IBA Guidelines on Legal Aid Principles on Civil, Administrative and Family Justice Systems and its Commentary

Prepared by the IBA Access to Justice and Legal Aid Committee and the Bar Issues Commission

Approved on 25 May 2019 by the Council of the International Bar Association

the global voice of the legal profession®

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1 Introduction

Since 1991, the IBA has recognised that legal aid is an essential element of access to justice, which is, itself, a universal human right:

- in 1991 it adopted a resolution affirming that the interests of justice required that no-one should be prejudiced by lack of means from receiving legal advice or preparing a case;
- in 1996 it resolved that 'the IBA reaffirms its commitment to the principle that access to justice for all individuals is a human right which requires the provision by all countries of effective legal aid programmes funded by the state'; and
- in its pro bono declaration in 2008 it asserted that 'access to justice is essential to liberty, fairness, dignity, progress, development and the Rule of Law' and 'that access to justice for all individuals is a human right'.

This guidance has been endorsed by IBA Section on Public and Professional Interest and Bar Issues Commission.

In 2012, the UN General Assembly adopted Resolution 67/187 on the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Principles and Guidelines on Criminal Legal Aid'). That Resolution recognised that legal aid is 'an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law'.[1]

This document starts from the position that legal aid is also an essential element in a fair, humane and efficient civil, administrative and family justice system that is based on the rule of law and focuses on access to legal aid in civil, administrative and family justice systems.

1 UN General Assembly Resolution 67/187 on the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012), at p 2, available at www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf, accessed 27 June 2018.

It is in the spirit of UN Resolution 67/187 and the recognition therein that legal aid is 'an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process'.[2] The Resolution also recognises that the UN Principles and Guidelines on Criminal Legal Aid 'can be applied by Member States, taking into account the great variety of legal systems and socioeconomic conditions in the world'.[3]

It is also a response to the UN Sustainable Development Goal 16 to:

- promote inclusive and peaceful societies for sustainable development;
- provide access to justice for all; and
- build effective, accountable and inclusive institutions at all levels.

2 Principle 1 of the UN Principles and Guidelines on Criminal Legal Aid.

3 UN General Assembly Resolution 67/187 at p 3.

2 Executive Summary

We have set out 27 principles under the headings of:

- Funding, Scope and Eligibility
- The Administration of Legal Aid
- The Provision of Legal Aid

We deal with such topics as the matters to be considered when setting a legal aid budget; the relationship between those administering legal aid and their government; how to avoid corruption and favouritism; how decisions should be made on who should be allowed to do legal aid work and how cases should be allocated to them; and how to calculate how much legal aid providers should be paid.

We drew up the principles with the help of legal aid experts from around the world, who came together for a round table discussion in Belfast in May 2017.

The Bingham Centre for the Rule of Law helped us to create a consultation document from the outcome of the round table, which was distributed throughout the IBA and beyond, and the Bingham Centre then analysed and collated the responses. This document was drafted from those responses and that analysis.

All of the 27 principles put forward in the consultation were agreed by the majority of those who responded to the consultation, and many were agreed by nearly all who responded.

There are considerable divergences of opinion on some matters, which reflect different cultural and practical ways in which countries have developed their justice and legal aid systems. We have set out the views of those who disagree with particular principles as fully as the views of those who agree with them, in acknowledgement that there are many legitimate ways to achieve our shared objective of providing universal access to justice.

The principles and examples in this document are not prescriptive, but are intended as starting points for debate and consideration. We recognise that some of the principles will not suit the circumstances of some jurisdictions, for reasons that they find compelling.

Nonetheless, we think that all of these principles should be looked at when setting up or reforming legal aid systems, so that proposals can be tested against the principles. The outcome of such comparisons may be a rejection of the principle (in which case a reason can be articulated); or a recognition that the principle can be worked towards but not implemented immediately (in which case a plan towards implementation can be expressed); or the principle may be seen to have merit that had previously not been obvious (in which case it can be adopted); or it may be familiar and accepted (in which case any proposal can be measured against it for validity).

We have quoted from responses, and given examples of differing viewpoints. This has been with the intention of stimulating discussion. To ensure that readers are not unduly influenced by the sources of the quotes and comments, they have not been attributed.

Although this guidance is complete in itself, it is intended to be a living document, with comments and examples being added from time to time, to recognise the many different ways jurisdictions can use the principles to further the aim of equal access to justice in their country.

Definitions are set out in section 3. The principles are set out in section 4. An analysis and description of the differing points of view in relation to many of the principles is given in section 5. The list of contributors is at section 6.

An analysis and description of responses to supplementary questions is given in Appendix 1 and examples of how the principles are applied in different jurisdictions are in Appendix 2. These examples are attributed, to allow readers to compare their systems with systems in similar or different jurisdictions, as such comparisons can produce useful insights.

3 Definitions

Access to justice is a basic principle of the rule of law. Features include:

- the independence of the judicial system, together with its impartiality and integrity;
- empowering the poor and marginalised to seek response and remedies for injustice;
- improving legal protection, legal awareness, and legal aid;
- oversight by civil society and Parliament;
- addressing challenges in the justice sector such as police brutality, inhumane prison conditions, lengthy pre-trial detention, and impunity for perpetrators of sexual and gender-based violence and other serious conflict-related crimes; and
- strengthening linkages between formal and informal structures.

Administration of legal aid can include:

- holding the legal aid budget;
- making decisions on the grant of legal aid;
- paying the legal aid providers who undertake the work;
- employing lawyers to provide legal aid services;
- allocating cases to legal aid providers; and
- monitoring the quality and efficacy of casework and the legal aid system.

The body administering legal aid carries out any of the above activities. In some jurisdictions activities will be carried out by more than one body.

Eligibility for legal aid consists of the criteria which qualify an individual for the receipt of legal aid.

Legal aid in some jurisdictions includes pro bono activity, public legal education, and the provision of information to the public. While recognising the importance of these activities to the rule of law and access to justice, we are defining 'legal aid', for the purposes of this document, as follows:

- legal advice, assistance and representation;
- for people or groups who cannot afford to pay privately for legal help;
- mainly provided by lawyers and paralegals;
- for specific legal problems;
- funded, in whole or in part, by the state; and
- including court fee waivers and other financial concessions.

We are doing so because we consider these to be the core qualities of legal aid.

For the purposes of this document, legal aid refers to both primary and secondary legal aid. (Some jurisdictions distinguish between primary and secondary legal aid. Primary legal aid has been described, for example, as legal support provided by 'non-certified' lawyers (for example, paralegals) and which does not include 'representation before courts or other activities that may only be performed by certified lawyers'.[4])

Legal aid provider recognises that a wider range of stakeholders can undertake legal aid work than the qualified lawyers and paralegals who mainly undertake the work. For example, the UN Principles and Guidelines on Criminal Legal Aid provide:

4 'International Study of Primary Legal Aid Systems with the Focus on the Countries of Central and Eastern Europe and CIS' (2012) at p 14, available at www.ua.undp.org/content/dam/ukraine/docs/seichasen_4708604._eng-_international_study-_legal_aid_systems.pdf, accessed 27 June 2018.

> 'The first providers of legal aid are lawyers, but the Principles and Guidelines also suggest that States involve a wide range of stakeholders as legal aid service providers in the form of nongovernmental organizations, communitybased organizations, religious and nonreligious charitable organizations, professional bodies and associations and academia'.[5]

Pro bono legal service is defined as work by a lawyer of a quality equal to that afforded to paying clients, without remuneration or expectation of remuneration, and principally to benefit poor, underprivileged or marginalised persons or communities or the organisations that assist them.

Professional bodies of lawyers refers to national and international law societies and bar associations.

Scope of legal aid refers to the type of problem or case for which legal aid is available.

5 Paragraph 9 of the UN Principles and Guidelines on Criminal Legal Aid.

4 Principles in Civil, Administrative and Family Justice Systems

Funding, scope and eligibility

Principle 1

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

Principle 2

(a) Setting the legal aid budget is a political decision. However, it needs to be adequate to support the services the executive and legislature have agreed should be funded and needs to provide fair remuneration for those who do the work.

(b) It also needs to be informed by evidence from the academic, professional and policy communities. The body administering legal aid should be responsible for gathering this information.

Principle 3

Professional bodies of lawyers should seek to maximise the ways in which their members can provide pro bono legal services in accordance with their culture and traditions, but governments cannot rely on this to cover services, which should properly be funded by legal aid.

Principle 4

There should be clear, transparent and published criteria on scope and eligibility for legal aid in civil, administrative and family law matters. These criteria should be drawn up by government in consultation with other stakeholders.

Principle 5

Court fee waivers should be seen as a form of legal aid. Where legal aid is granted, all court fees should be automatically waived without the need to complete an additional application process. Where a case is not within the scope of legal aid, but the client would have been financially eligible for legal aid had the case been within scope, court fees waivers should be available.

Principle 6

Where legal representation is mandatory to access legal services, courts and tribunals, the state has a duty to ensure that individuals without the financial means to pay for a lawyer themselves are represented by competent lawyers.

Principle 7

Principle 6 of the UN Principles and Guidelines on Criminal Legal Aid should apply, adapted to take account of relevant scope and eligibility criteria.[6]

Principle 8

Financial means is a relevant criterion when assessing eligibility for legal aid. Vulnerability, including lack of knowledge or ability to enforce legal rights without expert help, is also a relevant factor.

6 UN Principles and Guidelines on Criminal Legal Aid, Principle 6 (on non-discrimination) provides: 'States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status'. This proposition seeks to extend this principle to civil, administrative and family legal aid.

Principle 9

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

Principle 10

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

Principle 11

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

The Administration of legal aid

Principle 12

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

Principle 13

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

Principle 14

The body administering legal aid must be legally answerable for the quality of the service it administers. It must answer to the sponsoring ministry, which

provides its funding, but also to Parliament, as the representatives of the people who pay for, and benefit from, legal aid.

Principle 15

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

Avoiding corruption and favouritism in the legal aid system

Principle 16

Principles 9 and 12 of the UN Principles and Guidelines on Criminal Legal Aid should apply to all legal aid areas, including civil, administrative and family legal aid.[7]

7 This proposition seeks to extend UN Principles and Guidelines on Criminal Legal Aid, Principle 9 (on remedies and safeguards) and Principle 12 (on independence and protection of legal aid providers) to civil, administrative and family legal aid.
UN Principle 9 provides: 'States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid'.
UN Principle 12 provides: 'States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics'.

Principle 17

The criteria and procedure for the grant of legal aid should be clear, transparent and published. Opponents in a case where someone has applied for legal aid have the right to make representations to the body administering legal aid. However, decisions must be made independently and in accordance with the published criteria and procedure.

Principle 18

The criteria and procedure for the allocation of cases to legal aid providers must be clear, transparent, and published. The allocation of cases must be done independently of the courts and the opposing participants (for example, defending public bodies or individuals in civil cases) and in accordance with the published criteria and procedure. There must be published anonymised information on how cases have been allocated, a right of challenge, and regular audit.

Principle 19

The body administering legal aid must be independent and must be protected from interference (or attempted interference) in its decisions on the grant of legal aid and the allocation of work by government, the media, the profession and others.

Principle 20

To ensure that the pursuit of a reasonable working relationship with the sponsoring ministry does not threaten institutional, operational or financial autonomy, Board, Chair and CEO of any body administering legal aid should have robust security of tenure.

The provision of legal aid

Principle 21

A provider who wishes to undertake legal aid work should be qualified to deal with the relevant area of law, either by experience or training, and should understand and be familiar with the legal aid scheme and how it operates.

Principle 22

The body administering legal aid should consult with professional bodies of lawyers, as well as the sponsoring ministry, to establish the correct level of qualification mentioned in Proposition 21, but must have the duty to set the standard independently and in accordance with the published criteria and procedure.

Principle 23

Lawyers undertaking legal aid work are bound to carry out the work in accordance with their professional code of conduct.

Principle 24

Model Practice Standards for legal aid cases in the areas of civil, administrative and family law should be developed by relevant IBA committees, following the example of the UN Principles and Guidelines on Criminal Legal Aid in regard to those undertaking criminal defence work.

Principle 25

Legal aid services can be provided in a number of ways, for example by lawyers in private practice or lawyers employed directly by the body administering legal aid. Non-membership of a professional body of lawyers, for example, based on the nature of employment, should not be used to prevent non-members from carrying out legal aid work that they are otherwise qualified to undertake. However, all legal aid providers must be held to identified quality and ethical standards, whether or not they are members of a professional body of lawyers.

Principle 26

The body administering legal aid should put in place an effective system to measure the quality of work. This should consider the merits of outputs (assessed, for example, by audit or peer review) rather than inputs (for example, years of qualification or specific training) as the best way of assuring quality.

Principle 27

Those providing exclusively or mainly legal aid services should be paid according to industry norms so as to attract high quality providers and to allow for the development of expertise in the sector and therefore create value for money, whether in a salaried service or through private practice.

5 Options and variations around the principles

Principle 1

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

Comment

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

Analysis and discussion

Nearly 95 per cent of those responding agreed with this principle, with the remainder not giving a view.

Comments included:

- 'We agree that in evaluating the costs of providing adequate legal aid to people in need, the costs of not providing legal aid should also be considered… [We use] the term "essential public legal services" as the basis for determining which services publicly

funded legal aid should always cover. This language provides a principled and consistent lens for determining the services that should be guaranteed for all. We suggest that three main components should guide the regeneration of legal aid – national benchmarks as the basis for a principled framework for decision making; eligibility policies that prioritize people with low or modest means but provide graduated access for all who cannot access private legal services; and effective delivery approaches aimed at meeting community needs and reaching the "meaningful access to justice standard". [Our professional body] also emphasizes the idea of "facilitating everyday justice" to recognize both the prevalence of legal problems in people's lives and the fact that few legal problems actually end up in court. The goal is a multi-dimensional justice system focused on people, recognizing that there are many paths to justice, that a range of options should be provided, and that attention should move from litigation and the courts to timely intervention and preventive services. Beyond the goal of preventing legal problems altogether, [our professional body] has also emphasized that much can be done through early intervention to avoid escalating problems.'

- 'Municipalities and Commerce Chambers should also contribute to the budget formulation.'

Principle 2

(a) Setting the legal aid budget is a political decision. However, it needs to be adequate to support the services the executive and legislature have agreed should be funded and needs to provide fair remuneration for those who do the work.

(b) It also needs to be informed by evidence from the academic, professional and policy communities. The body administering legal aid should be responsible for gathering this information.

Comment

Governments have a responsibility to provide access to justice. Policymakers should consider options and scenarios that are fully thought through and costed in order to make informed decisions. This proposition seeks to emphasise that policymakers setting the legal aid budget should be properly informed by evidence from a range of stakeholders, including professional bodies of lawyers and user organisations; and that the body administering legal aid has a central role to play in this process.

Analysis and discussion

Nearly 95 per cent agreed with this principle, with the remainder not giving a view.

Comments included:

- 'The bar associations, as the administrating body, should collect the mentioned information and share it with the Ministry of Justice. The Ministry should not determine the budget itself.'
- 'I agree with the proposition, but its chances of implementation in most states in [my country] are almost zero. There is not a political consensus [here] that access to justice is a governmental responsibility. To the contrary, over the past 15 years at least, there has been a concerted effort in [national and regional legislatures], especially among political conservatives and members of one of the parties, to defund legal aid programs or to restrict severely the services that they may offer.'
- 'We agree with 2(a) and suggest concepts like "essential public legal services" and the "meaningful access to justice standard" should guide decision making… We agree with 2(b) in that decisions about funding should be based on evidence, but suggest that the evidentiary foundation should include experience and insights from users of the services and organizations that assist users of services. As to whether the body administering legal aid is the appropriate body to gather evidence as to how successful it is in meeting its mandate, there may be significant data that such a body is best positioned to collect. Resources would be required so as not to

take away from the primary function of providing legal aid to people who need it. [Our professional body] has suggested that such a role would be best assigned to Innovation centres, or Access to Justice Commissioners, with a broader mandate to consider other access to justice measures, and who could be more neutral in evaluating the success of the body administering legal aid.'

- '[A professional body] recommends the Administrations to make realistic budgetary projections and allocations to face with guarantee and efficiency the costs of the services, including lawyers' work. It is an exercise of responsibility to properly manage a quality service.'

One of those that did not give a view explained:

- 'We do not have a capped legal aid budget in [this country], rather we have rationing by reference to the nature of the assistance required, means-testing of service users and a crude form of merits testing by lawyers. Some degree of input from academic, professional and policy communities plays a role in the legislative processes that leads to the formulation of the statutory criteria for the means testing and merits assessment.'

Principle 3

Professional bodies of lawyers should seek to maximise the ways in which their members can provide pro bono legal services in accordance with their culture and traditions, but governments cannot rely on this to cover services, which should properly be funded by legal aid.

Comment

In many jurisdictions, pro bono activities have a long and honoured place in the traditions and ethos of the legal profession, and are seen as essential to increasing access to justice for the poor and vulnerable. Furthermore, pro bono activities are compulsory in some jurisdictions.

However, governments should not regard pro bono activities as an adequate substitute for a properly funded legal aid system. In this regard, it is important

to recognise that pro bono activities often include work that is not usually covered by legal aid – for example, transactional work for charities and NGOs, capacity building in developing countries, etc. Moreover, pro bono activities can introduce an element of arbitrariness into access to justice – where lawyers choose which clients and cases to take forward. A lack of transparency may also result in discrimination against certain groups.

This proposition therefore seeks to recognise the important role played by pro bono activities whilst recalling and making clear the responsibility of governments to provide access to justice.

This is reflected in the IBA's 2008 Pro Bono Declaration, which urges governments to 'allocate sufficient resources to make legal aid available to meet the critical legal needs of the poor, underprivileged and marginalized and not to use pro bono legal service as an excuse for reducing publicly funded legal aid'.[8] The Declaration acknowledges however, 'the delivery of pro bono service by the legal profession is of vital public and professional interest and helps to fulfil the unmet legal needs of the poor, underprivileged, and marginalized and restore public confidence in the efficacy of governmental and judicial institution'.

The Declaration considers that pro bono legal service may extend to:

- advice to or representation of persons, communities or organisations, who otherwise could not exercise or assert their rights or obtain access to justice;
- activities supporting the administration of justice, institution building or strengthening;
- assisting bar associations and civic, cultural, educational and other non-governmental institutions serving the public interest that otherwise cannot obtain effective advice or representation;
- assisting with the drafting of legislation or participating in trial observations, election monitoring, and similar processes where public

8 IBA Pro Bono Declaration (2008), at para (g), available at www.internationalprobono.com/declarations, accessed 27 June 2018.

confidence in legislative, judicial and electoral systems may be at risk;

- providing legal training and support through mentoring, project management and exchanging information resources; and also
- other similar activities to preserve the rule of law.

Analysis and discussion

90 per cent agreed with this principle, with the remainder disagreeing.

Comments from those who agreed include:

- 'There is no legal basis for pro bono in [our country]. However, lawyers dedicate a part of their working hours as pro bono due to the social necessity on the matter especially in cases related to human rights, environment and animals' rights. In addition, it is important to underline that pro bono cannot be an alternative of legal aid, the two systems should be considered separately.'
- 'Yes we agree that professional bodies of lawyers should seek to promote and assist members to implement the most effective use of pro bono resources, but we recognise that pro bono can never be a replacement for entitlement based state legal aid provision.'
- '[Our Constitution] provides free access to justice as a fundamental right to guarantee the right to effective legal protection. [Legal aid law] entrusts the National Bar the organisation of this service, regarding the tradition of the local and regional bars to provide this public service. At the same time, the National Bar and other legal institutions organise legal pro bono services, trying to support people and entities with lack of financial resources but not eligible for free legal aid.'

Comments from those who disagreed include:

- 'We are not against pro bono work as such and we agree that the financing of legal aid cannot be aligned with the possibility of pro bono work. However, we would like to emphasize that pro bono work should not be expected of lawyers.'

- ‘It is the duty of the government to provide access to justice for every person, not only civilians of the country but also [for example] refugees (illegal or not) confronted with civil, administrative or family justice. Large legal companies can – and do – provide this form of legal aid. Individual lawyers can also decide to do it.’
- ‘I agree with the intent of the proposition, but it is stated backwards, at least in countries, like [mine], where there is no political consensus that governments have any role at all in ensuring access to justice… [The phrase] “in accordance with their culture and traditions” guts the meaning and effect of the proposition. In countries where a violation of human rights is the norm, this phrase provides lawyers with an excuse for doing nothing. Access to justice and legal aid must not be a local option…’.
- ‘The proposition overlooks the value that lawyers contribute through “low bono” (ie, sharply reduced fees to accommodate the financial abilities of less affluent clients), It also overlooks the impact of legal services to social entrepreneurs. I would not include these in this proposition, provided that they are included within the scope of a separate proposition. “Pure” (ie, fee) pro bono work is a fundamental part of ensuring access to justice and promoting social development, but it is not the only part. Unless we address “low bono” and social entrepreneurship, we will have omitted an increasingly important part of the role of the legal profession in promoting the social and economic development of the societies and communities they serve.’
- ‘In [this jurisdiction] there is no compulsory pro bono requirement for lawyers, but there is a high rate of voluntary pro bono work done by lawyers. In addition, many lawyers undertake “low bono” work for little or no profit, including many legal aid providers who have told the Law Society they do not invoice for some (or even all) of their legal aid work. There is a risk that introducing a mandatory requirement for pro bono work would impact on the voluntary work already currently being done and also on those lawyers who continue to do legal aid work for low remuneration.’

Principle 4

There should be clear, transparent and published criteria on scope and eligibility for legal aid in civil, administrative and family law matters. These criteria should be drawn up by government in consultation with other stakeholders.

COMMENT

By 'scope' we mean whether the problem or the type of case, is one for which legal aid is available. Types of case for which legal aid may or may not be available in a civil, administrative and family law context include, for example, community care, debt, domestic abuse, discrimination, employment, housing, and welfare benefits. By way of illustration about how scope can be limited within types of case, a person may, for example, usually only get legal aid for advice about clinical negligence if their case relates to their child suffering a brain injury during pregnancy, birth or in the first eight weeks of life. Similarly, legal aid may not usually be available for advice about personal injury, other than in exceptional cases.

This proposition suggests that criteria should be drawn up to allow principled decisions on scope and eligibility for legal aid to be made in civil, administrative and family cases. It suggests this should be done by government in consultation with other stakeholders.

Examples of issues that might be covered by such criteria include the type of case/legal problem, the complexity of the case, whether the need for legal support is urgent, the consequences of failing to provide legal aid, and whether the claimant is a child etc. In the criminal justice sphere, Principle 3 (on legal aid for persons suspected of, or charged with, a criminal offence) of the UN Principles and Guidelines on Criminal Legal Aid attempts to capture some of these issues.

So, while the content of the criteria may vary and needs careful consideration, this proposition seeks to emphasise the need for certainty and principled guidance about scope and eligibility for legal aid in civil, administrative and family cases.

85 per cent agreed with this principle, over 10 per cent disagreed and the remainder did not give a view.

Comments from those agreeing included:

- 'Yes, criteria must exist, but they should be developed by both government and members of advocates' self-government'.
- 'We agree partially. There should be clear, transparent and published criteria but it should be drawn up by the [national professional body], not the government.'
- 'Our 'yes' is qualified. We consider we do have... a system for the provision of legal aid that meets the criteria set out above. We would note that whilst such clarity serves transparency, we have experienced in our own practices a slight tendency toward ossification, such that developments in legal practice, judicial structure, and societal need, are only slowly caught by the legal aid authorities here. We acknowledge a tension between clarity and flexibility.'
- 'The right of free justice is recognised for all citizens and for foreigners located in [this country], even some legal entities, for every jurisdiction. It must be accredited lack of economic resources to institute legal proceedings. The requirements demanded to access to this right are established in [our Constitution and legal aid law]. This law was approved with the consensus of all the political groups in Parliament and the support of the [national professional body].'
- 'This currently occurs in [this jurisdiction] and much of this information can be accessed through the Ministry of Justice website. The Ministry of Justice undertakes public consultation, including with the Law Society and legal profession, on matters affecting the scope of and eligibility for legal aid assistance.'

Comments from those who disagreed include:

- 'There should be legal aid in all parts of the law'.

- 'I strongly disagree with efforts to limit the scope of legal aid by excluding certain types of cases or matters, which is what the proposition invites. There must be equal access to justice for all, with the poorest person having the same access to raise the same legal issues as the wealthiest. To do otherwise is to invite politically motivated abuse of the rule of law and human rights oppose the notion that the government, not the legal profession, should set the standards.'
- '[I] agree with clarity but need flexibility to ensure justice prevails. [Bodies administering legal aid in this country], in the past at least, had special accounts to assist in urgent matters of significance. One issue I saw was one monied party running up costs to wear out the vulnerable party's "war chest" and that expressly was sometimes aimed at legal aid caps.'

Principle 5

Court fee waivers should be seen as a form of legal aid. Where legal aid is granted, all court fees should be automatically waived without the need to complete an additional application process. Where a case is not within the scope of legal aid, but the client would have been financially eligible for legal aid had the case been within scope, court fees waivers should be available.

Comment

Without such provision people of limited means could be denied their right to resolution of their dispute.

Analysis

75 per cent agreed with this principle; nearly 20 per cent disagreed and the remainder did not give a view.

Comments from those who agreed include:

- 'We broadly agree with this proposition. In [this jurisdiction], legal aid eligibility and court fee waivers operate under slightly different schemes, and a separate application requires to be made to the court for fee exemptions'.

- 'While we agree with the propositions, there is a more fundamental point [here] about which we hold emphatic views arising from the level of fees themselves. [Court fees are exceptionally high, such that fees for a day in court at first instance are nearly as much as the average monthly salary]. The fees are a barrier to justice. They represent a serious disincentive to anyone in seeking access to justice, including public authorities seeking orders in the interests of children. They alter the [perspective] of the judicial system from one that serves citizens to one providing for customers. Persons receiving legal aid are exempt from these charges but their introduction precludes the provision of legal services on speculative or no-win-no-fee arrangements'.
- 'We agree with Principle 5 but would go further to say that in jurisdictions such as [ours] where there are very tight restrictions on financial eligibility for legal aid and often very high court fees, it is in the interests of access to justice that financial eligibility for court fee waivers should be less restrictive than financial eligibility for legal aid.'

Comments from those who did not agree include:

- 'No, not entirely. Under [our law] there is a category of persons that may be relieved from paying court fees, but that does not mean that this category of persons is undeniably entitled to legal aid. Complete relief of all the court fees requires study and in-depth analysis.'
- 'Where a person would qualify financially, but the case is not within the scope of eligible cases, it is likely that the case would not involve an essential public legal service. For people that are financially eligible, the range of cases this would actually apply to seems quite limited.'
- '[Our professional body] agrees with the Serbian report quoted, which notes that "some citizens may not be eligible for free legal aid due to a slightly better economic position, but they also could be covered by exemption from payment of court fees, if that would facilitate their easier access to the court system". [We have] supported "reasonable eligibility policies that give priority to people of low and modest means, but

provide graduated access to all residents who are unable to retain private counsel". Additional court fee waivers would be helpful in this regard but again, it is important to keep in mind that the vast majority of people's legal problems do not end up in court".'

- 'In [this country], an applicant can apply for a court fee waiver in the civil and family courts on grounds of financial hardship or public interest, even if not eligible for legal aid. There are separate simpler forms for those who are receiving legal aid or benefits, which make it easier for them to apply for a waiver.'

One of those who did not give a view on the merits of the principle commented:

- 'It is suggested to delete the last sentence, only provide that all court fees should be waived. The reason is the last sentence is beyond the scope that these guidelines should consider.'

Principle 6

Where legal representation is mandatory to access legal services, courts and tribunals, the state has a duty to ensure that individuals without the financial means to pay for a lawyer themselves are represented by competent lawyers.

Comment

This proposition is aimed at situations where an individual requires legal representation in order to get access to legal services, courts and tribunals. It suggests that the state has a duty to ensure individuals are represented by competent lawyers in such situations, even where they lack the financial means to pay for such representation themselves.

For example, a recent report by The Hague Institute for Innovation of Law notes that 'For some legal services, and in some countries, assistance by a qualified lawyer is mandatory. In order to guarantee access to justice in such cases for people with limited means, it is often necessary that citizens have recourse to state funded legal aid in these areas'. It also highlights that 'Most countries allow people to bring cases before specialised tribunals (employment, social

security) without being represented by a lawyer' but that 'Many restrictions exist, however, in respect to procedures at courts' and that 'Generally, access to higher courts (appeal, supreme courts) can only be obtained with the assistance of a lawyer'.

Analysis and discussion

Over 85 per cent agreed with the principle; fewer than 4 per cent disagreed and the remainder did not give a view. Several commented that there was no requirement for mandatory legal representation in their jurisdiction.

Comments included:

- 'We do not want to see legal aid restricted to situations where representation is mandatory. We believe the state has a duty to ensure individuals without financial means have a right of access to competent counsel, through legal aid' [underline in original].
- 'To limit the state's obligation to the mandatory provisions is not in accordance with the situations provided by many countries' civil, administrative and family legal aid policies. This Proposition is easy to be misunderstood that only mandatory provision is state's duty. It is a kind of shrinking explanation.'
- 'If legal representation is deemed necessary (for instance, to ensure an individual's right to a fair trial, or principles such as defendants not being able to cross-examine victims of sexual violence), then the court may appoint legal representatives to assist the defendant and/or to assist the court. In matters involving young people, a lawyer must be present (however the young person still has a right to be heard in person) and free Youth Advocates are generally automatically appointed.'

Principle 7

Principle 6 of the UN Principles and Guidelines on Criminal Legal Aid should apply, adapted to take account of relevant scope and eligibility criteria.

Comment

UN Principles and Guidelines on Criminal Legal Aid, Principle 6 (on non-discrimination) provides 'States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status'. This proposition seeks to extend this principle to civil, administrative and family legal aid.

The reference in the proposition to adapting this to take account of 'relevant scope and eligibility criteria' is an acknowledgement that legal aid policy can prioritise certain areas of law and the needs of certain groups based on objective grounds – however, within the boundaries of scope and eligibility, all must be treated equally.

For example, in England & Wales, in the criminal justice sphere you have the right to free legal advice if you are questioned at a police station; and in the civil justice system, financial situation is not taken into account for cases about mental health tribunals, children in care, and child abduction for example.

Analysis and discussion

Nearly 95 per cent agreed with this principle, with the remainder disagreeing.

Comments from those in support included:

- 'Agree that legal aid should be provided without discrimination, but the list of prohibited grounds for discrimination is not entirely consistent with [our] law.'

Those opposing the principle appeared to do so as they felt the underlying premise was wrong, rather than because they approved of discrimination:

- 'No criteria of relevant scope are being taken into account, only objective criteria are relevant.'
- 'I object to the "scope" qualification… The legal profession should set the scope of representation, not the government… There are, of course, a number of other specific issues that are implied by this proposition. Issues such as access to

investigative services and expert witnesses for appointed defence counsel should be addressed; because a denial of access to or funding for these services can completely negate the right [to an] effective representation.'

Principle 8

Financial means is a relevant criterion when assessing eligibility for legal aid. Vulnerability, including lack of knowledge or ability to enforce legal rights without expert help, is also a relevant factor.

Comment

This proposition seeks to emphasise that, while relevant, financial means should not be the only eligibility criterion for legal aid and that vulnerability is a particularly important factor.

We would highlight here that vulnerability can be personal (for example, learning disabilities, mental health issues or young age) or situational (for example, being homeless, being a survivor of domestic abuse or having recently left care).

Analysis and discussion

85 per cent agreed with this principle; over 10 per cent disagreed and the remainder did not give a view.

Comments from those in support include:

- '[Our professional body] supports an approach to legal aid that goes beyond a "bright line" cut off for financial eligibility, and also provides some services to people somewhat or even significantly above that cut off. We also recognize that legal aid is commonly required to assist with legal problems before courts are involved. More flexible consideration of who needs help, including people with particular vulnerabilities, is appropriate, though the reality is that vulnerable people are generally the poorest economically. Different options can also be considered to expand eligibility to more 'people, including legal expense insurance or client contribution schemes.'
- 'The [professional body] agrees financial means should not be the only criterion relevant to determining eligibility for legal aid, and that

vulnerability (including age) is also an important factor. In [our] Youth Court, Youth Advocates are appointed without an assessment of the young person's financial circumstances.'

Comments from those disagreeing included:

- 'In our system, financial criteria are most important in order to access legal aid. The threshold must be low so that everyone in need is able to benefit from Legal Aid. A person not able to enforce legal rights without expert help can get represented by a lawyer. If the person is not able to pay for the representation, the person must seek legal aid.'
- 'Except for minors, financial means should be the only criteria. People who are vulnerable can receive help to get the legal aid they need, but not necessarily free.'
- 'While it is an attractive proposition, "vulnerability" is too broad a concept. A person with [significant] financial means may well still be "vulnerable" in one sense but certainly have the means to pay for legal costs. Legal aid should not be available purely on the basis of "vulnerability".'

Principle 9

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

Principle 10

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

Comment

These principles are taken together as they are linked and overlap.

Principle 9 provides that both the interests of justice and the likelihood of success are relevant to eligibility for legal aid. The matters relevant to the 'interests of justice' are set out as:

- the importance of the matter to the individual – considered objectively;
- the importance of the matter to others in society, particularly disadvantaged groups;
- the complexity of the matter; and
- the availability of satisfactory alternative methods of achieving justice, including alternative funding. The reference to 'alternative funding' seeks to recognise that in some countries legal expenses insurance is a usual element of household policies and in many countries trade unions provide legal services to their members. Provided they are of sufficient quality, access to these services can justify the refusal of legal aid.

This principle also considers the 'likelihood of success'. The key consideration here is whether public money should be spent on claims that, while not frivolous or vexatious, have a poor prospect of success. It emphasises that we have to balance the prospects of success with other relevant criteria including the importance of the matter to the individual and to the wider public. It is important to consider here that pre-empting the result of litigation (which is always uncertain) could deprive individuals of access to justice, which others, who can afford to pay their own legal costs, could pursue. Equally, where resources for legal aid are limited, if the likelihood of success is not considered, meritorious cases may not get funding because it has been spent on cases with little prospect of success.

It is also important to note that in some jurisdictions the losing party, even where they are legally aided, may have to pay at least part of the winning side's costs, so the likelihood of success becomes a very significant factor for claimants.

Principle 10 suggests that the 'interests of justice' is more important than the 'likelihood of success' in civil, administrative and family legal aid. It also suggests that the prospects of success will often not be relevant in family law matters, where, for example, the best interests of the child are paramount.

Analysis

Nearly 70 per cent unequivocally agreed with Principle 9 and over 20 per cent disagreed. 60 per cent agreed with Principle 10 and over 20 per cent disagreed. In each case, the remainder expressed ambivalent views.

Most of those responding agreed with both principles, but the proportion of those disagreeing was much higher that with previous principles. However, this was mainly because they felt the principles went too far in limiting access to legal aid. It is also possible that the different views were partly because the principles did not reflect the ways in which different jurisdictions try to manage the effective use of legal aid funds.

Those commenting mainly gave country specific examples:

- '[Our] system recognises the right of access to free justice to every… citizen, foreigners located in [this country] and some legal entities when they prove lack of economic resources to litigate in all the jurisdictions.'
- '[The] applicant is only required to submit evidence to demonstrate that his/her request is fair/reasonable. The likelihood of success is not among the criteria [here]. The legal profession cannot guarantee the result of the case. The duty of the lawyer is to be attentive; it is the court that will make the decision on the case. Therefore likelihood of success cannot be considered among the criteria.'
- 'In [this country], the "interests of justice" and the "prospects [likelihood] of success" are both relevant criteria in the Act for legal aid eligibility in relation to different types of proceedings… In the civil jurisdiction… the Commissioner "*must* refuse to grant legal aid if the applicant has not shown that [he/she] has *reasonable grounds* for

taking or defending the proceedings or being a party to the proceedings"… While the "prospects of success" test does not apply to certain proceedings filed under some family law statutes, the test is a key consideration for the Commissioner when deciding whether to approve grants in a number of applications made to the Family Court.'

- 'The "interest of justice" does not play a role in [our] system. The only criterion of the ones mentioned above in the propositions 9–10 is the likelihood of success. Legal aid (assistance under the legal advice scheme and assistance with court costs) is given when the applicant's personal and economic circumstances are such that he cannot raise the necessary funds and has no other reasonable possibility of obtaining assistance (eg, legal protection insurance, advice from a tenants' association or trade union). The intended exercise of rights must be neither wilful nor malicious. For assistance with court costs to be given, the planned prosecution or defence must also have a reasonable chance of success.'

- 'The probability of success should not even be considered as an eligibility criterion, but as a factor that enables legal assistance systems to explore other methods that can address a case in the most appropriate way possible. In these cases, what is suggested is to make strategic alliances with other entities that allow institutions to provide a solution to those cases that are not legally viable.'

- 'We do not favour any fixed order of priorities. Legal aid has been made available on a number of occasions because an official charged with determining whether to fund a particular litigation has been impressed by the boldness or originality of a proposed claim. At the same time too, unbridled, an imagination can lead to an unarguable waste of public money. We see no alternative to leaving these matters in the messy arena of discretion, if the values of prudence and innovation are to be appropriately balanced.'

- 'I am very uncomfortable with the commendable effort to promote access to justice as a basic

obligation of the profession and then whittle away at it by definition of the scope of the right to legal aid… I strongly object to "the likelihood of success" criterion. In most jurisdictions there are well-defined prohibitions against a lawyer bring[ing] a frivolous case or motion, enforced by professional sanctions "Likelihood of success["] should never be a criterion.'

- '[We agree] that the interests of justice is an important consideration in considering eligibility for legal aid. However, we have some reservations in relation to the idea of the "likelihood of success" given the potential implications for access to justice – there may be certain borderline civil law cases, potentially involving complex or novel points of law, which could be at risk of being denied funding under such a model. However, it is possible that this proposition could be expanded on to deal with such a matter.'
- 'One respondent distinguished between the first legal consultation which it suggested "must be granted in every case" and legal representation in which case they agreed with the proposition.'
- 'The criteria can apply in some extent to forgo disputes to no end, but the threshold to legal aid should be very low. The access to the judge should be guaranteed as much as possible.'

Principle 11

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

Analysis and discussion

Nearly 80 per cent of those responding agreed with this principle, with the remainder evenly split between those who disagreed and those that did not give a view.

Comments in favour included:

- 'We support broad eligibility for initial advice, but accept that certain requirements may be appropriate. For example, that the issue is justiciable and non-trivial.'

- '[There is a] need for early intervention to prevent escalating problems.'
- 'This (with some exceptions) was the general position in [our jurisdiction] prior to the introduction of [legislation] in 2013. Since then the abolition of initial advice in areas such as private family law, immigration, welfare benefits, employment and some housing has disproportionately impacted on the most vulnerable sectors of society. [We have] called for the restoration of initial advice for family and housing benefit advice as priority areas.'
- 'In [this jurisdiction], Community Law Centres operate nationally to provide free initial legal advice to individuals (generally those with unmet legal needs). The Citizen Advice Bureau also operates as an independent advice service, available to everyone on any subject matter.'

Those disagreeing with the principle commented:

- 'Consultancy is provided in the initial interview conducted during the first application to the bar associations; a separate system is not needed.'
- 'The proposition is too sweeping. It should not be necessary to show that there is no other satisfactory source of advice, but merely that the initial advice is required and can reasonably be sought from a solicitor. The criteria for initial advice in Scotland are clear and work well. They replace a scheme that was open to abuse when the criteria was less clearly enunciated.'

The administration of legal aid

Principle 12

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

Principle 13

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

Comment

These two propositions are aimed at ensuring that the interests of the client and society are placed at the forefront in the administration of legal aid, rather than the interests of other stakeholders such as the government or the legal profession. Conscious or unconscious bias may influence decisions on the allocation of work, for example, if other stakeholders are responsible for these decisions. The central question here is whether bodies administering legal aid should consult with other stakeholders and to what extent – and whether, in the case of the legal profession, this should be done at the level of individual lawyers or with representatives of professional bodies of lawyers.

Analysis

Over 80 per cent of those responding agreed with Principle 12, and 75 per cent with Principle 13. Fewer than 5 per cent gave no view on Principle 12, and fewer than 10 per cent on Principle 13. The remainder either disagreed with the principles, or were ambivalent. Several expressed concern that there could be a conflict of interest if lawyers made individual decisions.

Comments include:

- '[Our law] provides that the [legal aid] Commissioner "must act independently" when performing specified functions, but the Commissioner is subject to direction by both the Minister of Justice and the Secretary for Justice (the Chief Executive of the Ministry of Justice)… The Commissioner is an employee of the Ministry, and has the role of Deputy Secretary, Legal and Operational Services... The Law Society does not play a role in the administration or granting of legal aid, but does participate in Ministry consultations regarding practical operation of the legal aid scheme and proposed reforms of the scheme. The Law Society does have a role in nominating lawyers to sit on the Selection Committees that approve legal aid providers.'

- 'We should caveat our response by explaining that in [our jurisdiction] there is no cap on legal aid. This is made possible by the close relationship between [our] Government and [our] Legal Aid Board. We understand that the alternative would be for a set budget (capping legal aid) being handed to a Board which then had greater independence.'
- 'The administrative body is independent from the executive body for it is part of the judiciary. The judiciary has the same relevant expertise as the lawyers (successful first and second state examination)'.
- 'We do not agree with Principle 13, because in [our jurisdiction], the bar associations are the bodies administrating legal aid in civil cases and it has been conducted without any problem or conflict. We agree that the body administrating legal aid should be independent from the government.'
- 'I maintain that bar associations in jurisdictions with mandatory membership requirements are capable of operating legal aid without risks of conflicts of interest.'
- 'We agree to Proposition 12 and the first paragraph of Proposition 13, but we think that the second paragraph of Proposition 13 need not be stipulated.'
- 'We moved from a situation where legal aid was essentially lawyer administered, to one where it is government administered. While that development means that conflict of interest issues do not arise, other problems do: (1) The legal aid administrators do not have the understanding of how court cases run so the system is designed for a mythical case which progresses steadfastly from one step to the next, without deviation; (2) The bureaucracy imposed on lawyers is unwieldy and a disincentive to become a legal aid provider.'
- 'We are generally in agreement with principles 12 and 13, but we do not necessarily agree with the statement that conflicts of interest will generally preclude professional bodies of lawyers from controlling legal aid.'

- 'Up until the 1980s, legal aid in [this jurisdiction was administered by [our professional body] until this function was transferred to an independent government agency… Although [we] would not advocate a return to this arrangement, and recognises that the transfer of the administrative function to the [government agency] enabled the administrative body [to] introduce what were often… progressive policy initiatives, we do not think that the initial administration by the [professional body] was fundamentally flawed by conflict of interest issues.'

Principle 14

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

Comment

As discussed above, the body administering legal aid should be independent of government. However, it should be answerable to its sponsoring ministry for the quality of the service the ministry has funded (ie, value for money) as the government is responsible for providing access to justice. The body administering legal aid should also answer to Parliament, which has a public audit function.

It is important to distinguish here between the individual legal aid provider and the body administering legal aid; and between the quality of individual service and the quality of the wider legal aid system.

This proposition is focused on the administration of legal aid and the quality of the legal aid system as a whole, rather than the individual provision of legal aid, including questions of professional standards and quality of individual service; and the issue of the accountability of the individual provider to the client. A principal-agent problem may arise if individual providers feel more answerable to the state, than to their clients, who often have limited options, are more vulnerable than the state, and have the most to lose from poor quality service.

Analysis

Over 80 per cent of those who responded agreed with this principle, with 10 per cent disagreeing and the remainder not giving a view.

Comments from those in support:

- 'Yes for only the quantity of service it offers. The sponsoring ministry and Parliament's role must be limited to checking that the funds committed have been utilised for that function. Beyond that it should avoid as much as possible.'

Those who disagreed had pragmatic, and country specific, reasons for doing so:

- 'If legal aid is done by lawyers as part of their usual profession, there is no need for a big administration. It may be up to the courts to give admission to free legal aid.'
- 'In our legal aid system, the client can choose his lawyer and the lawyer gets paid by the state. The only exception exists for "necessary defence" in criminal procedures. The quality of the legal advice is assured by our high standards.'
- 'This is irrelevant in countries… where there is not a political consensus that legal aid is a government responsibility and, accordingly, there is no "sponsoring ministry".'

Principle 15

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

Comment

This principle suggests that, given its independence, the body administering legal aid is well placed to provide information to government, Parliament and the public about the operation of the justice system as a whole. As an integral stakeholder in the justice

system, the body administering legal aid is well situated to play a key role in monitoring and evaluation, and to identify opportunities and challenges, which may in turn influence legal aid policy.

There is some overlap here with Principle 1 on the costs and benefits of legal aid service delivery; impact assessments of legal aid service delivery; and legal aid impact assessments of new legislative and policy proposals. There is also some overlap with Principle 2 on setting the legal aid budget; the need for policymakers to be properly informed by evidence from a range of stakeholders; and the role of the body administering legal aid in this process.

Analysis

As with the previous principle, over 80 per cent agreed with this principle; 10 per cent disagreed and the remainder did not give a view.

One law society which agreed commented:

- 'We agree with proposition 15 but with the caveat that the body administering legal aid is at least at arm's length from the government. Our perception of the system in [our jurisdiction, where the body is] an agency of the Ministry of Justice [is that it] does not readily provide information about where the system is failing to provide access to justice.'
- 'Monitoring and evaluation frameworks provide a useful tool to ensure the efficiency of justice services, including ensuring the quality of services provided by legal aid providers.'

Some of those who disagreed did so on the basis that a legal aid agency was unnecessary, and one commented:

- 'References to providing information to the government are not relevant in all jurisdictions. Providing information to the public, however, is an excellent practice.'

Principle 16

Principles 9 and 12 of the UN Principles and Guidelines on Criminal Legal Aid should apply to all legal aid areas, including civil, administrative and family legal aid.

Comment

This principle seeks to extend UN Principles and Guidelines on Criminal Legal Aid, Principle 9 (on remedies and safeguards) and Principle 12 (on independence and protection of legal aid providers) to civil, administrative and family legal aid.

UN Principle 9 provides:

> 'States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.'

UN Principle 12 provides:

> 'States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.'

Analysis

One response was hard to interpret. All others agreed with this principle, insofar as the UN principles referred to where applicable to administrative, civil and family law, or could be adapted without losing their purpose. Comments included:

- 'The implementation in [our country] is compatible with the mentioned UN Principles and Guidelines in all kinds of cases (civil, administrative and criminal).'

- 'This is an area where [our] legal aid system generally works well.'
- 'Yes we agree with principles behind proposition 16 subject [to] minor amendments to make them specific to civil legal aid.'
- 'We agree with Proposition 16 as long as legal aid is given by lawyers only *and* every lawyer has access to legal aid work *as well as* the client can choose the lawyer themselves.'
- 'The question quotes Principle 9 that legal aid must not be "denied" and asks whether this should be extended to family and civil legal aid.' My answer was that whilst it would be nice to allow legal aid for all civil and family matters, this is unrealistic and there are some matters where legal aid may not be necessary. However, I see that the question could be interpreted differently. That is, the main point of the question is that the UN Principles 9 and 12 argue that states should ensure that there is not corruption in the criminal legal aid system. And the question is do we agree that states should also work to ensure that there is not corruption in the civil and family legal aid system. If that is the heart of the question, then of course the answer to that should be 'yes'.

Principle 17

The criteria and procedure for the grant of legal aid should be clear, transparent and published. Opponents in a case where someone has applied for legal aid have the right to make representations to the body administering legal aid. However, decisions must be made independently and in accordance with the published criteria and procedure.

Principle 18

The criteria and procedure for the allocation of cases to legal aid providers must be clear, transparent, and published. The allocation of cases must be done independently of the courts and the opposing participants (for example, defending public bodies or individuals in civil cases) and in accordance with the published criteria and procedure. There must be

published anonymised information on how cases have been allocated, a right of challenge, and regular audit.

Principle 19

The body administering legal aid must be independent and must be protected from interference (or attempted interference) in its decisions on the grant of legal aid and the allocation of work by government, the media, the profession and others.

Comment

These three propositions are focused on the criteria and procedure for the grant of legal aid and the allocation of cases, and on preventing interference in legal aid decisions. The role (if any) of professional bodies of lawyers in the administration of legal aid (including the grant of legal aid and the allocation of work) is discussed in more detail above. There is also some overlap here with the principles which consider the scope of legal aid and eligibility for legal aid.

In this context, we note that appearances can also be important to building trust – not only must justice be done; it must also be seen to be done.

Analysis and discussion

10 per cent of those responding to the consultation did not answer this question.

There were no dissentions amongst the remaining responders, although some commented that Principle 18 did not apply in their jurisdictions as clients chose their lawyers, rather than having them allocated, and others commented:

- 'There are automation systems in [our jurisdiction] for the appointment of lawyers in legal aid cases. These systems work on the basis of a scoring system which is transparent and which ensures the equal allocation of cases among providers.'
- 'The [professional body] agrees in part with Proposition 17: the criteria and procedures for the grant of legal aid should be clear, transparent and published, and decisions should be made based on an assessment of the application against consistent criteria and procedures. However, in [our] view

it is not appropriate to allow opponents to make representations to the legal aid administrator about the other party's application for legal aid…

'In the family and civil context, legal aid applicants are only able to apply for legal aid once they have chosen a lawyer. Legal Aid Services will assist them to find a legal aid provider if they cannot find one themselves. The legal aid provider will then apply for legal aid on the applicant's behalf. For applications about care of children, some earlier stages of the proceedings must be undertaken by the applicant in their personal capacity…'.

Principle 20

To ensure that the pursuit of a reasonable working relationship with the sponsoring ministry does not threaten institutional, operational or financial autonomy, Board, Chair and CEO of any body administering legal aid should have robust security of tenure.

Comment

By proposing security of tenure for the Board, Chair and CEO of any body administering legal aid, this proposition seeks to minimise the risk that the need for a good relationship between the body administering legal aid and the funding ministry takes precedence over proper decision-making and advice giving.

Analysis and discussion

Over 70 per cent of respondents agreed with the principle, nearly 15 per cent did not agree, and the remainder did not give a view.

Those who agreed commented:

- 'The bar associations, which are the responsible body for the administration of legal aid are totally autonomous in [our jurisdiction], the Ministry of Justice (the sponsoring ministry) does not have any authority on the tenure of the bar associations for the time being.'

- 'In [our jurisdiction], the body administering legal aid is the State. Thus, a Board, Chair or CEO is not foreseen in [our] system.'
- 'I support the proposition, but note that the prohibited actions are too frequently standard intimidation techniques in state legislatures in the [this country] and even occasionally [by legislators], particularly among members of one of the two major political parties.'

Those who did not agree commented:

- 'A robust security of tenure is granted for reasons that judges in [this country, who are in charge of legal aid] hold their position for life.'
- 'If the CEO of the body that administers legal aid is incompetent and those who should be getting legal aid are not, due to the failings of the administration. The CEO should not have such "robust security of tenure" that would mean that they are unable to be replaced.'
- 'In [this jurisdiction], this seems more likely to result in a lack of accountability and transparency than preventing undue influence or corruption.'
- 'We agree with the sentiment behind Principle 20 to protect the autonomy of the administering body. However there are various reasons why it may be necessary to remove a Chair or CEO of the administering body which are not related to maintaining the agency's independence. The risk for Principle 20 is that it could make it more difficult to remove inept leadership. We do not have any specific suggestion with regard to an alternative.'

Principle 21

A provider who wishes to undertake legal aid work should be qualified to deal with the relevant area of law, either by experience or training, and should understand and be familiar with the legal aid scheme and how it operates.

Principle 22

The body administering legal aid should consult with professional bodies of lawyers, as well as the sponsoring ministry, to establish the correct level of qualification mentioned in Principle 21, but must have the duty to set the standard independently and in accordance with the published criteria and procedure.

Comment

These two propositions are focused on qualification for legal aid work and the process for setting relevant standards.

Areas covered by legal aid may not generally have attracted the involvement of lawyers, and those without previous experience of legal aid work may not understand the specific requirements of the system and the three-cornered nature of the relationship between legal aid provider, client and the body administering legal aid. It is particularly important that legal aid providers understand their specific obligations to clients, who are often vulnerable, with limited resources.

Entry-level requirements to qualify as a lawyer are increasingly not regarded as sufficient to ensure the ability to do legal aid work. Those administering legal aid often have higher expectations. Therefore, the aim of Principle 21 is to make clear that bodies administering legal aid are entitled to require evidence of sufficient expertise and standards from the start.

A central question then becomes how providers can demonstrate sufficient expertise – what the correct level of qualification should be and who should play a role in setting the appropriate standards. Principle 22 is aimed at ensuring that the interests of justice and the client are not inadvertently diluted by the interests of the government or the profession.

Analysis and discussion

75 per cent agreed with Principle 21, but support for Principle 22 was comparatively low, at just under 65 per cent. Those disagreeing with the principles did so for a variety of reasons, as the following comments show:

- 'The body administering legal aid system not only should but is obliged to consult with professional bodies of lawyers in order to establish the correct level of qualification.'
- 'We agree in principle with Principle 21 and have no objections to the system in [our jurisdiction] where legal aid providers must have obtained an approved quality mark.'
- 'We agree that the administering body should consult with lawyers representative bodies over further qualification requirements. This is often controversial; on one hand specialist qualifications may be justified to protect the most vulnerable clients, whereas on the other lawyers can have legitimate concerns about the additional cost this incurs, particularly when legal aid pay rates are very low.'
- 'As for Principle 22, we think that lawyers should set the standard.'
- 'We broadly agree with these propositions. When setting minimum standards, it is important to ensure that requirements remain proportionate, and do not discourage or place unreasonable barriers to participation in the legal aid system.'
- 'Where specific codes of conduct or other requirements are in place, these should not clash with the requirements set by professional bodies. Professional bodies should retain primary responsibility for the regulation of the legal profession.'
- 'In [this country], a lawyer must complete an approval application form and demonstrate skills and qualifications in specific areas (based on whether they want to be a supervised or a lead provider), in order to provide legal aid services.'
- 'Bar associations with a high number of registered lawyers conduct their own trainings on legal aid (criminal and civil) and on certain specific issues (domestic violence, children's rights, etc). The Training Centre [run by the umbrella professional body] provides support to the bar associations with a lower number of members in this regard…

Standards and criteria should be determined with regard to the qualifications of service providers, but this should be in the discretion of bar associations, not the government.'

- 'Legal aid lawyers should be subject to the same professional standards as those acting for more affluent clients. Legal aid administrators should not be able to lower professional standards when dealing with legal aid clients, but they might require specialized training for sensitive cases.'
- 'Principle 21 suggests that qualification to provide legal aid services can be achieved by either experience or training. In our view, both elements are required and neither experience nor training of themselves is enough.'

Principle 23

Lawyers undertaking legal aid work are bound to carry out the work in accordance with their professional code of conduct.

Comment

Some vulnerable legal aid clients may lack the knowledge/confidence to complain about poor quality legal service. This proposition is therefore concerned with ensuring that legal aid providers understand their specific obligations to their clients in the context of vulnerability and limited resources. This proposition takes the view that professional codes of conduct will be sufficient to protect all clients, including vulnerable ones.

Analysis

Over 95 per cent of respondents agreed with this principle, none disagreed and nearly 5 per cent did not give a view.

There was only one comment, to the effect that the principle was insufficiently targeted.

Principle 24

Model Practice Standards for legal aid cases in the areas of civil, administrative and family law should be developed by relevant IBA committees, following the example of the UN Principles and Guidelines on Criminal Legal Aid concerning those undertaking criminal defence work.

Comment

This proposition envisages the development of model practice standards in order to help countries that are introducing or improving legal aid provision to devise proper qualification and quality criteria. These should take account of the wide variety of circumstances in which legal aid providers practice around the world in order to appeal to a range of jurisdictions.

Analysis and discussion

65 per cent of respondents agreed with Principle 24, nearly 20 per cent did not give a definite view and the remainder disagreed.

However respondents in each group had similar concerns, as follows:

- 'This will be a substantial, complex task – but a necessary one – if the IBA is going to produce standards that are going to be relevant in every jurisdiction, and are not dismissed (unfairly, to be sure) as another attempt by the IBA to impose "English" policies and practices on the rest of the world.'
- 'We consider that our practice in the fields mentioned is likely to compare strongly with that in any other jurisdiction. Cross fertilisation by voluntary exchange is far likelier to result in useful outcome.'
- 'Yes, but the standards may be too bureaucratic and therefore divorced from the reality of practice; [also] "universal" standards may not fit all cultures, countries and jurisdictions equally, that is, there is a concern about "cultural imperialism".'

- 'We would suggest that if any model practice standards are developed, these should not be mandatory, and must include a significant margin of appreciation to account for the significant differences between the history and legal systems of different states.'
- 'We do not have a stated view on the development of model practice standards, given the variations in different jurisdictions it is difficult to see how such standards could go beyond very basic principles.'
- '[This principle] may be difficult to apply in practice. Most jurisdictions will have their own practice standards and it may be more useful for countries to look at jurisdictions closely aligned to their own rather than attempt to draft generic practice standards. In [this country], practice standards were designed in conjunction with the Law Society, and are well established and apply to all legal aid providers.'

Principle 25

Legal aid services can be provided in a number of ways, for example by lawyers in private practice or lawyers employed directly by the body administering legal aid. Non-membership of a professional body of lawyers, for example based on the nature of employment, should not be used to prevent non-members from carrying out legal aid work that they are otherwise qualified to undertake. However, all legal aid providers must be held to identified quality and ethical standards, whether or not they are members of a professional body of lawyers.

Comment

This principle asserts that satisfactory legal aid services can be provided in a number of ways, for example, through private practice or salaried service; and that the decision of how to deliver legal aid services should depend on local circumstances. Membership of a professional body of lawyers should not be a pre-condition for providing legal aid services. There are jurisdictions where employed lawyers are not eligible to belong to professional bodies of lawyers, and

others where they are, so this is a local circumstance to be taken into account. Moreover, specialised civil society organisations often provide important legal aid services and may be better placed to represent clients in certain legal fields. The key here is that all legal aid providers should have professional autonomy and should adhere to identified quality and ethical standards. In addition, while client choice is unlikely to be possible in a salaried service, the client is entitled to expect expertise and professionalism.

Analysis

Nearly 60 per cent agreed with this principle, and over 30 per cent did not agree, with the remainder not giving a view, which makes this by far the most controversial principle.

Comments include:

- 'The service must be provided always by lawyers to guarantee the quality of the service and the adequate ethic control.'
- 'It would not be possible to hold non-members lawyers to account if they are not members of the professional body.'
- 'In our view, legal aid providers must belong to the professional body of lawyers. If non-lawyers are eligible to become legal aid providers there is a possibility that this could be seen by government funders as a means to reduce their obligation to provide proper legal services to clients in financial need.'
- 'This would be legally objectionable in jurisdictions that have mandatory membership in the bar association.'
- 'In [this jurisdiction], the legal aid providers have to be lawyers in private practice who are enrolled to the bar association in their city. There aren't any lawyers employed by the bar associations to provide services.

  Only in-house lawyers are not required to be enrolled to bar associations to practice, but they cannot provide legal aid services.'

- 'This proposition could be confusing in [our country], where all lawyers practicing law must be licensed and are bound by the ethical standards of provincial and territorial law societies, while membership in the [national professional body] is optional...'.
- 'This proposition is not applicable to [our country] since [here] every lawyer is required to be registered with a local bar association as well as the [national professional body] to practice law.'
- 'We have no difficulty with the suggestion that all providers should be held to identified standards.'
- 'In [this jurisdiction], payment by legal aid is available to unqualified staff in Law Centres and/or lawyers' offices, but only at half the rate payable to qualified personnel. It was anticipated when this was first permitted some 15 or so years ago that it would have a significant impact on the demographic of law firms, but that has not happened. We suspect that that is because the role of unqualified staff naturally devolves to a support rather than executive role, and that there is limited scope for such persons in tightly budgeted practices.'

Principle 26

The body administering legal aid should put in place an effective system to measure the quality of work. This should consider the merits of outputs (assessed, for example, by audit or peer review) rather than inputs (for example, years of qualification or specific training) as the best way of assuring quality.

Comment

This principle focuses on monitoring and evaluation in relation to individual case files. Evidence of relevant training or expertise is a proxy for measuring quality, and a good minimum requirement for undertaking legal aid work. However, monitoring and evaluation (for example, by auditing or peer reviewing completed files) is necessary to ensure that a good standard is being maintained, particularly when success is not a relevant measure.

65 per cent of respondents agreed with Principle 26; over 20 per cent did not agree, and the remainder did not give a view, so this is another controversial principle.

Comments on the principle varied widely in nature, from going too far to not going far enough; and from not being necessary to being the preserve of the professional bodies, as follows:

- 'I agree with the principle, but would delete the second sentence, which presents an overly simplistic, although not inaccurate, view of quality in legal services. Just having measurements does not assure quality. Much more is involved – too much more than would be appropriate for a statement of this important proposition.'
- 'In [this jurisdiction] lawyers submit reports to bar associations about the duties they have carried out within the scope of legal aid. In addition, according to the Code of Lawyers, every bar association submits a report to the [national professional body] at the end of every year on the functioning of legal aid.'
- 'Both types of requirements are essential to assess the quality of service: the measurement of the quality of work and the levels of training for the provision of an integral service.'
- 'An effective system to measure quality is desirable; however, quality assurance is not gained by monitoring either inputs or outputs – both need to be considered.'
- 'The [professional body] agrees that the body administering legal aid should put in place an effective system to measure the quality of legal aid work. [Here], the Ministry of Justice operates a quality assurance framework, which includes an annual audit of selected legal aid providers. The audit policy sets out a process for assessing a range of files selected for audit. The quality and value of legal aid services are audited against both general and case specific responsibilities. These can include the quality of advice and representation,

record keeping, communication with the client, instructions and preparation, conduct and advice and obligations under the Conduct and Client Care Rules.'

- 'Professional bodies of lawyers should put in place an effective system to measure the quality of work from a viewpoint of self-governance of lawyers.'
- '[It] is a job for the professional body of lawyers, qua the supervision with the lawyers, to ensure the quality of work. In [this jurisdiction] the Minister of Justice appoints a certain number of lawyers in each court who are obliged to handle court proceedings for clients that have been granted legal aid... However, the client can choose another lawyer who is not appointed. In practice, the court almost never rejects appointing the lawyer suggested by the client. In court proceedings, the court decides the lawyer's fee. In this regard, the court will include the quality of the work and the result of the case.'
- '[Our bar association] finds that it could be in conflict with the lawyers' independence if the state more generally "rates" lawyers on their quality and results as a condition for undertaking legal aid work. Therefore, the starting point should be that if a person is qualified to be a lawyer, the person is also qualified to undertake legal aid work. Others mechanisms – such as public sanctions from The Disciplinary Board for Lawyers – should give the clients the necessary information to choose the right lawyer for the work. Furthermore, in specific cases it is always a possibility to file a complaint at The Disciplinary Board.'
- 'If there is free access to legal aid for all lawyers and the client is free to choose his lawyer, there is no need for such assessments.'
- 'We agree that the administering body should have effective systems to measure the quality of legal aid work. In principle, we would agree that the best indicators are provided by evaluation of outputs. The problem in practice is how to effectively measure them. Successful outcomes are not necessarily indicative of quality; providers who take on straightforward cases will have more successful

outcomes than those who deal with more complex cases where the outcome is often uncertain.'

- 'We have concerns about over-zealous auditing that places a disproportionate administrative burden on legal aid providers. Audits deal primarily with cost control and providers who fail do not necessarily do so because their work is of poor quality.'
- 'We believe that peer review can offer the best measure of quality provided that peer reviewers are well trained and there are effective systems for moderating results to ensure that all peer reviewers are assessing to the same standard. There must also be an effective right of appeal for providers who want to challenge the peer review rating. Our experience… is that peer review is expensive and for that reason has been used sparingly [by the legal aid body]. There can also be issues of recruiting peer reviewers of an acceptable standard.'

Principle 27

Those providing exclusively or mainly legal aid services should be paid according to industry norms so as to attract high quality providers and to allow for the development of expertise in the sector and therefore create value for money, whether in a salaried service or through private practice.

Comment

There is a link here to Principle 2 which addresses remuneration for legal aid work in the context of setting a legal aid budget, and asks whether appropriate rates of pay should be independently evaluated.

Analysis and discussion

Over 80 per cent agreed with this principle, over 5 per cent did not agree, and the remainder did not express a view. Comments, whether for or against, were country-specific:

- 'We would like to point out that, in [this country], there are no lawyers who exclusively provide legal aid services.'

- ‘As one who, during the first year of practice, took court-appointed cases for indigent defendants at rates so low that they threatened to make me eligible for legal aid myself, I agree; but I note that the probability of this actually being observed in practice is very low in some jurisdictions, especially in [this one].’

- ‘We wish to comment on this on some length, as it affords an opportunity to make observations on two matters, which seem to us to be important to the provision of legal services in the fields in which legal aid is provided. Those issues are to do with the recovery of judicial expenses and the levying of court fees. As far as the first issue is concerned, legal aid practice in public and administrative law [here] is underpinned and subsidised by the availability of judicial expenses where a party is successful. A lawyer practising in that field can absorb relatively low rates of pay under legal aid if they know there is a possibility they will be paid at a commercial rate if they win. Such an arrangement incentivises the selection of meritorious cases and discourages the bringing of weak cases. Any approach to legal aid funding which leaves out of account the importance of judicial expenses being recoverable is liable to be an incomplete account. So too is an account that leaves out consideration of court fees. Until the introduction of prohibitive court fees, it was possible for practitioners to provide their services on a speculative basis to persons who were too well resourced to qualify for legal aid but not resourced enough to afford private legal services. The eligibility of huge court fees closes off that possibility and for an admittedly small but not negligible group of people denies them access to justice. We refer to our response to Principle 5 above.’

- 'The [professional body] considers it important that the legal aid system provides fair remuneration for those who do the work. Currently there is real concern about the economic viability of legal aid work in [this jurisdiction] based on the current level of fees, and the resulting loss of lawyers (particularly senior lawyers) from the legal aid system. However, it is acknowledged that governments will often face competing funding priorities in other areas (health, education, etc) which will impact on the funding available for legal aid.'

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