







Access to Legal Assistance in Malta

MAPPING THE AVAILABILITY
OF LEGAL ASSISTANCE FOR THE
PROTECTION OF FUNDAMENTAL RIGHTS IN MALTA





TRUE PEACE IS NOT MERELY THE ABSENCE OF TENSION; IT IS THE PRESENCE OF JUSTICE.

DR. MARTIN LUTHER KING, JR. 1955

Access to Legal Assistance in Malta - Mapping the availability of legal assistance for the protection of fundamental rights in Malta

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aditus foundation is an independent, voluntary & non-profit organisation (NGO) established by a group of lawyers with a mission to monitor, act & report on access to fundamental human rights in Malta. We believe in the universality, interdependence and indivisibility of all human rights.

The Critical Institute is a non-profit organisation set up and run by academics and activist practitioners. It offers a democratic and interdisciplinary platform to debate, learn and collaborate on world class critical research, teaching and practice.

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We would like to express our gratitude to all stakeholders who agreed to be interviewed for this report, and to all persons who took the time to complete our online survey.



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Context and Aims

THE ATLAS PROJECT

The ATLAS (Access To Legal Assistance) project was conceived from the idea that although the legal framework for the protection of fundamental rights in Malta has been in place for a considerable period of time, reporting and acting on any breaches of such rights remain considerably low.

There are a number of reasons for this, although we have seen consistently that lack of information and access to sound legal advice are some of the main culprits. This gap is exacerbated for vulnerable or socially-excluded persons: this could be an effect of socio-economic disadvantages or marginalization due to, for example, belonging to an ethnic minority, having a physical or intellectual disability, or being queer or transgender. Furthermore, access to mainstream professional legal advice and litigation can be an expensive and lengthy process with the availability of legal aid assistance being crucial in order to guarantee access to justice for victims.

The main objectives of the ATLAS project were to identify Malta's human rights obligations in relation to provision of legal aid, to map the actual availability of legal assistance for the protection of fundamental rights and to increase the capacity of legal professionals who give *pro bono* legal assistance. In the context of the project, we carried out a number of stakeholder interviews and conducted an online survey regarding the provision and availability of legal aid in Malta. In January 2017 a capacity-building workshop "Understanding the Right to Legal Assistance in Malta: Access to a Lawyer, Legal Aid and Pro Bono" was held, attended by over 30 professionals. Speakers from JUSTICE, Fair Trials and its LEAP (Legal Expert Advisory Panel) Expert from Malta outlined national international and European legislation and jurisprudence relevant to

the right to legal aid and the right to access a lawyer. A representative from PILnet, the Global Network for Public Interest Law, drew on the importance of *pro bono* legal assistance as a commitment to an effective and accessible legal aid system

PURPOSE & SCOPE OF THE REPORT

In compiling the present report aditus foundation and The Critical Institute want to analyse the availability and outline the importance of legal aid for individuals who cannot afford the costs of private legal advice, counsel and representation in Malta.

The principal aim is to encourage Malta to develop and implement an effective and sustainable legal aid system that enables individuals to exercise and enjoy their human rights. aditus foundation and The Critical Institute firmly believe that the provision of accessible quality legal aid is essential, and that it should encompass all stages of judicial or extrajudicial procedures. It contributes to the elimination of obstacles that frustrate access to justice by means of providing assistance to people otherwise unable to access or afford private legal advice, representation and access to the court system. It is hoped that the recommendations set forth in the report's final section will be considered in the ongoing justice reform initiated by the Prime Minister in March 2013.

This report is set-out in three sections. Section I highlights existing international and European human rights standards relating to legal aid – focusing on the normative content of the right to legal aid – and reviews the jurisprudence of human rights treaty bodies and regional courts. Section II analyses the legislative, judicial, administrative, and budgetary implications of the Maltese legal aid system. It also presents the results of the survey and interviews carried out with local stakeholders on their perception of the legal aid system. Section III contains an analysis of *pro bono* legal assistance, aiming to explain how a well-structured and regulated *pro bono* system can support – yet not replace – a formal legal aid system.

RESEARCH METHODOLOGY

The objectives of the report were achieved through a multifaceted approach which included exploratory desk-research, interviews with relevant local stakeholders and an online survey.

The researchers collected and analysed data through desk research of national, international and regional legal instruments on the rights to access to a lawyer and to legal aid. An in-depth study and analysis of international, European and Maltese laws, rules of procedure and jurisprudence was also carried out.

In addition, interviews were conducted with key stakeholders and national experts, including government officials, NGO officers, and private lawyers. The interviews followed a common structured approach and provided valuable information on a wide range of issues, including the methodology used to appoint legal aid lawyers, an evaluation of the system by practitioners, the existence or otherwise of *pro bono* services, problems relating to representation and the impact of lack of representation.

Finally, data was collected through an anonymous online survey that targeted persons who had had experiences with the Malta's legal aid system. This research component presented a number of limitations. Firstly, disaggregated data in relation to persons accessing legal aid, nature of aid required and subject-matter was not available. This rendered it impossible to map with any degree of accuracy Malta's actual experience implementing legal aid, and the overall research population/themes. Secondly, although the survey seeks to elicit input from persons who had accessed legal aid, guaranteeing responses for this specific response group was impossible due to a combination of confidentiality issues, and the general marginalisation of the population. It is therefore important to underline that, due to these constraints, the data collected is not intended to be a quantitative representative of trends.



Legal Aid as a Prerequisite for Effective Human Rights Protection

"Legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the administration of justice."

GABRIELA KNAUL, SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, UN GENERAL ASSEMBLY REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, 2013'.

INTRODUCTION

Legal aid, generally defined as the assistance by lawyers provided by the state, is a means to achieve access to justice since it allows persons with limited or no resources to prepare a defence, bring a claim or otherwise engage with the justice system. It can may take several forms and modalities, such as a government subsidy for the use of a specific lawyer, in-kind service provided by the government, legal advice centres, websites or also telephone services. In Malta, legal aid is provided through the appointment of public legal aid lawyers by the Legal Aid Agency.

The right to legal aid is inexorably linked to the right of access to justice, the right to an effective remedy and the right to a fair

¹ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Legal aid, a right in itself, Geneva, 15 March 2013, UN Doc: A/ HRC/23/43. The report analyses the possibilities of providing legal aid to individuals who come into contact with the law but cannot afford the costs of legal advice, counsel and representation.

trial. One cannot discuss the right to legal aid without understanding the other principles, as together they each constitute an essential component of a fair and efficient justice system founded on the rule of law.

This section will briefly discuss each element whilst also making reference to the main legal instruments, policy documents and jurisprudence that relate to them.

Access to justice

Access to justice is a core element of a person's right to an effective remedy, it allows individuals to protect themselves against violations of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings. As such, it is a fundamental element of the rule of law² and cuts across civil, criminal and administrative law. Access to justice is both a process and a purpose, it is essential for individuals seeking to benefit from other procedural and substantive rights³, and it is a crucial prerequisite for the protection and promotion of all human rights.

The term 'access to justice' is not frequently employed as legal terminology and is not expressly used in, for instance, the European Convention on Human Rights (ECHR)⁴ nor in the Maltese Constitution⁵. Although, interestingly, the only mention of access to justice in the European Charter of Fundamental Rights (CFR) is in relation to the right to legal aid in Article 47: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice"⁶. There is notably no limitation as to the residence or citizenship of the persons to whom this right refers in this provision.

² Council of Europe (2015), Factsheet on guaranteeing equal access of women to justice, Strasbourg, Council of Europe.

³ European Union Agency for Fundamental Rights (FRA) (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office, p. 16.

⁴ The concept received explicit attention in the legal doctrine by Mauro Cappelletti in the 70's/80's, see Cappelletti M, (ed.) (1978) Access to Justice, Milan: Sijthoff and Noordhoff. More recently see Francioni F, (ed.) (2007) Access to Justice as a Human Right, Oxford University: Oxford University press (OUP).

⁵ Constitution of Malta, 1964.

⁶ Article 47 Charter of Fundamental Rights of the European Union, European Union, (2000/C 364/01)

According to international and European human rights principles, the notion of access to justice obliges all states to ensure remedies which are "accessible, affordable, timely and effective", thus guaranteeing each individual's right to go to court and to obtain a remedy if rights have been infringed. Therefore, access to justice can be considered as an enabling right, meaning that it supports individuals in enforceing other rights.

At the international level, the UN Human Rights Committee, since its establishment under the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR), has interpreted concepts relating to access to justice⁸. Furthermore, access to justice is protected by several UN instruments, such as Articles 2(3) and 14 of the ICCPR⁹ and Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR)¹⁰, which guarantee the right to fair trial and to an effective remedy, all enshrined in the concept of 'access to justice'.

At the European level, the assessment of access to justice in EU Member States is delegated to the EU Justice Scoreboard¹¹, the aim of which is to assist the EU and Member States to realise a more effective judicial process by providing objective, reliable and comparable data on the quality of justice systems as well as on the independence and efficiency of the judiciary within the EU. The Treaty of Lisbon contains a specific reference to access to justice: Article 67(4) stipulates that "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters"¹².

⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 9: The domestic application of the Covenant (1998), UN Doc E/C.12/1998/24.

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

⁹ UN, General Assembly (1966), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

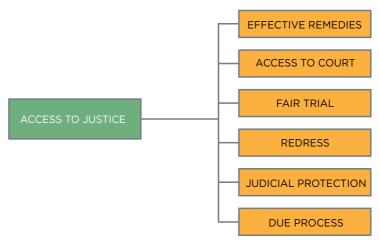
¹⁰ UN, General Assembly (1948), Universal Declaration of Human Rights (UNDHR), 10 December 1948.

¹¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The 2015 EU Justice Scoreboard, COM(2015) 116, 9 March 2015

¹² See also Article 81(2)(e) that refers to access to justice, and Article 81(2)(f) concerning the "elimination of obstacles to the proper functioning of civil proceedings".

In European human rights law, the notion of access to justice is specifically protected in Articles 6 and 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights (CFR), which protect the right to a fair trial and to an effective remedy, as interpreted respectively by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

FIGURE 1: ACCESS TO JUSTICE AND RELATED HUMAN RIGHTS



Access to justice encompasses a number of core human rights, such as the right to a fair trial and the right to an effective remedy. International human rights bodies and experts have called on governments to efficiently remove any obstacle to access to justice, with particular reference to those obstacles that disproportionately exclude people living in poverty and discriminate against other marginalised and vulnerable groups and individuals¹³.

¹³ See UN Committee on Human Rights, General Comment No. 32, Report by the Special Rapporteur on extreme poverty and human rights (2012), UN Doc A/67/278. Treaty bodies have also highlighted the impact of legal aid cuts on access to justice in the context of a number of countries: cf Concluding observations of the Committee on the Elimination of Discrimination against Women Canada (2008) CEDAW/C/CAN/CO/7.

The right to an effective remedy

The right to an effective remedy is a key element of human rights protection, enshrined in all major human rights treaties. It functions as a procedural tool whereby individuals can enforce their rights and obtain redress¹⁴. Effective remedies and effectiveness of justice, notably in providing effective and incisive recourse to any alleged victim of a violation of her or his rights, are regarded as essential: without such recourse, justice is of little use.

International law requires that remedies are available not only in law but that they must be accessible and effective in practice¹⁵. This also includes the right to fair, meaningful and impartial procedures through which claims can be justly adjudicated and, if established, an effective remedy can be fairly granted. Legal aid is one mechanism by which states can ensure that the right to an effective remedy is not illusory, but realised in practice.

Although not defined in international or European law, the right to an effective remedy is contained in Article 13 of the ECHR¹⁶ and Article 47 of the CFR. It is also ensured by international instruments, such as Article 8 of the UDHR and Article 2(3) of the ICCPR¹⁷.

Article 13 of the ECHR, entails claims alleging substantive breaches of ECHR provisions and guarantees protection to everyone

¹⁴ To this regard see for example the following, all of which have been ratified by Malta, Article 8 of the Universal Declaration of Human Rights, Article 2(3) of the International Covenant on Civil and Political Rights, Article 2 of the International Covenant on Economic, Social and Cultural Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 13 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union.

¹⁵ See for example, UN Committee on Human Rights, General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13, concerning Article 2(3) of the International Covenant on Civil and Political Rights, paras 14 "The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect [...]" and 15 "[...] A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an on-going violation is an essential element of the right to an effective remedy".

¹⁶ Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁷ It is to be noted that Article 2(3)(b) of the ICCPR provides that the right to a remedy should de "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State".

who wishes to complain about alleged infringements and it states that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

Under European Union law, the right to an effective remedy is a core element of the European legal order based on the rule of law¹⁸. Article 47 of the CFR establishes that "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

The above cited legal instruments do not contain specific requirements concerning the form or type of the remedy which should be established by states. The only necessary requisite is that the remedy must be "effective in practice as well as in law" 19. Moreover, the effectiveness of a remedy is not established by the certainty of a positive outcome; the remedy is effective if it is accessible, if its provides redress in respect of the applicant's complaints, and it must offer a reasonable prospect of success²⁰.

The right to a fair trial

The right to a fair trial is essential to the rule of law and to democracy itself. The right, which applies to both criminal and civil cases, requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. If a person cannot afford legal representation, this can undermine her/his right to a fair trial.

The right to a fair trial is one of the most important fundamental human rights. Since fair trial rights have been acknowledged by

¹⁸ Cf CJEU C-294/84, Parti écologiste "Les Verts" v. European Parliament, 23 April 1986; CJEU C-50/00 P, Unión de Pequeños Agricultores v. Council, 25 July 2002; CJEU C-222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, 15 May 1986.

¹⁹ ECtHR M.S.S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011, para 288.

²⁰ ECtHR *Vuckovic and Others v. Serbia*, Application no. 17153/11, 25 March 2014, paras 71 and 74.

the Universal Declaration of Human Rights²¹ in 1948, they have been provided and pledged by many international human rights documents, such as the International Covenant on Civil and Political Rights which contains the most detailed provisions on fair trial rights²².

Under Article 6(1) of the ECHR, everyone has the general right "to a fair [..] hearing" in the determination of civil rights and obligations or of any criminal charge. This surely entails an appropriate degree of 'equality of arms'. In relation to criminal offences, Article 6(3) (c) establishes that everyone has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". Therefore, legal aid is a fundamental component of the effective enjoyment of the right to a fair trial, as well as a human right in itself.

Analysed in detail below, in contrast to criminal cases, an entitlement to free legal aid in civil cases is not absolute. Nonetheless, the ECtHR has held that the right to access to a court contained in Article 6(1) encompasses the right to free legal assistance in civil matters when such assistance proved indispensable for effective access to the courts and a fair hearing, especially for ensuring the equality of arms²³.

In deciding whether free legal assistance is indispensable for effective access to the courts or fair hearing in a particular case, the ECtHR has stated it will consider the particular circumstances of each case, taking into account several factors:

- the importance of what is at stake for the applicant;
- the complexity of the case or the procedure, particularly when legal representation is mandatory by law;
- the capacity of the applicant to effectively exercise his/her right of access to court²⁴.

²¹ See Articles 10 and 11 of the Universal Declaration of Human Rights, 1948

²² See Articles 14 and 15 of the International Covenant on Civil and Political Rights, 1966

²³ See ECtHR Airey v. Ireland, Application no. 6289/73, 9 October 1979, ECtHR Artico v. Italy, Application no. 6694/74, 13 May 1980, and ECtHR Jordan v. the United Kingdom, Application no. 24746/94, 4 May 2001.

²⁴ ECtHR *Airey v. Ireland,* Application no. 6289/73, 9 October 1979, *Quaranta v. Switzerland,* Application No. 12744/87, Judgment of May 24, 1991

THE RIGHT TO LEGAL AID UNDER INTERNATIONAL LAW

The right to legal aid allows those who do not have sufficient financial resources to meet the costs of a court case and/or legal representation. It is a form of assistance given by the state to persons who on demand, and following an assessment of their claim and their financial situation, are declared as not having the means to access the courts of justice.

The UN Special Rapporteur on the Independence of Judges and Lawyers forcefully argues that the right to legal aid should be recognised, guaranteed and promoted in both criminal and civil cases, given its importance as an essential procedural guarantee for the right to an effective remedy, the right to equality before the courts and tribunals and the right to a fair trial²⁵.

Whilst highlighting that states bear the primary responsibility to adopt all appropriate measures to fully realise the right to legal aid for any individual within its territory and subject to its jurisdiction, the UN Special Rapporteur also specified that legal aid should be as broad as possible, stressing that its aim is to contribute to the elimination of obstacles and barriers that impair or restrict access to justice²⁶.

As outlined above, under the European Convention on Human Rights the notion of access to justice is protected in Article 6, which also encompasses the principle of equality arms and necessitates access to legal aid. In a recent Recommendation, the Council of Europe outlined the need of member states to guarantee equality of arms to alleged victims of business-related human rights abuses within the meaning of Article 6. States should provide legal aid schemes regrading claims concerning such abuses, such legal aid should be obtainable in a manner that is effective and practical²⁷.

In this regard, the European Court of Human Rights has stated that under Article 6 of the Convention:

²⁵ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, *Legal aid, a right in itself*, n.1.

²⁶ Ibid.

²⁷ Committee of Ministers of the Council of Europe, Recommendation CM/ Rec(2016)3 of the Committee of Ministers to member States on human rights and business, March 2016

"an accused is entitled to legal assistance which is practical and effective and not theoretical or illusory. This Convention provision speaks of "assistance" and not of "nomination": mere nomination does not ensure effective assistance since a lawyer may be prevented from providing such assistance owing to various practical reasons, or shirk his or her duties. A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. However, if a failure by legal-aid counsel to provide effective representation is manifest or is sufficiently brought to the authorities' attention in some other way, the authorities must take steps to ensure that the accused effectively enjoys the right to legal assistance"28.

Malta is a signatory to a number of international conventions and consequently is obliged to abide by their provisions. There is an obligation on Malta to ensure that such provisions are effective at a national level and to adopt or amend any laws with a view to achieve the aims of the conventions it is signatory to.

The table below maps out Malta's obligations in relation to providing legal aid under the main international and regional treaties and conventions.

TABLE 1 - LEGAL AID IN INTERNATIONAL & REGIONAL TREATIES

Name of Legal Document	Article	Text
European Convention on Human Rights	Article 6(3) (c)- Right to a fair trial	Everyone charged with a criminal offence has the following minimum rights: to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

²⁸ Huseyn et v. Ażerbajan, Application Nos 35485/05, 45553/05, 35680/05 u 36085/05, 26th July 2011

Name of Legal Document	Article	Text
International Covenant on Civil And Political Rights	Article 14 (3)(d)	In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
Convention on preventing and combating violence against women and domestic violence	Article 57	Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.
Convention on Action against Trafficking in Human Beings	Article 15(2)	Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.
Convention on Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters	Article 50	An applicant who in the State of origin has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the State addressed.

LEGAL AID IN THE EUROPEAN UNION

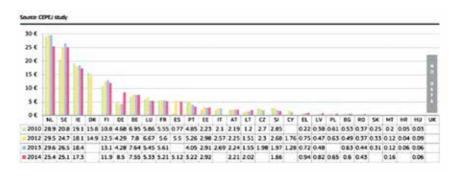
Malta, being a Member State of the European Union, must apply and enforce European Union legislation. European law is part and parcel of the Maltese legal system and therefore the report would be incomplete without an examination of any provisions requiring the provision of legal aid.

Legal aid systems exist in all Member States of the European Union, as in Malta, for both civil and criminal proceedings. When comparing national schemes providing legal aid, fundamental differences are revealed: differences in the philosophy, organisation and management of such legal aid systems. If some States seem to

make legal services generally available, in some others legal aid can be available only for the poorest.

There are also fundamental differences as to the amounts that Member States allocate in their national budgets to legal aid as can be seen in Figure 2 below. In 2014, the Netherlands, at the top end, allocated €25.40 per inhabitant to legal aid costs, whereas Malta allocated a mere €0.16 per inhabitant:

FIGURE 2: ANNUAL PUBLIC BUDGET ALLOCATED TO LEGAL AID PER MS (EUR PER INHABITANT)



(Graph taken from The 2016 EU Justice Scoreboard²⁹)

The latest public figures show that the sum of €150,000 was allocated to the Legal Aid Agency in the Annual Budget for 2017, published by the Ministry for Finance in October, 2016^{30} .

Furthermore, across the European Union a number of problems continue to exist in the provision of legal aid in national jurisdictions. Generally, the issues that have been identified are the following:

 legal aid lawyers are often poorly paid or have to wait a long time for payment to be processed. In some Member States

²⁹ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The 2016 EU Justice Scoreboard, COM(2016) 199, 2016, p 18

³⁰ Ministry for Finance, Annual Budget 2017, Financial Estimates 2017 Ministry for Justice, Culture and Local Government, October 2016, pg 245

legal aid lawyers are paid a flat rate regardless of the amount of work done or the complexity of the case;

- the quality of legal aid lawyers in some Member States is very low, at times due to inexperience, which jeopardises the quality of the service:
- legal aid is sometimes not guaranteed during initial police questioning, meaning that suspects are unrepresented at one of the most crucial stages of the process;
- in the vast majority of EU Member States, legal aid lawyers are not appointed at clients' discretion; and
- in some Member States applying for legal aid can be excessively bureaucratic and cumbersome, which is particularly problematic for non-nationals who may not understand the documentation required³¹.

Although the Charter of Fundamental Rights contains an obligation for Member States to provide legal aid to those who lack sufficient resources, this provision is only applicable at a national level insofar as Member States are applying EU law. However, in October 2016 a new Directive on the right to legal aid for citizens accused of criminal offence and for those subject to a European Arrest Warrant³² was adopted. The purpose of the Directive is to lay down a common set of standards for suspects and accused persons and their right to access legal aid across the Member States of the European Union.

Besides the Directive on the right to legal aid in criminal proceedings, EU legislation lays down the obligation to provide legal aid in a number of other instances as illustrated in the table below:

³¹ Fair Trial International, *The practical operation of legal aid in the EU*, July 2012, p 6.pp 2-3.

³² Council Directive 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

TABLE 2 - LEGAL AID IN EUROPEAN UNION LAW

Name of Legal Document	Article	Text
Charter of Fundamental Rights of The European Union	Article 47	Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
Regulation No 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast)	Article 27	Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved.
Council Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations	Article 44	To ensure such effective access, Member States shall provide legal aid in accordance with this Chapter.
Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing regulation (EC) no 1347/2000	Article 50	An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

Name of Legal Document	Article	Text
Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments	Article 56	An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.
Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes	Article 55	An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.
Council Regulation 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships	Article 55	An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

Name of Legal Document	Article	Text
Council Directive 2003/109/ EC Concerning the Status of Third-Country Nationals Who Are Long-Term Residents	Article 12(5)	In relation to expulsion measures: Legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside.
Council Directive 2004/81/ EC on the Residence Permit issued to Third-Country Nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities	Article 7	Member States may provide the third-country nationals concerned with free legal aid, if established and under the conditions set by national law.
Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes	Article 3	Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice.
Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA	Article 13	Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings.
Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast)	Article 20	Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures.

Name of Legal Document	Article	Text
Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings	Article 18	Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer.
Directive 2016/1919 of on legal aid for suspects and accused persons in criminal proceedings and	Article 4(1)	Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the
for requested persons in European Arrest Warrant proceedings	Article 5(1)	assistance of a lawyer have the right to legal aid when the interests of justice so require. The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.

The Maltese Legal Aid System

...it is clear that the legal aid institute needs to be reviewed with the aim to:

- changes are needed to this institute of procedural law to be updated for today's times;
- removal of archaic procedures;
- more expeditious process when providing the due legal aid benefit;
- more accountability in the provision of this benefit...

FINAL REPORT OF THE COMMISSION FOR THE HOLISTIC REFORM IN THE FIELD OF JUSTICE, 2013

LEGAL FRAMEWORK

Legal Aid Agency

One of the major developments in the provision of public legal aid services was the creation of the Legal Aid Agency³³ in 2014. The Agency was set up to be responsible for and to administer the provision of legal aid in all areas where this is required³⁴. The setting up of an independent and organised departmental structure to administer the granting of legal aid follows from the proposals under **Recommendation 16 on the Legal Aid Benefit** published by the Commission for the Holistic Reform in the Field of Justice (Justice Reform Commission)³⁵. The setting up of a separate and distinct entity ensures its autonomy from the office of the Attorney General.

³³ Legal Aid Agency (Establishment) Order, S.L. 497.11 of the Laws of Malta

³⁴ Fourth Schedule of the Public Administration Act, Cap. 497 of the Laws of Malta

³⁵ Commission for the Holistic Reform in the Field of Justice, Final Report of the Commission for the Holistic Reform in the Field of Justice, November 2013, pg. 106

The Agency provides administrative support in respect of procedures or measures on legal aid, advocates for legal aid and curators. It also has the added functions and duties to undertake studies for the purposes of improving legal aid, to organise training and discussion on legal aid and to carry out constant monitoring of the working of the legal aid system³⁶. Any person wishing to apply for a legal aid lawyer would have to apply with the Legal Aid Agency. The Agency would carry out the merit and means test and if the person is eligible for the benefit of legal aid, a legal aid lawyer will be appointed to such person.

There is no appeal from the decision of the Agency refusing to grant legal aid³⁷. However, if the report of the Advocate for Legal Aid is unfavourable the Civil Court shall examine the report, and shall give the parties the opportunity to make submissions before it decides on whether to accept the adverse report or to reject the report and allow the demand for legal aid³⁸.

The Advocate of Legal Aid heads the Legal Aid Agency and performs all the functions and duties of the Chief Executive Officer of the Agency³⁹. The Advocate for Legal Aid is on salary Scale 10⁴⁰, receiving between €18,218.98 and €20,665.00 per annum⁴¹. At the time of writing, there were 17 lawyers on the legal aid roster, of which four perform legal work in Gozo⁴² and lawyers on the Legal Aid Agency roster are paid a retainer fee⁴³ irrespective of the number or complexity of cases they are assigned.

³⁶ Regulation 4 of the Legal Aid Agency (Establishment) Order, S.L. 497.11 of the Laws of Malta.

³⁷ Legal Aid Agency, Frequently Asked Questions: https://mjcl.gov.mt/en/legalaidmalta/Pages/faq.aspx

³⁸ Article 917 of the Code of Organisation and Civil Procedure, Cap. 12 of the Laws of Malta

³⁹ Regulation 9, Ibid.

⁴⁰ Third Schedule of the Public Administration Act, Cap. 497 of the Laws of Malta

⁴¹ Ministry for Finance, Annual Budget 2017, Financial Estimates, Appendix L - Schedule of Grades, 2017, October 2016, pg 382

⁴² The Malta Government Gazette, No. 19,726 of the 9th February, 2017 https://www.gov.mt/en/Government/Government%20Gazette/Documents/2017/02/Government%20Gazette%20-%209th%20February, %202017.pdf

⁴³ It was recently reported that the Minister for Justice confirmed that the retainer fee for legal aid lawyers went up from €2,000 to €6,000 annually. Pace Yannick, Owen Bonnici: Legal aid lawyers' retainer already revised, MaltaToday, 18th January, 2017 http://www.maltatoday.com.mt/news/national/73575/owen_bonnici_legal_aid_lawyers_retainer_already_revised#.WO3909J95pg

Data as to the number of people granted or denied the benefit of legal aid, the number of cases processed and the time-period for processing applications was not publicly available at the time of writing.

It should be noted that a separate entity, the Third Country Nationals Unit within the Ministry for Home Affairs and National Security, administers the provision of legal aid to asylum-seekers at appeal stage, and in order to challenge or review their administrative detention⁴⁴. This unit is separate from the Legal Aid Agency and there are currently 11 lawyers on the TCN Legal Aid list⁴⁵. The lawyers on the TCN roster are chosen through a public call for applicants and after interviews are conducted with each lawyer. The selected lawyers are paid on a case by case basis⁴⁶.

Criminal Proceedings

The right to legal aid in criminal proceedings is a constitutionally protected right under Article 39(6)(c) which lays down that "Every person who is charged with a criminal offence ... shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense".

This is also reflected in the Criminal Code which states that the Advocate for Legal Aid shall gratuitously undertake the defence of any accused who has briefed no other advocate or who has been admitted to sue or defend with the benefit of legal aid⁴⁷. It should be pointed out that the right to legal assistance and to legal aid starts from the moment the person becomes a suspect and before they are questioned by the police or other authority⁴⁸. The request for legal aid can be made either by application or orally to the Advocate for

.....

⁴⁴ More information about the scope of the legal aid provided can be found below in the Other Sectors section.

⁴⁵ Information provided during interview with the TCN Unit on the 5th October 2016

⁴⁶ For each case the TCN legal aid lawyer is paid €69.88. Call for Expression of Interest for Legal Aid Lawyers (Refugees Act): https://homeaffairs.gov.mt/en/MHAS-Information/Job%20Opportunities/Documents/Archived/Call%20 for%20Expression%20of%20Interest%20for%20Legal%20Aid%20Lawyers_Duties%20and%20Remuneration.pdf

⁴⁷ Article 570 of the Criminal Code, Cap. 9 of the Laws of Malta.

⁴⁸ Article 355AUA of the Criminal Code, ibid.

Legal Aid. The Criminal Code refers to specific provisions of the Code of Organization and Civil Procedure⁴⁹ which apply to the provision of Legal Aid in criminal matters.

The Legal Aid Agency states that no means test is applied in criminal cases from the time when the person is held in police custody up until trial⁵⁰. However, the absolute right to a legal aid lawyer without a means test during criminal proceedings remains unclear. In 2016, a *Courts of Justice Citizens' Charter* published by the Courts of Justice Department within the Ministry for Justice, Culture and Local Government⁵¹ states that:

"Every person has the right to defend himself in person or through the use of a legal representative of his choice or, **if the party lacks funds for legal representation**, the services of advocates of the Legal Aid".

Furthermore, a local newspaper recently reported that during an arraignment before the Court of Magistrates an accused requested the appointment of a legal aid lawyer. This request was denied by the Magistrate due to the fact that the accused was gainfully employed⁵².

Civil Proceedings

The Code of Organisation and Civil Procedure lays down the provisions that regulate the right and the procedure for the provision of legal aid in civil proceedings. The law states that legal aid may be granted to any person

- a. who is a party to a civil dispute or who has good grounds for commencing civil legal action; and
- b. whose maximum income did not exceed the national minimum wage and total assets did not exceed €6,988.12⁵³.
- 49 Article 911(4), (5) and (6) of the Code of Organisation and Civil Procedure, Cap. 12 of the Laws of Malta
- 50 Assessment Criteria for Legal Aid Service, Legal Aid Malta webpage: https://mjcl.gov.mt/en/legalaidmalta/Pages/assessment.aspx
- 51 Ministry for Justice, Culture and Local Government, Courts of Justice Citizens' Charter, Courts of Justice Department, July 28th, 2016 http://www.justiceservices.gov.mt/CourtServices/Courts_of_Justice_EN.pdf
- 52 Agius Matthew, Man arraigned on domestic violence charge, MaltaToday, 27th October, 2016 http://www.maltatoday.com.mt/news/court_and_police/71014/romanian arraigned on domestic violence charge#.WOZBJdJ9600
- 53 Article 912 of the Code of Organisation and Civil Procedure, Cap. 12 of the Laws of Malta

Therefore, in civil proceedings the test is two-fold and examines both the merit and the means. In order to qualify under the merits criteria, the Legal Aid Agency must conclude that that there is a probable cause for litigation, a *probabilis causa litigandi*. The criteria adopted in this assessment are unclear, as they are not contained in either the Code or in any other guidelines or regulations.

Furthermore, applicants must also prove that they do not have sufficent means to afford a private lawyer by showing that in the past year their income did not exceed the national minimum wage and total assets did not exceed 66,988.12.

It is interesting to note that the general legal aid provided in civil proceedings only applies to civil litigation and not to pre-litigation legal advice. However, in Title XA of the Code of Organisation and Civil Procedure, which transposes the Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, allows for the provision of legal aid which also includes pre-litigation advice with the aim of reaching a settlement *prior* to instituting legal proceedings⁵⁴.

The restriction on the provision of legal aid to cases for which there is a probable cause for litigation creates a situation where persons who are at an economic disadvantage are unable to access any pre-litigation advice or assistance without charge. This constitutes a serious restriction on access to justice due to a lack of knowledge of their rights and the correct forum within which to file a complaint or action.

This is further exacerbated by the fact that most local equality bodies, such as the National Commission for the Promotion of Equality and the Office of the Ombudsman, do not provide legal advice, although their officers assist in the formulation and lodging of complaints in the respective bodies. The Commission for the Rights of Persons with Disability does provide free legal advice through their Equal Opportunities Compliance Unit.⁵⁵

⁵⁴ Article 928B of the Code of Organisation and Civil Procedure, Cap. 12 of the Laws of Malta

⁵⁵ Information provided during interviews and email correspondence with representatives of the equality bodies between on the 4th October 2016, 17th October, 2016 and 25th October, 2016

Other Sectors

A number of specialised laws also guarantee the right to legal aid, to be seen as complementary to the above-mentioned schemes. The Victims of Crime Act gives victims of crime, including victims of trafficking, the right to request a legal aid lawyer to assist them during criminal proceedings⁵⁶.

Furthermore, under the Refugees Act, persons who wish to appeal from the first instance decision of the Refugee Commissioner have the right to free legal under the same conditions as Maltese nationals⁵⁷. The lack of a legal aid lawyer at first instance of the asylum procedure is a matter of concern for asylum applicants, as they do not receive guidance or legal advice in preparing their application and interview before determination of their status⁵⁸. Although it is noted that a small number of NGOs provide free legal assistance at both first instance and appeal stage, not all applicants are able to access these services due to their inherent limitations of capacity⁵⁹.

In addition, all asylum-seekers are entitled to legal aid for assistance and representation for challenges against any Detention Order issued against them, and during the review of the lawfulness of their detention⁶⁰. The Working Group on Arbitrary Detention, in its Report following a visit to Malta, recommended to extend the right to a legal aid lawyer to stages beyond the Immigration Appeals Board, to include legal aid provision for challenges brought before national and regional Courts and international human rights bodies⁶¹.

Together with legal aid for these specific issues, Regulation 16 of the *Reception Regulations* specifies that free legal assistance will also be granted to all applicants who, lacking sufficient resources, wish to appeal an decision taken under the Regulations. Together with detention, referred to above, the Regulations cover important

⁵⁶ Article 10, Victim of Crime Act, Cap. 539 of the Laws of Malta

⁵⁷ Article 7(5) of the Refugees Act, Cap. 420 of the Laws of Malta

⁵⁸ Information given by TCN legal practitioners and NGO lawyers during interviews conducted on the 3rd October 2016

⁵⁹ The Jesuit Refugee Service Malta and aditus foundation both provide free legal advice to asylum seekers at both stages of the proceedings.

⁶⁰ Regulation 6(2) and 6(5) of the Reception of Asylum Seekers Regulations, S.L. 420.06 of the Laws of Malta

⁶¹ Human Rights Council, Report of the Working Group on Arbitrary Detention on its follow-up mission to Malta, A/HRC/33/50/Add.1, 23rd June, 2016, p 17

issues such as reduction and withdrawal of reception conditions (e.g. housing, healthcare, material benefits, etc.), family unity, schooling and education, and access to employment. In terms of the Regulation "free legal assistance and representation shall entail the preparation of the required procedural documents and participation in the hearing before the Immigration Appeals Board."

In order to apply for this form of legal aid, asylum-seekers need to make the request before the Third Country Nationals Unit within the Ministry for Home Affairs and National Security.

In specific circumstances, free legal assistance will also be given to illegally staying third-country nationals in relation to an application before the Immigration Appeals Board for the review of a Return Decision and a Removal Order.⁶² Legal aid will only be granted to those who are not subject to an entry ban and to those who do not enter Malta through irregular crossing by sea or air. Furthermore, a rather draconian proviso was included which provides that free legal assistance will only be provided where the review is likely to succeed.

Legal aid is also provided, without the application of a means test, in cases relating to an action for the correction or cancellation of any registration, or for the registration of any act of birth, marriage or death⁶³.

JUSTICE REFORM RECOMMENDATIONS

In March 2013, the government set up a Justice Reform Commission with the task to conduct a review of the local legal and justice system and to make proposals and recommendations for the reform for the administration of justice. It was also tasked with, amongst others, "to make proposals for a reform of the legal aid system to ensure more aid to those in need"⁶⁴. After several consultations, the Commission published its report which contained 34 Recommendations and 449 measures. Recommendation Sixteen relates to the provision

⁶² Regulation 11 of the Common Standards and Procedures for returning Illegally Staying Third Country Nationals Regulations, S.L. 217.12 of the Laws of Malta

⁶³ Article 913 of the Code of Organisation and Civil Procedure, Cap. 12 of the Laws of Malta

⁶⁴ Commission for the Holistic Reform in the Field of Justice, Final Report of the Commission for the Holistic Reform in the Field of Justice, November 2013, p. 22

of the Legal Aid Benefit and this Recommendation lays down 87 proposed measures for the reform of the legal aid system⁶⁵.

This report will highlight those proposed measures that have been identified as the most pressing issues in the stakeholder consultations carried out throughout the project⁶⁶. The measures have been grouped into thematic sections. A number of recommendations also refer to *pro bono* legal assistance and these will be outlined in Section III – *Pro Bono* in Malta.

Legal Aid Lawyers

- Appointment: The appointment of Legal Aid Lawyers shall be made following a public call for applications. Their removal, for a valid and fair reason, shall be made by either the Advocate for Legal Aid, or in case of an appeal, by the Discipline for Judicial Services Authority.
- 2. **Distribution of Lists of Legal Aid Lawyers**: Two lists of lawyers should be established. One list covering civil cases, administrative and cross-border cases and one list for criminal cases.
- 3. Personalised service: It may happen that a civil or criminal court case may need a constitutional reference or a parte civile appearance in a criminal court case. It is proposed that a legal aid lawyer can act in any type of case civil or criminal, even though he may be listed on the other roster, in order to ensure a more complete and personalised service.
- 4. Payment rates: The payment rate should be increased and should be proportionate to the workload of the individual lawyer. There should also be an annual payment rate for a lawyer on the criminal list. The listed lawyer should have the right to collect his fees from the losing party, who is not on legal aid, when the beneficiary client receives the funds.
- 5. **Possibility of providing a Tax Rebate**: The possibility that listed lawyers would be given a tax rebate per beneficiary they patronise instead of getting paid should be explored.

⁶⁵ Ibid, see pages 106 - 128

⁶⁶ It must also be noted that a number of measures, such as the setting up of the Legal Aid Agency, have already been implemented and will therefore not be discussed in this section.

Legislation

 Special law on Legal Aid: There should be a special law ad hoc and all provisions governing the grant of legal aid benefits scattered in various laws should be consolidated into one law.

2. Right of Appeal: There should only be a right of appeal heard by the Duty Judge from the decision of the Legal Aid Lawyer in case a rejection for request for legal aid, and this without prejudice to the removal of legal aid, or when the Legal Aid Lawyer is satisfied that the person admitted to benefit was not entitled to it.

Merits

- Provision of Legal Aid Benefit in General: Legal aid should not be linked with any specific court, tribunal or be restricted to any single procedure. Once the benefit is granted, it can be exercised at any Court, at any tribunal wherever the benefit is admitted and for every procedure, including those extra-judicial.
- Duties of the Registered Legal Aid Lawyer: Once the lawyer
 is assigned a beneficiary, he/she shall pursue all the cases of
 the beneficiary, as far as possible, where the substance of the
 proceedings is connected, so that the beneficiary is assigned
 one lawyer to serve all needs.
- 3. List of type of assistance covered: The assistance should cover mediation and arbitration proceedings; any procedures that may be filed in court; presentation of official letters, judicial letters, interpellator letters; submission of appeals, retrials and counterclaims; interventions in statu et terminis; third part in lawsuit; procedures during questioning by Police; procedures parte civile; procedures concerning sentenced persons; proceedings before quasi-judicial tribunals; out-of-court settlement proceedings; legal advice which does not necessarily lead to judicial proceedings; procedures for injunctions and any action provided by law, including actio popolaris.

Means test

- Social Security Department: It was proposed that the means test should be administered by the Department of Social Security, by which one means test is to be established and associated with each person claiming public benefits.
- 2. **Means test**: If the means is not carried out by the Department of Social Security then (i) the amount of €6,988.12 laid down by the COCP should be raised to €10,000 and (ii) the amount referred to as minimum wage should be increased by €3,000 over the national minimum wage.
- 3. Means Testing in criminal cases should be mandatory: It appears that testing is only done in the case of trials, and not in summary criminal cases. It is proposed that means testing is carried out in every case of a criminal nature in which legal aid benefit is claimed.
- 4. **Legal Aid Benefit granted to Arrested persons**: The legal aid benefit shall be granted to urgent cases in criminal proceedings, such as on arrest, where the means testing should not be applied.

Quality of Service

- Complaints: The Legal Aid Lawyer shall investigate complaints received from beneficiaries relating to the service being provided by the assigned lawyer. When a judge notes that the listed legal aid lawyer is not performing duties properly, a notification should be sent to Legal Aid Lawyer.
- Identification: Instances when legal aid benefit is considered as not being properly given should be identified, for example when the legal aid lawyer fails to provide effective representation or fails to appear at sittings.
- 3. **Gender sensitivity**: The institute of legal aid should be gender sensitive. This means the list of lawyers must contain male and female lawyers and the applicant would have the right to choose the preferred gender of the lawyer.

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Access & Information to the Public:

 Opening Hours of the Legal Aid Department: The Legal Aid Lawyer and Assistants should be recruited on a full-time basis, and the opening hours of the Legal Aid Department should be comparable to that of a Government department. The information on the website of the Legal Aid Department should be provided not only in Maltese but in as many languages as possible.

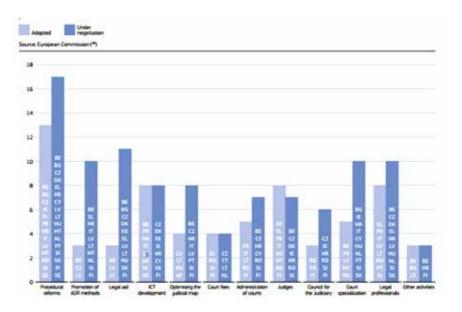
- Preparation of Leaflets about the Legal Aid Benefit: The Legal
 Aid Department should prepare brochures on how the legal aid
 system works and these brochures are to be distributed in Local
 Council offices, police stations, etc.
- Information and leaflets should be distributed in Local Councils, Police Stations, Court buildings both in Malta and in Gozo, the Corradino Correctional Facility, the detention facility in Mount Carmel Hospital, in detention centres for immigrants, etc.

As explained, the major legislative changes adopted within the provision of legal aid have been the setting up of the Legal Aid Agency and the procedures regulating the application and grant of the benefit. A look at the latest European Justice Scoreboard published in 2017⁶⁷, shows that Malta adopted or negotiated initiatives in the justice sector relating to procedural reforms, promotion of alternative dispute resolution methods and the appointment of judges.

However, no measures adopted or under negotiation relating to legal aid have been reported for the purposes of the EU Justice Scoreboard. It remains to be seen which of the Justice Reform Commission's recommendations and measures will be taken on board in the future.

⁶⁷ European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The 2016 EU Justice Scoreboard, COM(2017) 167, 10 April 2017, p 4

FIGURE 3: LEGISLATIVE AND REGULATORY ACTIVITY CONCERNING JUSTICE SYSTEMS IN 2016 (ADOPTED MEASURES/INITIATIVES UNDER NEGOTIATION PER MEMBER STATE)



(Graph taken from the 2017 EU Justice Scoreboard⁶⁸)

PERCEPTIONS OF THE LEGAL AID SYSTEM IN MALTA

Fair Trials International, in its report on the practical aspect of legal aid in the European Union, found that in Malta although the availability of legal aid exists and the police support suspects to apply for legal aid, serious concerns have been raised in relation to the practical and effective availability of legal aid, as it is often denied in practice. In addition, the report found that practitioners usually take on legal aid work on top of their full time private practice and therefore are frequently not able to dedicate a fair amount of time

⁶⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The 2016 EU Justice Scoreboard, COM(2017) 167, 10 April 2017, p 4

SECTION II 39

to their non-fee paying clients⁶⁹. These and other shortcomings in the system have been acknowledged by the Justice Reform Commission and the need for improvement has been reiterated by the authorities on a number of occasions⁷⁰.

Furthermore, the Maltese Courts have been called on to examine the legal aid system due to alleged breaches of fair trial rights in relation to the appointment of legal aid lawyers and the lack of specialisation of such lawyers, resulting from there only being one general roster.

In **Daniel Holmes vs L-Avukat Ġenerali**⁷¹ the applicant alleged breach of Article 39(6)(c) of the Maltese Constitution and Article 6(3) (c) of the European Convention on Human Rights on the right to legal assistance as an element of the right to a fair trial, on the basis that the legal aid lawyer was assigned to him from a list of the only 2 lawyers on the roster in Gozo without due regard to their experience⁷². The Court did not accept the plea on the basis of the fact that the applicant was not complaining against the actions of his particular legal aid lawyer but on the legal aid system in general. The Court concluded that it should not carry out a theoretical examination of the legal aid system, it should instead examine whether in this particular circumstance the aid received breached the applicant's fundamental rights. The Court found that that the legal assistance given to the applicant was adequate, specifically since the first court had found the applicant not guilty. This reasoning was confirmed on appeal by the Constitutional Court, and since the applicant himself stated that he did not have a complaint on the actions of the legal aid lawyer, such legal assistance was not one that was "theoretical or illusory"73.

⁶⁹ Fair Trials International, *The Practical Operation of Legal Aid in the EU*, July 2012, p.6.

⁷⁰ Pace Yannick, Owen Bonnici: Legal aid lawyers' retainer already revised, MaltaToday, 18th January, 2017; Terms of Reference of the Commission for the Holistic Reform of the Justice System https://mjcl.gov.mt/en/justice/krhg/ Pages/Terms-of-Reference.aspx

⁷¹ Daniel Holmes vs L-Avukat Generali et, First Hall Civil Court (Constitutional) 32/14 (30/06/15)

⁷² The applicant's second plea relating to legal aid was that the legal aid lawyer was paid from the office of the Attorney General who also acts as Public Prosecutor and therefore lacked independence. This plea was also rejected by the Court. The issue has now been resolved with the new legal aid regulations that created a Legal Aid Agency independent from the Attorney General's Office.

⁷³ Daniel Holmes vs L-Avukat Generali et, Constitutional Court (Appeal), 32/14 (03/05/16)

In **Aaron Cassar vs L-Avukat Ġenerali**⁷⁴ the applicant raised similar pleas as in the Daniel Holmes' case. The Court held that the applicant has the right to practical and effective legal assistance, however from the facts of the case it did not result that this right was breached. The Court went slightly further in its reasoning and held that the existing legal aid system does have some shortcomings that need to be addressed and made reference to the proposals put forward by the Justice Reform Commission. The Court highlighted that one of the proposed measures was that of creating two specialized lists of lawyers. It however concluded that in the particular circumstances of the case it did not find any shortcomings on behalf of the legal aid lawyer. This reasoning was confirmed in 2017 in the judgement **Udagha Omeh John Vs Attorney General Et**⁷⁵.

Perceptions from the public

An anonymous online survey was carried out by aditus foundation⁷⁶ in order to gather some experiences of persons who used the legal aid system in Malta. Generally, the respondents showed that they were reasonably knowledgeable on the eligibility to access legal aid by subject matter.

Half of the respondents had never used the legal aid system and from these: 7% of the respondents were not entitled, 35% of the respondents had never heard of legal aid and 50% preferred to go to private lawyers:

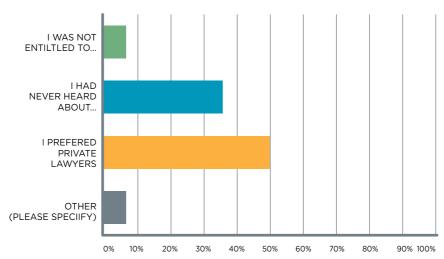
⁷⁴ Aaron Cassar vs L-Avukat Generali et, First Hall Civil Court (Constitutional) 7/14 (28/01/16)

⁷⁵ Udagha Omeh John Vs Attorney General Et, First Civil First Hall (Constitutional Jurisdiction), 10/2014, (31/01/2017)

⁷⁶ The anonymous online survey was carried out between November 2016 to March 2017, aiming to gauge public thoughts on the availability and effectiveness of the legal aid system in Malta. 34 responses were registered. Participants in the survey were invited to answer 14 questions relating to access to legal advice, knowledge of availability of legal aid and the quality of the service received through legal aid.

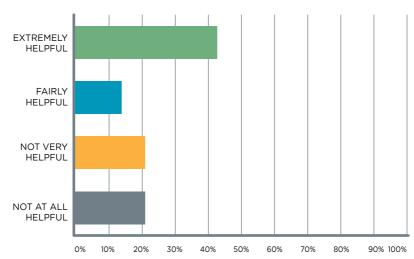
SECTION II 41



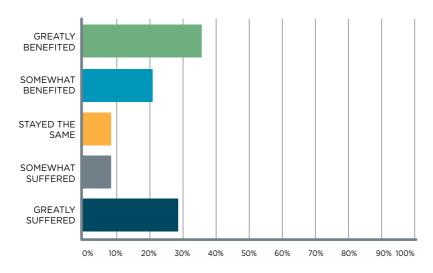


Those respondents who used the legal aid system were asked questions relating to their experience with accessing the legal aid system and with the service that legal aid lawyers had given:

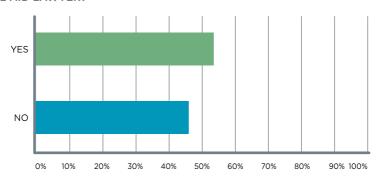
Q2: HOW HELPFUL WAS THE LEGAL AID AGENCY OR THE ADVOCATE FOR LEGAL AID IN ASSIGNING A LAWYER TO YOU?

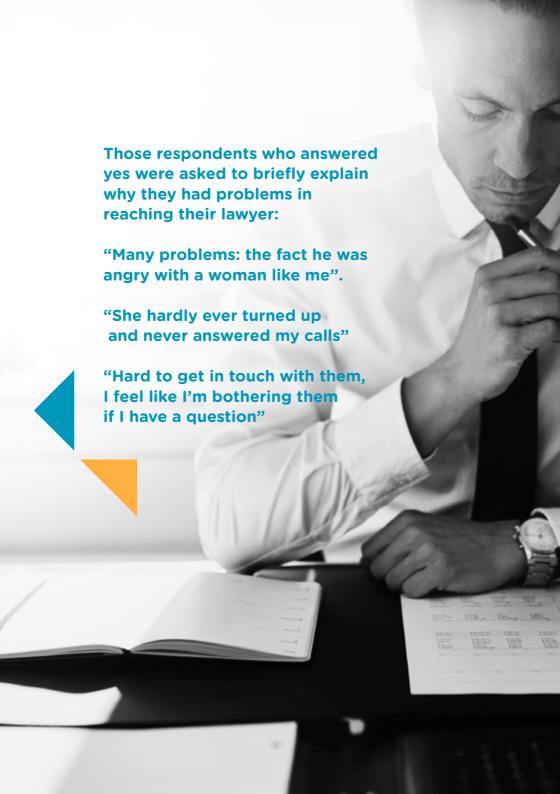


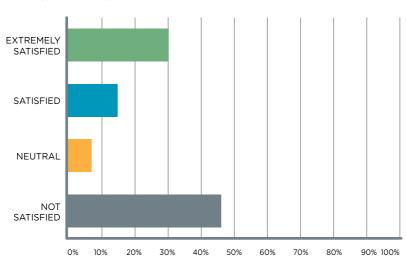
Q3: TO WHAT EXTENT DO YOU THINK YOUR SITUATION HAS CHANGED AS A RESULT OF CONTACTING LEGAL AID? WOULD YOU SAY IT HAS:



Q4: HAVE YOU HAD ANY PROBLEMS IN GETTING IN TOUCH WITH YOUR LEGAL AID LAWYER?







Q5: HOW SATISFIED ARE YOU WITH THE OVERALL EXPERIENCE WITH THE LEGAL AID LAWYER?

The sampling shows that persons who have used the local legal aid system are roughly divided into two equal groups, those that have had a positive and satisfactory experience and those who have had an extremely negative experience. Where respondents were asked about their first contact with the legal aid lawyer, 53% answered that this happened a few days after being assigned a legal aid lawyer and 23% a few weeks after the appointment. However, 2 respondents met their lawyer either a few hours before the Court hearing or during the Court hearing. One respondent answered that "(H)e was always busy and countless times gave me an appointment and did not show up".

Many of the negative experiences could be tackled with the implementation of a number of measures proposed by the Justice Reform Commission, such as the recommendation for gender sensitivity in the appointment of legal aid lawyers, the provision of training for legal aid lawyers and the institution of a complaints system within the Legal Aid Agency.

SECTION II 45

Perceptions & Recommendations

In the carrying out of the research for this report, a number of interviews were conducted with key stakeholders and national experts, including government officials, NGOs officers, and private defence counsels. In general, it was found that the current legal aid system in Malta raises some concerns in relation to the means tests adopted, the subject-matters covered and the limited funding assigned to legal aid, resulting in practitioners being underpaid and overworked.

Meetings with the stakeholders followed a common structured interview approach, and provided extremely valuable information concerning an evaluation of the system by the implementers and practitioners themselves. The common issues which arose largely mirror the concerns raised by the Commission for the Reform of Justice:

- The need for specialised lists of legal aid lawyers to cater for the different needs of the client;
- The extension of the scope of legal aid to include pre-litigation advice;
- 3. The need to remunerate legal aid lawyers on a case-by-case basis according to the complexities of the case;
- 4. The need for information in crucial areas, such as courts, police stations, etc.;
- 5. The need for full-time lawyers on the roster;
- 6. A charter or code of conduct for legal aid lawyers needs to be drawn up;
- Sanctions for legal aid lawyers need to be introduced in cases of failure to act;
- 8. The threshold applied for means test to be eligible for legal aid needs to be higher, and the methodology revisited. At times the means test can prejudice victims of domestic violence if the spouses have a joint account;
- 9. Legal aid for asylum-seekers should be extended to first instance applications;
- 10. Consolidate legal aid granted through the Legal Aid Agency and that granted through the TCN Unit;
- 11. There needs to be more information on the right to a legal aid lawyer for victims of crime.



Pro Bono in Malta

"Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities."

JUSTICE RUTH BADER GINSBURG, U.S. SUPREME COURT ASSOCIATE, 2014

PRO BONO

The term *pro bono publico* is used to describe "*legal work that is carried out unpaid for the good of the general*" It usually denotes work undertaken by private lawyers for the public good without charge, in particular legal work carried out for a client on a low income⁷⁸. The practice of *pro bono* has deep roots in medieval Europe and it was considered as a charitable duty provided by private lawyers or the Church⁷⁹. With the emergence of the duty of the state to provide legal aid in 20th century Europe, the practice of *pro bono* did not remain the norm.

The development of large multinational law firms in the United States and London saw the emergence of an institutionalised and structured model of *pro bono* legal services. However, this enthusiasm has not caught on at the same rate in other European countries, including Malta. This is mainly due to the establishment of

⁷⁷ Law J., and Martin E.A., A Dictionary of Law (7 ed.), Oxford University Press, 2014

⁷⁸ Knowles E., The Oxford Dictionary of Phrase and Fable, Second Edition, Oxford University Press, 2005

⁷⁹ Khadar L., The Growth of Pro Bono in Europe - Using the power of law for the public interest, November 2016

public legal aid but also due to the absence of a link between private law firms, NGOs and clients.

The ethos behind providing *pro bono* legal work is that many lawyers consider such work as an integral part of being a member of the legal profession providing access to justice⁸⁰ and giving back to the community by using their skills to help those who are vulnerable. It is based on the fundamental belief that access to justice is essential to liberty, fairness, dignity, progress, development, and the Rule of Law, and that the legal profession has the duty and the opportunity to provide *pro bono* legal services⁸¹.

Pro bono assistance can take a number of different forms and it could include the provision of legal advice and representation for clients on a low income, legal research and analysis in collaboration with NGOs and legal training in particular areas⁸². The beneficiary of *pro bono* legal assistance can be individuals, NGOs or charities and also social enterprises.

COMPARATIVE PRO BONO SYSTEMS

United States

In the United States, defendants in criminal proceeding have a right to a legal representative appointed by the government. Each individual state can broaden the right to counsel through their laws and constitution. However, there is no general right to legal aid in civil matters. Consequently, *pro bono* services offered by private lawyers for assistance in civil matters are in high demand in the US.

There is no mandatory requirement imposed by the state bar on lawyers to provide legal aid. However, the American Bar Association (ABA) resolved in its Model Rule 6.1 that every lawyer has a professional responsibility to make available their service to individuals who are unable to pay⁸³ and further specifies that "A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year". In order to fulfil this responsibility,

⁸⁰ National Pro Bono Centre, The Joint Pro Bono Protocol for Legal Work, London, England http://www.nationalprobonocentre.org.uk/about-probono/

⁸¹ International Bar Association, IBA pro bono declaration, 2008

⁸² The Global Network for Public Interest Law (PILnet) Pro Bono Pack, 2017

⁸³ American Bar Association, ABA Model Rule 6.1 on Voluntary Pro Bono Publico Service: http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html

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the lawyer should provide the majority of the 50 hours of free legal services to persons with limited means or to charitable institutions. Additional services should be provided at substantially reduced costs to persons of limited means and to organisations seeking to protect civil liberties. The ABA also encourages lawyers to take part in activities aimed at improving the law, the legal system or the legal profession.

In addition, the ABA's Model Rule states that lawyers should voluntarily contribute financial support to organisations that provide legal services to persons of limited means.

States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions.

United Kingdom

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In the United Kingdom, *pro bono* services are of significant importance. Although the cost of state-subsidized legal aid in UK is one of the highest in the world,⁸⁴ *pro bono* services are constantly promoted to encourage legal professionals to engage in *pro bono* work. Solicitors and barristers in the UK do not have a legal obligation to provide *pro bono* services.

However, recent years saw a rise in the number of law firms and private attorneys offering free of charge services. Solicitors and barristers providing services free of charge often work through Bar Association Pro Bono programmess like Solicitors Pro Bono Group⁸⁵ and Bar Pro Bono Unit⁸⁶.

Together with solicitors and barristers, law students can also get involved in *pro bono* activities through university legal clinics⁸⁷. The student's work, such as providing legal information, advice and assistance to members of the public, is supervised by qualified solicitors and barristers.

⁸⁴ Bowles R., Perry A., International comparison of publicly funded legal services and justice systems, Ministry of Justice Research Series 14/09, 2009

⁸⁵ LawWorks - The Solicitors Pro Bono Group https://www.lawworks.org.uk/

⁸⁶ Bar Pro Bono Unit - Free Legal Advice and Representation https://www.barprobono.org.uk/

⁸⁷ https://www.lawworks.org.uk/legal-advice-individuals/find-legal-advice-clinic-near-you

Under UK law⁸⁸, if a civil case is won with *pro bono* support, *pro bono* costs can be ordered by the court or be included in settlements. The scheme helps ensure a level playing field for costs and so encourages settlement⁸⁹. The funds support further *pro bono* assistance to litigants who would otherwise act in person. The legislation requires the costs to be paid to the Access to Justice Foundation⁹⁰. The Access to Justice Foundation distributes the funds to agencies and projects giving free legal help to those in need. This same Foundation also runs a programme, the Its Not Just Peanuts programme, which encourages law firms to donate dormant client account monies. The money donated would then be distributed to those law centres and legal help agencies or associations in the continuation of their work⁹¹.

Germany

In Germany, both the Federal Republic and Federal States offer legal assistance to indigent persons. Individuals as well as legal entities seeking legal advice and out-of-court representation are entitled to assistance in all areas of law free of charge or at a very low cost. Rules concerning access to free legal advice differ between states. Some states offer help through official state offices, other states issue vouchers that can be used with the attorney of choice.

In general, private attorneys do not have legal obligation to take *pro bono* cases. However, it is quite common that legal professionals provide their services free of charge or they partially waive the fees for indigent clients⁹². Private attorneys also have a possibility of joining non-profit organisations and of engaging in activities of state agencies dealing with *pro bono* services.

Legal Clinics, run by law students within universities, also offer legal advice under the supervision of specialized attorneys. Often legal clinics specialize in some particular areas like social and labour law, or refugee law⁹³.

⁸⁸ Section 194 of the Legal Services Act 2007

⁸⁹ Access to Justice Foundation on, Information for judges Pro Bono Costs: http://www.atjf.org.uk/uploads/4/1/8/1/41811233/quick_guide_judiciary.pdf

⁹⁰ Access to Justice Foundation: http://www.atjf.org.uk

⁹¹ Dormant Client Account Balances: http://www.atjf.org.uk/unclaimed-client-accounts.html

⁹² Pro Bono Deutschland: http://www.pro-bono-deutschland.org/en/pro-bono-legal-advice/

⁹³ Refugee Law Clinic, Munich: http://www.lawclinicmunich.de/en/; Humboldt Law Clinic, Berlin: http://lawclinic.rewi.hu-berlin.de/

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PRO BONO IN MALTA

Although the provision of *pro bono* legal services in Malta is relatively unstructured, throughout our research we have noted that many of private lawyers interviewed do provide *pro bono* services to indigent clients, and in most cases this contribution goes unnoticed. Private practice lawyers expressed the concern that there is no structure, support or guidelines that would assist them in giving *pro bono* advice.

The large majority of local private firms are relatively small firms, and it is arguably difficult to draw comparisons between large European and US firms and the system in which they work. However, from our research it emerged that many freelance or smaller law firms do provide *pro bono* advice, although maybe not called by that name. Largely, clients are either self-referring or referred to the private lawyer through NGOs. A number of NGOs provide free legal advice to clients and an ad hoc legal clinic was set up by the Faculty of Laws at the University of Malta⁹⁴.

In setting up a *pro bono* system in Malta, legislators, together with the Chamber of Advocates, academics and other stakeholders, would have to look at the various elements in the provision of *pro bono* services. They would have to identify the gaps that exist in accessing justice, such as the lack of legal aid for pre-litigation advice in civil matters and hardly any legal aid provision for persons to appear before administrative tribunals, whilst also keeping in mind that *pro bono* should be provided in addition to public legal aid and not as a substitute for a proper system of publicly-funded legal services.

It is not only practicing private lawyers that can provide *pro bono* legal work, but also retired lawyers and judges, legal procurators and notaries, and trainees and students through legal clinics under the supervision of private lawyers.

The provision of *pro bono* work should be encouraged and legal professionals could be prompted to provide varying forms of *pro bono* which could also include non-legal support in the form of:

- Private practice lawyers providing free training and/or advice to vulnerable clients and/or groups;
- Material support to NGOs or other organisations implementing access to justice projects or initiatives;

⁹⁴ University of Malta, Legal Clinic: http://www.um.edu.mt/crc/projects/legal_ clinic

- Litigation support to NGO lawyers;
- Training to NGO lawyers on litigation strategy and legislative reforms;
- Comparative international research on best practices in other European states in implementing EU legislation;
- Assistance with drafting volunteer and administrative policies;
- Non-legal support: office space, case-management systems, legal-secretarial support⁹⁵.

There are various reasons why a legal professional or a law firm would want to set up a *pro bono* practice:

- Lawyers could feel that excercising their profession comes with the responsibility that everyone, even the most vulnerable, should have access to quality legal advice;
- · Increased staff and trainee engagement;
- Broader professional experience for staff and trainees;
- Improved reputation and profile;
- Demonstration of the firm's beliefs and values:
- A tangible contribution to the firm's corporate social responsibility (CSR).

The lack of a proper system in Malta was also noted by the Justice Reform Commission. ⁹⁶ In its report, the Commission outlined that together with the review of the legal aid system in Malta, there should also be a structure or system through which legal assistance could be provided by private lawyers on a *pro bono* basis. This would mean that lawyers who practice the legal profession privately would offer their free services to beneficiaries.

The Commission recommends the implementation of two measures relating to *pro bono* legal assistance⁹⁷:

⁹⁵ Mckeown M., Director of Global Pro Bono, PILnet, How Can Pro Bono Legal Services Improve Access to Justice in Malta? presentation given on 13th January 2017, Valletta, Malta.

⁹⁶ Commission for the Holistic Reform in the Field of Justice, Final Report of the Commission for the Holistic Reform in the Field of Justice, November 2013, p.106

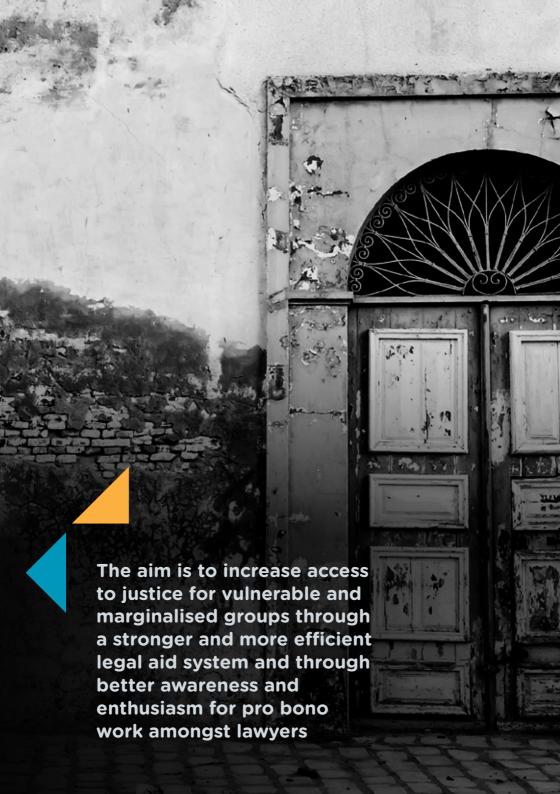
⁹⁷ Ibid. pg 124

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Legal assistance provided on Pro Bono basis: Legal Aid Lawyers would also be appointed from lawyers who are not on the list. Therefore, there should be discussions between the Legal Aid Lawyer and the Bar to prepare a scheme of legal assistance from private lawyers on a pro bono basis. For example, lawyers in this scheme can patronise a number of clients every year and be offered the same facilities of the Legal Aid lawyer. In order for this scheme to work properly, the beneficiary must apply normally at the Legal Aid Department and after approach a lawyer of trust who has agreed to participate in this scheme. The beneficiary would then be informed by the legal aid office whether that private lawyer will patronise him pro bono or not.

Possibility of providing a Tax Rebate: The possibility that listed lawyers and pro bono lawyers would be given a tax rebate per beneficiary they patronise instead of getting paid should be explored. Other material incentives could be considered.

It should be noted that the definition of *pro bono publico* denotes the providing of legal services without payment, benefit or advantage. It should be provided voluntarily by the legal professional or law firm to persons who do not have the means to pay for legal advice or representation. Therefore, any reforms would need to ensure that the public legal aid services and any *pro bono* legal services are kept distinct and separate. Importantly, the government should not see the emergence of a *pro bono* culture amongst private legal professionals as an excuse to reduce publicly funded legal aid.



Conclusions

Access to justice for all individuals is a fundamental human right and governments have the primary responsibility to protect and realise this right through publicly-funded legal aid. The difficulty of accessing high-quality legal advice by the poor, underprivileged and/or marginalized undermines the rule of law, liberty, fairness, dignity and development. In addition, the delivery of *pro bono* services by legal professionals is vital and would help to fulfil unmet needs and restore public confidence in judicial institutions.

We cannot but agree with the recommendations put forward by the Commission for the Reform of Justice in relation to the broadening of the scope of legal aid to cover legal assistance with includes pre-litigation advice, mediation and out-of-court settlement procedures. The need to provide legal aid that can be exercised in any court or tribunal, including before administrative tribunals, and for any every procedure is also paramount.

It emerged clearly that the payment structure for legal aid lawyers needs to be further increased or made on a case-by-case basis depending on time spent or complexity of the case. Furthermore, legal aid lawyers need to be appointed following a public call for applicants, and continued professional training provided once appointed. A complaints system needs to be in place, with the Legal Aid Agency having the power to investigate complaints. Finally, a specialised and gender-sensitive list for legal aid lawyers is also required.

Most importantly, the current threshold to be eligible for legal aid is extremely low and consequently large segments of the population, who do not have the financial means to access private lawyers, are excluded from the benefit. The applicants have to show that their assets do not amount to more than €6,988.12 and they do not earn more than the national minimum wage. The national

minimum wage currently stands at $\le 8,827.52^{98}$ and therefore any person earning over that amount would not be eligible for legal aid. It should be noted that in 2015, the average household gross income in Malta stood at $\le 31,429^{99}$. aditus is also concerned that the threshold assesses the availability of funds and not their accessibility, such as in situations of abusive relationships.

aditus firmly believes in the importance of the availability of *pro bono* legal services. However, the provision of *pro bono* services by private lawyers and/or other entities should be completely separate and independent from the state-funded legal aid. There is a need for *pro bono* services to be included in any legislation regulating the legal profession and the regulating body ought to be the Chamber of Advocates.

Tax incentives, such as possible deductions for expenses incurred in performing the services or giving the advice, may be offered to law firms or lawyers who provide *pro bono* services. In order to further support vulnerable persons in a sustainable manner, a system based on the UK model could be set up whereby funds recovered through *pro bono* assistance could be paid into a public foundation. This public foundation, besides promoting *pro bono* work, could also distribute grants to organisations which provide free legal assistance to people in need, or which furthers access to justice more broadly.

The importance and practice of *pro bono* legal services should be emphasized and promoted at University throughout the Bachelor or Doctors of Laws programmes, by making *pro bono* opportunities an inclusive part of the academic programme, whether through a legal clinic or through a volunteering programme.

aditus foundation hopes that this report will stimulate the discussion for a continuing reform of the justice system in Malta. The aim is to increase access to justice for vulnerable and marginalised groups through a stronger and more efficient legal aid system and through better awareness and enthusiasm for *pro bono* work amongst lawyers.

⁹⁸ Department for Industrial & Employment Relations, National Minimum Wage: https://dier.gov.mt/en/Employment-Conditions/Wages/Pages/National-Minimum-Wage.aspx

⁹⁹ National Statistics Office, Statistics on Income and Living Conditions 2015: Salient Indicators, 152/2016, 2016 https://nso.gov.mt/en/News_Releases/ View_by_Unit/Unit_C1/Living_Conditions_and_Culture_Statistics/ Documents/2016/News2016_152.pdf

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