



THE BAR  
OF IRELAND

*The Law Library*

BARRA NA HÉIREANN

*An Leabharlann Dlí*

Submission to the Joint Committee on Justice on the

# General Scheme of the Criminal Justice (Legal Aid) Bill 2023

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## Introduction

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,159 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advice of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

## Scope of submission

The Joint Committee on Justice has invited the Council to make a written submission on the General Scheme of the Criminal Justice (Legal Aid) Bill (the “General Scheme”). The Council welcomes this opportunity and sets out its observations on a head by head basis.

Before commenting on the General Scheme, the Council would like to highlight from the outset, two general observations of importance:

1. The right to legal aid is an aspect of the fundamental rights of the citizen, necessary to ensure the protection and vindication of the right to a fair trial and of those rights, including the right to one’s good name and the right to liberty, which are always at stake in the criminal trial process. The current criminal legal aid system, while always capable of improvement, is both effective and economical in achieving these aims.
2. There is an important public interest in the efficient and timely operation of the criminal justice system. Delay of any sort is contrary to that public interest and invidious to the interests of justice and to the protection of the personal rights of all parties involved (whether victims, accused or witnesses). The operation of the current criminal legal aid system does not cause any significant delay in the criminal justice system.

As it currently stands, the criminal legal aid system is effective, economical and consistent with the efficient operation of the criminal justice system in a manner in line with interests of all parties involved. New legislation on the subject of criminal legal aid must take caution to avoid amending a system that is not broken which may lead to doing more harm than good in the process.

The Council made a submission to the Department of Justice in November 2022 that set out some preliminary observations in respect of a previous Draft General Scheme of the Criminal

Justice (Legal Aid) Bill, following a meeting with the Department held on 21<sup>st</sup> October 2022. Many of the Council's preliminary observations and recommendations persist, and it is clear from the current General Scheme there are areas of importance within the Scheme where legislative proposals remain to be finalised.

Finally, it is important to note barristers are being treated differently to other actors involved in the administration of criminal justice in relation to fee restoration. Since July 2018, the Council has been asking the Government to implement the outcome of a detailed review process led by the Office of the Director of Public Prosecutions in conjunction with the Department of Justice and sanctioned by the Department of Public Expenditure & Reform.

Unfortunately, despite repeated attempts by the Council, along with the support of the Minister for Justice and the Office of the DPP, over several years in our call for the restoration of professional fees, there has been no meaningful engagement on the issue and the Council can only conclude that the Government has no intention of responding to our request to be treated fairly and reasonably, consistent with the approach taken in relation to other groups of workers and independent contractors where the State is the paymaster. The Council has been left with no option but to recommend to our members an initial one-day withdrawal of their professional services in pursuit of a meaningful, independent mechanism to determine the fees payable to barristers by the Director of Public Prosecutions and under the Criminal Justice (Legal Aid) scheme. This withdrawal of services will occur on Tuesday, 3<sup>rd</sup> October 2023. The Council greatly regrets having to pursue this course of action and is acutely conscious that the disruption that will inevitably occur will impact on victims of crime, those accused of criminal offences, juries and other stakeholders involved in the administration of criminal justice. The flexibility delivered by barristers, and their cooperation with reform of the criminal justice system over the past decade, as acknowledged and accepted by both the Department of Justice and the Office of the DPP, have enabled a range of improvements and efficiencies to be implemented for the benefit of all stakeholders. The Bar has not been found wanting in that respect. It is now clear, regrettably, that the goodwill of our members is being taken for granted.

## Observations on Part 1 of the General Scheme

### Head 4: Advances to the Board

1. In regard to the transfer of responsibility of criminal legal aid to the Legal Aid Board, it would be beneficial to the Council to better understand its intended consequences and what measures will be put in place to ensure sufficiency of the criminal legal aid budget. As referenced in the Council's preliminary observations on the General Scheme [insert link], it would be of assistance to receive further information in respect of how standards of efficiency and service to users will be maintained, especially during the transitional period and upon full implementation.
2. In the event where the Legal Aid Board oversees both criminal and civil legal aid, the Council seeks confirmation that the legislation will protect ring fenced funding specifically for the criminal legal aid budget.
3. The Council recommends Head 4 or Head 5 to explicitly outline the need for parity of representation between the prosecution and the defence.

### Head 6: Repeal

4. As mentioned in our preliminary observations, the Council would request further information in respect to any proposal to consolidate various provisions for different types of legal aid certificates.

### Head 7: Regulations

5. As currently written, Head 7 permits the Minister to "*make regulations for carrying this Act into effect including in relation to any matter referred to in this Act as prescribed or to be specified*". Clarification as to the necessity for particularised powers to create regulations and what regulations the Minister intends to implement would be of assistance to the Council. Specifically, further information on the justification for measures in Head 7(1)(iii) to (xi) would be beneficial.
6. The Council expresses a significant concern in Head 7 referencing the following text: "*The circumstances in which fees may or may not be paid, the terms and conditions under which different fees and expenses may be paid and how the rates of fees are structured in specified circumstances*". This could be interpreted as granting authority to restrict compensation for legitimate expenses accrued during preparation and

execution of an accused person's defence. Further clarification as to the intention of this measure would be of assistance.

## Head 9: Transitional

7. As mentioned in the Council's preliminary observations in November 2022, it is suggested that comprehensive provision for transitional measures should include provision for the recent administrative mechanism for payment of fees for review of significant disclosure.

## Observations on Part 2 of the General Scheme

### Head 10: Persons subject to proceedings ("specified person")

8. Regarding Head 10, the Council welcomes the inclusion of measure 10(vii): "*A person the subject of another proceeding of a criminal nature*", broadening the list of specified persons. The Council would appreciate additional information on whether this amendment permits the inclusion of persons subject to quasi-criminal and ancillary proceedings. This would reflect the European Convention jurisprudence and the application of Article 6 rights. Article 6 protection extends more widely than matters traditionally considered as involving the exercise of strictly criminal jurisdiction in the Irish legal system.
9. The Council seeks further information as to the rationale for the current provision of categories of a "specified person" within Head 10. Further clarification of the meaning of "*relevant proceedings*" mentioned in 10(vi) would also be beneficial.
10. The Council would also suggest Head 10 specifies legal aid for persons charged before the Special Criminal Court in the event they are not persons who have "returned for trial" as mentioned in measure 10(iii).

### Head 11: Court to inform of legal aid

11. In respect of Head 11(2) which states "*a trial*" of a matter should not continue in the absence of legal representation where a certificate has been accepted, the Council has significant concerns. A literal interpretation of this provision has the potential to legally compel a defendant to elect trial or plead guilty without the advantage of legal counsel. It is submitted that greater protection should be afforded to an accused person who has been granted legal representation to include a principle that

proceedings should not progress in any substantive or meaningful way until the accused has legal representation.

12. In addition, the Council has concerns that a new process for reviewing legal aid applications in the General Scheme could possibly result in setbacks and inefficiencies in advancing proceedings if legal aid applications are not processed promptly. A new procedure has the potential to cause significant delays and may be counterproductive for the General Scheme, therefore more information regarding administrative plans to support the General Scheme would be of assistance.
13. It should also be noted that if delays do occur from the result of new procedures set out by the General Scheme, it would be mandatory that Head 11(2) is extended to persons whose application for a legal aid certificate has not yet received a final decision.
14. The Council would suggest that further consideration is given to Head 12 in that it does not explicitly provide for circumstances where a defendant decides to discharge legal counsel near the trial date.

## Head 12: Application for Criminal Legal Aid

15. The Council welcomes changes to the provision within Head 12(3) which has been amended to provide clarity in respect of the requirement for a specified person (or a person nominated on his or her behalf) to make an application for Criminal Legal Aid *“at the commencement of the proceedings or at another time in the proceedings having regard to the interests of justice”*.
16. The Council continues to encourage the inclusion of a provision for an application for Criminal Legal Aid in respect of a person who lacks capacity (for example by a mental disorder).
17. Consistent with the observations made in Head 11, the Council would benefit from additional information as to how legal aid applications are to be processed and requests a timeframe for consideration of such applications.
18. As stated by the Council in preliminary observations *[insert link]* made regarding the General Scheme in 2022:

*“[The Council] is mindful that specified persons who have not received station bail, for example, will be brought to Court in custody in respect of their first appearance.*



*Head 12(2) requires that the specified person makes an application for legal aid in writing or in an online / electronic form. The practicality of such a person being able to make an application in writing or in online / electronic form requires further consideration.”*

19. The above observation remains relevant for the purpose of this submission and the Council would welcome additional review of Head 12(2). In addition, the necessity for a specified person to submit an application in writing may also prove to be difficult for persons with a disability or in the event of an individual is a non-native speaker or for those with literacy problems. The Council suggests the inclusion of a provision for these circumstances.

## Head 14 and 15: Regulations to provide for Statement of Financial Circumstances and power of court to grant or refuse legal aid

20. In Heads 14 and 15, significant issues arise and require further detailed review by the Council. The Council appreciates there is a balance to be met between the clarification of financial circumstances of an accused person and the public interest in the administration of justice. As stated in the introduction of this submission, the current preparation and consideration of applications for legal aid will only in extremely rare cases result in added delay to the criminal justice system.
21. The process of legal aid applications detailed in Heads 12-15 is notably more complicated than the current system in place. It can be predicted that very lengthy setbacks will result in criminal proceedings in the event where a person is delayed in obtaining necessary legal aid and advice, specifically in the instance where a referral is made by a Court to the Legal Aid Board in line with Head 15(4). It would be unfair and partisan to allow the prosecution to continue in any significant way before legal aid is finalised. Therefore, the Council suggests clear timelines for the makings of decisions by the Legal Aid Board be considered.
22. In addition, the requirements for courts to provide reasons in writing to applicants as to why their legal aid application was refused or denied under Head 15(10) could also add to delays.
23. The specific details and requirements of the application process and required information to provide in an application is not generally an area upon which the experience of the Bar would allow us to provide detailed information. Therefore, we defer to views of experienced criminal defence solicitors. Despite this, it would helpful

for clarity to be provided on the purpose of the “specified threshold” measure under Head 14(4). In particular, additional information as to the nature and application of the threshold would be of assistance and whether the “specified threshold” will be a standard, specific amount and if the complexity or difficulty of the case will be taken into consideration in assessing thresholds.

## Head 16: Refusal of Legal Aid: Further Provisions

24. As submitted in our preliminary observations of the General Scheme in 2022, the proposal to review a decision of the court to refuse criminal legal aid on the financial ground provided for in Head 16 could be problematic. It seems to be intended that the Court which made the decision will have the sole responsibility for deciding whether that decision is to be considered by the Legal Aid Board. The Council's concerns lie in the constitutionality of the provision as the General Scheme does not state grounds upon which a court's refusal to review may be based.
25. A review process involving an appeal from a decision of a court to the Legal Aid Board is both unusual and questionable. The Council would suggest instead a measure requiring a court to refer an application to the Legal Aid Board in the event where a court is considering refusing legal aid on financial ground.

## Head 17: Interests of Justice

26. The Council requests clarification of the meaning of Head 7(1)(a) where it states: “the nature of the defence if any that may have been set up”. It should be stressed that the process of applying for legal aid must not serve as a pretext for infringing upon established rights of the defence and this must be clearly stated in the law. Further, there does not appear to be any relevancy between the nature of a defence and entitlement to legal aid.
27. The UK Criminal Legal Aid Regulations 2013 assumes the interest of justice requirement is met in various cases, including those which fall within the General Scheme. The provisions in Head 17 is in stark contrast to this and the Council suggests that certain matters, such as trials on indictment and proceedings in the Superior Courts, where the legislation should acknowledge the obvious reality that the interests of justice test will always be met.
28. As it is currently drafted, the General Scheme indicates a reservation to trust in the judgement of the courts, contrary to the 2013 Regulations which show a willingness

to leave the question of what is in the interests of justice to the court without additional clarification. The Council would strongly encourage the General Scheme to acknowledge that a decision as to what is in the interest of justice will exclusively be a matter for the courts established under and in line with the Constitution.

## Heads 18 and 19: Grant of a legal aid certificate

29. The Council maintains its concerns in respect to several provisions in Heads 18 and 19 from its preliminary observations in 2022. The consequence of Heads 18 and 19 as they currently stand would significantly reduce an accused person's right to representation by solicitor and counsel in respect of serious offences. The Council would be concerned by such measures as there is no reason for the abolition or reduction of rights or the restriction of access to legal representation by solicitor and counsel detailed in the explanatory note accompanying the General Scheme.
30. It is noted that the Department provided assurance to the Council, during a meeting convened by the Department on 21 October 2022, that it did not intend to make any substantive changes to the right to criminal legal aid. Based on this reassurance, Heads 18 and 19 will require amendment.
31. Regarding Head 18, the interests of justice in having a solicitor *and* counsel assigned to a case is apparent in nearly every offence which is prosecuted on indictment. In such a situation, provisions 19(4) and (5) significantly impede on the right of an accused person to be granted the services of solicitor and counsel and would result in a significant and unintended amendment of Section 3 of the Criminal Justice (Legal Aid) Act 1962.
32. As currently written, Head 19(6) could potentially erode the established right to two counsel in the case of a trial on indictment in the Central Criminal Court. Again, the Council has received reassurance from the Department that it does not intend to make such a change in the General Scheme.
33. It should be noted with considerable care the references to exceptionality (whether exceptional gravity or exceptional difficulty) when determining if the accused has the right to counsel. Such analysis is appropriate in cases prosecuted in the District Court, where it might be legitimately observed, as in the decision of the Supreme Court in *Carmody*, that "solicitors are professionally well qualified to represent and conduct defences" in most cases. On the other hand, in indictment cases, there is a routine complexity involved that requires the right to both solicitor *and* counsel to

warrant the right to a fair trial. This right properly extends to the right to a solicitor and two counsel in the cases of trial on indictment in the Central Criminal Court and the Special Criminal Court. Under particular circumstances, such as the complexity and volume of material, the right to more than two counsel is justified. Similar considerations apply generally to quasi-criminal and ancillary proceedings heard by the Superior Courts. These actualities must be recognised in the General Scheme.

## Head 20: Objection to grant of legal aid

34. In the circumstance where a person is in possession of or has access to illicit funds, those resources cannot be used to obtain legal aid. Objection to legal aid in these situations is in some ways futile because such funds, although appearing to be available, cannot be used for the purpose of securing legal representation due to anti-money-laundering obligations of legal professionals. In such a situation, once it is understood that the funds represent the proceeds of crime and cannot be used to secure legal aid, objecting to the grant of legal aid services will only delay or obstruct the course of the prosecution. The Council would encourage further consideration to such situations as to eliminate potential delays and obstruction to legal proceedings.
35. This suggestion is by no means implying that the possession of illicit funds should be ignored. A statutory scheme is available to freeze and recover the proceeds of crime and should be pursued if there is evidence to support it. It is important to note that an application for legal aid should not be used as parallel means for securing the identification and recovery of the proceeds of crime.

## Head 21 to 24: Referral to Board etc.

36. In its current draft, it appears the General Scheme intends that the Legal Aid Board will remain responsible in full for fees and costs of legal practitioners. The Council welcomes the confirmation of this position which was provided by the Department in the meeting convened by the Department on 21 October 2022. This means that the Scheme must operate on the basis that the contribution is paid for and recovered by the Legal Aid Board. This is independent of the entitlement to payment of solicitors and counsel pursuant to the grant of a legal aid certificate. Any other procedure to the Scheme would be unfeasible.
37. Noting this, the General Scheme should consider explicitly stating that the contribution mechanism must not disrupt the availability of legal aid. If this is not

clearly stated, an accused person could intentionally disrupt the process of a criminal prosecution by delaying in making contribution payments.

38. In order to avoid delays and ensure efficient progress of proceedings, the Council recommends the implementation of a time limit for the conduct of a means assessment by the Legal Aid Board in accordance with Head 22.

## Head 25: Further determination by court on recommendation of Board

39. Preservation of the right of payment to solicitors and counsel for work done prior to amendment is outlined in Head 25(3) under the current scheme. However, the Council suggests it creates an impression that withdrawal or amendment of a legal aid certificate may result from a failure to contribute, with the intended consequence that the assigned solicitor or counsel will not be paid for work done after that time. This would effectively give the accused a reason to delaying on the trial by refusing to pay a contribution. The Council welcomes the Department's confirmation, given at the meeting on the 21st October 2022, that this is not intended and, accordingly, this Head will require revision to reflect the stated intention.
40. A different approach could involve standard payment under the Scheme, followed by collection of the contribution as a debt owed to the Legal Aid Board. Not only would this model give certainty for solicitors and counsel working under the scheme, but it would also be in line with the Department's intention and in accordance with the operation of the criminal justice system. It is important to consider that a significant amount of work is completed by counsel in case preparation but before a brief fee is officially payable. It would be unjust to withdraw or amend a certificate for legal aid after extensive preparatory work is completed but before a brief fee is payable. The Counsel urges the revision of the terms of Head 25 with this situation in mind.

## Head 26: Refusal of certificate (appeal and case stated)

41. S.4(1) of the Criminal Justice (Legal Aid) Act of 1961 appears to have been amended by effect of Head 26(1)(b)(ii) as it appears the automatic right to counsel before the Court has been removed. In its current form, the provision would represent a substantial reduction in the accused person's right to legal aid compared to the 1962 Act. Concerns previously outlined in Heads 18 and 19 are equally applicable in this provision. Again, the Council welcomes the Department's confirmation that this is not the intended effect of the General Scheme, which will require revision accordingly.

## Head 27 and 28: Custody aid and custody legal aid

42. Although it is recognised that the Legal Aid Custody Issues Scheme and / or the Attorney General's Scheme have operated previously on a non-statutory basis, the Council suggests that if they are to be put on a statutory basis, they should function like the general legal aid system. It is argued there is no fundamental difference justifying the implementation of separate systems. Specifically, it is irrelevant whether a legal issue from a criminal proceeding is raised by way of case stated or judicial review from the perspective of the need for legal representation. For this reason, the Council believes the General Scheme is an opportunity to create a process for clearly determining at the beginning of relevant proceedings, what a person's entitlement is to legal aid (if any) and is aware of the judgement of Baker J. in *O'Shea v. The Legal Aid Board* in that regard. Further, the Council will draw attention again to similar observations made under Head 10.

## Head 29: Expert witnesses and other fees

43. The Council requests further information and justification of the intended purpose and function of the Criminal Legal Aid (Expert Witnesses) Committee. It would be of the Council's understanding that the question as to whether an expert or witness is necessary for the preparation of the defence or other proceedings is not a matter for the Legal Aid Board to decide. The rationale for this provision is unknown and further information on this would be beneficial.

## Observations on Part 4 of the General Scheme

### Head 34: Restrictions of rights and obligations under Data Protection Regulation

44. As previously stated in the Council's initial observation to the General Scheme, Head 34 is vague and remains to be viewed as a work in progress. The Council reiterates its suggestion that given the importance of the issues arising and the extent of the financial information required to be provided in support of a legal aid application, that a much greater degree of detail and clarity as to the intended effect is required.

## Observations on Part 5 of the General Scheme

### Head 37: Amendment to Act of 1995

45. Current arrangements for the payment and administration of criminal legal aid claims are relatively reliable, efficient and operate in an orderly manner. The Council will echo its previous comments that a proposal to transfer those functions to another State agency is not an idea the Council would have a particular view on, other than to ensure that the agency in question is properly resourced, financially and technically, with regard to human resources. This will establish a similar level of timeliness and reliability in the performance of the transferred operations. If such a transfer of functions is not supported with necessary resources, there is a significant risk of delays arising in the prosecution of offences.
46. The Council notes an alternative to transferring the function of the criminal legal aid scheme to the Legal Aid Board would be to simply improve existing standards of administration within the Department. This is particularly relevant when improving and / or implementing audit recommendations. Rather than implement new audit recommendations under the General Scheme, a simpler approach would be to improve and repair existing Department standards to allow for appropriate audit requirements to be met. An explanation as to why such a simpler alternative not be adopted would be appreciated by the Council.

## Observations on Part 6 of the General Scheme

### Head 38: Functions of Board: Criminal legal aid

47. Further to the submissions made above in the Introduction and regarding Heads 11, 14 & 15, 20, 21-24, 25 and 37, the Council is concerned as to the efficient functioning of the criminal justice system and the functions of the Legal Aid Board should encompass the administration of criminal legal aid in such a manner so as to ensure the efficient and expeditious functioning of the criminal justice system.

### Head 39: Criminal Legal Aid Oversight Committee

48. The inclusion of a representative of The Bar of Ireland on the Oversight Committee is welcomed. The Council observes that such a representative would be essential to the

## Observations on Part 7 of the General Scheme

### Head 41: Counsel providing services under the Act

49. The Council acknowledges and welcomes the amendment at Head 41 with “counsels” replaced by “counsel”.

### Head 43: Time limit for submission of payment claims

50. The Council is requesting justification for the 6-month time limit in respect to solicitors and counsel filing claims for payment following the conclusion of a legal aid proceeding. More information as to why this limitation exists and why the ordinary limitation period should not apply would be beneficial to the Council.

### Head 44: Payment claims and tax compliance

51. Insofar as the Council is aware, Tax Clearance Certificates are no longer issued by the revenue commissioners and the Bill should reflect the current practice, which is that the revenue commissioners provide counsel with a Tax Clearance Status Access No and the payor (currently the Department of Justice, but obviously the Legal Aid Board in the context of the General Scheme) then logs on to the revenue commissioners’ website to ascertain counsels’ tax clearance status.
52. Further, the Council is not aware of the requirement for the making of a statutory declaration as applying to any other professionals paid by the State for services rendered (for example, doctors, dentists, pharmacists etc) and the Council is unclear as to the rationale underpinning this requirement. In the absence of a clear and cogent rationale, it is suggested that the requirement is excessive and should not be incorporated in the Bill. Lastly, Head 44 refers to a ‘section 25’, but there is no section 25 in the General Scheme and the Council seeks clarity in relation to this reference.

## Observations on Part 9 of the General Scheme

### Head 46: Representation in matters concerning proceeds of crime and other matters

53. Parallel to our observations regarding the Legal Aid Custody Issues Scheme and / or the Attorney General’s Scheme outlined in Head 27 and 28, the Council recommends placing the Proceeds of Crime Scheme on a statutory footing under the General



Scheme rather than having a separate ad-hoc system. The recommendations made in Head 10 are again repeated in this provision.

## Observations on Part 10 of the General Scheme

### Head 47: Advice to Victims of Sexual Offences

54. The *Criminal Justice (Sexual Offences and Human Trafficking) Bill* submitted a measure re-defining “sexual assault offence” and it is possible this definition can be applied in this context. While it is commendable that State-funded legal advice for crime victims has been expanded, it is reasonable to ask whether there is justification for not extending the General Scheme to encompass all victims of serious personal offenses. More information on the possibility to extend the scheme would be appreciated by the Council.

## Conclusion

The Council appreciates the invitation to make this written submission to the Oireachtas Joint Committee on Justice and welcomes continued engagement in respect of the Bill. The Council furthermore remains available to the Joint Committee should it have any queries or requests for clarification in relation to any aspect of its submission.



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