

February 2023

NWC Submission on the REVIEW OF CIVIL LEGAL AID SCHEME

Introduction

Founded in 1973, the National Women's Council (NWC) is the leading national women's membership organisation. NWC represent and derive our mandate from our membership, which includes over 190 groups and organisations from a diversity of backgrounds, sectors and locations across Ireland. Our mission is to lead and to be a catalyst for change in the achievement of equality for women. Our vision is of an Ireland and of a world where women can achieve their full potential and there is full equality for women.

NWC chairs the National Observatory on Violence Against Women an independent network of over 22 grassroots and national organisations that convene quarterly to monitor progress on violence against women in Ireland. NWC established and chairs the National Advisory Committee supporting the Dept. of Higher Educations' Framework Safe, Respectful, Supportive and Positive – Ending Sexual Violence and Harassment in Irish Higher Education Institutions.

NWC welcomes the invitation to make a submission on the REVIEW OF CIVIL LEGAL AID SCHEME. NWC focused this submission mainly on domestic, sexual and gender based violence and access to justice for victims and survivors. In 2021, NWC made 2 submissions to the Family Justice Oversight Group¹ and the Third National Strategy on Domestic, Sexual and Gender-based Violence² that addressed some of the recommendations that NWC considers essential to put users at its centre. Despite of DSGBV being extremely prevalent in Ireland, the courts and other state apparatus has been slow to respond and have failed to grasp the impact and seriousness of these offences. It is self-evident that an underfunded and inadequate legal aid scheme adds to the harms already experienced by victims/survivors of domestic, sexual and gender based violence. NWC urges that recommendations to ensure the provision of free legal to all victims/survivors of domestic, sexual and gender based violence are in place. NWC also made recommendations with regards the gendered constraints in accessing legal advice with regards employment and housing issues.

In addition, NWC endorses the recommendations, as stated by Free Legal Advice Centres (FLAC)³, especially with regards the need for a wider definition of legal aid that includes information about

¹ NWC submission to Family Justice Oversight Group - Phase 1 Consultation

https://www.nwci.ie/learn/publication/family_justice_oversight_group_phase_1_consultation

² National Women's Council, Submission to the Third National Strategy on Domestic, Sexual and Gender-based Violence (June 2021).

³ FLAC Guide to Review of the Civil Legal Aid Scheme: Making a Submission to the Review Consultation, the key issues under Review & FLAC's Recommendations (February 2023)

rights, public and community legal education, training, advocacy, legal advice, legal representation, help in preventing or resolving disputes, alternative means of dispute resolution such as mediation, and assistance in enforcing decisions/judgements. As well as the recommendations focusing on the need for a comprehensive mapping of all forms of public legal assistance, provided by statutory and non-statutory bodies and the Independent Law Centres to analyse and implement alternative models of legal assistance from a best practice perspective.

Legal assistance schemes and access to Justice

Ireland's State-funded civil aid scheme is administered by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995⁴. In 2011, the former UN Special Rapporteur on extreme poverty and human rights noted her concern that "several areas of law that are particularly relevant for people living in poverty" are excluded from the scope of the Legal Aid Board⁵. In 2015, UNCESCR expressed concern regarding the exclusion of certain areas of law from the civil legal aid scheme "which prevents especially disadvantaged and marginalised individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits". Thereafter, UNCESCR recommended that the remit of the Legal Aid Board be expanded and that civil legal aid services be made available in a wider range of areas⁶.

Moreover, in January 2021, Legal Aid Board Law Centres reported that the vast majority of advice and representation provided by the Legal Aid Board relates to family law and waiting times of up to 44 weeks for an initial consultation with a lawyer⁷. Women's Aid has also noted that legal aid for victims and survivors of DSGBV is over-stretched, under-resourced and not meeting demand⁸.

The right to access to justice is a fundamental human right recognised by international instruments. The new legal scheme in order to be an effective public legal assistance model must take into account

⁴ In addition to the Legal Aid Board, there are legal assistance schemes/services, of statutory and non-statutory bodies (and voluntary bodies) which receive public funding and which have varying levels of experience and functions in relation to the provision of legal information, advice, advocacy, legal representation, and law reform. As well as Independent Law Centres, such as FLAC, Community Law Centres and Specialist Independent Law Centres.

⁵ FLAC Submission to the Office of the United Nations High Commissioner for Human Rights: Third Review of Ireland under the UN UPR Mechanism, March 2021 available at: <https://www.flac.ie/publications/flac-submission-to-the-office-of-the-united-nation/>

⁶ Ibid

⁷ Ibid

⁸ Women's Aid, Submission to the Joint Committee on Gender Equality on the Recommendations of the Citizens' Assembly (2022)

the intersecting needs and barriers as a result poverty, gender, ethnicity, migration, as legal problems affect disproportionately vulnerable and disadvantaged groups and individuals.

In this regard, FLAC recommends including not just individuals but community groups and groups who come with the discriminatory grounds in the equality legislation using the human-centred design approach, to obtain legal information to legal representation⁹.

Recommendations

1. The State must ensure adequate resourcing to the new Legal Aid Scheme to carry out its purpose and ensure that all have access to justice and legal services and in a timely manner;
2. Consider minority and minoritised people experiences in the methods of service delivery, including Traveller and Roma women, migrant women and disabled women.
3. The Review Group should make recommendations on the design of a new public legal assistance system, from the perspective of the user and potential user, to ensure that the scheme can deliver a legal assistance service that addresses the real legal needs of the growing and diverse population.

Domestic, Sexual and Gender Based Violence

Despite the significant progress made by Ireland in relation to DSGBV, the European Institute of Gender equality has estimated that the cost of gender-based violence for Ireland is €4 billion per year¹⁰ and violence against women remains at the heart of women's inequality in our society. Women's Aid Femicide watch has reported that since 1996, 255 women have died violently, and 20 children have died during incidents where women have died violently in the Republic of Ireland – 63% were killed in their own homes¹¹. Moreover, women experiencing income poverty are especially more vulnerable

⁹ Suggested users should include: A homeless person seeking emergency accommodation; A Roma person applying for Supplementary Welfare Allowance (SWA); A Traveller seeking Traveller-specific accommodation from a local authority; A person from a minority ethnic community experiencing domestic violence; Local authority tenants wanting to complain about substandard accommodation; A trans person seeking appropriate health care; A person with a disability in a residential institution bringing a discrimination claim; A prisoner seeking advice on family law proceedings; A person in long-term mortgage arrears facing repossession proceedings; A community group wanting to bring proceedings about the impact of air pollution on the health of their children; An employee living in Direct Provision wanting to bring a claim of sexual harassment against their boss.

¹⁰ EIGE (2022). Costs of gender-based violence in the European Union.

¹¹ Women's Aid Femicide Watch January 2023

<https://www.womensaid.ie/assets/files/pdf/1673698407342369511.pdf>

to domestic violence as poverty limits choices and resources preventing them from escaping from violent environments.¹²

Ireland has adopted multiple policy and legal changes aligning with the provisions of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention), where the civic legal aid scheme must align with. Including the enactment of the Female Genital Mutilation Act 2012, the Domestic Violence Act 2018, the transposition of the EU Victims of Crime directive through the Criminal Justice (Victims of Crime) Act 2017, the Criminal Law (Sexual Offences) Act 2017 and 2019, the Health (Regulation of Termination of Pregnancy) Act 2018 and the Criminal Law (Extraterritorial Jurisdiction) Act 2019.

Article 57 of the Istanbul Convention States that ‘parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law’¹³. The Third National Strategy on Domestic, Sexual and Gender-based Violence launched in 2022 includes in its Implementation Plan 3.3.8 the ‘increase and widen access to legal aid resources available for both adult and child victims/survivors of DSGBV linked to the review of the Civil Legal Aid Scheme to increase flexibility and responsiveness to the legal needs of those whom it is intended to serve and make recommendations regarding reforms’¹⁴.

Currently, access to legal aid as a general support service is a particular challenge for victim-survivors of violence to access to justice. This challenge arises from the requirement that victim-survivors satisfy an income test to determine if they qualify for legal aid and that while legal aid is technically available to victims of domestic violence, the requirement to pay financial contributions hampers the accessibility of justice¹⁵. In 2013, the situation was exacerbated as the minimum contribution for legal services provided by the Legal Aid Board increased from €50 to €130 – a rise of 160%. Victims of domestic violence may need to make recurring applications for legal aid and a financial contribution is required for each. Moreover, some women are not eligible for legal aid because of assets held in joint names over which they have no control or financial abuse is part of overall domestic violence, victims may not have the access to means to independently engage and pay for legal advisors¹⁶.

¹² Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape 2009

¹³ Council of Europe, Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011

¹⁴ Department of Justice, Implementation Plan - Zero Tolerance Third Domestic, Sexual and Gender-Based Violence Action 3.3.8

¹⁵ National Women’s Council, Submission to the Third National Strategy on Domestic, Sexual and Gender-based Violence (June 2021).

¹⁶ Ibid

In practice, this income threshold leaves many victim-survivors of DSGBV without access to legal aid, often directly impacting on their decision not to seek justice through the legal system¹⁷. In 2021, FLAC reported that 13% of service users with a family law query were seeking assistance in relation to domestic violence¹⁸. This obstacle to access justice particularly impacts minority and minoritised women. Furthermore, such a low income threshold to access legal aid may encourage some perpetrators to keep bringing victim-survivors into the legal system as a way to exercise economic violence¹⁹.

In a separate but related issue, in recognition of the importance of access to legal advice for victims of sexual crimes, the O'Malley Review recommends amending the current law to include the provision of free legal advice to victims of all sexual offences that is not contingent on there being a prosecution. Civil society organisations and NGOs have been calling for the necessity to extend this recommendation to all victim-survivors DSGBV²⁰, including intimate partner abuse, sexual harassment, stalking, victims of prostitution, online digital abuse, FGM and forced marriage etc.

Ireland's consistently low prosecution rates, low conviction rates as well as high attrition rates concerning domestic, sexual and gender-based crimes²¹ show that it is essential that further work on legal aid scheme addresses the needs of its most vulnerable users and that it is designed with the safety and well-being of victims of sexual and gender based violence at its core. The provision of free legal aid and advice would acknowledge the gendered nature and gendered constraints that are experienced by victims of DSGBV in accessing legal aid and advice, in order to access to justice, especially minority and minoritised women.

Moreover, frequently Legal Aid representatives are the first encounter that individuals have with the legal system, or of framing their experience in legal concepts or protections. As a gateway to the legal system, legal aid practitioners can direct users to the range of services and supports that are available to individuals, including mediation. When legal aid practitioners are the first point of contact, they may be uniquely in a position to recognise domestic violence, including coercive control, that has not been directly disclosed by the individual, and help them to connect with the supports that are available to them. It is vital that legal aid practitioners are adequately trained to recognise and understand the

¹⁷ Irish Observatory on Violence Against Women, Shadow Report to Greivio in respect of Ireland (August 2022)

¹⁸ FLAC, Towards Equal Access to Justice, Annual report 2021

¹⁹ Irish Observatory on Violence Against Women, Shadow Report to Greivio in respect of Ireland (August 2022)

²⁰ National Women's Council, Submission on the Third National Strategy on Domestic, Sexual and Gender-Based Violence (National Women's Council of Ireland, June 2021) page 31.

²¹ NWCI submission to Family Justice Oversight Group - Phase 1 Consultation

https://www.nwci.ie/learn/publication/family_justice_oversight_group_phase_1_consultation

impact of domestic abuse on the victim and how it might shape their interactions at every stage of engagement with the family justice system. Training must focus on the experiences of victim-survivors of DSGBV including the impact of trauma on accessing services, reporting and navigating the legal system, on tackling the myths and stereotypes around DSGBV and on the intersecting barriers faced by minority and minoritised women. For migrant, Traveller and Roma women, the level of awareness of rights, entitlements and procedures as well as ability to effectively access and participate in legal systems and procedures are severely compromised. Low/no literacy and/or English language skills, low levels of trust in legal professionals and system, and inability to afford the cost of legal fees/ lack of access to free legal aid prevent many migrant, Traveller and Roma women from accessing justice from domestic and sexual violence²².

Recommendations:

1. The State must provide free legal advice, representation and aid for all victim-survivors of domestic, sexual and gender based violence and abuse, including in Custody and Access cases where domestic violence is an issue;
2. The State must ensure that all legal aid and advise practitioners are trained to identify and address DSGBV from an intersectional, non-discriminatory and gender-sensitive perspective, including abuse of legal processes through repeat applications and delays to target the victim and the heightened risk for abuse of child access arrangements;
3. Increase engagement between court support services and legal aid, so that legal information and assistance for victims and survivors can be delivered seamlessly and collaboratively by multiple agencies;

Gendered constrains in accessing legal aid: Employment and housing

The gendered nature and gendered constraints accessing legal advice must take into account that the civil legal aid scheme is not available to people who want to take employment, employment equality or equal status claims to the Workplace Relations Commission²³. In circumstances where women, often financially disadvantaged, cannot access the civil legal aid scheme, this is a real cause for concern. Sometimes equality and employment law cases involve complex legal issues and there is a

²² Pavee Point, Irish Traveller and Roma Women- Joint Alternative Report (August 2022)

²³ National Women's Council, Shadow Report in advance of the examination of Ireland's combined sixth and seventh periodic reports under the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (National Women's Council, January 2017)

risk that individuals, including older persons, may not be able to present their cases in the manner that fairness demands without legal representation.

Moreover, Ireland has one of the highest rates of female homelessness in the EU²⁴. Lone parent families, 86% of whom are headed by women, are the highest proportion of families living in emergency accommodation, the vast majority having been made homeless from the private rental sector²⁵. A 2016 national study on women’s homelessness found that 10% of participants identified as members of the Traveller community.²⁶ Therefore, the gendered constraints in accessing legal advice must also take into account that the civil legal scheme is not available for “disputes concerning rights and interests over land”, that combined with the strict application of the means test and a “merits test” explained above mean that legal aid is often not available in cases related to housing (including family home repossession) and debt. A similar matter of concern is the perception that civil legal aid is not available in cases concerning housing and homelessness against the State and local authorities. The lack of Legal Aid is a major barrier to women wishing to enforce their rights.

Recommendations:

1. The Civil Legal Aid Scheme should be expanded and supported to provide legal assistance to women taking claims under employment equality and equal status legislation;
2. The Civil Legal Aid Scheme should be expanded and supported to provide legal assistance in areas of law that most impact people living in poverty, such as social welfare, housing and homelessness, and equality and non-discrimination.
3. No means test should apply in the circumstances where an applicant: receipt of social welfare or possesses a medical card; is seeking legal assistance for welfare law matters such as access to Supplementary Welfare Allowance or access to emergency housing supports; where someone is in immediate danger of eviction or repossession proceedings; “On the day” emergency advice and advocacy; where initiating or defending legal proceedings would otherwise be prohibitively expensive; where undue hardship will be suffered if legal aid is denied; cases where children might be taken into care; cases of domestic violence; in cases or

²⁴ National Women’s Council, Pre-Budget Submission: Shaping Our Future: Tackling the cost of living for women in Budget 2023 (June 2022)

²⁵ Ibid

²⁶ Ibid

matters of principle or in the public interest; in test cases which might act as a precedent for other cases²⁷.

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²⁷ FLAC Guide to Review of the Civil Legal Aid Scheme: Making a Submission to the Review Consultation, the key issues under Review & FLAC's Recommendations (February 2023)