



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to the Department of Justice Call for
Evidence on Civil Legal Aid**

June 2024

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Summary of Recommendations

The NI Human Rights Commission recommends that:

- 2.9 the Department of Justice adopts a human rights based approach to the development and implementation of any and all policy on legal aid provision in NI, that includes the full range of internationally accepted human rights standards.**
- 2.15 the Department of Justice should actively consider Windsor Framework Article 2 in the review, development, and implementation of any and all policy on civil legal aid provision in NI.**
- 2.18 the Department of Justice should make sure that all reviewed, developed and implemented policy in the provision of civil legal aid in NI upholds the right to an effective remedy and a fair trial provided for in Article 47 of the EU Charter of Fundamental Rights and CJEU case law.**
- 2.21 the Department of Justice considers the EU asylum acquis while reviewing, developing, and implementing policy in the provision of civil legal aid in NI.**
- 3.5 the Department of Justice takes all effective measures to improve access to justice through the provision of adequate free legal aid to all persons without sufficient means, including by increasing the allocation of human and financial resources to ensure the adequate and efficient functioning and sustainability of the Legal Services Agency NI.**
- 3.11 the Department of Justice ensures that the provision and scope of civil legal aid in NI is accessible and responsive to the needs of every individual who may require it. This includes specific protection and assistance for people with additional needs or who may experience social or economic exclusion.**
- 3.12 the Department of Justice continuously collects, monitors and evaluates disaggregated data of legal aid recipients in order to understand the legal needs of the population. This includes**

employing a variety of data collection tools to ensure data is of appropriate quality and publishing the findings to ensure transparency.

3.16 the Department of Justice ensures early intervention mechanisms and techniques are effectively used and adequately resourced to ensure the accessible and timely legal advice and assistance to every individual who may require it.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). The NIHRC is also required, by section 78A(1) of the Northern Ireland Act 1998, to monitor the implementation of Article 2 of the Windsor Framework, to ensure there is no diminution of rights protected in the “Rights, Safeguards and Equality of Opportunity” chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK’s withdrawal from the EU.¹ In accordance with these statutory duties the following advice is submitted to the Department of Justice to inform its policy development on civil legal aid provision in Northern Ireland (NI).
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998, and the United Nations (UN) system and treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- European Convention on Human Rights 1950 (ECHR);²
 - UN Convention on the Elimination of Racial Discrimination 1965 (UN CERD);³
 - UN International Covenant on Civil and Political Rights 1966 (UN ICCPR);⁴
 - UN Convention on Elimination of Discrimination against Women 1981 (UN CEDAW);⁵
 - UN Convention on the Rights of the Child 1989 (UN CRC);⁶
 - UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).⁷

¹ The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement and all references to the Protocol in this document have been updated to reflect this change. See Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

² Ratified by the UK 1951.

³ Ratified by the UK 1969.

⁴ Ratified by the UK 1976.

⁵ Ratified by the UK 1986.

⁶ Ratified by the UK 1989.

⁷ Ratified by the UK 2009.

1.3 In addition to these treaty standards, the following declarations and principles provide further guidance in respect of specific areas:

- UN Human Rights Committee, General Comment No. 32;⁸
- UN CESCR Committee, General Comment No.7;⁹
- UN CERD Committee, General Recommendation No.29;¹⁰
- UN CERD Committee, General Recommendation No.31;¹¹
- UN CEDAW Committee, General Recommendation No. 33;¹²
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems;¹³
- Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul;¹⁴
- Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law.¹⁵

1.4 The NIHRC further advises on the compatibility of this consultation with the UK Government's commitment, in Windsor Framework Article 2(1), to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, Section 6 of the Northern Ireland Act 1998 provides that the NI Assembly is prohibited from making any law which is incompatible with Windsor Framework Article 2. Section 24 of the 1998 Act also provides that all acts

⁸ CCPR/C/GC/32, 'UN Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14)', 23 August 2007.

⁹ CESCR/C/GC/7, 'UN CESCR Committee, General Comment No.7: The right to adequate housing (Article 11)', 20 May 1997.

¹⁰ CERD/C/GR/29, 'UN CERD Committee, General Recommendation No.29: Article 1, Paragraph 1 of the Covenant', 1 November 2002.

¹¹ A/60/18, 'UN CERD Committee, General Recommendation No.31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System', 11 March 2005.

¹² CEDAW/C/GC/33, 'UN CEDAW Committee, General Recommendation No. 33 on women's access to justice', 3 August 2015.

¹³ A/RES/67/187, 'UN General Assembly Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems', 28 March 2013.

¹⁴ A/HRC/23/43, 'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul', 15 March 2013.

¹⁵ CM(2021)36-add2final, 'Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law', 31 March 2021.

of the Department should be compatible with Windsor Framework Article

2. The relevant EU law in this context is:

- EU Legal Aid Directive;¹⁶
- EU Procedures Directive.¹⁷

1.5 The NIHRC acknowledges that the current call for evidence primarily seeks views from individuals with personal and professional experience of civil legal services in NI. However, the NIHRC welcomes this opportunity to highlight, from the outset of the Department's review process, the international human rights obligations that should underpin civil legal aid provision in NI and could provide a useful framework for future policy development in this area. The following section encourages the Department to consider the full range of international human rights standards, guidance documents, best practice, and jurisprudence from courts, tribunals and treaty-monitoring bodies. The subsequent section briefly highlights access to justice issues that the NIHRC has encountered during its ongoing monitoring of human rights concerns in NI.

2.0 Human Rights Framework

International human rights standards

2.1 Access to justice is a fundamental element of the international human rights system and the rule of law. It guarantees an individual's ability to protect their rights in conformity with human rights standards and should therefore be guaranteed to all individuals irrespective of their financial situation. Accordingly, access to legal aid (including the provision of legal advice, assistance and/or representation) is critical for ensuring access to justice.¹⁸

2.2 In 2013, the then Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, confirmed that the right to legal aid,

¹⁶ Directive 2002/8/EC, 'Directive of the Council the European Council to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes', 27 January 2003.

¹⁷ Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

¹⁸ A/HRC/23/43, 'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul', 15 March 2013; Council of Europe, 'European Committee on Legal Co-operation: Legal Aid'. Available at: <https://www.coe.int/en/web/cdcj/activities/free-legal-aid>

...can be construed as both a right and an essential procedural guarantee for the effective exercise of other human rights, including the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial.¹⁹

- 2.3 Ensuring fairness and effectiveness in the administration of justice is provided for in a number of international instruments to which the UK and NI are signatory. This includes the European Convention on Human Rights (ECHR, Article 6),²⁰ the International Covenant on Civil and Political Rights (ICCPR, Article 14),²¹ the Convention on the Rights of Persons with Disabilities (CRPD, Article 13),²² the Convention on the Rights of the Child (CRC, Article 40),²³ the Convention on the Elimination of all forms of Racial Discrimination (CERD, Article 6),²⁴ and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, Article 14).²⁵ Despite some of these instruments only expressly providing for legal aid in criminal proceedings,²⁶ several courts, tribunals and treaty-monitoring bodies have found an implied right to legal aid in civil and administrative proceedings.²⁷
- 2.4 The UN Special Rapporteur on the independence of judges and lawyers advised that the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems “may also be applied, *mutatis mutandis*, in civil and administrative law cases where free legal assistance is indispensable for effective access to the courts and a fair hearing, as well as for access to legal information and counsel and to mechanisms of alternative dispute

¹⁹ A/HRC/23/43, ‘UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul’, 15 March 2013, at para 28.

²⁰ Ratified by the UK 1951.

²¹ Ratified by the UK 1976.

²² Ratified by the UK 2009.

²³ Ratified by the UK 1989.

²⁴ Ratified by the UK 1969.

²⁵ Ratified by the UK 1986.

²⁶ Namely, Article 14 of the ICCPR, Article 40 of the UN CRC and Article 6 of the ECHR.

²⁷ CCPR/C/GC/32, ‘UN Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14)’, 23 August 2007; CESCR/C/GC/7, ‘UN CESCR Committee, General Comment No.7: The right to adequate housing (Article 11)’, 20 May 1997; CERD/C/GR/29, ‘UN CERD Committee, General Recommendation No.29: Article 1, Paragraph 1 of the Covenant’, 1 November 2002; A/60/18, ‘UN CERD Committee, General Recommendation No.31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System’, 11 March 2005; CEDAW/C/GC/33, ‘UN CEDAW Committee, General Recommendation No. 33 on women’s access to justice’, 3 August 2015.

resolution".²⁸ Consistent with the UN Principles and Guidelines, legal aid should not be limited to covering only legal assistance and representation in criminal, administrative and civil proceedings, but should include legal education, access to legal information and other services provided through alternative dispute resolution mechanisms and restorative justice processes.²⁹

- 2.5 Article 6 of the ECHR acknowledges the role of legal aid in guaranteeing the right to a fair trial. Article 6(1) of the ECHR provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Article 6(3)(c) of the Convention guarantees everyone charged with a criminal offence the right to legal assistance, and where the defendant has insufficient means to pay for it, to get free legal assistance "where the interests of justice so require".
- 2.6 Article 6 of the ECHR does not explicitly provide for free legal assistance in civil matters or outside of judicial proceedings. However, the European Court of Human Rights (ECtHR) has found that State authorities should provide everyone within their jurisdiction with the assistance of a lawyer in civil cases when this proves indispensable for effective access to court³⁰ or when lack of such assistance would deprive a person of a fair hearing.³¹
- 2.7 To establish whether Article 6 implies a requirement for legal aid, the ECtHR will consider what is at stake for the applicant, the complexity of the relevant law or procedure, the applicant's capacity to represent themselves effectively, and the existence of a statutory requirement to have legal representation.³² Under Article 6, the right of access to the courts is not absolute and it may be permissible to impose conditions on the grant of legal aid based on certain limited circumstances.³³ However, the ECtHR has

²⁸ A/HRC/23/43, 'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul', 15 March 2013, at para 48. See also, A/RES/67/187, 'UN General Assembly Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems', 28 March 2013.

²⁹ A/HRC/23/43, 'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul', 15 March 2013, at para 26.

³⁰ *Airey v. Ireland* [1979] ECHR 3, at para 26.

³¹ *McVicar v. UK* [2002] ECHR 436, at para 48-51.

³² European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)' (ECtHR, 2013).

³³ *Steel and Morris v. UK* [2005] ECHR 103, at para 62. See also, European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)' (ECtHR, 2013).

held that the requirement to pay fees to a civil court should not hinder access to a court for applicants who are unable to pay them.³⁴

- 2.8 In 2021, the CoE Committee of Ministers adopted Guidelines on efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law.³⁵ These provide guidance for States' reform processes regarding legal aid systems to provide better access to justice, particularly to the most vulnerable. This includes advice on early intervention initiatives, quality assurance mechanisms in legal aid schemes, means and merit testing, organisation of legal aid schemes and availability of legal aid providers, and data collection.³⁶
- 2.9 **The NIHRC recommends that the Department of Justice adopts a human rights based approach to the development and implementation of any and all policy on legal aid provision in NI, that includes the full range of internationally accepted human rights standards.**

Windsor Framework Article 2

- 2.10 Windsor Framework Article 2 requires the UK Government to ensure that no diminution of rights, safeguards and equality of opportunities contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK's withdrawal from the EU. This includes an obligation to "keep pace" with any changes made to the six Annex 1 equality

³⁴ *Kreuz v. Poland* [2006] ECHR 70, at para 66.

³⁵ CM(2021)36-add2final, 'Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law', 31 March 2021.

³⁶ CM(2021)36-add2final, 'Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law', 31 March 2021.

directives³⁷ which improve the minimum levels of protection available, after 1 January 2021.³⁸

- 2.11 For other EU obligations which underpin the rights, safeguards and equality of opportunity in Windsor Framework Article 2, the UK Government commitment to ensure 'no diminution' is measured by the relevant EU standards as they were on the 31 December 2020.
- 2.12 The rights, safeguards, and equality of opportunity chapter of the Belfast (Good Friday) Agreement was not an exhaustive statement of rights protections. Rather, the parties affirmed their "commitment to ... the civil rights and religious liberties of everyone in the community" before affirming "in particular" a non-exhaustive list of rights and safeguards.³⁹ The High Court recently confirmed that "reading the [Belfast (Good Friday) Agreement] as a whole, it is apparent its provisions and protections are broad in scope".⁴⁰ The High Court has also held that, "a narrow interpretation of 'civil rights' undermines the forward-facing dimension of the non-diminution commitment in article 2(1)".⁴¹
- 2.13 Due to this commitment to civil rights and the commitment in the same chapter of the Belfast (Good Friday) Agreement to incorporate the ECHR, Windsor Framework Article 2 is relevant to this discussion, to the extent that such rights are underpinned by relevant EU measures. Access to legal aid is linked to the EU right to an effective remedy and the effectiveness of

³⁷ These are the Racial Equality Directive (Directive 2000/43/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000); the Employment Equality (Framework) Directive (Directive 2000/78/EC, 'Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000); the Gender Goods and Services Directive (Directive 2004/113/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and services', 13 December 2004) Gender Equality (Employment) Directive (Directive 2006/54/EC, 'Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006); the Self-Employment Equality Directive (Directive 2010/41/EU, 'Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010); and the Equality in Social Security Directive (Directive 79/7/EEC, 'Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.)

³⁸ Article 13, Windsor Framework to the UK-EU Withdrawal Agreement.

³⁹ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity. See also UK Government, 'UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland', (NIO, 2020); *In the matter of an application by Martina Dillon and others for Judicial Review* [2024] NIKB 11, at para 540.

⁴⁰ *In the Matter of an Application by NI Human Rights Commission and Another for Judicial Review* [2024] NIKB 35, at para 70.

⁴¹ *Ibid*, at para 554.

EU law. These inform the interpretation of all EU measures falling within the scope of Windsor Framework Article 2. This briefing therefore provides the Department of Justice with consideration of the general principle of the right to an effective remedy provided for in the EU Charter of Fundamental Rights read with the EU minimum standards outlined below.

2.14 Prior to UK withdrawal, the Court of Justice of the EU (CJEU) had developed the requirement of effectiveness of EU law,⁴² which included effective judicial protection as a general principle.⁴³ The CJEU has consistently identified access to courts and the right to a remedy as essential for the vindication of EU law rights⁴⁴ and also accepted the imposition of reasonable national restrictions.⁴⁵ The NIHRC has identified a range of measures which underpin the rights, safeguards and equality of opportunity part of the Belfast (Good Friday) Agreement.⁴⁶ Where required by the UK-EU Withdrawal Agreement, including Windsor Framework Article 2, the EU Charter of Fundamental Rights continues to have relevance in NI.⁴⁷

2.15 The NIHRC recommends that the Department of Justice should actively consider Windsor Framework Article 2 in the review, development, and implementation of any and all policy on civil legal aid provision in NI.

The Right to an Effective Remedy

2.16 Article 47 of the EU Charter of Fundamental Rights provides for the right to an effective remedy and to a fair trial, which is applicable to proceedings concerning all rights and freedoms derived from EU law. Article 47 of the EU Charter stipulates “legal aid shall be made available to those who lack

⁴² *KME Germany and Others v EU Commission*, Case C- 389/10, 8 December 2011.

⁴³ Paul Craig and Gráinne de Búrca, ‘EU Law – Text, Cases and Materials (7thEd)’ (UK Version) (OUP, 2020), at 272. Article 19, Treaty on EU states “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

⁴⁴ See *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens*, Case 222/86; *Kadi and Al Barakaat International Foundation v Council of the EU and EU Commission*, Joined Cases C-402/05 and C-415/05, 3 September 2008; *R(Mellor) v Secretary of State for Communities and Local Government*, Case C-75/08, 30 April 2009.

⁴⁵ *Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme*, Case C-61/14, 6 October 2015.

⁴⁶ Appendix 1, NI Human Rights Commission and Equality Commission NI, ‘Working Paper: Scope of Article 2(1) of the Ireland/NI Protocol to the Withdrawal Agreement 2020’, (NIHRC and ECNI, 2022).

⁴⁷ *Re Angesom* [2023] NIKB 102; *AT v Secretary of State for Work and Pensions* [2023] ECWA Civ 1307.

sufficient resources in so far as such aid is necessary to ensure effective access to justice". The explanations to Article 47 clarify that, in accordance with the jurisprudence of the ECtHR, provisions should be made for legal aid "where the absence of such aid would make it impossible to ensure an effective remedy".⁴⁸ The CJEU clarified the scope of Article 47 in *DEB v Germany* concluding that the guarantee of the right to effective access to courts may, in certain cases, require the grant of legal aid like the dispensation from advance payment of court fees and/or the assistance of a lawyer.⁴⁹ In addition, the CJEU has recognised that the notion of the equality of arms is a procedural right inherent to Article 47.⁵⁰

2.17 Further to Article 51 of the EU Charter of Fundamental Rights, and related caselaw, its provisions are binding when the state is "implementing EU law", in other words acting "within the material scope of EU law".⁵¹ This means, for example, that disputes in areas of law falling within the scope of the EU measures relevant to the Windsor Framework, must be read in light of the Article 47 right to an effective remedy. This includes measures specified in the Annexes to the Windsor Framework as well as the example provided below in relation to the EU Asylum acquis.

2.18 **The NIHRC recommends that the Department of Justice should make sure that all reviewed, developed and implemented policy in the provision of civil legal aid in NI upholds the right to an effective remedy and a fair trial provided for in Article 47 of the EU Charter of Fundamental Rights and CJEU case law.**

Access to Civil Legal Aid in EU Asylum Acquis

2.19 Prior to UK withdrawal from the EU, the EU Procedures Directive set minimum EU standards for the provision of legal assistance and aid to asylum-seekers.⁵² The EU general principle of effective judicial protection mandates that Member States ensure the objectives of these EU instruments are achieved.

⁴⁸ Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17.

⁴⁹ *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Case C-279/09, 22 December 2010, at para 59.

⁵⁰ *Sanchez Mocillo and Abril García*, C-169/14, 17 July 2014; *Sweden and Others v API and Commission*, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, 21 September 2010, at para 88.

⁵¹ *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55 at para 28.

⁵² Directive 2005/85/EC, 'Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', 1 December 2005.

2.20 Article 10 of the EU Procedures Directive provides for access to interpretation and stipulates that persons seeking asylum should be informed of the decision by the determining authority in a language they can reasonably be expected to understand when they are not assisted or represented by a legal adviser or counsellor, and when free legal assistance is not available.⁵³ Article 15 provides that in the case of the refusal of an asylum application by a determining authority, free legal assistance and/or representation be granted on request subject to certain conditions.⁵⁴

2.21 **The NIHRC also recommends that the Department of Justice considers the EU asylum acquis while reviewing, developing, and implementing policy in the provision of civil legal aid in NI.**

The EU Legal Aid Directive

2.22 The NIHRC is considering the degree to which the EU Legal Aid Directive falls within the scope of Windsor Framework Article 2. Article 3 of the Directive states that “Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.”⁵⁵ The Directive, which bound the UK before EU withdrawal, is focused on cross-border disputes. Before Brexit, an individual could have relied upon the Directive to seek support in respect of a legal dispute in a jurisdiction other than the one in which they reside. Such protection may be of particular value to those with legal connections in other jurisdictions such as frontier workers or EU nationals working or residing in Northern Ireland. The NIHRC is considering whether withdrawal of access to such support would constitute a diminution of rights, contrary to Windsor Framework Article 2.

⁵³ Directive 2005/85/EC, ‘Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, 1 December 2005.

⁵⁴ Free legal assistance and/or representation is restricted only for procedures before a court or tribunal not in the case of appeals or reviews; only to those who lack sufficient resources and only if the appeal or review is likely to succeed (making sure that the appeal is not arbitrarily restricted).

⁵⁵ Directive 2002/8/EC, ‘Directive of the Council the European Council to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes’, 27 January 2003

3.0 General Comments

Effective functioning and sustainability of legal aid services

3.1 In 2024, the UN Human Rights Committee examined the implementation of the International Covenant on Civil and Political Rights in the UK and NI. It recommended that,

The State party should redouble its efforts to improve access to justice through the provision of adequate free legal aid to all persons without sufficient means, especially in cases where the interests of justice so require, in accordance with article 14 (3) (d) of the Covenant, including by increasing the allocation of human and financial resources to ensure the adequate and efficient functioning and sustainability of the Legal Aid Agency.⁵⁶

3.2 In 2022/2023, the Legal Services Agency NI highlighted that the operational landscape continues to be challenging due to the heavy demand for services, while adapting to new ways of working and moving accommodation, amid significant funding pressures.⁵⁷ The Law Society of NI and the Bar of NI advise that existing pressures in the legal aid system are further exacerbated by structural issues.⁵⁸ For instance, the budget for legal aid in NI is fixed and funded through the Department of Justice. Legal professionals highlight a disconnect between the budget arrangements and the demand-led nature of publicly funded legal services.⁵⁹ Increased demand often results in the Legal Services Agency NI having to delay payments of legal aid, compounding existing delays and backlogs in the system, resulting in a highly pressurised workforce.⁶⁰ Concerns were raised that many suppliers do not have the cash flow necessary to continue providing legal aid services, threatening legal aid coverage across NI and impeding the ability of citizens to access local solicitor firms.⁶¹

⁵⁶ CCPR/C/GBR/CO/8. 'UN Human Rights Committee, Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 3 May 2024, at para 49.

⁵⁷ Legal Services Agency NI, 'Annual Report and Accounts 2022-2023' (LSANI, 2023), at 1.

⁵⁸ The Law Society of NI and The Bar of NI, 'Access to Justice Under Threat: A Joint Submission on the Draft NI Executive Budget 2022-25' (LSNI and Bar of NI, 2022); The Law Society of NI and The Bar of NI, 'Written evidence submitted by The Law Society of NI and The Bar of NI, relating to the funding of public services in NI' (LSNI and Bar of NI, 2023).

⁵⁹ The Law Society of NI and The Bar of NI, 'Written evidence submitted by The Law Society of NI and The Bar of NI, relating to the funding of public services in NI' (LSNI and Bar of NI, 2023), at 7-9.

⁶⁰ The Law Society of NI and The Bar of NI, 'Access to Justice Under Threat: A Joint Submission on the Draft NI Executive Budget 2022-25' (LSNI and Bar of NI, 2022), at 3-4.

⁶¹ The Law Society of NI and The Bar of NI, 'Written evidence submitted by The Law Society of NI and The Bar of NI, relating to the funding of public services in NI' (LSNI and Bar of NI, 2023), at 7-9.

- 3.3 The delivery of effective legal aid requires proper geographical distribution of legal aid providers, including in remote areas.⁶² Therefore, the NIHRC is concerned by the warnings that the availability of services across NI could be impacted if no changes are made. In fact, the NIHRC is already aware of concerns regarding the low number of specialist immigration solicitors,⁶³ particularly outside Belfast,⁶⁴ which is affecting the availability of immigration legal services.⁶⁵ It is hoped that both the fundamental review of criminal legal aid and the holistic review of civil legal aid provision will ensure an adequate supply of suitable advice in all subject matters across NI.
- 3.4 In addition, the NIHRC reiterates the importance of ensuring the sustainability of legal aid provision. This refers not only to ensuring an appropriate level of remuneration for legal providers,⁶⁶ but to ensuring that the structure and processes for legal aid provision do not discourage solicitor practices from taking on legal aid work, which could lead to people being denied legal aid in practice.⁶⁷
- 3.5 **The NIHRC recommends that the Department of Justice takes all effective measures to improve access to justice through the provision of adequate free legal aid to all persons without sufficient means, including by increasing the allocation of human and financial resources to ensure the adequate and efficient functioning and sustainability of the Legal Services Agency NI.**

⁶² CM(2021)36-add2final, 'Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law', 31 March 2021, at para 20.

⁶³ There are 14 lawyers on the Law Society of NI's Directory of Solicitors that provide advice in relation to immigration and asylum in NI. See: Law Society of NI, 'Immigration Practitioners' List – Law Society of NI'. Available at: <https://www.lawsoc-ni.org/immigration-practitioners-list-law-society-of-northern-ireland>.

⁶⁴ Meeting between NI Human Rights Commission and the Law Centre NI, 27 November 2023; Law Centre NI, 'Refugee and Asylum Forum Priorities for Action 2023' (LCNI, 2023), at 28; Migrant Centre NI, 'Submission to the UK Parliament NI Affairs Committee's Call for Evidence on "The Experience of Minority Ethnic and Migrant People in Northern Ireland"' (UK Parliament, 2021).

⁶⁵ Law Society of NI, 'Immigration Practitioners' List – Law Society of NI'. Available at: <https://www.lawsoc-ni.org/immigration-practitioners-list-law-society-of-northern-ireland>; Meeting between NI Human Rights Commission and the Law Centre NI, 27 November 2023; Law Centre NI, 'Refugee and Asylum Forum Priorities for Action 2023' (LCNI, 2023), at 28; Migrant Centre NI, 'Submission to the UK Parliament NI Affairs Committee's Call for Evidence on "The Experience of Minority Ethnic and Migrant People in Northern Ireland"' (UK Parliament, 2021).

⁶⁶ CM(2021)36-add2final, 'Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law', 31 March 2021, at para 22.

⁶⁷ Julian O'Neill, 'Legal aid: Lawyer strike disrupts NI courts', BBC News NI, 17 November 2023.

Understanding and addressing barriers

- 3.6 The ECtHR has confirmed that the right of access to a court must be “practical and effective” and an individual must “have a clear, practical opportunity to challenge an act that is an interference with his rights”.⁶⁸ For instance, the rules governing the steps to be taken and the time-limits to be complied with should not prevent or limit an individual’s possibility of applying to a court.⁶⁹ Similarly, jurisprudence from international treaty bodies emphasises the importance of ensuring legal aid systems are accessible and responsive to the needs of all individuals who may require them. For instance, the UN CRC Committee,⁷⁰ the UN CRPD Committee,⁷¹ and the UN CEDAW Committee⁷² have made specific recommendations for the UK and NI in relation to the removal of barriers faced by children, women and people with disabilities. This includes ensuring “the provision of procedural and age-appropriate accommodations”.⁷³
- 3.7 The NIHRC emphasises the importance of ensuring that any changes to legal aid provision must have due regard for removing or minimising barriers experienced by people with additional needs or who may experience social or economic exclusion. Recent research has identified barriers for accessing justice are prominent for litigants in person⁷⁴ and persons with disabilities, particularly deaf people.⁷⁵ In addition, the Criminal Justice Inspection NI highlighted that older people need to be better supported to participate in the criminal justice system.⁷⁶ The CoE Committee of Ministers Guidelines suggest ways to facilitate access to legal aid services, particularly for vulnerable people, such as awareness-raising

⁶⁸ *Bellet v. France* [1995] ECHR 53, at para 38.

⁶⁹ European Court of Human Rights, ‘Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)’ (ECtHR, 2013).

⁷⁰ CRC/C/GBR/CO/6-7, ‘UN CRPD Committee Concluding observations on the combined sixth and seventh reports of the United Kingdom of Great Britain and Northern Ireland’, 2 June 2023, at para 17.

⁷¹ CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017, at para 33.

⁷² CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 24.

⁷³ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 24.

⁷⁴ Gráinne McKeever, Lucy Royal-Dawson, Eleanor Kirk and John McCord, ‘Litigants in Person in NI: Barriers to Legal Participation’ (UU, NIHRC and Nuffield Foundation, 2018).

⁷⁵ Bronagh Byrne, Brent Elder, Michael Schwartz, ‘Enhancing Deaf People’s Access to Justice in Northern Ireland: Implementing Article 13 of the UN Convention on the Rights of Persons with Disabilities’ (SJDR, 2021); Department for Communities, ‘Disability Strategy Expert Advisory Panel: Report and Recommendations’ (DfC, 2020), at para 5.6; CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017, at para 33.

⁷⁶ Criminal Justice Inspection NI, ‘An Inspection of the Criminal Justice System’s Approach to Vulnerable Older People in NI’ (CJINI, 2023).

events for target groups, mobile teams, community law centres or pop-up advice centres.⁷⁷

- 3.8 As the Department of Justice has identified, there are gaps in data collection in relation to legal aid provision and no mechanism for gathering and analysing section 75 data.⁷⁸ The NIHRC welcomes that the current call for evidence aims to improve the Department’s understanding of the current system and thereby mitigate any adverse impact in its resulting proposals for reform. However, the NIHRC underlines the critical importance of establishing data collection mechanisms and embedding continuous monitoring going forward.
- 3.9 The UN Principles and Guidelines advise States to continuously track, monitor and evaluate the provision of legal aid by introducing measures to “conduct regular research and collection of data disaggregated by the gender, age, socioeconomic status and geographical distribution of legal aid recipients and to publish the findings”.⁷⁹ The CoE Committee of Ministers Guidelines advise States to “consider using tools to collect data on legal aid systems, which may include surveys, focus groups, complaints mechanisms, lawyer self-assessments and case-management systems”.⁸⁰
- 3.10 Beyond the structural or procedural accommodations that will ensure the effective delivery of legal aid, the NIHRC emphasises that any justiciable problems disproportionately faced by marginalised people in NI should be included within the scope of civil legal aid. For instance, the UN CEDAW Committee recommended that the UK and NI “ensure that women have access to legal aid in areas that affect them the most, such as family, housing, immigration and welfare benefits law”.⁸¹ The Department identifies “cuts to the scope of legal aid” as one of the ways to make savings within its budget.⁸² The NIHRC has serious concerns about any

⁷⁷ CM(2021)36-add2final, ‘Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’, 31 March 2021, at para 20.

⁷⁸ Department of Justice, ‘Foundational Review of Civil Legal Services Call for Evidence for Civil Society’ (DoJ, 2024), at 25.

⁷⁹ A/RES/67/187, ‘UN General Assembly Resolution 67/187, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems’, 28 March 2013, at para 74.

⁸⁰ CM(2021)36-add2final, ‘Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’, 31 March 2021, at para 26.

⁸¹ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 24.

⁸² Department of Justice, ‘Foundational Review of Civil Legal Services Call for Evidence for Legal Practitioners (Judiciary, Solicitors (in private and public practice), Barristers)’ (DoJ, 2024), at 14.

potential exclusions of specific areas from the scope of civil legal aid. Any consideration of a system of restricted scope would have to be carefully assessed against the Department’s human rights obligations.

- 3.11 **The NIHRC recommends that the Department of Justice ensures that the provision and scope of civil legal aid in NI is accessible and responsive to the needs of every individual who may require it. This includes specific protection and assistance for people with additional needs or who may experience social or economic exclusion.**
- 3.12 **The NIHRC recommends that the Department of Justice continuously collects, monitors and evaluates disaggregated data of legal aid recipients in order to understand the legal needs of the population. This includes employing a variety of data collection tools to ensure data is of appropriate quality and publishing the findings to ensure transparency.**

Holistic approach to legal aid services

- 3.13 UN treaty monitoring bodies have recommended “expanding the types of support provided under the legal aid budget”⁸³ and ensuring that systems are accessible and responsive “at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes”.⁸⁴ Therefore, the NIHRC welcomes that the current review is intended to be a holistic review of civil legal aid provision in NI.⁸⁵ The NIHRC would encourage the development of effective early intervention approaches that could ultimately avoid escalation of problems that could otherwise become unmanageable.
- 3.14 The CoE Committee of Ministers Guidelines encourage the use of early intervention mechanisms and techniques to help resolve legal disputes

⁸³ CRC/C/GBR/CO/6-7, ‘UN CRPD Committee Concluding observations on the combined sixth and seventh reports of the United Kingdom of Great Britain and Northern Ireland’, 2 June 2023, at para 17.

⁸⁴ CEDAW/C/GC/33, ‘UN CEDAW Committee, General Recommendation No. 33 on women’s access to justice’, 3 August 2015, at para 37.

⁸⁵ Department of Justice, ‘Review of Civil Legal Aid – Call for Evidence’. Available at: [Review of Civil Legal Aid – Call for Evidence | Department of Justice \(justice-ni.gov.uk\)](#)

quickly and alleviate financial demands on the legal aid scheme.⁸⁶ It recommends that consideration should be given to the following:

- making widely available, and easily accessible for everyone, information on law and the legal system and, in particular, on legal rights, obligations and remedies;
- providing the public with easy access to legal advice and assistance through integrated and/or holistic public services (for example, “one-stop shops”) in areas such as social policy, health, housing, employment and education;
- supporting access to information on legal rights, obligations and remedies through integrated and interactive information technology solutions.⁸⁷

3.15 The Committee of Ministers Explanatory Memorandum contains a number of best practice examples emerging from Member States.⁸⁸ For example, in Poland, information on legal aid is disseminated by post, especially to older adults or people with disabilities.⁸⁹ In the Netherlands, the *Rechtwijzer* (“conflict resolution guide” or “interactive platform to justice”) provides an example of interactive information technology solutions relating to the provision of legal information.⁹⁰ The Committee of Ministers reports,

It is run by a joint committee with the support of a number of stakeholders, including the bar association. This website provides legal assistance by means of a “decision tree”, which helps individuals to find solutions to their legal problems in an interactive manner. The website also refers users to an appropriate expert or organisation if necessary. An additional important feature of this website is an online platform which allows people to settle legal conflicts through negotiations with another party to the conflict with the involvement of an impartial third party in an

⁸⁶ CM(2021)36-add2final, ‘Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’, 31 March 2021, at para 5.

⁸⁷ CM(2021)36-add2final, ‘Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’, 31 March 2021, at para 6.

⁸⁸ Council of Europe, ‘Explanatory Memorandum: Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’ (CoE, 2021).

⁸⁹ Council of Europe, ‘Explanatory Memorandum: Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’ (CoE, 2021), at para 9.

⁹⁰ Council of Europe, ‘Explanatory Memorandum: Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’ (CoE, 2021), at para 10.

online “trialogue”. In particular, this type of assistance is provided in divorce cases.⁹¹

- 3.16 **The NIHRC recommends that the Department of Justice ensures early intervention mechanisms and techniques are effectively used and adequately resourced to ensure the accessible and timely legal advice and assistance to every individual who may require it.**

⁹¹ Council of Europe, ‘Explanatory Memorandum: Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law’ (CoE, 2021), at para 10.

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