore, should ensure the individual is able to engage with the proper mechanisms to access a fair and equitable judicial remedy.
123. As prescribed by Article 51 of the Charter and elaborated by the CJEU in *Åkerberg Fransson*,<sup>185</sup> Member States are bound by the EU's fundamental rights set out in the Charter whenever they are implementing Union law. Given that the EU directives on employment anti-discrimination are transposed through the Employment Equality Act, proceedings covered by this Act should comply with the Charter, which guarantees *inter alia* the right to legal aid in Article 47(3). According to the *DEB* case law of the CJEU, legal aid must be granted when the lack thereof limits the right to access the court. National courts and authorities, however, must apply the criteria given by the CJEU in *DEB* to assess whether legal aid must be provided in order to comply with the principle of effective judicial protection enshrined in Article 47 of the Charter. The CJEU has derived the criteria from the ECtHR's case law, including the prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the applicable law and procedure as well as the applicant's capacity to represent himself effectively.

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<sup>185</sup> Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

124. According to the principle of supremacy of EU law, rights that stem from the Charter bind both Member States and their governmental entities, when they are applying national law that implements EU law. To comply with EU law and in particular with Article 47 of the Charter, the Legal Aid Board should be able to grant access to legal aid in employment equality disputes, where a failure to do so would deny a person's right to effective judicial protection.
125. Moreover, the protections found in the ECHR have been entrenched in Ireland's domestic law since the passage of the European Convention on Human Rights Act 2003. Both state organs and the Irish courts must ensure that Ireland's laws are compatible with the ECHR. The necessity for compatibility is subject only to the Constitution, but as has been analysed in this Report, the fact that applicants in employment equality cases may not apply for legal aid contravenes both the Constitution and the ECHR.
126. The ECHR and EU Charter have developed the bounds and limitations of the protections within their texts through the case law of their respective courts. The ECtHR and CJEU have consistently built upon the concepts of the 'principle of fairness' and the 'principle of effectiveness' as being key to upholding an individual's right to fair procedures and access to justice.
127. The principle of fairness requires consideration of certain aspects of an applicant's personal circumstances, and the standards by which the fairness of the trial may be evaluated have been identified by the ECtHR and the CJEU. Both European courts have developed similar criteria, including taking into account the vulnerability of the applicant, the applicant's ability to represent himself effectively, the applicant's financial resources, the complexity of the relevant law and procedure, and the emotional burden that may be placed on an applicant when the subject matter of the litigation is distressing or of a very personal nature.
128. Each of these considerations may be relevant to an applicant seeking to take an employment equality claim before the WRC. This Report has identified the statistical disadvantages of self-representation before the WRC. Additionally, the relevance of the personal circumstances of an applicant are undeniable in employment equality claims. The potential for emotional distress and bias is high when the subject matter may reference instances of traumatic discrimination and the result of the dispute may have implications for the applicant's ability to make a living. Furthermore, the statistics regarding successful cases in the WRC show that there is a lower

chance of winning one's case when self-representing, which speaks to a potential correlation with the fairness of a trial.

129. The international courts have shown a clear and consistent trend towards placing great weight on the personal circumstances of an application when determining the fairness of a trial. These trends demonstrate a high likelihood that the ECtHR and CJEU would have reason to find some employment equality cases taken in the WRC as not being fair without having the opportunity to retain professional legal representation. While this conclusion may not mean that all applicants in employment equality cases are entitled to legal aid, the current scheme does not even allow for the opportunity to apply, which does not appear to abide by the 'principle of fairness'.
130. The ECHR and the Charter have also identified the 'principle of effectiveness' as guiding evaluations of the right to access to the courts. This right is not meant to be 'theoretical or illusory', as mentioned in the ECtHR's *Airey* judgment, but rather 'practical and effective'. As the legal framework now stands in Ireland, it could be said that the right to protect oneself from discrimination in the workplace is more 'illusory' than effective, due to the prohibitively high costs of taking a case before the Workplace Relations Commission and the difficulty of representing oneself in court that have been identified in this Report.
131. This Report recommends that the Irish government take the necessary steps to allow for issues of employment equality law in front of the WRC and the Labour Court to be eligible for state-funded legal aid.

## Appendix – WRC cases under the Employment Equality Act

The dataset below includes all cases that have been decided by the WRC in the period from 1<sup>st</sup> January 2018 to 31<sup>st</sup> January 2021 on the basis of the Employment Equality Act and for which information of the representation of the claimant and the respondent are available. The data was drawn from the case database on the WRC website that can be accessed through the following link (filters already applied): <https://www.workplacerelations.ie/en/search/?decisions=1&from=1/1/2018&to=31/1/2021&legislation=23> accessed 23 April 2021.

The criteria set out above is fulfilled by a total of 410 cases, whereas in a total of 13 the WRC decided that it has no jurisdiction or ruled “Statute barred”. Therefore those 13 cases are not considered in any statistic drawn from the dataset below.

The following abbreviations and terms are used in the table below:

Professional.....	the party was represented by a solicitor or a barrister (firms of solicitors that are formally not represented are considered professionally represented for the purpose of this Report)
Union.....	the party was represented by a Union representative
Self-representation .....	the party did represent itself
Consultant .....	the party was represented by a professional consultant
Citizens Information Service .....	the party was represented by a representative of a Citizen Information Center
FLAC .....	the party was represented by a representative of FLAC (Free Legal Advice Centres)
IBEC.....	the party was represented by a representative of the Irish Business and Employers Confederation
Other.....	the party was represented by another person or organization not mentioned above
n/a.....	Information not available

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Parties	Reference No	Employee representation	Grounds	Outcome
<b>2021</b>				
A Supervisor v A Community Employment Scheme	ADJ-00026791	Union	age	lost
Kitchen Porter v Restaurant	ADJ-00026242	Self-representation	race	lost
Vivienne O'Connor v North Munster Citizens Information Service CLG	ADJ-00025722	Self-representation	age	lost
Alison McDonnell v VMware International Unlimited Company	ADJ-00025773	Professional	race	lost
Site Support Specialist v Accommodations and Food	ADJ-00027364	Professional	family	lost
Operations Administrator v Window & Door Provider	ADJ-00028649	Self-representation	gender	lost
Nicola Matthews v Department of Health	ADJ-00025554	Union	age	won
A Customer Care Advisor vs. An Insurance Company	ADJ-00016629	Professional	disability	lost
Joe Quinn v Health Service Executive	ADJ-00013276	Union	age	lost
A General Operative V A Manufacturer	ADJ-00019975	Union	age	won
Sunil Monga v Health Service Executive	ADJ-00016512	Professional	age	won
Kamran Farooq v Appletree Developments Limited	ADJ-00025202	Professional	race, religion	lost
Krzysztof Tryka v Thermal Insulation Distributors Ltd	ADJ-00027767	Self-representation	race	lost
<b>2020</b>				
Breda Rafter v The Public Appointments Service	ADJ-00012188	Professional	gender, age	won
Production Planner v Medical Device manufacturer	ADJ-00027749	Consultant	fixed-term	won
Ewelina Rauch v La Creme Recruitment	ADJ-00027515	Self-representation	gender	lost
Peter O'Loughlin v Health Services Executive HSE West	ADJ-00026333	Union	age	lost
Yvonne O'Rourke v Minister for Defence	ADJ-00007375	Professional	gender	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
Josipa Akinradewo v St. Teresas Nursing Home t/a Sundyp Ltd.	ADJ-00026839	Self-representation	race	lost
Denis O'Keeffe v Pat O'Donnell & Co	ADJ-00026978	Union	age	lost
A Manager v A Transport and Logistics Company	ADJ-00025639	Professional	disability	lost
Magdalena Pudlak v The Carambola Ltd	ADJ-00018470	Union	gender	lost
Maja Stanislawska v Jaguar Land Rover Ireland	ADJ-00023582	Self-representation	gender, sexual orientation	lost
A Local Authority Employee v A Local Authority	ADJ-00027228	Self-representation	family status	lost
An Office Worker v A Logistics Organisation	ADJ-00026294	Self-representation	family status	lost
A Food and Beverage Assistant v A Cafe	ADJ-00027323	Self-representation	gender	won
An Employee v A Hospital.	ADJ-00026823	Self-representation	penalisation	lost
A Presenter V A Broadcasting Company	ADJ-00010297	Professional	gender	won
Padraig Tansey vs. Jv Hutton Limited	ADJ-00022892	Professional	disability	lost
Group Sales Director v A Specialist Metals Company.	ADJ-00023463	Professional	disability	lost
Anne Clarke vs. Cari's Closet Limited	ADJ-00019839	Professional	gender	Statute barred
Executive Assistant V University	ADJ-00022851	Professional	disability	lost
A Groundsman v An Employer	ADJ-00021643	Professional	disability	won
A Housekeeper v An Employer	ADJ-00021648	Professional	disability	won
IT Support Engineer v Global software providers.	ADJ-00021267	Union	race	lost
IT support engineer v Staffing agency	ADJ-00021266	Union	race	lost
Production Operative v Bakery	ADJ-00024805	Professional	disability	lost
A Holistic Therapist v A Provider of Holistic Therapy	ADJ-00015842	Self-representation	disability	lost
Liuba Leahu vs, Euroconnect Cleaning Contractors	ADJ-00025681	FLAC	age	won

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Parties	Reference No	Employee representation	Grounds	Outcome
A Teacher V Government Department	ADJ-00022172	Professional	gender	Statute barred
User Interface Designer v Engineering Company	ADJ-00023614	Professional	race	won
Bernie McPhelim v Health Service Executive	ADJ-00023691	Self-representation	gender	lost
Regina Foley vs. Lansdowne Care Limited trading as Home Instead Senior Care.	ADJ-00015253	Self-representation	race	lost
Bridie Mahon v Health Service Executive	ADJ-00020011	Union	disability	lost
A Doctor V A Health Service Provider	ADJ-00021516	Self-representation	age	lost
Sean Hallinan v National Museum Of Ireland	ADJ-00017346	Professional	fixed-term	lost
Adrijan Vuckovic V Kepak Cork Unlimited Company	ADJ-00023720	Professional	disability	lost
Joseph McGrath V Focus Ireland	ADJ-00018823	Self-representation	age	won
Jessica Padayachee v Petit Delice Ltd	ADJ-00023019	Professional	gender	won
A Manager V A Hotel/Guesthouse	ADJ-00015339	Professional	disability	won
Josephine Delehanty v Galway Clinic Doughiska Limited	ADJ-00020524	Other	gender	lost
An Accounts Office Worker v A Religious Congregation	ADJ-00024869	Professional	age	lost
A Vehicle Inspector v A Vehicle Testing facility	ADJ-00016529	Professional	disability	lost
A clerical officer v A government agency	ADJ-00025124	Self-representation	gender	lost
Kristine Kozinceva v Poundland Ltd - Dealz	ADJ-00020441	Self-representation	gender	lost
John McCormack v Power City	ADJ-00003730	Self-representation	age	lost
A Station Officer v A Public Body	ADJ-00017854	Union	disability	won
A Warehouse Operative v A Wholesaler	ADJ-00021220	Professional	race	lost
A Senior Healthcare Assistant v A Healthcare provider	ADJ-00017891	Union	gender	won
Paramvir Singh Gill V Accenture Ireland Limited	ADJ-00023837	Self-representation	religion	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
Industrial Supervisor v Incarceration and Reformatory Service	ADJ-00019938	Professional	disability	lost
Customer Support Representative v A Technical Entertainment Company	ADJ-00019764	Self-representation	race	lost
A Solicitor V A Legal Advice Body	ADJ-00021423	Professional	disability	lost
Josh Braybrooke v Department of Employment Affairs and Social Protection	ADJ-00021765	Self-representation	disability	lost
Iulian Cosmin Predoi V Hays Specialist Recruitment	ADJ-00021355	Self-representation	race	lost
Claimant V Respondent	ADJ-00020991	Professional	victimisation	lost
A Head of Department vs. A University	ADJ-00021811	Consultant	gender	lost
Imran Molvi v Grafton College of Management Sciences	ADJ-00021979	Self-representation	race	lost
HR manager v Aviation recruitment and staff support agency.	ADJ-00023183	Consultant	gender	won
A Night Porter V A Hotel	ADJ-00019651	Self-representation	race	won
Briama Gassama v Cpl	ADJ-00021626	Self-representation	race, gender, age	statute barred
Muqheet Haider vs. Provincial Security Services Ltd	ADJ-00024277	Self-representation	race	lost
Philip O'Malley V Coghill & Hickey Solicitors	ADJ-00016575	Self-representation	gender	won
A Senior Contracts Administrator V An Aircraft Leasing Company	ADJ-00020828	Professional	age, family	lost
A Security Officer V A Security Firm	ADJ-00015922	Professional	gender	won
Mr. Colm McNamee vs. Offaly Integrated Local Development Company Limited By Guarantee	ADJ-00020498	Self-representation	disability	lost
Mercy Okooboh Ebenade v City Jet Designated Activity Company	ADJ-00017729	Professional	race	lost
A Senior HR Manager V A Global Management Company	ADJ-00023549	Professional	gender	lost
Ms. X V A Respondent	ADJ-00019185	Professional	sexual orientation	lost
A Clerical Officer v A Public Service Entity	ADJ-00020368	Union	disability	lost
A Lecturer v An Institute of Technology	ADJ-00017345	Professional	victimisation	Statute barred



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Parties	Reference No	Employee representation	Grounds	Outcome
A Safeguarding Officer v A Care Provider	ADJ-00016116	Professional	gender, family status	lost
A Retail Worker v A Service Station	ADJ-00015870	Professional	disability, race	lost
A School Secretary v A School	ADJ-00018880	Professional	family status, victimisation	lost
A Service Administrator V A Waste Services Company	ADJ-00016274	Union	gender	won
NATASHA NOWACKI v LAURENCE WALL, TOMAS O'SHEA and JOSEPH KAVANAGH, Veterinary Partnership t/a Moyne Veterinary Clinic	ADJ-00000026	Professional	family status, gender	lost
<b>2019</b>				
IT Tutor V Community Training Organisation	ADJ-00019429	Professional	victimisation	won
Breda Enright vs. Health Service Executive National Ambulance Service	ADJ-00021089	Union	gender	won
Alison Halligan v Praxis Care	ADJ-00019670	Self-representation	civil status	lost
Deli Assistant v Supermarket	ADJ-00020897	Professional	sexual harassment	lost
A Chemical Engineer v A Social Media Company	ADJ-00023395	Self-representation	civil status	lost
Sinéad Ward v Dun Laoghaire Rathdown County Council	ADJ-00021708	Self-representation	family status	lost
Siobhan Mac Cobb v Trinity College Dublin	ADJ-00020129	Professional	age	lost
A Clerical Officer v A Public Service Employer	ADJ-00018924	Professional	disability	lost
Abbey Ellis v Osg Restaurants Limited	ADJ-00021049	Self-representation	gender	lost
Eirene Qualter v Public Appointments Service	ADJ-00013917	Professional	disability	won
Diarmuid Ó Gruagain v Department of Business, Enterprise and Innovation	ADJ-00024123	Professional	disability	won
Ivelina Belcheva v Npd Group Inc	ADJ-00018576	Self-representation	family status	lost
A civil servant vs. A Government Department	ADJ-00016513	Self-representation	gender	won
Giulia Gasparri vs. Ingersoll-rand International Limited/ Thermo King	ADJ-00014284	Professional	disability	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
A Complainant v A Respondent Company	ADJ-00015987	Self-representation	gender	won
Mark Savage v University College Dublin	ADJ-00014412	Self-representation	religion	lost
Kathleen Dempsey V The West of Ireland Alzheimer's Society	ADJ-00014857	Union	age	won
Peter McLoughlin v Shannon Transport & Warehousing Company t/a STL Logistic	ADJ-00018810	Union	age	won
Bogdan Drutu V ALL IN Care Ltd	ADJ-00021131	Self-representation	race	lost
Grzegorz Wojcik v Tesco	ADJ-00019765	Self-representation	disability	lost
Siobhan Nolan v Gino's Italian IceCream Gino's Gelato	ADJ-00017730	Professional	gender, family status	lost
A Catering Assistant V A Facilities Company	ADJ-00013554	Professional	gender	won
An IT Systems Support Officer VS. A Hospital	ADJ-00020545	Self-representation	disability	lost
Bernard Lester Vs. Public Appointments Service	ADJ-00017571	Self-representation	age	lost
An IT Systems Support Officer Vs. A Hospital	ADJ-00021831	Self-representation	disability	lost
An Employee Vs An Electrical Company	ADJ-00019594	Self-representation	disability	lost
Irena Grochowska v Quay Co-op Ltd	ADJ-00018615	Self-representation	race	lost
Sarah Mulreany v Laboratory Supplies LtdLennox	ADJ-00020234	Professional	gender, family status	lost
Pamela Brennan v BOM Scoil Mhuire agus Iosaf Junior School	ADJ-00018053	Professional	gender, family status	won
A Job Applicant v A Firm of Solicitors	ADJ-00019742	Self-representation	family status, age, gender	lost
A Restaurant Worker v A Restaurant	ADJ-00020817	Self-representation	disability	won
Michael Fox V Tedcastles Aviation Fuels Limited	ADJ-00016441	Union	age	won
Tracy Costello v Allied Irish Bank plc	DEC-E2019-007	Citizens Information Service	disability	won
An agency Worker v A Contract Manufacturing Company	ADJ-00015144	Professional	disability	lost
Joe Gleeson v Public Appointments Service	ADJ-00019239	Self-representation	age	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
Mary Helebert v ICE Group Business Services Limited	ADJ-00015142	Professional	disability	lost
Complainant v Respondent	ADJ-00012833	Self-representation	disability	lost
A Job Applicant V A firm of Solicitors	ADJ-00019308	Self-representation	family status, age, gender	lost
A Clerical Worker v A County Council	ADJ-00019789	Union	disability	won
A Director of Marketing v A Telecom and Electronic Communications Infrastructure support Company	ADJ-00019756	Professional	gender, family status	won
An Employee v A Healthcare Company	ADJ-00017070	Professional	disability, gender, family status	won
Refereeing Official V Sporting Association	ADJ-00017749	Professional	disability	lost
Louise Moss Vs. The Health Service Executive	ADJ-00013259	Professional	gender	lost
A Clerical Officer Vs A Government Department	ADJ-00018800	Union	disability	lost
Receptionist v Guest House	ADJ-00020065	Self-representation	gender, family status, disability, race	lost
Judy Bamford V Citizens Information Phone Service Ltd.	ADJ-00017442	Self-representation	age	lost
Abderrezak Boumekik Vs. P&J Security Services Ltd	ADJ-00016881	Self-representation	n/a	lost (no show)
A Gatekeeper v A Rail Company	ADJ-00016415	Professional	age	lost
Louise Kinsella V Irish Prison service	ADJ-00013612	Union	gender	won
A Shop Assistant v A Retailer	ADJ-00015003	Professional	gender	won
Support and Counselling Project Worker V A Charity	ADJ-00018058	Union	disability	won
Daniel George Zorila v Beechvale Transport Ltd	ADJ-00016897	Self-representation	n/a	lost (no show)
A Teacher v A Minister and A Government Department	ADJ-00012722	Union	gender	lost (no jurisdiction)
Jennifer Waters v Matheson	ADJ-00019738	Self-representation	gender, age, civil status	lost
A Store Manager V A Provider of pet products	ADJ-00016233	Self-representation	gender	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
Kate Reynolds Vs. Kbc Bank Ireland	ADJ-00015986	Self-representation	7 grounds (all but travel community)	statute barred
Sean Nihill v Bar One-Racing Ltd	ADJ-00012863	Self-representation	disability	lost
Cecilia Daniels v Boston Scientific	ADJ-00010763	Self-representation	race, age, gender	lost
Jennifer Morgan v Irish Stock Exchange Euronext Dublin	ADJ-00020127	Self-representation	n/a	lost (no show)
A Sales Assistant V A Retailer	ADJ-00017836	Professional	gender	won
Philip O'Malley Vs. Morgan McKinley Abtran	ADJ-00016923	Self-representation	age	lost (no show)
Przemyslaw Kulczycki Vs The Tipperary Cheese Company Ltd.	DEC-E2019-006	Union	disability	won
Daniel Burdacki V Slaney Foods International Unlimited Co	ADJ-00017748	Professional	race	lost
Grzegorz Szyszka V Slaney Foods International Unlimited Co	ADJ-00017765	Professional	race	lost
Piotr Adamczyk V Slaney Foods International Unlimited Co	ADJ-00017766	Professional	race	lost
A HGV Driver v An Oil supplier	ADJ-00013650	Professional	disability	lost
Rebecca Forde V HSE	ADJ-00016013	Self-representation	gender	lost
A retail worker v A retail chain	ADJ-00017439	Professional	disability	won
Programme Assistant V Healthcare Service Provider	ADJ-00016891	Self-representation	gender	statute barred
Necati Hakan Erdogan v Ecomm Merchant Solutions Ltd	ADJ-00014913	Self-representation	race	lost
An Employment Candidate V A Telecoms Company	ADJ-00018064	Self-representation	age, gender	lost
An Employment Candidate V A Recruitment agency	ADJ-00018061	Self-representation	age, gender	lost
Adam Herzyk V Assured Personnel Limited	ADJ-00013697	Professional	disability	lost
James Peter Maloney Vs. Ability West Clg	ADJ-00011207	Professional	age	won
A Warehouse Operative V A Logistics Company	ADJ-00015652	Self-representation	n/a	lost (no show)
worker v employer	ADJ-00018094	Citizens Information Service	disability	won

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Parties	Reference No	Employee representation	Grounds	Outcome
Brooke Leavitt Vs. Mitie Gather And Gather	ADJ-00017221	Self-representation	n/a	lost
Neil Farrelly V Department Of Justice And Equality Embassy Of Ireland, Turkey	ADJ-00017344	Self-representation	family status	lost
Class Teacher V Educational Supplier	ADJ-00015030	Self-representation	gender	won
Ruffy Magat v Component Distributors (CD Ireland) Limited	ADJ-00016752	Professional	sexual orientation, race	won
Rachel Fitzgerald V Mary Immaculate College	ADJ-00014893	Self-representation	n/a	lost (no show)
An Employee v A Company	ADJ-00016566	Other	disability	lost
Phyllis Kenny vs. Noonan Services Group Ltd	ADJ-00014747	Self-representation	n/a	lost (no show)
Jennifer McNally V Rose Marie Daly trading as RD Paedodontist	ADJ-00017044	Professional	gender, family status	won
A Training Co-Ordinator / Instructor V A Training and Rehabilitation Organisation	ADJ-00017677	Professional	disability	lost
Garvan Harper V Dept. of Employment Affairs & Social Protection [DEASP	ADJ-00016053	Professional	gender	lost
A Lecturer Vs. A University	ADJ-00013590	Union	gender, disaility	lost
Colm McNamee Vs. Irish Municipal Public And civil Trade Union Impact Trade Union / FORSA Trade Union	ADJ-00012244	Self-representation	disability	lost
A Secondary School Teacher Noeleen Bogue v The Department of Education and Science	DEC-E2019-004	Professional	gender, family status	lost
A Risk Officer v A Financial Institution	ADJ-00019125	Professional	n/a	lost (no show)
A Secondary School Teacher Fidelma O'Reilly Ryan vs The Department of Education and Science	DEC-E2019-005	Professional	gender, family status	lost
A Cleaner Vs. A Cleaning Company	ADJ-00014743	Self-representation	age	lost
An Employee V A Government Department	ADJ-00015888	Self-representation	disability	lost
Callaghan La'brooy vs. Neville Hotels Unlimited Company t/a Kilkenny River Court Hotel	ADJ-00012659	Professional	gender, family status, race	lost
Claimant V Respondent	ADJ-00013708	Self-representation	family status	lost
Mark O'Mahony V Gael Taca Teoranta (Represented by Mr J Barrett B.L. instructed by Cliona Ni Chathain)	DEC-E2019-003	Self-representation	disability	lost (no show)

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Parties	Reference No	Employee representation	Grounds	Outcome
Andras Hull V Clonarn Clover Ltd	ADJ-00013240	Self-representation	n/a	lost
Paula Sant'anna Guimaraes v Southwell Investment Company Ltd Ned Kelly Sports Club	ADJ-00015470	Self-representation	gender	lost (no show)
A Waiter V A Hotel	ADJ-00014091	Self-representation	disability	won
Noelle Loughlin V Fellerim Limited	ADJ – 00017848	Self-representation	gender	lost
A General Operative V A Production Company	ADJ-00014236	Professional	gender, race	lost
Sales & Customer Care Consultant v A Call Centre Company	ADJ-00016123	Professional	gender, race	lost
A Technical Records Assistant v An Airline	ADJ-00012426	Professional	gender, race	lost
Technical Records Assistant V An Airline	ADJ-00015400	Professional	gender, race	lost
Claimant V Respondent	ADJ-00014516	Professional	gender	lost
A Complainant v A Third Level College	ADJ-00014991	Union	gender	lost
Clinton Tully v Banner Fire Prevention Services Bridget Mcaleer	ADJ-00013628	Citizens Information Service	disability	lost
Catering Assistant v A Catering Company	ADJ-00014615	Self-representation	n/a	lost
Claimant V Respondent	ADJ-00013028	Professional	gender	lost
Gabriella Skora v Alps Electric Ireland	ADJ-00013236	Self-representation	n/a	lost (no show)
A Chef v A Fast Food Restaurant	ADJ-00017337	Consultant	race, religion	lost
Grade iv v Hospital	ADJ-00016270	Self-representation	n/a	lost
Senior Staff Nurse v Nursing Home	ADJ-00013739	Professional	gender	won
An Operations Manager v A Technical Services Company	ADJ-00017082	Union	race	lost
Ryszard Cichocki v Abbot Ireland	ADJ-00012976	Self-representation	disability	lost
Dariusz Bryl v Cognex Ireland Ltd	ADJ-00014510	Self-representation	civil status	lost
Paul Carolan V Saongroup Ltd. t/a Irish Jobs.ie	ADJ-00014609	Self-representation	n/a	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
Paul Carolan V Abrivia Recruitment	ADJ-00013092	Self-representation	age	lost
In house Architect v Government Department	ADJ-00013052	Self-representation	n/a	lost (no show)
Technician v Mobile Phone Repair Company	ADJ-00018042	Self-representation	race	lost
A floor waitress v A Gastropub	ADJ-00013406	Professional	n/a	lost
Customer Service Adviser v Online Retailer	ADJ-00017293	Self-representation	age	lost
Contract Cleaner v Cleaning Company	ADJ-00014318	Professional	race	lost
An Assistant Staff Officer Vs. A Healthcare Provider	ADJ-00014152	Professional	age	lost
Henry Kan vs. Merchant's Arch Restaurants Company Limited	ADJ-00016284	Self-representation	race	lost
Eileen Owens v Guinness Storehouse Ltd.	ADJ-00014909	Self-representation	age	won
an employee -v- a employer	ADJ-00015993	Professional	race	lost
A Support Administrator v A Software Company	ADJ-00012712	Professional	gender, age	lost
Laura O'Connor v National University of Ireland, Galway	ADJ-00010453	Union	gender	lost
A Dog Groomer Vs. A Pet Shop	ADJ-00010073	Self-representation	n/a	lost
Marine Pilot V Port Company	ADJ-00004560	Professional	age	lost
<b>2019</b>				
Peter Mooney Vs. Yapstone International Limited	ADJ-00012162	Self-representation	8 grounds	lost
Áine Murray v University Hospital Limerick	ADJ-00012306	Union	family status, gender	lost
Dympna Whelan v Pfizer Ireland Pharmaceuticals	ADJ-00015038	Union	gender, disability	Statute barred
Doctor V Hospital	ADJ-00012924	Professional	gender, family status	won
Ann Aziz V David Jones, John Smith, Ballarat Clothing Ltd	DEC-E2019-002	Ohter	gender, age	lost
A Secretary Vs. A Solicitor's Firm	ADJ-00016645	Citizens Information Service	age	won

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Parties	Reference No	Employee representation	Grounds	Outcome
Geraldine Broderick v Kerry Deaf Resource Centre	ADJ-00008396	Professional	disability	lost
Emma McIntyre v Finn Hair and Beauty Ltd.	ADJ-00014454	Self-representation	disability	lost
A Former Administrative Assistant Vs. A Third Level Institution	ADJ-00007341	Professional	disability	lost
An Employee V A Limited Company	ADJ-00015316	Self-representation	age	lost
John Ryan vs. Seetec Employment & Skills Ireland Ltd Seetec Jobpath	ADJ-00015283	Professional	gender	lost
A Warehouse Operative v A Distribution company	ADJ-00002985	Union	gender	lost
A Warehouse and Logistics Assistant Vs. A Global Adhesive Manufacturer	ADJ-00012941	Professional	race, family status	lost
Glenn Casey Vs. H&H Collection Ltd	ADJ-00014733	Self-representation	race	lost
Laura Reilly V Milestone Integration Services Limited	ADJ-00014491	Self-representation	n/a	lost (no show)
Elvira Yusupova v Athlone Credit Union Ltd	ADJ-00012153	Union	race	lost
An Employee (Represented by Siobhan McLaughlin CIS) -V- An Employer (Represented by Tony O Sullivan BL)	DEC-E2018-026	Professional	disability	won
A Control Centre Operator V An Employer	ADJ-00012416	Self-representation	n/a	lost
Complainant v Respondent	ADJ-00019572	Self-representation	n/a	lost (no show)
Complainant v Respondent	ADJ-00019899	Self-representation	n/a	lost (no show)
A HR Administrator v A Medical Devices Company	ADJ-00020437	Self-representation	n/a	lost (no show)
Eulalia Martin v CPL Recruitment	ADJ-00016382	Self-representation	n/a	lost (no show)
Sarah Jane Reid Vs. Cornstore Limerick	ADJ-00021759	Self-representation	n/a	lost (no show)
Carol Hutton V Thunders Bakery Limited	ADJ-00017258	Self-representation	n/a	lost (no show)
<b>2018</b>				
Niall Fitzgerald V Mud Pie Beauty Cottage Limited	ADJ-00015458	Self-representation	gender	lost
Hatem Mohamed V Accenture	ADJ-00014522	Self-representation	race	lost



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Parties	Reference No	Employee representation	Grounds	Outcome
Hatem Mohamed V Accenture Ireland Limited	ADJ-00014519	Self-representation	disability	lost
Complainant V A Company	ADJ-00012220	Self-representation	5 Grounds	lost
Financial Administrator V Telecom Provider	ADJ-00015172	Professional	gender	won
A Press Operator V A Food Processing Company	ADJ-00011847	Self-representation	race	won
A Project Manager V A Manufacturing Company	ADJ-00009021	Professional	race	lost
A Primary School Teacher V Board of Management of a Primary School	ADJ-00012205	Consultant	gender, family status	lost
A healthcare assistant V A healthcare staffing agency	ADJ-00012428	Self-representation	disability	lost
A Teacher V Government Department	ADJ-00011974	Self-representation	gender, disability	lost
Marian Jaroslaw Nowak V Fold Housing Association Ireland Ltd	DEC-E2018-025	Self-representation	gender, race, age and disability	statute barred
Receptionist V Security Company	ADJ-00014455	Professional	gender, family status	won
A Care Worker Vs A Services Provider	ADJ-00013822	Other	age, disability	lost
An Examinations Officer V A Public Medical Regulatory Body	ADJ-00014097	Union	gender	lost
An Administrative Worker V A Public Medical Regulatory Body	ADJ-00014356	Union	gender	lost
Security Officer V Security Company	ADJ-00010569	Self-representation	race	lost
Dr Zsolt Fábián V Royal College of Physicians of Ireland	DEC-E2018-024	Self-representation	race	won
A Worker V Services Company	ADJ-00014806	Self-representation	n/a	lost
Call Centre Worker V Service Provider	ADJ-00014131	Self-representation	disability	won
Medical Services Advisor V Medical Insurance Company	ADJ-00008530	Professional	gender, age	lost
A Phlebotomist V A Hospital	ADJ-00007121	Professional	disability	lost
A E-Commerce Product Manager V A E-Commerce Company	ADJ-00013861	Professional	gender, race	lost
Dympna Boyce V Ras Medical Limited Auralia	ADJ-00011059	Professional	gender, family status	won

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Parties	Reference No	Employee representation	Grounds	Outcome
A Worker V A Fast Food Outlet	ADJ-00008526	Professional	gender	won
A Business Development Manager V A Services Company	ADJ-00010061	Professional	family grounds, disability	lost
A General Operative V An Agricultural Services Company	ADJ-00013581	Professional	race	won
Jenny Moran Vs. Kaneco Limited	ADJ-00009361	Professional	disability	lost
A Deputy Head Services Officer V A Government Department	DEC-E2018-023	Professional	disability	won
A Care Administrator v A Provider of Care Services	ADJ-00009322, ADJ-00009305	Union	disability	lost
Technical Support Employee V Technical Support Contractor	ADJ-00013904	Self-representation	race	won
A Study Supervisor v A Board of Management	ADJ-00014012	Professional	n/a	no jurisdiction
A Lecturer V A Third Level University	ADJ-00003593	Union	age, gender	won
A Warehouse Assistant V A Logistics Company (2)	ADJ-00013531	Union	n/a	lost
Mr Allen Hogan V Vistamed Ltd.	DEC-E2018-022	Professional	disability	lost
A Job Applicant V A Health Service Provider	ADJ-00009956	Self-representation	age	lost
An Employee V An Employer	ADJ-00015538	Self-representation	pregnancy	won
Warehouse Assistant V Logistics Company	ADJ-00007778	Union	n/a	lost
A Worker V A Print Company	ADJ-00009631	Self-representation	gender, race	won
A Business Manager Vs. A Motor Dealership	ADJ-00011959	Professional	disability	won
An Employee v A Butcher	<u>ADJ-00010440</u>	Professional	race	lost
Accommodation Assistant v Hotel	ADJ-00012899	Union	disability	lost
Applicant V Consultancy Company	ADJ-00012718	Self-representation	gender	lost
Carolina Mustuc Vs. Noonan Services Group	ADJ-00010243	Self-representation	n/a	lost (no show)
A Production Operator Vs. A Manufacturing Company	ADJ-00010072	Professional	disability	won

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Parties	Reference No	Employee representation	Grounds	Outcome
A Waiter V A Restaurant	ADJ-00014192	Self-representation	race	lost
Eithne O'Doherty V The Rehab Group	ADJ-000131	Self-representation	disability, harassment	no jurisdiction
Deirdre Kelly v Health Service Executive	DEC-E2018-020	Self-representation	gender	won
A Pharmacy Technician v A Hospital	ADJ-00008998	Professional	disability	won
A Job Applicant V A Consulting Engineering Company	ADJ-00013382	Self-representation	civil status, family status	lost
A former employee V A shipping service company	<u>ADJ-00011724</u>	Self-representation	n/a	lost
A LABOURER V A FARM	DEC-E2018-019	Other	race, sexual orientation	lost
Caroline Joyce V TTM Healthcare Limited	ADJ-00010321	Self-representation	family status, age	lost
A Tutor V An Educational Body	<u>ADJ-00004879</u>	Union	age	lost (no show)
A Fund Accounting Supervisor V A Fund Management Company	ADJ-00010660	Professional	disability, race	won
Ivar Raginski V Lodge Service	ADJ-00013268	Self-representation	race	lost
A Maintenance Worker V A Hotel	ADJ-00013978	Professional	discrimination, harassment	lost
A Technical Support Analyst V A Services and IT Support Company	ADJ-00010284	Self-representation	race	lost
A Factory Supervisor V A Manufacturing Company	ADJ-00008372	Professional	disability	lost
A Relief Childcare Assistant V A Community Playgroup	ADJ-00011852	Self-representation	discrimination	lost
A Clerical Officer v A Pubic Service Body	ADJ-00014043	Self-representation	family status	lost
A National School Teacher Ciara Fitzgerald vs The Department of Education and Skills and A Board of Management	DEC-E2018-017	Professional	gender	lost
A National School Teacher Helen Donnelly vs The Department of Education and Skills and A National School Board of Managemen	DEC-E2018-018	Professional	gender	lost
An Employee V A Pharmacist	ADJ-00006961	Professional	gender, harassment	won
A Business Development Representative v A Software & IT Business Development Company	ADJ-00012946	Consultant	disability	won

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Parties	Reference No	Employee representation	Grounds	Outcome
An Employee Vs. A Contract Cleaner	ADJ-00014754	Self-representation	n/a	lost
Yvonne Hennessy v Telegael Teoranta	ADJ-00006075	Professional	gender, family status	lost
A Mechanic v A Transport Provider	ADJ-00006020	Union	gender	lost
Marie Tierney v Dunnes Stores	ADJ-00007905	Union	discrimination	lost
A Technical Writer v An I.T Company	ADJ-00011143	Self-representation	disability	lost
Boguslaw Madajczyk v Multiroofing Systems Ltd (Represented by Construction Industry Federation)	DEC-E2018-016	Self-representation	age, disability	lost
A Cleaning Supervisor v A Cleaning Services Provider	ADJ-00012307	Self-representation	age	lost
Boguslaw Mycyk V Intense Communication	ADJ-00011912	Self-representation	n/a	lost
A machine supervisor V A packaging firm	ADJ-00012606	Self-representation	race	won
An Employee v A Limited Company	<u>ADJ-00014554</u>	Professional	n/a	lost
An individual v A legal company	ADJ-00013700	Self-representation	gender	lost
An agency Worker Vs.An Employment agency	ADJ-00013029	Professional	disability	lost
Dmitri Taganov Vs. Prl Group Logistics	ADJ-00010483	Self-representation	n/a	lost
Ground Handling agent v Airline	ADJ-00010096	Other	disability, race	lost
A Retail Sales Assistant v A Retail Clothing Company	ADJ-00012701	Self-representation	gender	won
A hospital clerical employee v A Hospital	ADJ-00013564	Union	disability	lost
Complainant V Respondent	ADJ-00011920	Professional	n/a	lost
Doreen Davis V Turas Training Limited	ADJ-00007774	Union	disability	lost
Liviu Bozdog Vs. Valeo Foods	ADJ-00014206	Self-representation	n/a	lost (no show)
An employee V A beauty Salon	ADJ-00012376	Self-representation	discrimination	lost
Ivar Raginski V Keyguard Security Ltd	ADJ-00013267	Self-representation	race	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
An Assistant Manager v A Coffee House & Restauran	ADJ-00010716	Self-representation	gender, family status	won
A Sales Advisor V A Furniture Retailer	ADJ-00007327	Self-representation	gender	won
An Employee v A Health Care Provider	ADJ-00008856	Self-representation	disability	statute barred
XY (Represented by Gallen Alliance Solicitors) V Matrix Shipping Ltd. (Represented by Waters and Associates Solicitors)	DEC-E2018-015	Professional	age, gender, disability	won
Mukesh Gandhi V A Health Service Executive	ADJ-00014032	Self-representation	n/a	lost
A Shop Assistant v A Retail Store	ADJ-00009612	Self-representation	disability	lost
A Service Station Manager V A Service Station	ADJ-00008902	Professional	gender	won
A Production Operator v A Manufacturing Company	ADJ-00003893	Other	disability	lost
A Job Applicant v A Tour Operator	ADJ-00011111	Self-representation	age, disability, sexual orientation	lost
A General Operative V Medical Devices Company	ADJ-00002616	Professional	gender	won
An Employee v An Employer	ADJ-00011608	Professional	n/a	lost
Marek Smilowski V Noonan Services Group Ltd	ADJ-00014288	Self-representation	n/a	lost (no show)
A Worker v A Construction Company	ADJ-00003120	Self-representation	race	lost
A Household Assistant v A Hospital	ADJ-00010108	Professional	gender	lost
A Chief v A Hotel	ADJ-00004807	Self-representation	gender	lost (no show)
A Employee Vs A Haulage Company	ADJ-00009626	Professional	age, disability	lost
A General Store Assistant v A Large Company	ADJ-00010217	Union	harassment	won
A Hairdresser v a Salon	ADJ-00008622	Self-representation	disability	won
Rosina Gillespie v Business Mobile Security Services T/A Senaca Group	ADJ-00003243	Professional	civil status	lost
Breda Rafter v Department of Public Expenditure and Reform	ADJ-00012185	Professional	gender, age	statute barred
Manufacturing Operative V Moulding and Painting manufacturing company	ADJ-00004267	Consultant	race	won

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Parties	Reference No	Employee representation	Grounds	Outcome
A Security Guard v A Private Security Company	ADJ-00011992	Union	race	lost
Helene McManus v HSE	ADJ-00009162	Professional	gender	lost
Andrew Conway V Public Appointments Service	ADJ-00008454	Professional	age	lost
Andrew Conway V Department of Agriculture, Food and Marine	ADJ-00011134	Professional	age	lost
Donal McGrath V Public Appointments Service	ADJ-00009975	Self-representation	age	lost
Emmett Delaney v Lidon Group	ADJ-00008217	Self-representation	sexual orientation	lost (no show)
Amy Deady V Fexco Mbso Unlimited Company	ADJ-00012105	Professional	n/a	lost
A Security Officer V A Security Company	ADJ-00011039	Self-representation	age, race	lost
Dr. Atiya K Jones V Cpl PLC t/a CPL Recruitment agency`	ADJ-00010354	Professional	race, religion	lost
A Job Applicant v A Potential Employer	ADJ-00008637	Self-representation	age, religion	lost
An Employee v A Licensed Premises	ADJ-00009146	Professional	disability	lost
Community Employment Scheme Supervisor v A Voluntary Organisation	ADJ-00006876	Union	age	lost
A Factory Operative Vs A Food Manufacturer	ADJ-00007944	Self-representation	race	lost
A Medical Doctor Vs A Medical School	ADJ-00011021	Professional	age	lost
Catering Assistant v A Cafe	ADJ-00009919	Self-representation	n/a	lost
Jill Loughrey V Department of Transport, Tourism & Sport	ADJ-00003850	Self-representation	gender, victimisation	won
An Employee v An Airline Company	ADJ-00011206	Self-representation	n/a	lost
Aoife Nadia Martin v Home Fare Services t/a KSG	ADJ-00012886	Self-representation	gender	lost
An Employee v A Training Centre	ADJ-00008945	Self-representation	civil status	no jurisdiction
A Potential Employee v An Employee Assessment Provider	ADJ-00009545	Self-representation	race	lost
A Catering Assistant v A Catering Company	ADJ-00007911	Self-representation	n/a	lost

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Parties	Reference No	Employee representation	Grounds	Outcome
A Hotel Worker (3) v A Hotel	ADJ-00008900	Consultant	n/a	lost
A Hotel Worker (1) v A Hotel	ADJ-00008972	Consultant	n/a	lost
A Hotel Worker (2) v A Hotel	ADJ-00009047	Consultant	n/a	lost
A massage therapist V A massage parlour	ADJ-00010948	Citizens Information Service	n/a	lost
Store Worker v Store	ADJ-00009422	Professional	n/a	lost
Claimant V Respondent	ADJ-00004786	Self-representation	n/a	lost
A Worker V A Public Sector Recruitment agency	ADJ-00008534	Self-representation	disability	lost
A nurse Vs A Hospital	ADJ-00008073	Union	age	won
A Quality Analyst v A Pharmaceutical Company	ADJ-00008926	Self-representation	disability	lost
Rafal Kesik v Norspace	DEC-2018-013	Self-representation	Victimisation	lost
A Chef V A Café /Service Station	ADJ-00008582	Self-representation	gender	lost
A Manager v A Financial Services Provider	ADJ-00005226	Professional	age	lost
Complainant V Respondent	ADJ-00009293	Professional	disability	won
Sylvia Ozurumba McJyn V RehabCare	DEC-E2018-012	Professional	race, harassment	lost
A temporary clerical officer v A government department	ADJ-00008405	Self-representation	disability	lost
Warehouse Operative V Distribution Company	ADJ-00008313	Professional	race, sexual orientation	won
An Employee V A Company	ADJ-00004188	Self-representation	gender	statute barred
Coordinator in a home care service Vs Home care service provider	ADJ-00007818	Professional	age, harassment	lost
A Storekeeper Vs A Retailer	ADJ-00008524	Citizens Information Service	age	won
A Marketing Co-ordinator v A Financial services Company	ADJ-00009122	Self-representation	nationally, gender	lost
Rafat Mustafa Salah El Din V Temple Recruitment	DEC-E2018-011	Professional	age, race	won

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Parties	Reference No	Employee representation	Grounds	Outcome
Dr Anne Cleary and University College Dublin	DEC-E2018-009	Professional	gender, age	won
Ishita Sanon Bond Personnel Group Limited	ADJ-00008025	Professional	race	won
A Quality control Assistant / A Grocery Retailer	ADJ-00005772	Professional	disability	lost
Ms. Leann Lane Vs Mater Dei Institute of Education	DEC-E2018-010	Union	gender, religion	lost
An Occupational Therapist v An employer	DEC-E2018-007	Self-representation	race	lost
An Employee v A Retailer	DEC-E2018-008	Professional	age	lost
A Receptionist v Car Parts Company	ADJ-00009794	Citizens Information Service	sexual harassment	won
A civil Servant v A Government Department	ADJ-00006175	Professional	n/a	lost
A Retail Manager v A Supermarket Chain	ADJ-00005949	Professional	harassment	lost
A Female Employee v A Café & Restaurant	ADJ-00003616	Professional	gender	won
A Healthcare worker v A Healthcare provider	ADJ-00005119	Professional	gender, disability	lost
An Officer V A Public Service Body	ADJ-00003880	Self-representation	disability, discrimination	won
Janos Kalman v Rosderra Irish Meats Group	ADJ-00005910	Professional	disability	lost
Brendan Lydon AND Navan Education Centre t/a National Behaviour Support Service	DEC-E2018-003	Union	disability	lost
An Employee AND An Post	DEC-E2018-005	Self-representation	disability	lost
Driver V Service provider	ADJ-00007640	Self-representation	race	lost
Tom Keane v Acc Loan Management Dac T/a Acc Loan Management And/or Acclm	ADJ-00005228	Professional	age	lost
A Teacher V A Primary School	ADJ-00008274	Union	age	lost
William Hamill Vs Scouting Ireland Limited	DEC-E2018-002	Self-representation	age	lost
Artur Gronczewski AND Amark Healthcare Services Ltd	DEC-E2018-001	Professional	race	lost



