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an assessment with recommendations on the operation of the

Georgia Legal Aid Service

and report on required changes to legislative and statutory framework with recommendations on draft amendments to

- **the Law of Georgia on Legal Aid**
- **Statute of the Legal entity of public law: Legal Aid Service**
- **LEPL Legal Aid Service Internal Labour Regulations**

John Eames

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This document has been produced as part of the Council of Europe project on Enhanced Access to Legal Aid Services for Marginalised Population. The opinions expressed in this document are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe.

Contents

1 Executive summary of my recommendations

1.1 My two types of recommendations

My recommendations in detail follow, in the body text of this report. My recommendations take two forms:

- suggestions for substantive directions for reform on legal aid in Georgia: these are currently suggestions intended for serious discussion rather than imperatives
- adjustments to the way the law and guidance is structured, to simplify it and make it more rational

It is important to note that the two types of recommendations can largely proceed independently of one another. Substantive changes to the way the legal aid system works in. Georgia can all largely be achieved without any reform or reconfiguration of the legislation. Similarly, the restructuring of the legislation can be done independently of any substantive change to the rules. That affords a certain flexibility, and means that moving forward on either of these fronts can be done without too much hesitation as to how far the other front will be affected.

1.2 My headline strategic recommendations

1.2.1 Substantive matters

As far as substantive issues in the Legal Aid Service are concerned, I suggest areas for discussion, aspiration and vision-making rather than set out any imperative matters. Whilst discussion in the finalisation period July 2022 to October 2023 has allowed finetuning of these recommendations, they remain largely undiluted. They include:

- fine-tuning the **scope of the scheme** as regards which legal issues are covered and including non-contentious matters
- defining **areas of discretion** in determining eligibility for those not on the social vulnerability database
- suggesting a filter against **frivolous or vexatious cases** should be adopted
- improving the recruitment pool for consultation centres by grooming a **cadre of paralegals**
- continuing with urgent work to populate the **total envisaged 50 consultation centres**
- urgently **reviewing accessibility** at bureaus and consultation centres – both physical and in terms of other barriers
- finetuning approaches to mediation so as to allow for **mandating (with exemptions) attending at a mediation information and assessment meeting** as a pre-condition for legal aid eligibility in suitable cases
- reviewing the range of **non-traditional methods of delivering legal advice** especially in remote or small communities
- a renewed focus on **quality and quality assessment,** with a view to bringing methods and range of quality assessment up to international standards
- fresh focus on **better data management** to achieve maximum short-term responsiveness to blips in supply and demand
- a fresh focus on **outreach work** with a view to promoting better take up of free legal aid

- encouraging strong focus on **partnership and collaboration** both within the immediate free legal aid network and in the wider environment of help for disadvantaged individuals
- adopting and inculcating a formal **8-point values statement** to underpin the practical delivery of legal aid with key non-negotiable principles

1.2.2 Legal framework

As far as adjusting the legal framework is concerned, I make detailed comments about how the existing statutes that I have looked at can be properly disentangled and remodelled into a more modern and rational format, with a hierarchy of laws, in order to avoid overarching statute becoming bogged down in detail, and to avoid detailed rules having to restate wider principles.

2 Project aim and this document

This report is a finalised version of that which was initially released in July 2022. It now incorporates and processes as much of the views and feedback from the Georgian stakeholders as I was able to glean – who until now had not had a significant voice in its writing. The previous iteration of the assessment finished with a number of consultation questions, and those have been usefully answered chiefly by the Legal Aid Service. For practical and political reasons – ministers and lawmakers have had plenty else to think about this last year – the critical and detailed response from colleagues in Georgia that was invited has not been as forthcoming as would have been desirable. Nor has there been detailed line-by-line discussion of proposals herein. Moreover, in the context of developing the report wholly without the benefit of a visit to Georgia, there are still sure to be mistakes and misunderstandings on my part. These are no-one's fault but my own; I still look forward to being ruthlessly corrected where these are found.

Between July 2022 and August 2023 a further journey of consultation was envisaged. Three more online meetings took place after the submission of the initial version of the assessment. Unfortunately, understandable circumstances in Georgia meant that less iterative collaboration and fewer substantive meetings were able to be accomplished than had been expected. No meetings with ministers or other lawmakers were able to take place. Nonetheless, a number of written responses were received alongside further conversation with LAS officials who have eagerly sought to press forward with completing this assessment notwithstanding the lighter engagement at parliamentary level. Then, in June 2023, this same CoE project released Dr Stephanie Lemke's *Assessment report on quality assurance of legal aid provision in Georgia* and whilst having full regard to her meticulous, assured and highly researched report, I have taken care to try not to trespass on her territory.

2.1 Background objectives

2.1.1 This document's background

The wider background objectives are as follows:

> *The Council of Europe is currently implementing a Project "Enhanced Access to Legal Aid Services for Marginalised Population" to support legal aid providers in Georgia in order to increase the effectiveness, promptness and accessibility of legal aid throughout the country, especially in the regions and among minority populated areas.*
>
> *In that context, the Provider has been chosen to provide consultancy services for the primary beneficiary of the project, the LAS by analysing its operation and business processes, assess its legislation and statutory framework and develop*

recommendations for amendments to legislation and the statutory framework regulating operation of the LAS in line with the CoE standards.

2.1.2 Brief for the present project

Deliverables envisaged in this present work are:

- deliver an assessment report on LAS operation and its link with the legislative and statutory framework
- develop recommendations on draft amendments to the Law of Georgia on Legal Aid
- develop recommendations on draft amendments to the statute and internal regulations of the LAS
- present findings and recommendations.
- modify and finalise the report on the assessment of the legislative and normative framework of the Legal Aid Service based on the input of the new management of the LAS in addition to review of LAS's overview of amendments note for the MPs regarding legislative changes

2.2 The author of the report

My name is John Eames. I am a British barrister-at-law (lawyer) from Bath, England. I am assigned by Council of Europe to assess the current Georgian position as set out above in the project objectives.

My professional background was as a community paralegal from 1986 to 2002, working as a citizens' advocate and community legal activist in a community Law Centre in the UK, representing clients in human rights, social welfare and immigration matters. Qualifying as a barrister in 2010, I then undertook client work at Garden Court Chambers, London whilst at the same time being appointed as Judge of the First-tier Tribunal, first in the Social Entitlement Chamber, and soon after (2014) also in the Immigration and Asylum Chamber; later still (2015) I became a Judge of the Court of Protection. In the UK we have part-time judges: I am one of these, and for a time I continued my advocacy work as a barrister alongside my judicial duties, all of it focusing on human rights and social welfare.

During all that time I undertook many teaching duties: training lawyers, social workers, probation workers, and government officers in the law on social security, human rights and EU free movement law. I have taught social welfare and human rights law at universities in the UK and other CoE member states.

I have served on a number of UK government commissions relating to free legal aid and the functioning of tribunals in citizen versus state administrative matters. I have served as an international expert on a number of projects involving human rights, improvements to judicial structures and access to justice – in Russia, Greece, Moldova, North Macedonia, Armenia and Latvia, among others. I was consultant to Committee of Ministers of the Council of Europe in the creation of their *Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, published 31 March 2021. I am a trained mediator.

2.3 How this report was written: sources

It needs to be stressed that I have not visited Georgia to make my own findings of fact in situ. That presents a significant disadvantage, but the reasons for it are obvious given the three years of Covid-19 that paralleled it. Hence it has been based on

- desk research, or in other words the available resources of the internet plus translations into English kindly supplied to me by my Georgian colleagues through the offices of Council of Europe
- consultation of publicly available web-based resources where they are accessible in English
- access to still-untranslated Georgian LAS documents using my own very limited web-based translation resources
- conversations with
    - CoE Tbilisi experts and secretariat and
    - LAS first deputy director Nino Meladze and deputy director Davit Simonia.
- comprehensive answers to my detailed questions by e-mail from the Legal Aid Service secretariat
- the input of the new management of the LAS
- review of LAS's overview of amendments note for the MPs regarding legislative changes
- John Eames: *Supplementary briefing on "importance and complexity" in regard to a merits test*, released for the present project in January 2023
- Dr Stephanie Lemke: *Assessment report on quality assurance of legal aid provision in Georgia*, released for the present project in June 2023

  …for all of which I am most grateful; and
- standard international materials on legal aid (CoE Committee of Ministers; UNODC etc)

Part I substantive recommendations

3 View and comment on the functioning of the Legal Aid Scheme in Georgia

3.1 Scope and eligibility

3.1.1 Some context

It is well established international practice that the rules on scope and eligibility require clear unambiguous definition. Individual states have total competence over who to include and who to exclude. It is useful to note in full paragraphs 10 to 18 of the Guidelines of The Committee of Ministers of the Council of Europe on the *Efficiency and the Effectiveness of Legal Aid Schemes*[1]:

> ***Means and merits testing***
>
> *10. With a view to contributing to robust and financially sound legal aid schemes, procedures for testing an applicant's means and the likelihood of a successful outcome of the legal proceedings should be in place.*
>
> *11. The member States which choose to make legal aid available to legal persons may take into account the financial situation of the legal person, and of natural persons with an interest in the legal person, when deciding whether legal aid should be granted or refused.*
>
> *12. Potential applicants for legal aid should be informed of the eligibility criteria and the application procedure, which should be clear and easy to understand.*
>
> ***Methods of measuring financial eligibility***
>
> *13. Member States should consider ensuring that financial eligibility for legal aid is measured (for example, by taking into account the applicant's gross income, disposable income and assets.*
>
> *14. When an applicant is not eligible for legal aid but cannot afford to pay for the legal services of a private lawyer, member States should inform him or her about the available alternatives to legal aid (for example, the availability of pro bono legal services and legal clinics).*
>
> ***Waiving of means testing***
>
> *15. Member States should consider allowing the waiving of means testing whenever justified.*
>
> ***Verifying financial eligibility***
>
> *16. Member States should ease the bureaucratic burden imposed on applicants, in particular by reducing the number of documents they are required to provide in support of an application for legal aid.*
>
> ***Informing about the refusal or granting of legal aid***
>
> *17. Whenever an application for legal aid is refused, member States should consider allowing applicants to challenge the refusal before a competent authority which should give reasons for*

[1] Guidelines of The Committee of Ministers of the Council of Europe on *the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, 31 March 2021

its decision. Applicants should also be informed of the alternatives to legal aid and, in particular, about any available:

- *– free legal advice and representation (pro bono) provided by legal professionals, municipalities, non-governmental organisations, trade unions, etc;*
- *– alternative dispute resolution mechanisms;*
- *– legal insurance.*

18. Whenever an application for legal aid is granted, member States should provide applicants with accessible information, in plain language, about the procedure to follow in order to benefit from legal aid and the extent to which legal costs will be covered by the State.

The UNODC *Model Law on Legal Aid in Criminal Justice Systems*[2], in discussing determination of eligibility by a means test, proposes that

33.4. In determining the applicant's financial eligibility, the Legal Aid Authority may take into consideration:

33.4.1. The applicant's debts and financial obligations;

33.4.2. The cost of living in the applicant's habitual place of dwelling;

33.4.3. Whether the applicant has dependants; and

33.4.4. Any other circumstance affecting the applicant's ability to afford legal services.

33.5. If the means test is conducted on the basis of the applicant's household income, but family members are in conflict with each other or the family income is regulated by a matrimonial regime of separate ownership of property, the Legal Aid Authority shall take into consideration only the applicant's income for the purpose of evaluating the applicant's financial eligibility.

Whereas on the question of limiting eligibility, the model law suggests[3]

34.3 In evaluating the interests of justice, […] the Legal Aid Authority retains the right to take into consideration:

34.3.1. The seriousness and complexity of the case or dispute;

34.3.2 Whether the provision of legal aid services is in any case desirable in the interests of justice, by reason of exceptional circumstances, including the gravity of charges or of potential penalty;

34.3.3. Whether the provision of legal aid services is in any way related to a matter of public interest;

34.3.4. Any other reasonable grounds, as deemed appropriate by the Legal Aid Authority.

The *2016* UN Global Study on Legal Aid: Global Report[4] finds that

The grounds for legal aid eligibility in civil cases vary considerably between countries, and even between jurisdictions within single countries having a federal justice system. Globally, ***financial need*** *is the most common factor determining eligibility to legal aid in civil cases (73% of responding countries). Other frequently cited eligible beneficiaries in civil cases include* ***children*** *(42%) and* ***persons with intellectual/mental disabilities*** *(36%). Countries that have adopted a separate law on legal aid recognize financial need (78%) as a basis for eligibility to legal aid in civil matters more frequently than countries where no such law is in place (63%).*

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[2] Article 33, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[3] Article 34, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[4] UNODC/UNDP Global Study on Legal Aid: Global Report, Wien 2016

In civil cases where eligibility for legal aid is not automatically based on the type of case or its gravity, legal aid applicants may be requested to produce evidence of eligibility (such as proof of poverty). Since they often will not have this information at their disposal at the time of arrest, this may serve as a disincentive to request legal aid. States most often require evidence of low income (requested by 46% of respondents), evidence proving status as a recipient of welfare or State subsidies for indigent or vulnerable members of the population (requested by 36% of respondents) and/or evidence of family hardship, such as multiple children, single parent household, family member disability, etc. (requested by 28% of respondents).

Under the laws of responding Member States, legal aid is provided for a wide range of actions or stages in a civil or administrative matter. The most common type of legal aid for civil or administrative cases is the provision of primary legal aid (legal advice; 80%) and assistance during trial (74%). Once again, countries that have adopted a separate law on legal aid provide primary legal aid (85%) more frequently than countries where no such law is in place (68%).

3.1.2 Areas of law and what "legal issues" covers

Legal advice under the legal aid system is provided on any legal issue and during any criminal, civil and administrative proceedings.

It may be desirable to have clearer guidance on how to define "legal issue". Internationally, there is general consensus that a matter may be 'justiciable' – In other words, capable of being brought to a dispute with another party with possible recourse to court – even before it has reached a formally disputed stage. Preliminary enquiries by a prospective client about a matter that may turn into a dispute can equally be regarded as a legal issue. The response of the LAS is that there is no need for further clarification as issues do not arise in practice. I accept this is not a flashpoint for disagreement as between applicants and the LAS, but I nonetheless still consider it would be good to have certainty such as referencing eligible matters as those which are potentially justiciable.

It is now agreed that legal aid in Georgia can cover non-contentious matters. This could include, for example, the writing of a will, changing a person's name, how to produce evidence as a third-party witness, managing money and housing in retirement, or getting advice on maximising a social protection entitlement. Those matters per se do not have an opponent as such, yet a lawyer advising on them would need to exercise their legal skills and legal judgement. It is confirmed such areas are included in the legal aid system in Georgia. Although there is a risk, if one defines too clearly the kind of non-contentious matters that are included, it would be sensible nonetheless to have some exemplary eligible non-contentious scenarios containing guidance.

According to ECtHR caselaw whilst there is no absolute obligation on the state to provide free legal aid for every dispute relating to a "civil right" [5]. There is a clear distinction between Article 6(3)(c) – which guarantees the right to free legal aid in criminal proceedings subject to certain conditions – and Article 6(1), which makes no reference to legal aid[6]. However, the Convention is intended to safeguard rights which are practical and effective, in particular the right of access to a court. Hence, Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court[7]. State authorities should provide everyone within their jurisdiction with legal assistance in civil cases

[5] *Airey v. Ireland*, 9 October 1979, Series A no. 32 paragraph 26

[6] *Essaadi v. France*, paragraph 30

[7] *Airey v. Ireland*, 9 October 1979, Series A no. 32. paragraph 26

- when this proves indispensable for an effective access to court[8], or
- when lack of such assistance would deprive a person of a fair hearing[9].

The ECtHR has not identified specific areas of law or types of civil proceedings in which legal aid must be provided. The decision on whether or not a state provides legal aid should be taken on an individual case-by-case basis applying these factors:

- the **importance** of what is at stake for the applicant[10]
- the **complexity** of the case[11]
- the applicant's **capacity** to represent him or herself effectively[12]
- the existence of a legislative **requirement** to be legally **represented**[13]

3.1.3 Eligible individuals

There is a reasonable level of clarity that to be eligible, a prospective client in general must have an entry in the Unified Database of Socially Vulnerable Families and to have a specific maximum rating of under 70,000, in order to be considered insolvent. Prescribed positive exceptions exist, in a document (which I have not seen) approved by the Legal Aid Council, which exhaustively lists persons not in the list of socially vulnerable persons, who are nonetheless eligible for legal aid, such as IDPs and veterans. Ideally, that list of exceptions to the principle of needing a rating less than 70,000 should be incorporated into statute.

In the LAS document *Overview of amendments proposed for the law of Georgia on legal aid and other needs of the legal aid service* and paragraph 1(5) on page 4, *Revising criteria for providing legal aid in exceptional cases*, notes that

> *Legal Aid Council has already approved criteria for appointment of a public lawyer in exceptional cases. However, these criteria do not include every possible case, as a result persons in dire economic situation remain beyond the scope of the law.*
>
> *Often, in practice a person is not registered in the unified database of socially vulnerable families and does not meet the criteria established by the Council, however documentation presented by him/her is directly indicative of his/her dire economic situation.*
>
> *Registration in the unified database of socially vulnerable families requires submission of an application for an adult member of the family to the Social Services Agency.*
>
> *Until procedures established for registration in the database are finished, a person may need urgent legal assistance. Therefore, it is important to evaluate and analyse every individual case based on evidence and documentation presented.*

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[8] *Airey v. Ireland*, 9 October 1979, Series A no. 32. paragraph 26

[9] *McVicar v. the United Kingdom*, 46311/99, ECHR 2002-III. paragraph 48

[10] *Steel and Morris v. the United Kingdom,* 68416/01, ECHR 2005-II. paragraph 61

[11] *Airey v. Ireland*, 9 October 1979, Series A no. 32. paragraph 24

[12] *McVicar v. the United Kingdom*, 46311/99, ECHR 2002-III. paragraph 48-64

[13] *Gnahoré v. France*, 40031/98, ECHR 2000-IX. paragraph 41

Meanwhile the UNODC Model Law suggests[14]

> ***Protection of vulnerable persons***
>
> *The United Nations Principles and Guidelines recognize the special needs of vulnerable populations. According to principle 10:*
>
> *32. Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures.*
>
> *33. States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to per- sons who are members of economically and socially disadvantaged groups.*

It continues[15]:

- *A legal aid system being "accessible" means that legal aid is available to every person who is arrested, detained, suspected or accused of, charged with or sentenced for a crime and cannot afford a legal practitioner, and to every vulnerable person regardless of his or her financial status*

So it is to be welcomed that there is discretion to allow legal aid in exceptional cases for those not registered in the database in Georgia. It is firmly agreed in principle – and I endorse this, that the discretion should be wide. Examples given to me include matters relating to access to education where the person does not fit within any formal criteria, but there is a clear need in the spirit of the law.

I note that other formal widening of categories is already underway, and the scope of legal aid is expected to be widened to include victims of torture. Legal initiatives in that regard are at the time of writing being advocated before the parliament. Again in the LAS document *Overview of amendments proposed for the law of Georgia on legal aid and other needs of the legal aid service* and in particular paragraph 1(5) on page 3, *Revising criteria for providing legal aid in exceptional cases*. It is stated there that

> *It is recommended to create a flexible role in the legislation for appointment of a public lawyer by the LAS Director in exceptional cases, according to which, in view of a natural person's economic situation, if the person submits to the LAS irrefutable evidence of the economic situation, the director will be able to appoint a lawyer for them.*

Similarly, the document continues

> *According to the existing law of Georgia on legal aid. According to the existing Law of Georgia on Legal Aid (Article 5(3)), the Legal Aid Council establishes criteria based on which the Director makes a decision to provide legal aid to a person who is not a member of a family registered in the unified database of socially vulnerable families.*

So it is good that bringing other categories of applicant within scope is being to some extent codified, and such codification goes a long way to removing areas of doubt or uncertainty.

But that still does not negate the need to also codify the exercise of the wide discretion that is envisaged. It is still desirable to set out factors and guidelines under which that discretion is exercised by the Director of the Service, and to define the limits to that discretion or say openly that it is an unfettered discretion; and also to prescribe a decision-making algorithm within

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[14] Article 32, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[15] UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

which the Director is to make such decisions. That does not mean making a list of possible examples for inclusion into eligibility; rather it would prescribe factors, which must be looked at when making a discretionary decision. Enabling those factors to be properly enumerated, and made transparent would assist both decision-makers – nominally the Director – and members of the public, as well as lawmakers.

According to the ECtHR, as noted already with the issue of scope, the question whether or not legal aid must be provided should depend on the importance of what is at stake for the applicant[16], the complexity of the case[17], the applicant's capacity to represent him- or herself effectively[18] and the existence of a legislative requirement to be legally represented[19]. ECtHR does not assess eligibility criteria for legal aid as such. Rather it considers whether the right of access to justice overall has been guaranteed. The ECtHR accepts that means-testing is acceptable; access to legal aid may be conditional on litigant's financial situation[20]. Member states exercise discretion regarding organisation of their legal aid systems, including the scope of such systems and financial eligibility criteria. But the system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness[21] – and this would generally include avoiding too many areas of discretion in entitlement rules, much less an absence of transparency in the exercise of such discretion.

3.1.4 Exceptionality: recommendations

The question of exceptionality, as a means by which otherwise ineligible legal aid applications may be accepted, also goes to the question of how exceptional the legal matter is. I reported separately on this in my *Supplementary briefing on "importance and complexity" in regard to a merits test* for this project, released in January 2023.

My recommendation – set out in more detail in that report – is that:

It would be desirable to codify the principles on which clients who are financially ineligible but nonetheless of limited means, or particularly disadvantaged, can be allowed legal aid, or the basis on which greater funding than the usual limits can be allowed.

Such exemptions and extensions should be prescribed where

- the case is of exception importance to the individual because of risk to their life, liberty, personal safety, livelihood, physical and mental wellbeing, or interference with their fundamental human rights, or risk of them becoming homeless, or
- the case is of significant wider public interest, or
- the case is of significant and exceptional complexity.

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[16] *Steel and Morris v. the United Kingdom,* 68416/01, ECHR 2005-II. paragraph 61

[17] *Airey v. Ireland*, 9 October 1979, Series A no. 32. paragraph 24

[18] *McVicar v. the United Kingdom*, 46311/99, ECHR 2002-III. paragraph 48-64

[19] *Gnahoré v. France*, 40031/98, ECHR 2000-IX. paragraph 41

[20] *Steel and Morris v. the United Kingdom,* 68416/01, ECHR 2005-II. paragraph 62

[21] *Gnahoré v. France*, paragraph 41; *Essaadi v. France*, paragraph 36; *Del Sol v. France*, paragraph 26; *Bakan v. Turkey*, paragraph 75-76

Following the findings of the UN Global Study on Legal Aid: Global Report[22] is noteworthy that globally there are other plausible ways of determining entitlement going beyond mere financial eligibility, such as: that a minimum monetary threshold is in dispute, the applicant speaks a language other than an official state language, internally displaced persons, the merits of the claim, an assessment of the case's gravity, complexity, or case-type, the interests of justice require state intervention, an applicant with physical or intellectual/mental disabilities, children, refugees.

It would be sensible, in respect of observing the rule of law, for there to be fully reasoned decisions, both on this discretionary basis and in decisions based on a strict application of the black-letter eligibility rules, especially where there is a refusal to provide discretionary aid. This would afford transparency, encourage confidence in the integrity of the system and reduce any suggestions of corruption, lack of compassion or bureaucratic inflexibility. It is a principle endorsed in all the body of international commentary.

3.1.5 Merits test

There has until now been no formal merits test in the legislation. In other words, cases are not normally refused on the basis of low prospects of success. That said, I am told that

> *representation in a court in civil and administrative cases, as well as representation in an administrative body in an administrative case, is provided if the person is insolvent and it is expedient to provide legal aid to the person due to the importance and complexity of the case.*

I would expect there to be clear legislation as to the limits of the discretion implied in the word "expedient" and the phrase "importance and complexity of the case". If there is discretion on the part of a lawyer or Head of a Legal Aid Bureau, it would be desirable to closely define the limits of the discretion and the factors to be taken into account when exercising such discretion.

I have reported separately on this in my *Supplementary briefing on "importance and complexity" in regard to a merits test* for this project, released in January 2023.

I still consider – and it is now agreed – that it may be desirable to implement a system which would filter out vexatious and frivolous cases. A considerable amount of discretionary judgment would be required to judge whether a person's case falls into that category or not. But in terms of sensible use of public funds, such a filter would make sense.

ECtHR does not assess eligibility criteria for legal aid as such. Rather it considers whether the right of access to justice overall has been guaranteed. The ECtHR accepts that a merits test or prospects-of-success test are acceptable; access to legal aid may be conditional on a litigant's prospects of success in the proceedings[23]. Member states exercise discretion regarding organisation of their legal aid systems, including the scope of such systems and eligibility criteria including prospects testing.

3.1.6 Merits test: recommendation

I understand that during and after the first version of the present assessment report in July 2022, further consideration was already underway in relation to this matter. In the LAS document *Overview of amendments proposed for the law of Georgia on legal aid and other needs of the legal aid service* it was stated at paragraph 1(6)

[22] Figure 54, UNODC/UNDP Global Study on Legal Aid: Global Report, Wien 2016

[23] *Steel and Morris v. the United Kingdom,* 68416/01, ECHR 2005-II. paragraph 62

The criterion of "importance and complexity of the case" is ambiguous and it is important to elaborate in detail the issues that should be taken into account when evaluating the case against this criterion.

For example, it is important to include a legal provision in the law directly excluding provision of legal aid for "unfounded claims". In practice, there are cases when certain lawsuits are prepared as beneficiaries insist on them, even though they have no prospect of success and the beneficiary has no evidence to support their claims. In certain cases, such beneficiaries visit bureaus almost on a daily basis, demanding drafting of legal documents. Despite explanations, they are complaining about lawyers/consultants because court is refusing to admit such lawsuits. As a result, resources of lawyers/consultants, LAS administration, courts are wasted.

I agree, but my recommendation is that the emphasis should be on a light touch when it comes to *denying* legal aid for merits-related reasons.

The most rational approach will be to ensure that a relatively very small proportion of cases get refused on merits. Overcomplication is to be avoided – (eg as in the UK system's complexity). A reasonable and simple approach will be to exclude

- cases with **no legal prospects** of success despite there being supporting evidence
- cases which are **unfounded** because of complete absence of evidence
- cases with **very low prospects of success** (unless of exceptional importance to the individual or of significant wider public interest) – but there should be no attempt to try to measure prospects of success on a percentage-chance-of-winning basis
- cases brought only on a **frivolous or *entirely* vexatious** basis, and
- cases in which **the cost of legal action is *greatly* disproportionate to the advantages** (financial or other) that the client could win if the case succeeds (unless of exceptional importance to the individual or of significant wider public interest); and in any case carefully taking into account the subjective value of the win to that individual, and in particular the non-financial value of their win.

I note the issue that LAS highlight, of "beneficiaries visiting bureaus, almost on a daily basis, demanding drafting of legal documents [with no prospect of success]". Solving this is almost entirely a matter of good communication, with the lawyer taking time to explain how cases are won or lost in court, and why it may be a waste of the person's time and energy (not to mention the lawyer's time and the public purse) to pursue the case. **For that reason, serious consideration is to be given to skills training for lawyers in communicating a "no prospects" determination to a client**. I understand this is now underway, and that is to be applauded.

Care must be taken with rejecting a claim on the basis that it is *vexatious*. All individuals bringing a legal claim will wish their opponent to lose! Feelings including hostility and enmity commonly arise. That is not enough reason to refuse its eligibility.

Overall I do not recommend the adoption in Georgia of a '*Reasonable private paying individual test*' (ie, "would a reasonable private paying individual pay for this legal service? If not, legal aid should be denied").

A '*contrary to the public interest*' test is also strenuously to be avoided. It is too political and could be used by an unsympathetic administration to extinguish awkward or embarrassing cases; it is difficult to codify and ultimately could limit access to justice in genuine cases.

I note that some of the thinking in these recommendations is now being introduced in new legal issue initiatives being put before parliament, and **that is to be welcomed, but with a rigorous review as to the fine detail of defining "no prospects of success / unfounded" and "frivolous or vexatious claims"**.

International context suggests that a legal aid authority may either police this itself, with practitioners referring questionable cases to them, or may devolve this function on a trust-based basis to those very practitioners. At present, it is accepted by LAS that such judgements would be made by the Head of the Bureau, and that seems to me satisfactory, again provided that the exclusion of applications on this basis is operated sensitively.

3.1.7 Test of prior attempt to settle – including mediation?

Whilst there is some reference in the law to mediation and other forms of so-called appropriate dispute resolution, there is no explicit requirement in the Georgian law to first of all exhaust out-of-court modes of settling the case before going to court. Nonetheless, referrals to mediation are envisaged under the present new legal initiative. The LAS view is that it would be logical to refer those categories of cases to mediation which the court itself is referring to. In my view that is approximately correct.

Two separate issues should be distinguished:

- the extent to which legal aid funding covers the actual cost of mediation; and
- whether or to what extent access to legal aid for the broader costs of a case (in other words, not just mediation, but, should mediation not work, the normal legal costs of advice and assistance) should depend in the first place on the legal aid client having initially tried the mediation route.

On the first point, it would be unconscionable for the Legal Aid Service to be able to deny an eligible client funding for mediation in situations where the court itself has demanded mediation. It is outside the scope of this report to comment on which types of case, and in which type of court, the judiciary themselves must or must not refer cases for mediation. Generally speaking, it is uncontroversial to suggest that **if mediation is appropriate, parties want it, and it is undertaken as an alternative to court action, then legal aid should fund it reasonably**.

Some background materials

As a starting point I have noted that at section 6 of the LAS *Overview of amendments*[24] the LAS propose

> ***(6) Introducing mandatory mediation, creating a register***
>
> *In certain disputes, before filing in court, it is possible to have mandatory mediation within the legal aid scheme.*
>
> *On the one hand, mandatory mediation will encourage the culture of resolving disputes based on mutual agreement. On the other hand, it will help save resources of the LAS as well as courts.*
>
> *Existence of mandatory mediation requires existence of mediators. In this case, having a register of mediators is recommended. LAS may also have mediators internally.*

[24] *Overview of amendments proposed for the Law of Georgia on Legal Aid and other needs of the Legal Aid Service* – private document circulated to assist this report, 2023

CEPEJ Handbook for Mediation Lawmaking

A key text for guidance and definition (though it is not legal-aid-specific) is the 2019 CEPEJ *European Handbook for Mediation Lawmaking* [25].

On the basic question of whether mediation costs should be eligible for legal aid, the Handbook quite simply states mediation should be provided free:

> 7.*2.3.Subsidies*
>
> (*a) Provide free of charge mediation for those who objectively cannot afford it or reduce the cost significantly through legal aid or other mechanisms.*

Lithuanian provisions are given as an example of the scope of mediation costs that should be met:

The costs of mediation consist of preparation of the documents concerning mediation, mediator's fee and costs related to the preparation of mediation settlement. State guarantees and covers 100 percent of the costs of primary legal aid and mediation.[26]

The view of this report is that that level of funding for mediation is to be encouraged as per the CEPEJ Handbook.

Turning to the voluntary / obligatory paradigm, the Handbook in effect gives good guidance on whether entry to legal aid eligibility at all can be made conditional on participating compulsorily. in mediation. The Handbook very properly distinguishes voluntary and mandatory routes into mediation. As far as voluntary entry into mediation is concerned, the Handbook at s4.1 in effect urges a light legislative touch, seeking to provide that

- procedural structures should allow for mediation to be engaged in voluntarily,
- disputes formally settled by mediation cannot be reopened in court,
- there be proper procedures for initiating mediation between the parties and
- judges and **other officials in charge of a dispute** in front of them **are encouraged to recommend mediation and provide the parties with the necessary information**.

I highlight the last of those, considering that the 'officials' referred to may include LAS itself and lawyers and consultants working within the legal aid framework. So that recommendation has specific application within legal aid in Georgia.

Reading across from those four recommendations about mediation generally to the legal aid environment, there is a need to ensure that where legally-aided clients are encouraged towards mediation in Georgia, the legal-aid-specific rules should not contradict those in the mainstream Georgian law on mediation or create inconsistency.

As far as mandatory entry into mediation is concerned, before going on to discuss judge-referred mediation, at s4.2 the Handbook proposes initial mediation information and assessment sessions; it forcefully notes the following limitations and caveats, which have particular resonance in legally-aided cases:

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[25] European Commission for the Efficiency of Justice (CEPEJ): *European Handbook for Mediation Lawmaking* as adopted at the 32th plenary meeting of the CEPEJ, Strasbourg 13 and 14 June 2019

[26] The Republic of Lithuania, Law on the Legal Aid Guaranteed by the State, *Valstybės žinios*, 2000, No. 30-827, Art. 2 (11) and 14 (3 and 4)

4.2.1. Attendance of an initial mediation session as a condition precedent to legal proceedings

(a) Consider introducing an obligation for the parties to participate in an **introductory first mediation session or in a mediation information session with a mediator** [27] and ensure a possibility to continue with mediation in the same session if parties so decide.

(b) Allow parties to **opt-out after the initial session without requiring them to provide reasoning for their decision**.

(c) Emphasise that parties **cannot be forced into a settlement**.

(d) Consider **making participation in such an initial mediation session a condition precedent to legal proceedings in certain types of dispute**. Consider including at least disputes arising from family law, labour law issues as well as arising from joint ownership and relations between neighbours.

(e) Ensure that the **participation in the initial session does not give rise to significant costs** for the parties nor cause substantial delay for bringing legal proceedings.

(f) Ensure procedural guarantees, as outlined in chapter 5.4.

(g) Clearly state when the requirement to participate in the initial mediation session is met and when parties are allowed to submit a claim in court.

(h) Consider implementing pilot projects to test the application of mandatory attempt to mediate in practice prior to scaling such practices to the whole system as will be described in chapter 9.

I have emphasised cautions which need special attention in the context of legal aid. It is strongly recommended here, that there should be no rules or requirements as to access to legal aid in Georgia (either at all or for the mediation itself), which impose a stronger or stricter requirement of participation in mediation than this.

In the context of the state's and its agents' obligation to inform clients about mediation, at s7.1 the Handbook discusses at s7.1.2 again that member states should

a) Allow and encourage judges and other officials resolving disputes to provide all necessary information with regard to mediation to the parties to a dispute or to direct the parties to an information session conducted by another person when they deem that an amicable settlement is likely.

b) […]

c) **Require officials providing legal aid to inform the person in question about the possibility of using mediation and its benefits. Establish priority of trying mediation before litigation of particular dispute when parties or one of them is supported by legal aid**.

[My bold highlighting added]

[27] In an example from Republic of Italy's Legislative Decree of March 4 2010, n.28, Art.8(1), the Handbook quotes: "During the first meeting the mediator will clarify for the parties the function of and the process for conducting the mediation. The mediator, in the same first meeting, will then invite the parties and their lawyers to comment on the possibility of starting a mediation and, if affirmative, will proceed with the mediation.

An example from Lithuanian law is cited: *Persons providing primary legal aid shall look for possibilities to help the applicants solve their disputes amicably. Possibilities of resolving their dispute through mediation shall also be explained to the applicants.* [28]

Even the notion of a requiring attendance at a mediation information and assessment meeting (MIAM) does entail some compulsion though, and the Handbook, at s4.2.1 of its Explanatory Note, offers further cautions about mandatory mediation in the context of a discussion of the need not to infringe upon the right to access to court and effective judicial protection for citizens:

> Requiring parties to participate in the first meeting with a mediator still retains a certain level of compulsion with regard to the initiation of the process. Therefore, national legislators shall be careful not to infringe the principle of effective judicial protection 'stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR253 and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union'. Therefore, they are encouraged to pay attention to specific criteria established below to be able to ensure effective judicial protection while reaching the primary goals of such a requirement, i.e., an increased amount of (successful) mediations conducted and reduced number of cases pending in court.

Rules in the legal aid system which strongly encourage participation in a mediation information and assessment meeting will not before an applicant is to be granted access to legal aid for court action, will not in my view infringe those rights provided it is exercised with a light touch. The 'light touch' should foresee exemptions such as in the quoted family procedure rules in the UK, such that a party to a family dispute shall not be obliged to participate in a mediation information and assessment meeting in cases of urgency, bankruptcy, domestic violence cases, child protection concerns, and others.

The CEPEJ Mediation Development Toolkit

The 2018 CEPEJ *Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation* [29] is useful for its take on cautions as to when mediation may be inappropriate at Q4 in the FAQs section:

> 4. When Mediation may be Inappropriate?
>
> - When the parties are already negotiating in a satisfactory way, and the presence of a third person is not necessary;
> - When a legal precedent is needed for the jurisprudence;
> - When a judicial conciliation is feasible, at reasonable cost and quickly, and **when the value is minimal**;
> - When the facts are not contested and thus it is possible to obtaining a court decision or an arbitral sentence quickly or at a reasonable cost;
> - When all the parties want to fight through litigation;
> - In case of individual **need for any specific party to obtain statutory protection**;

[28] The Republic of Lithuania, Law on the Legal Aid Guaranteed by the State, *Valstybės žinios*, 2000, No. 30-827, Art. 15 (6)

[29] CEPEJ Mediation Development Toolkit Ensuring implementation of the CEPEJ Guidelines on mediation CEPEJ(2018)7REV – as adopted at the 30th plenary meeting of the CEPEJ from 27 to 29 June 2018 in Strasbourg and completed at the 31st plenary meeting of the CEPEJ on 3 & 4 December 2018

- In certain cases where there is a **serious imbalance of power between the parties**;
- In case of denial of **violence** or reiterated violence;
- In case of **abusive procedures by one of the parties** (established bad faith) or **domestic violence**, in some circumstances;
- In case of **legal incapacity** of one party (except if he/she has a legal guardian who represents him/her in the process).
- In family disputes, for **children's protection** purposes when appropriate.

I have highlighted in bold those alerts which have particular relevance in legally aided cases. It is suggested that these warnings of potential unsuitability are likely to carry considerable weight, and recognising them must be built into any assessment about making legal aid obligatory.

Unsuitability and other barriers to mediation in legal aid cases

The relevant alerts in CEPEJ's Toolkit which are singled out above as having particular relevance in legally aided cases, and the suggestion of potential unsuitability, do need to be encompassed by the 'mandatory or not' discussion. The types of dispute likely to be entered into by disadvantaged citizens are often the ones in which mediation or negotiation with the other party will put them at a disadvantage. That is because there may be a power imbalance between the impoverished or disadvantaged litigant and their opponent, whether the opponent is a private party they are suing or a government body or for that matter a former partner. Situations like these where there is a power imbalance do not lend themselves well to mediated or negotiated settlements, or if they do appear to, the disadvantaged party is likely to get a worse result than if they had gone to court. Aside from power imbalance cases, domestic violence, child protection, low-value claims like state pensions, or highly codified and non-negotiable entitlements to state benefits, are all further examples of potential unsuitability on this basis, which disproportionately affect legal aid litigations.

Those caveats in the CEPEJ 2018 Toolkit FAQs echo experiences described in the UN Global Study on Legal Aid: Global Report[30] (though there the net is cast wider than mediation as to non-court methods of settlement) and reflect well-established misgivings about mediation in low-income cases or cases where there is a significant power imbalance, as can happen with legally-aided matrimonial/family cases, for example. The research of Professor Hazell Genn[31] is a salutary underscoring of this issue and cannot be ignored.

As far as legal-aid clients' potential resistance to mediation is concerned, there are two issues that should be addressed – and which legally-aided potential mediation participants should be reassured about. They are (i) *how do I know the mediator is neutral and operates to high quality standards?* And (ii) *doesn't mediation mean that, if it doesn't work and we have to go back to court, I'll be prohibited from raising things which were said in the mediation?*

Reassurances to legally-aided potential mediation participants as to neutrality and quality do need to be clear and based on evidence, which I understand the Georgian mediation

[30] Section C and Part III chapter 10, UNODC/UNDP Global Study on Legal Aid: Global Report, Wien 2016

[31] Professor Hazel Genn: The Central London County Court Pilot Mediation Scheme: Evaluation Report; Faculty of Laws, University College London – Research Unit, UK Department for Constitutional Affairs, 1998 https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/central_london_county_court_mediation_scheme.pdf

community as well as LAS in proposing a register (see above [32]), are taking seriously. References to how neutrality and quality are guaranteed should probably be a requirement when legal aid cases are referred to mediation.

Then, regarding the risk of a perception by legally-aided clients at least that mediation can lead to 'secret, unaccountable justice' (I am not saying that it does, only that this can be a barrier as to public perceptions): again the onus is on the legal aid system and on providers considering referring a case to mediation to *explain* to clients the precise parameters of this oft-quoted 'rule'. There is some truth that the rule – that material shared in mediation cannot then be used in evidence in court – can be a serious apparent impediment in civil cases. These concerns are noted and explored by Genn et al: *Twisting arms: court-referred and court-linked mediation under judicial pressure*, London 1998 [33]. Georgian law on mediation especially in a criminal context is, rightly, highly alive to the sanctity of information divulged in mediation. There are explicit safeguards to protect the privity of mediated matters which after all come before the courts; those who are not obliged to give testimony in court include these:

> *Article 50*
>
> *1. The following persons shall not be obliged to be interrogated as witnesses, and to transfer an item, a document, substance or other object that contains information essential to the case:*
>
> *[…]*
>
> *(g)(1) A participant of the mediation with regard to the information which has become known to him/her in the process of mediation, or which substantially is a result of the mediation process, except for the case provided for by the Law of Georgia on Mediation, where disclosure of confidential information is necessary for the purpose of investigating an especially serious crime*[34]

I have not researched attitudes to mediation in Georgia and it is out of scope here, but an international perspective would tend to endorse that such correctly-conceived rules can suggest to clients unfamiliar with mediation that the evidence and points of view they elaborate during mediation will then be barred from later being divulged in court, should the mediation not reach agreement (and that perception can sometimes be correct).

Those important and concerning reservations mean that it is preferable for the consideration of out-of-court alternatives to be suggested by a caseworker and explored by the client with the caseworker, rather than create a formal *requirement to have exhausted any out-of-court avenues of redress*. The caseworker's priority must always be to act in the client's interests, and there must not be any perception of a competing interest in the form of helping to save court time, reducing pressure on the courts' workload, or an ideological desire to lessen reliance on judicial solutions.

That said, there is a level of overall endorsement, when it comes to how mandatory mediation should be, supporting the idea that it is legitimate to expect parties to attend – not mediation per se – but a Mediation Information and Assessment Meeting (MIAM)

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[32] *Overview of amendments proposed for the Law of Georgia on Legal Aid and other needs of the Legal Aid Service* – private document circulated to assist this report, 2023

[33] Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa: *Twisting arms: court referred and court linked mediation under judicial pressure*: Faculty of Laws, University College London University of Nottingham Business School; UK Ministry of Justice Research Series 1/07 May 2007 http://bristol-mediation.org/wp-content/uploads/2011/03/Twisting-arms-mediation-report-Genn-et-al.pdf

[34] Article 50 of the Criminal Procedure Code

I would not recommend any substantive change so as to require that parties have exhausted out-of-court avenues before court action can proceed. Instead though I think it desirable to build into the *Law on Legal Aid: Procedure Rules* a paragraph strongly encouraging the lawyer or consultation centre consultant to look at out-of-court options, but only insofar as they are appropriate for that client and that matter – having in mind potential unsuitability. And as LAS have commented, rightly, *Following the consent of both parties the mediator will be involved and will decide on the prospects of mediation.* They should have in mind, the possibility of a Mediation Information and Assessment Meeting (MIAM).

However, LAS have also suggested, in paragraph 6 of the document *Overview of amendments proposed for the law of Georgia on legal aid and other needs of the legal aid service*, that

> *In certain disputes, before filing in court, it is possible to have mandatory mediation within the legal aid scheme.*
>
> *On the one hand, mandatory mediation will encourage the culture of resolving disputes based on mutual agreement. On the other hand, it will help save resources of the LAS as well as courts.*

Thus, there is well established disapprobation of *fully mandatory* mediation (and such disapproval comes as much from mediators as from outside their community), nonetheless, mandatory mediation is explicitly under discussion in the present raft of LAS proposals. In order to square those two positions, better definition is needed. In the view of many commentators, this author included[35], it is plainly acceptable and often desirable to require a legal aid client, in suitable cases, to attend a **Mediation Information and Assessment Meeting** (MIAM). In the international context, when so-called mandatory mediation is discussed, it is often referring to such a meeting. But beyond that there can be no compulsion. But at least it is an opportunity for the party to see where the mediation could work for them, and for both the courts and the Legal Aid Service to reassure themselves that money and resource is not being expended on court proceedings without at least considering alternative dispute resolution.

There will be few cases where it will be genuinely appropriate to deny free legal aid on the basis that mediation has been objected to. That is especially true if the client elaborates valid reasons for the objection. There may be clients who will turn down the very idea even of a Mediation Information and Assessment Meeting (MIAM). There should be safeguards that this reason is not readily treated as a route for denying free legal aid. Even if they object to and refuse the MIAM, legal aid should not be able to be denied for their case in court, provided the client gives valid reasons, and is helped to articulate those reasons. As stated above, the lawyer or consultation centre consultant should always consider out-of-court options, but only insofar as they are *appropriate* for that client and that matter. The focus should be on information-sharing, not forcing people to mediate, so that where inclusion of mediation into the legal aid scheme is considered, it doesn't mean that the parties should be forced to do it: indeed they should not.

Conclusions about mediation and legal aid

In conclusion there is an arguable case for the LAS

- **continuing funding for mediated routes to out-of-court settlement for those seeking to lodge a lawsuit; and**

[35] The author of this report stresses he is not critical of mediation overall nor biased against it and is in fact a trained mediator, a proponent of ADR and past practitioner of mediation.

- **imposing at least a soft level of compulsion for clients in appropriate cases to attend a mediation information and assessment meeting, with full safeguards for those who object to this on real grounds**

Encouraging mediation is to be endorsed cautiously, in the light of evidence and my comments above about making mediation mandatory

Compulsion should only go so far as a Mediation Information and Assessment Meeting and not further

Clear guidelines are needed to flag up types of case potentially unsuitable for mediation as per the CEPEJ Toolkit

Legal aid clients should be advised and informed carefully through their questions about legally-aided mediation, and any reservations they have about neutrality, quality and gagging themselves in court should be addressed full-square and without pressure by the lawyer or consultant

Eligibility for legal aid on grounds of client's refusal to attend a MIAM is only to be denied with caution, and with specific protection for those with a reasoned objection to even attending the MIAM

Denying eligibility for legal aid on grounds of refusal to pursue mediation beyond a MIAM is not acceptable

3.2 Delivery of service

3.2.1 Providers

The bureaus of the Legal Aid Service employ public lawyers. A lawyer employed in a bureau is required to be a member of the Bar Association in accordance with Article 21 of the Law of Georgia on Lawyers;

The consultation centres employ consultants who are not lawyers, so legislation does not oblige them to be a member of the Georgian Bar Association and to hold a lawyer's certificate. However, the Legal Aid Service gives preference to candidates with the credentials of a lawyer when selecting consultants, as the Statute of the Service provides for an obligation of consultants to provide legal representation in a court or an administrative body when necessary.

I am told that because the Service is represented by multiple consultation centres on a regional scale, it is often a problem in the process of staffing consultation centres to find staff members with the credentials of a lawyer. Thus, according to legislation, during the selection of consultants of consultation centres it is not mandatory for a candidate, unlike a public lawyer, to hold a certificate proving their credentials of a lawyer. However, as mentioned above, preference is given to candidates with a lawyer's status.

In the light of that admitted problem, I at first considered that it may be necessary to encourage the growth of a cadre of "paralegals", who are not necessarily qualified lawyers, but who can benefit from on-the-job training allowing and qualifying them to perform a limited range of paralegal tasks, such as initial advice, referral to more specialist advice, form filling, signposting to appropriate information sources, and so on. Internationally it has been shown that paralegals can perform an important stratum of low-level legal tasks without the qualifications of a lawyer, and to the satisfaction of clients[36]. The lawyer community sometimes object on the basis that this is creating a set second-class tear of substandard legal advice, but with proper supervision

[36] Article 17, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

(which may be remote) by a qualified lawyer, the paralegal concept can work well. It would normally require active initiative by a collective involving both government and the Bar and the Legal Aid Service, to identify and recruit trainees from appropriate backgrounds, but without a formal law qualification. Candidates typically will come from civil society organisations or public sector backgrounds. A training programme would be necessary for such an intake.

There are arguments for and against. The UNODC *Model Law on Legal Aid in Criminal Justice Systems*[37] foresees a broad spread of potential providers without recommending specifically a particular mix. Nonetheless, there is ample endorsement internationally for the nation of paralegals, specifically at article 17 of the model law. The UN Principles and Guidelines on Access to Legal Aid[38]

> *70. States should, where appropriate, engage in partnerships with non-State legal aid service providers, including non-governmental organizations and other service providers.*
>
> *71. To this end, States should take measures, in consultation with civil society and justice agencies and professional associations:*
>
> *(a) To recognize in their legal systems the role to be played by non-State actors in providing legal aid services to meet the needs of the population*

In general the *UN Principles and Guidelines*[39] actively promote the notion of paralegals and their role in a legal aid system, provided this is compatible with local conditions in a given state.

However, I bear closely in mind the initial response of LAS, including that there is no normative basis for regulating the institution of a cadre of paralegals. For LAS, it is difficult to envisage future steps in taking such a system of recruitment of paralegals forward, outside regular recruitment procedures.

Nonetheless, **LAS concede that despite the existing very low level of skills base in local communities who might populate the paralegals cadre, they do already involve local people in effect as paralegals on the basis that they have better knowledge of the local context and more trust. That is a direction fully supported in my recommendation here, and it is to be commended that trusted local people be recruited – whether they are formally called paralegals or not does not matter – who can undertake low-level, but important legal tasks on behalf of legal aid clients**.

3.2.2 Locations

Thirty consultation centres are currently functioning. 17 consultants are currently employed. Future plans exist to open the remaining 20 consultation centres out of the total 50 envisaged. Clearly the aspiration to reach the envisaged 50 by end of 2023 is desirable and appropriate, and seems realistic in that at the time of writing they are only for consultation centres short of that target. Risks include that the figures suggest legal expertise and the spread of consultants nationally may be somewhat thin. The biggest issue is finding relevant staff. This may link with the previous comment, above, about encouraging the paralegal concept as one way to address any shortfall in the supply of appropriate staff.

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[37] Article 17, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[38] Guideline 16 Articles 70 & 71 of the Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

[39] Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

The CoE Committee of Ministers CM Recommendation No. R (93) 1 [40] invites member states to promote legal services to the poor by defraying the cost of legal advice through legal aid schemes, by supporting advice centres in underprivileged areas, and by enabling non-governmental organisations or voluntary organisations providing support to the very poor, to give legal assistance.

In the UNODC's 2017 *Model Law on Legal Aid in Criminal Justice Systems*[41] it is recommended that outreach to remote areas etc should be undertaken:

> *Article 7. Protection of vulnerable persons*
>
> *The United Nations Principles and Guidelines recognize the special needs of vulnerable populations. According to principle 10:*
>
> *33. States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.*
>
> *In recognition of the need to target vulnerable populations in the provision of legal aid, the Model Law prescribes the means of informing members belonging to vulnerable groups of their right to legal aid, as well as how such legal aid should be delivered to them while taking into account their special needs. For that purpose, article 7 imposes an obligation on the Legal Aid Authority to ensure, when necessary, the use of health or child welfare professionals or any other means deemed appropriate.*

3.2.3 Accessibility

Physical accessibility is not guaranteed other than in four offices of the Legal Aid Service. Clearly this needs to improve, both through design and building of physical access measures like ramps, handrails, self-opening doors, accessible toilets etc.

Unsurprisingly, the problem is the financial one. LAS have raised the matter with Parliament and also requested additional funding. Now, the Director of the service has approved an action plan in relation to persons with disabilities. It envisages mobile groups to provide service to such persons at their place of residence. This is naturally to be applauded, **and the disability action plan should be placed high on the agenda**. The alternative option of home visits, as now set out, is very commendable. It will need to regard to safeguarding issues including chaperoning, and resourcing, and the likely high travel costs for roving staff.

Effective access to court, arguably implying effective access to legal help, is as already noted a requisite according to ECtHR; this will include legal assistance in civil cases when this proves indispensable for an effective access to court[42], or when lack of such assistance would deprive a person of a fair hearing[43]. The applicant's **capacity** to represent him or herself effectively[44] must be a factor.

3.2.4 Non-traditional methods of delivery

Increasingly the international picture shows a degree of success in delivering some forms of legal advice and legal help remotely through online platforms, like conferencing platforms, chatbots, or simply allowing enquiries by e-mail, chatting/texting apps or more traditionally by

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[40] CM Recommendation No. R (93) 1 *On Effective Access to the Law and to Justice for the Very Poor*

[41] Article 7, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[42] *Airey v. Ireland*, 9 October 1979, Series A no. 32. paragraph 26

[43] *McVicar v. the United Kingdom*, 46311/99, ECHR 2002-III. paragraph 48

[44] *McVicar v. the United Kingdom*, 46311/99, ECHR 2002-III. paragraph 48-64

permitting phone interaction with advisers. A feasibility study would be in order to assess how far and how appropriate it would be for some proportion of the caseload to be managed through online routes. Caution of course is needed in relation to a sector of the population predisposed to be less electronically connected or IT-literate, but it should not be rejected where it is appropriate. The LAS view is that IT is indeed appropriate but requires resources. Nonetheless, it is creditable that an online application has been developed and the website is equipped with the new functionalities which are being piloted at the moment.

Face-to-face services may still be delivered but in a different format to the traditional one of clients attending an office in person. Outreach sessions, sometimes following a timetable or a short-term pop-up campaign format, can be set up in smaller towns and villages, in the form of a pop-up advice point in public locations like libraries, local housing offices, health clinics, hospitals, youth centres, prisons, schools, and even commercial shopping centres. That kind of activity is somewhat envisaged in article 146 of the Labour Regulations, and it is recommended that this area of work to be enhanced according to cyclical programs of encouraging take up. LAS agrees that there should be such a systematic programme depending on the available resources. As of now they are considering deployment of mobile groups of advisers who would stay in certain location (a village) for a day and give consultations, and such developments are to be strongly, encouraged, and hopefully replicated across smaller towns and villages with a systematic annual or even monthly timetable.

The positive view of the Committee of Ministers of the Council of Europe in their 2021 *Efficiency and Effectiveness* guidelines at paragraph 6 [45]

> *Consideration should be given to, in particular, the following mechanisms and techniques:*
>
> *– making widely available, and easily accessible for everyone, information on law and the legal system and, in particular, on legal rights, obligations and remedies;*
>
> *– providing the public with easy access to legal advice and assistance through integrated and/or holistic public services (for example, "one-stop shops") in areas such as social policy, health, housing, employment and education;*
>
> *– supporting access to information on legal rights, obligations and remedies through integrated and interactive information technology solutions.*

Then, at paragraph 20 of its Guidelines, the Committee of Ministers urges[46]

> *ensuring proper geographical distribution of legal aid providers, including in remote areas (for example, through the use of information technology tools, call services and videoconferencing);*
>
> *– facilitating access to legal aid services for beneficiaries, particularly vulnerable people, who may experience difficulties in accessing them (for example, through awareness-raising events for target groups, mobile teams, community law centres or pop-up advice centres);*
>
> *– launching initiatives to increase the diversity of legal aid providers;*
>
> *– allowing beneficiaries to freely choose a legal aid provider and/or to change the legal aid provider or request a second opinion (for example, when a client has a legitimate reason not to be satisfied with the quality of the legal aid provider's work);*
>
> *– setting up safeguards to ensure the professional independence of all legal aid providers;*

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[45] Guidelines of The Committee of Ministers of the Council of Europe on *the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, 31 March 2021, paragraph 6

[46] Guidelines of The Committee of Ministers of the Council of Europe on *the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, 31 March 2021, paragraph 20

– *assigning legal aid cases to legal aid providers based on their competence and specialisation;*

– *taking into account possible conflicts of interest;*

– *sensitising potential legal aid providers to the importance of legal aid work to meet the needs of vulnerable people (for example, through legal clinics, community law centres or awareness-raising events).*

3.3 Quality and quality assessment

A renewed focus on measuring quality in free legal aid services is in order in all systems in all countries. There is a risky tendency to rely on the few client feedback forms that are returned after a case has closed, alongside the usually even smaller number of complaints that are formally received. Those two methods are insufficient as a way of both measuring quality and enhancing it.

Globally it can be observed from the UN Global Study on Legal Aid that[47]

> *In a majority of Member State respondents, performance monitoring and data collection is a formal responsibility of legal aid authorities. […F]unctions such as "establishing and monitoring performance standards on the delivery of legal aid" (a function of legal aid authorities in 66% of responding States), "monitoring expenditure of legal aid funds" (in 56% of responding States) and "reviewing data on legal aid and incorporating it into new legal aid policy" (in 47% of responding States) are regularly included amongst official responsibilities of legal aid authorities.*
>
> *When asked whether there is a mechanism in place in their country to monitor the quality of legal aid services (Figure 64), the bar association is the institution most frequently cited by Member States (35%). A fifth of Member State respondents say that the legal aid board or the Ministry of Justice perform monitoring functions. Only a tenth (11%) of respondents report not having such an institutional mechanism in their country.*
>
> *However, it is striking that the monitoring mechanism in a given country is very often managed by the same institution that has the chief responsibility for the administration of legal aid, which can raise questions about the independence and impartiality of monitoring activities (Figure 65). Such an arrangement can also inhibit legal aid providers' inclination to zealously advocate for their clients' interests , given that legal aid beneficiaries often come up against State parties in litigation. This may pose a problem to legal aid providers whose livelihood depends on favourable reviews by the same institution that is also responsible for hiring and paying them.*
>
> *A majority (57%) of Member State respondents indicate that data to monitor the quality of legal aid services is mainly collected through the review of complaints lodged by legal aid recipients. This method may not be optimal as many legal aid clients lack the legal sophistication, time or incentive to draft a complaint.*

But it is hard to assess the current state of quality assessment without further consultation and dialogue with the Georgian LAS Office for Evaluation of Quality of Legal Consultation and Legal Aid in Criminal Cases and the Office for Evaluation of Quality of Legal Consultation and Legal Aid in Civil and Administrative Cases (created by articles 15 and 16 of the 2018 law). The existence of those two offices is highly encouraging however. It speaks of a praiseworthy desire to ensure that quality is high on the agenda, and that is exactly appropriate. It is critical to the sustainability of a successful legal aid system that quality matters get to do attention.

[47] Chapter H – *monitoring the scope and quality of legal aid services and remedies*, UNODC/UNDP Global Study on Legal Aid: Global Report, Wien 2016

Aside from the substantive question of whether legal aid clients are getting good advice and good legal help, there is the question of the perceived trustworthiness of legal aid bureaus and consultation centres and critically a need for legal aid not to be seen as "second-class law".

So the project will welcome further dialogue to enable a collaborative assessment of where quality measurement and enhancement could make further advances in the Georgian scheme.

A rigorous system will need to address both organisational proxy factors which suggest that good advice is being given by reference to the way an office or bureau is run, and serious organised peer-review of samples of casefiles, under an organised protocol set up by the Legal Aid Service.

The recommendations of the Committee of Ministers of the Council of Europe in their 2021 *Efficiency and Effectiveness* guidelines at paragraphs 7 to 9 [48] are wholly salient:

> *7. Mechanisms and measures should be in place to ensure the quality of legal aid schemes, both in terms of their general functioning and, more importantly, in terms of the legal services delivered by legal aid providers.*
>
> *8. In designing mechanisms for legal aid delivery and possible changes to them, consideration should be given to the needs of and difficulties faced by potential users of the legal service; consulting users as to whether the legal aid scheme as designed meets their needs is likely to produce a more resilient and effective overall structure.*
>
> *9. Consideration should be given, in particular, to the following mechanisms and measures, all of which should be implemented with full respect for the principles of professional independence (of all legal aid providers) and legal advice privilege:*
>
> *– the use of clear, objective criteria for the appointment of legal aid providers;*
>
> *– thorough and regular assessment of legal aid providers (whether governmental, not-for-profit or commercial) against clear criteria, including the quality of their management, policies, accreditation, electronic and paper-based case-management systems, customer-care standards, complaints procedures, in-service training programmes, adequacy of premises, and accessibility;*
>
> *– continuous professional development on a regular basis for legal aid providers;*
>
> *– the use of quality assurance clauses in public contracts between governmental bodies responsible for legal aid providers;*
>
> *– requirements that legal aid providers adhere to ethical codes and other forms of ethical provisions;*
>
> *– the use of quality assessment tools such as client satisfaction surveys and peer reviews by other legal aid providers, based on objective sets of criteria and/or rating systems, and carried out by either an independent body or by individuals (for example, fellow lawyers);*
>
> *– establishing formal and impartial procedures that allow clients to complain about a legal aid provider;*
>
> *– establishing formal and impartial procedures that allow for the replacement of a legal aid provider whose services are of unsatisfactory quality;*
>
> *– establishing procedures for imposing disciplinary measures (including warnings, fines, withdrawal from a list of approved legal aid providers, removal of files and transfer to another legal aid provider) on a legal aid provider who fails to comply with quality standards.*

[48] Guidelines of The Committee of Ministers of the Council of Europe on *the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, 31 March 2021, paragraphs 7 to 9

The UNODC *Model Law on Legal Aid in Criminal Justice Systems*[49] is unequivocal in its frequent promotion of the need for quality services with proper quality assessment; noting that

> *a legal aid system being "credible" and "sustainable" means that there is continuity in the provision of legal aid that is regularly monitored and supervised through State-allocated funds to ensure its **quality**, and that such funds are adequate to meet the needs of the community, especially those of vulnerable groups*

Citing Guideline 16 of the United Nations *Principles and Guidelines on Access to Legal Aid*[50], the model law is clear that **quality** majors in the responsibilities of the legal aid authority which comprise inter alia[51]

> (*b) To set quality standards for legal aid services and support the development of standardized training programmes for non-State legal aid service providers;*
>
> *(c) To establish monitoring and evaluation mechanisms to ensure the quality of legal aid services, in particular those provided at no cost;*
>
> *(d) To work with all legal aid service providers to increase outreach, quality and impact and facilitate access to legal aid in all parts of the country and in all communities, especially in rural and economically and socially disadvantaged areas and among minority groups;*

With that steer in mind, I strongly recommend that **there should be strategic planning towards the design of an independently assessed *National Legal Aid Quality Mark***, available at different qualifying levels to stakeholders including bureaus and consultation centres, lawyers and those on the periphery delivering information and signposting outside the system and referring clients into the system.

LAS has already developed the (draft) *Rules and Criteria for the Assessment of Quality of Legal Consultation and Legal Aid provided by the LEPL Legal Aid Service* and Dr Lemke's commendable report analyses it, affording this topic far more detail than I can here. It is agreed by LAS that on her recommendations, they are developing a questionnaire to assess current compliance with standards she has set out.

But the LAS is cautious about developing the independently assessed National Legal Aid Quality Mark that I have recommended. Nonetheless it is consonant with Dr Lemke's broader analysis in her report at her Part III Analysis (3) Comments (c) Audits: Recommendation 7. Hence that suggestion is left in play here, to remain part of the conversation, because, without agreed standards, there can be no assessment of quality, and any reliable assessment must be done under some independent framework.

The view of ECtHR includes that the quality of legal assistance should not be so poor as to deprive an individual of the practical and effective access to court[52]. Indeed, assigning a lawyer not enough and alone does not in itself guarantee effective assistance[53]. Quality monitoring and the imposition of quality systems is not an affront to the legal profession: the ECtHR has held that it is the responsibility of the State to ensure the requisite balance between the

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[49] Article 16.9.1, 20.1.2, 22.1, 26.4.2, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[50] Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

[51] Article 17, UNODC *Model Law on Legal Aid in Criminal Justice Systems*, UNODC Wien 2017

[52] *Staroszczyk v. Poland*, 59519/00, 22 March 2007 paragraph 135

[53] *Siałkowska v. Poland*, paragraphs 110 and 116

effective enjoyment of access to justice on the one hand and the independence of the legal profession on the other. ECtHR underlined that It is important to have due regard to the quality of a legal aid scheme[54] and to verify whether the eligibility method chosen by the authorities is compatible with the Convention[55]. These considerations ought to buttress the idea of establishing a National Legal Aid Quality Mark in Georgia.

3.4 Strategic planning

3.4.1 Supply and demand

The current level of research on unmet legal need in Georgia is not advanced. Measuring unmet legal need is critical to attuning the supply of free legal aid to the **demand** – as accurately measured[56]. It is easy to assume that the demand equals the number of people actually seeking legal advice, but that is not the case, hence the concept of *unmet* need. This is merely flagged up as a future consideration in the present report, as researching unmet legal need is no small task, and will go far beyond the scope of the present project. Nonetheless it is useful to incorporate the concepts of supply and demand in the legal aid context, and it is a matter which should be on the agenda of the LAS Development Council, if it is not already. It is now a given in research supporting legal aid systems, that understanding the legal needs of existing clients is no real indicator of the true extent of legal need in the population. A full assessment of the extent of such need is a subtle and extensive piece of work. It would, as LAS have pointed out, require considerable resource from their side. However, it needs to be undertaken and kept up to date. In my view, the fact that the LAS Analytical Unit visits every consultation centre and bureau and interviews clients, whilst commendable, does not get anywhere near the assessment of unmet need for help with justiciable problems. By definition, existing users of the consultation centres and bureaus have taken positive action to get their legal needs met. They are the tip of the iceberg; those individuals struggling in their communities at home without getting the help of the population that needs to be measured and assessed.

There remains such a gap in information about wider unmet legal needs, so **I still recommend a programme of research on unmet legal needs, showing the extent of the existence of justiciable problems within the Georgian population, stratified and disaggregated according to various socio-economic modalities**. Ideally, such a study needs to be done independently, by a commissioned research team cold-calling by phone some 3000-4000 people – as is commonly undertaken in a typical unmet legal needs exercise. The precise design of such an exercise is outside the scope of this report, but experts exist who have undertaken similar in similar-sized populations to Georgia, and the exercise would be entirely feasible in a country the size of Georgia, as has been shown in North Macedonia and Moldova for example. It would divulge invaluable data on what is really needed as to supply of legal aid, by geographical area, legal expertise area and client-group.

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[54] *Essaadi v. France*, paragraph 35

[55] *Santambrogio v. Italy*, paragraph 52; *Bakan v. Turkey*, paragraphs 74-78; *Pedro Ramos v. Switzerland*, paragraphs 41-45

[56] Paragraphs 26-29 *Data Collection*, Guidelines of The Committee of Ministers of the Council of Europe on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law, CoE Committee of Ministers, 31 March 2021

3.4.2 Outreach

I comment, under non-traditional modes of delivery at paragraph 3.2.4 above, on some of the directions which increased outreach can follow. These are to be encouraged, and in the context **of promoting take up of legal aid among disadvantaged individuals and communities, outreach activity with a promotional emphasis is as important to kickstart demand where there is it is suspected there is a need but it hasn't materialised in client numbers**. Communities less likely to use legal services, or particularly disadvantaged communities, may be targeted in this way, and this would be highly desirable in the Georgian context.

3.4.3 Strategic responsiveness

At present, within the current capabilities of LAS, there is focus on analysing the demand of certain types of case, matched against regions. This is commendable, and the data needs to be used actively. To some extent it is: in that its outreach work LAS includes information on such local regional focuses in their awareness raising campaigns in relevant regions. They also use the data collected in order to capacity build amongst their lawyers. That is an excellent starting point, and the work needs to be developed further, to create better responsiveness in real time, and to develop the skills base of the legal community in an appropriate way, matched to local needs and dysfunctions in the communities.

The *Guidelines* of the Council of Europe Committee Of Ministers are clear on these points[57]:

> *26. Member States should consider using tools to collect data on legal aid systems, which may include surveys, focus groups, complaints mechanisms, lawyer self-assessments and case-management systems.*
>
> *27. Member States should consider ensuring that the collected data are of appropriate quality. The quality of the data may be assessed as to their relevance (coverage and content), accessibility and comparability (over time, by region or other criteria). Member States should comply with the applicable provisions on data protection, confidentiality and the obligations of professional confidentiality and legal professional privilege.*
>
> *28. Member States should consider collecting data which may include the following:*
>
> – *the annual budget spent on the legal aid system;*
>
> – *the number of legal aid providers;*
>
> – *the number of beneficiaries;*
>
> – *the number of legal aid applications rejected;*
>
> – *the number and type of cases. Monitoring and analysis*
>
> *29. Member States should analyse the data collected in order to understand the legal needs of the population and how the latter interacts with legal aid services.*

And the United Nations Principles and Guidelines on Access to Legal Aid[58] recommend

> *Guideline 17. Research and data*
>
> *73. States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid.*

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[57] Guidelines of The Committee of Ministers of the Council of Europe on *the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, 31 March 2021, paragraphs 7 to 9

[58] Guideline 17, Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

74. For this purpose, States could introduce measures:

(a) To conduct regular research and collection of data disaggregated by the gender, age, socioeconomic status and geographical distribution of legal aid recipients and to publish the findings of such research;

(b) To share good practices in the provision of legal aid;

(c) To monitor the efficient and effective delivery of legal aid in accordance with international human rights standards;

[…]

Working towards a system where detailed, granular data is collected about the overall caseload of the Legal Aid Service is a desirable direction. Proper systemic analysis of data can enable the Analytical Office to make recommendations even a very short-term and immediate basis. Ideally, the data is to be collected and analysed and in as close to real time as is possible, that's enabling emergency situations to be addressed (examples would be the sudden closure of a key employer within a given smalltown, or a perceived shortage of lawyers with particular necessary specialism in certain areas, or a sudden upturn in enquiries at bureaus in a specific matter in a specific place). Responsive alertness to data blips of that kind can help the Legal Aid Service be flexible and resilient in its provision and match the supply better to changing demand.

3.5 Take-up

Legal aid schemes typically need to encourage take-up amongst the population. This is sometimes surprising in the context of apparently needy, disadvantaged and unhelped groups plainly needing the sort of legal help that legal aid scheme can provide. Internationally, and according to establish standards, it is systematic and inherent that legal aid schemes need to be promoted[59] . Yet there are many barriers to take-up, ranging from ignorance of the system, poor education and literacy, self-denial, stigma, fear of consequences, ignorance of the fact that there is a legal solution, a sense that the law only exist for more educated or well-off groups in society, not for the downtrodden or disadvantaged. It is a permanent challenge in most well-developed legal aid schemes, to work against those beliefs and prejudices and to encourage citizens to use the law to secure their rights. Hence the need to encourage take up, especially amongst sectors of Georgian society relatively unrepresented in the legal aid caseload. The Council of Europe Committee of Ministers also nods towards increasing take-up when it takes as its starting point that early intervention mechanisms and techniques to help resolve legal disputes quickly and at source should be encouraged, and consideration given to making widely available and easily accessible information on law and legal systems, as well as easy access to legal advice and assistance[60].

At present, LAS are **implementing activities for awareness-raising (including with Council of Europe support). Focus is on Georgia's mountainous regions, regions bordering other countries, people with disabilities, asylum-seekers, children and people from a minority ethnic background. That is strongly to be encouraged**.

[59] Guidelines of The Committee of Ministers of the Council of Europe on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law, CoE Committee of Ministers, 31 March 2021**;**

[60] Guidelines of The Committee of Ministers of the Council of Europe on *the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law*, CoE Committee of Ministers, 31 March 2021, paragraph 6

The requirement to permanently campaign for better take up should probably be built into the values and structure of the system, and become part of my proposed *Law on Legal Aid: Quality and Delivery Rules*, in which I include this proposal at my paragraph 6.7 below0 below.

Any future mandatory requirement for the system to actively promote take up of free legal aid will require a communication strategy that assesses and understands potential and helped target groups, their lifestyles and likely legal aid needs, and their preferred channels of receiving mass-communication or social media. It links closely with the comments above about Non-traditional modes of delivery at 3.2.4 and Outreach at paragraph 3.4.2.

3.6 Partnership in the legal aid environment

Comments are made, under paragraph 3.7 below about *Values*, about the need for collaboration and partnership between agencies. This is an important principle to follow, and it has been demonstrated that it is a feature of successful legal aid systems[61].

The United Nations Principles and Guidelines on Access to Legal Aid[62] urges

> *Principle 14. Partnerships*
>
> *39. States should recognize and encourage the contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid.*
>
> *40. Where appropriate, **public-private and other forms of partnership should be established** to extend the reach of legal aid.*

The Principles and Guidelines[63] moreover are clear on the need on the part of a legal aid authority

> *(c) To **promote coordination between justice agencies and other professionals such as health, social services and victim support** workers in order to maximize the effectiveness of the legal aid system, without prejudice to the rights of the accused;*
>
> *(d) To establish partnerships with bar or legal associations to ensure the provision of legal aid at all stages of the criminal justice process;*

For Georgian purposes, the principle goes far outside the immediate network of bureaus and consultation centres: a level of partnership and collaboration should be encouraged actively between those key players (bureaus and consultation centres) and others more peripheral to the network of legal services for disadvantaged citizens, so as to eventually create a National Legal Aid Partnership.

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[61] Guidelines of The Committee of Ministers of the Council of Europe on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law, CoE Committee of Ministers, 31 March 2021**;**

[62] Principle 14 Articles 39-40 of the Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

[63] Guideline 11 Article 55 of the Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

The LAS state that

> *We are renewing the operation of the legal aid network with the support of the USAID and UNDP. We are renewing the statute of the network and will have about 20 other organisations who will be involved. These include non-government organisations and university clinics. The updated statute will include many details, like which organisation can provide services in which region and what topics. The website was already developed and this portal provide all necessary information to potential clients on available services. It will also enable communication between the members of the network. The network will work under common standards which implies that the LAS will share relevant parts of the quality control document with the members of the network.*

This is an excellent starting point **for development of a National Legal Aid Partnership**, formally constituted, so as to expressly include stakeholders such as

- civil society organisations (CSOs, NGOs)
- community groups
- specific client group organisations (like those for disabled people, single parents, people with mental health problems)
- other branches of the statutory sector like
    - health services
    - library services
    - special needs education and
    - social protection agencies

who can all come together to help direct and informally govern the provision of free legal aid. It is acknowledged that this may require permission as well as changes to the law, but it can be done informally as a pilot without any risk of diluting the level of control and governance exercised by the state over its legal aid system. **The feasibility of encouraging such partnership informally at first, should be considered**.

Typically there will be an inner circle of stakeholders inherently interested (LAS itself, lawyers, bureau and consultation centre staff) or with strong interest in their clients' / user-group's legal outcomes (advice agencies, interest-group-specific CSOs, other lawyers); and then an outer circle of more peripheral interested parties: the aforementioned health services, library services, special needs education, social protection agencies etc. The outer circle are of special interest because they represent a liminal zone where individuals can move from being unhelped into the legal assistance they need – it's an entry point into legal aid, in other words.

I recommend that a national co-ordinating partnership be informally piloted, with strong encouragement to participate for smaller, ad-hoc and informal groupings of those with an interest in promoting the interests of underprivileged citizens. The pilot would comprise an initial series of 3 bimonthly meetings, and could gradually develop an agenda to include information-sharing, legal updates, sharing of issues within the legal aid system, and consideration of an informal peer-to-peer training programme. It strengthens the necessary partnership aspects of a collaborative and democratic approach, and provides a useful feedback loop for the LAS by which to consider improvements. It would not have any kind of formal governance role, so no constitutional change would be required to the system. On the other hand it is an effective way to keep the system informally under review, and also to provide formally-involved stakeholders with an observatory through which they can stay in touch with underprivileged communities' demands.

3.7 Adoption of a formal values-statement

Whilst values and principles are alluded to quite rightly at article 1.3 of the Labour Regulations and article 2 of the 2017 Law, there is considerable scope for actively reinforcing a correct set of values. Successful legal aid schemes have been shown to have actively adopted (instead of just dutifully noting) strong and pervasive value systems, against which all activity and actions can be checked: *does the work I am doing conform to the values we adopt as a system?*

This should be incorporated into Chapter 2 of my proposed *Law on Legal Aid: Main Statute* developed at my paragraph 6.3 below.

There is much more to say about this, but in brief for now, the suggested values statement should include a pervasive set of client-focused values. These are not a part of detailed operational instructions to be followed daily, but do need to be understood by caseworkers. Caseworkers / lawyers are to be strongly encouraged to sign up to these and work towards them.

Client-care: the client comes first and LAS provides a service to them, taking pride in looking after them, keeping them informed, protecting their data to the high standards and prioritising their interests. It means telling clients if a mistake is made and what redress they have if the Legal Aid Service gets it wrong. It also encompasses taking particular care of clients who may be vulnerable or who have special needs.

Accessibility: put simply, this means making sure that clients can reach and use the service without physical barriers or psychological barriers. It will incorporate making clients welcome from even from the outside of the building or venue, and making venues acceptable to those with sensory, behavioural, neurodiverse or mental health problems. Active adjustments may have to be made other than physical ones, including flexible opening, flexible place of consultation, virtual methods, or arranging home visits. Reaching out to groups and communities who are traditionally shun or avoid legal services is an important element too.

Being non-judgmental and being non-discriminatory involves eliminating subconscious bias and being actively inclusive to all, regardless of gender, race, city, colour, nationality, sexuality, religion, disability, marital or family status, as well as avoiding treating people differently on grounds of their job, lack of work, class, level of educational literacy, homelessness etc etc

Valuing service-users' (beneficiaries') experience and input: a renewed emphasis on always treating clients and third parties with respect, and always being attentive, kind, polite, positive, tactful, discreet, confidential and proactive towards clients. It means remembering the client is the true case owner. Beneficiaries and their representative groups should have input into strategic planning for the service.

Transparency and explaining things simply: this means speaking and writing in plain language that beneficiaries understand, telling them what's happening on their case before they chase the cat service, using the communication media that they use as far as possible, aiming that no client should be puzzled about what is happening on their legal aid application. Clients should be allowed to see what is on their case file at any time without exception and to have copies of any documents on their file. Client should be told immediately if a caseworker thinks they have made a mistake on their case.

Collaboration and partnership between agencies in the client's interests: this means working well on the client's behalf with other agencies such as lawyers, other institutions, civil society organisations (NGOs), improving how cases are referred on to other sources of help and ultimately developing a referrals protocol to be agreed between different agencies within the overall legal aid ecosystem. It should ultimately encompass an ongoing conversation, across the sectors, through meetings and online contact, between all stakeholders in the

overall network of help that the client may need to access. In a mature system, this would involve regular meetings to coordinate the Legal Aid Service and can require a state system to act with respect and equality towards the other sectors.

Promoting quality in legal advice: this will involve principles like making sure correct information is given, following raise relevant legislation, making sure legal opinions are correct, keep in case management standards high, frequent training, having safeguards against Miss advice, telling clients immediately if mistakes have been made. A serious framework of assessing quality measures is the necessary corollary of this statement of principles. This will involve both organisational proxy factors which suggests that good advice is being given by reference to the way an office or bureau is run, as well as serious peer review of samples of Case files, under an organised protocol set up by the Legal Aid Service. The Quality value will ultimately be reinforced by an independently assessed **National Legal Aid Quality Mark**.

Sustainability: sadly the UK system provides a cautionary tale in this regard, in which a well-crafted and successful legal aid scheme was able to be dismantled and dismembered within a matter of months by a government committed to cost-cutting 'austerity', despite the social costs of doing so. Building sustainability means that stakeholder partnerships need to be solid and trustworthy, political support across all political parties needs to be established, and the overall buy-in to legal aid as a "good thing" supported by voters of all political persuasions needs to be maintained. Support from a usually silent judiciary can also be of importance here too. These are the prerequisites for making sure the system cannot too readily be dismantled. Backing up strategic actions with evidence-based research will also contribute to the sustainability of a system. Flexibility in the face of social change, IT change and political change within Georgian society is also necessary. Hence the need to have regard to sustainability can be embedded especially within strategic planning for the legal aid system.

Those values have now been endorsed as acceptable by the LAS, and it is noted that suggested that they are already included in the new quality control standards document, developed after the initial July edition of this report. That is commendable, and it means there should now be a programme to educate and instil those values as the living instrument by which all legal aid work is done and measured across Georgia. A programme of promulgation of the values should be part of an exercise of training for all workers in consultation centres and legal bureaus.

Part II recommendations for changing the legal framework

In this Part II I set out a radical restructuring proposal for the legislation. It is tempting to see this part as somewhat dry and boring. It is actually far from that. The possibility of restructuring in the manner that I have proposed below could be a **catalyst for a greatly modernised and reinvigorated legal aid system overall**. Clear and logical codification, and proper separation of the component parts of the code, will pave the way for **better clarity in actual delivery of the service, better accountability, and transparency as to rights and responsibilities for the legal aid service, service users (clients), lawyers and other stakeholders**.

It is an controversial to say that in a modern rule of law, based society, the detail and legislative overview of a legal aid scheme need to be set out with clarity, transparency, and certainty. Whatever the rules say, they must be visible, accessible and available. The UN Global Study on Legal Aid: Global Report[64] includes the following in its conclusions:

> *Recommendations: 2 Legal framework:*
>
> *Develop **legal aid laws, including related rules and regulations** – While having the right to legal aid guaranteed in the constitution is critical to establishing access to legal aid services as a fundamental right, **having dedicated legislation on legal aid can help to give effect to the right enshrined in the constitution**, as well as to establish a comprehensive legal aid system that is capable of implementing the right to legal aid. **Legal aid legislation can address the details regarding provision of legal aid, such as the eligibility, regulation of legal aid providers, procedure for the request and provision of legal aid and how legal aid delivery will be administered and funded**. In many States, legal aid legislation also establishes a national legal aid authority that administers legal aid services and in some cases guarantees their independence and establishes separate budget lines for legal aid services.*

The United Nations Principles and Guidelines on Access to Legal Aid[65] lay down a similar basic duty to adopt systematic legislation, rules and regulations, according to local law, making norms, but whatever those norms, the legislation should be properly enacted:

> *Principle 2. Responsibilities of the State*
>
> *15. States should consider the provision of legal aid their duty and responsibility. To that end, they should consider, where appropriate, **enacting specific legislation and regulations** and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.*

Thus the internationally endorsed principles of transparency and clarity in legal aid legislation do not need further rehearsal here; it is axiomatic that access to justice in any area requires legislation to be comprehensible and structured rationally. The present situation with the Georgian legislation fails, in my view, to meet that standard, whatever the merits of its actual content.

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[64] Part III conclusions and recommendations, UNODC/UNDP Global Study on Legal Aid: Global Report, Wien 2016

[65] Principle 2, paragraph 15 of the Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)] 67/187: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN, New York 2013

4 Existing structure of the law

According to the documents I have seen, the way the law is structured comprises three main instruments

Instrument		Function	
Overall governing instrument: Law of Georgia on Legal Aid No 4955-IS 19 June 2007 ("the 2007 Law")		• Sets out the entire overall system plus some fine detail: • Prescribes the existence of o the LAS and its independence o the Legal Aid Council o administration o Legal Aid Bureaus o Consultation Centres o Registry of lawyers • Guarantees independence of the LAS • Prescribes detail on: o What actions are covered by legal aid o Who may receive legal aid o Beneficiaries: eligibility, financial and on other grounds o Award of costs against opposing losing party • Detailed description of the functioning of the Legal Aid Council • Existence and role of the Director and their functions • Brief description of the role of public lawyers • Funding of the service	 Article 8 Article 10 Article 15 Article 16 Article 17 Article 19 Article 8^{1} Article 3 Article 4^{1-3} Articles 5-6 Article 7 Articles 11 & 12 Articles 13-14 Article 22 Articles 21-22
Comment: Here there is mix of: establishment of institutions, prescribing their existence, rules of operation, procedural detail. These disparate functions need uncoupling. Some need to go into an establishing statute, and some into a process tool giving operational guidance to workers.			

Statute of the Legal entity of public law: Legal Aid Service (15 March 2018) ("the 2018 Law")		Objectives Management and structure of the service Component units and offices Bureaus and their objectives Consultation centres and their objectives Procedure: involving a LAB lawyer in a case Creation of the register of invited public lawyers Procedure: involving a lawyer from the register of invited public lawyers in a case	Articles 2-4 Articles 4-11 Articles 12-21 Article 22 Article 23 Article 24 Article 25(1) Article 25(2)-(4)
Comment: This statute is largely declaratory of the existence of the component entities of the overall Legal Aid eco-system. It is consistent in purpose and does not stray into operational procedure except at articles 24 and 25((2)-(4). It replicates to a small degree some of the provisions in the 2007 Law however. And articles 24 and 25((2)-(4) need to be removed into a process tool giving operational guidance to workers.			

LEPL Legal Aid Service Internal Labour Regulations ("the Labour Regulations")		Recruitment and secondment Employee obligations, terms and conditions: Working time – Absence – Pay – Leave – Recording time worked – Shifts – overtime – safety at work – termination – membership of professional body (GBA) – misconduct & disciplinary matters – incentives In-service training Using equipment, IT and vehicles	Articles 3-75
		Articles 76-150 Case-management – general Case management – lawyers Client-care – communicating with beneficiaries Liaising with other caseworkers Closing cases Document-writing Casefile review by caseworker Professional ethics	76-80 81 et seq 104-105 86-88, 101 102 106 108

		Client-care – interpersonal skills and duties	108
		Legal Aid Bureau rules of operation	109
		Services to clients in prison	111
		Decision: to provide or to refuse legal aid	112-113
		Data collection on refusals	114
		Consultation centres – operation	115
		Legal aid costs	121-122
		Personnel and HR procedures	123-125
		Rules of communication and conduct, attire at work including client-care: duty of courtesy etc	121-127, 131
		Communication with other agencies	128
		Client-care: communication with beneficiaries	129
		Dealing with the media, social media	130
		Client-data processing and data protection	132-135, 144-145
		Employee data protection	136-143
		Outreach ('field events') – rules, principles and procedures	146-147
		Review and amendment of Internal Regulations	148-150

Comment: Articles 3-75 form a rational and consistent set of terms and conditions for employees, to which employees' actual work contracts could legitimately refer.

After article 75, the Internal Labour Regulations completely change their focus in a way inappropriate for a set of terms and conditions.

Articles 76 to 150 are largely, but not entirely, procedural, with detail on day-to-day operational matters. These should be removed from the Internal Labour Regulations and reorganised into a process tool giving operational guidance to workers. Some articles in that second half of the document nonetheless set out principles and aspirations; these are not procedural but should probably go into a new establishing statute.

5 Recommendations for a new structure to the legislative basis

As a very generalised finding, I would give a qualified approval to

- **Statute of the Legal entity of public law: Legal Aid Service (15 March 2018)**

as it performs its function very well with consistency and rational purpose.

However, I find that the other two main instruments are detached from their purpose and have lost connection with their overall function:

- **Law of Georgia on Legal Aid No 4955-IS (19 June 2007)**
- **LEPL Legal Aid Service Internal Labour Regulations**

This has happened because in the drafting process there may have been a failure to keep in mind the purpose of the instrument in question, and its level in the overarching/detailed hierarchy.

5.1 Reforming Statute No 4955-IS 19 June 2007: a better division of overarching statute versus operational detail

The mix of fine detail and wide-vision provisions in Statue No 4955-IS 19 June 2007 needs to be untangled.

At present it seems to me that within statute No 4955-IS 19 June 2007 there is an irrational mix between overarching prescription (eg of the existence of the Legal Aid Service, existence of the Legal Aid Council, their legal status etc) and detailed rules (eg of eligibility of beneficiaries, or the fine detail of the decision-making procedures of the Legal Aid Council).

This is problematic because it combines prescribing legal entities or organisations along with how they should operate. These are different functions when it comes to legislation, rules and guidance.

A reader – let's say a member of the public – hoping to understand what their rights are to legal aid, will not wish to wade through formal statute giving effect to the existence of the Legal Aid Service until they reach the part of the rules describing their eligibility. Rules on eligibility are what they want so they can easily see if they qualify. They will not be interested in governance of the system or how decisions are made.

Conversely, a reader – let's say an elected politician – may wish to understand the legal structure of the Service so s/he can appreciate where the system sits in the state machinery, without having to wade through fine detail of the Council's decision-making procedures or the nuances of how impoverished an applicant has to be to qualify. This reader will want to deal in the large picture, the overarching umbrella that explains what the Legal Aid Service actually is. S/he will not be so interested in what exceptions exist to the rule that you must be registered in the database of socially vulnerable families.

If we define and divide up the types of article we find in the Law of Georgia on Legal Aid No 4955-IS 19 June 2007 we find a wide-ranging variance as between overarching and constitutional matters, purposive material, matters of principle, and fine detail – procedure, entitlement, methods of working. That is probably too wide a variance for a single legal instrument to make sense of.

A sensible arrangement would be to divide up the legislation according to a rational hierarchy. It would mean removing detailed rules of entitlement eligibility or fine points of procedure from the overarching statute, and instead, placing them within operational regulations. The statute

would still refer to those subsidiary regulations, so diverting the detail into regulations rather than statute does not lead to loss of control by the executive or to lawlessness or to excessive discretionary powers. On the other hand, removing the detail from the statute and into operational regulations will

- provide for clarity: a reader will know where to look according to whether they wish to understand the structure and its legality, the principles by which each entity operates, or the fine detail of who and what is covered by legal aid, and who and what is not; and what actions are expected at given moments in the life of a case;
- afford better and more flexible opportunity to amend or finetune detailed rules according to circumstance, change in policy etc – but without removing such amending powers from ministerial/Parliamentary control in any way.

At the same time as the statute containing details under present arrangements, there is the further anomaly that much of the finer detail of operational procedure – eg for the consultation centres and legal aid bureaus – is contained within the Legal Aid Service Internal Labour Regulations. This is highly inappropriate.

5.2 Disentangle operational guide from the employment terms and conditions

This is the second most critical and urgent change that needs to take place. At the moment, detailed operational instructions for the way the legal aid service should serve beneficiaries are embedded in the Labour Regulations. There should be two quite distinct documents. Operational instructions for delivering free legal aid has no place in an employment contract.

Strictly speaking, the set of labour rules – appended to an employment contract – is a document between two parties (employer/employee) which only they are privy to. An employment contract is meant to set out rights and responsibilities between those two parties, employer and employee. That means it is not a useful way to present a description of a service to the public, or to set out operational guidance to the employee. An employing organisation should not be expecting its employees to be checking their terms and conditions of employment in order to understand their daily operational duties.

It is legitimate for the public to be able to see the content of the legal aid services operational instruction manual, as a matter of freedom of information, should they wish to. But it is not normally legitimate or desirable for the public to see the content of a private work conditions document between an employer and an employee, even if the employer is a public authority. Employees and employers are entitled to some privacy as to what contract, terms and conditions exist between them, even in the public sector. And you would not expect to find the operational guidance for running a legal aid system within terms and conditions of employment.

You might on the other hand reasonably expect that terms and conditions of employment will require an employee to work within such guidance as exists. That is something I would recommend. And you might well expect to find a handbook or manual which anyone is allowed to look at, that governs the way legal aid is delivered. Employees can check it to see if they are carrying out the right procedures; beneficiaries could check it to see whether they are getting the service that is prescribed by law, or just to prospectively see whether they might qualify for legal aid. Lawyers for parties opposing a legally-aided party have the right to see how and whether their opponents might be funded for the legal action. And none of those players would expect to be searching through a set of internal labour regulations to find the answers.

But even setting aside the question whether the public have, or should have, access to the document, it is still inappropriate for operational guidance and the setting-out of the way a

service to the public will be run, to be framed within terms and conditions of employment. Usually, operational guidance is not of itself a matter of strict obligation. Of course it sets out what the service expects to do, and what the public may expect from it, and prescribes how lawyers/employees are to deliver that service. Naturally, lawyers and employees are expected to follow it. But operational guidance is also intended to be helpful, like an instruction manual.

An analogy might be the instruction booklet you may receive when you buy a new washing machine. You want it to tell you how to do the things you want to do. You do not want an engineering manual, and you do not want technical detail on the componentry and how it works, or electrical diagrams. In fact, washing machine instructions make a good paradigm for converting a process map into a useful and usable tool to assist practitioners, employees and lawyers in knowing what they've got to do and how to do it.

Finally there is the question of transparency, again related to whether or not a member of the public may consult the rules governing whether they will have entitlement to legal aid and how they may expect the service to be delivered. It is entirely possible that a legally-aided litigant who loses their case will legitimately want to explore all avenue for finding a way to legally undo, or set aside, the adverse decisions they received in court. Well-developed legal aid systems have, for better or worse, often seen a growth in secondary litigation aimed at legal aid decisions that unsuccessful litigants feel have contributed to them losing their case. In order to freely allow them to look at the performance of the LAS to see whether it contributed to their loss, such individuals and their lawyers need a transparency in the rules governing delivery of the service. Though the Labour regulations may well be in the public domain, the fact that procedural matters are buried in the employment terms and conditions does not give confidence around transparency.

6 A new hierarchy of laws to govern Legal Aid

6.1 Six new legal instruments to cover the Legal Aid Service

I propose that the law be consolidated into a different structure. Types of law, or regulation, fall into the following taxonomy:

- **1. Establishing-laws, laws of constitution**: these are overarching and broad; the necessary skeleton of the system, but not likely to need daily consultation by stakeholders. They
    - establish the existence of a body or entity, such as legal aid as a concept, the Legal Aid services, the component agencies/units within LAS
    - set out its purpose
    - explain the entity's place in a structure
    - prescribe its independence or dependence
    - set out its internal hierarchy and broad membership
    - codify its upward and downward accountability or power, the permissions it may need and the duties owed to it
    - prescribe in broad terms the principles and values it must adopt
    - existential matters like liquidation

  The overarching establishing-law may be quite brief. As a 'parent-statute' it must refer to the subsidiary regulations which fall under its aegis, as in eg "The Human Resources

Office shall carry out the functions specified in the *Law on Legal Aid: Constitutional Rules*".

As a working title for the purposes of this report, we will call this the *Law on Legal Aid: Main Statute 2022.*

- **2. Detailed constitutional rules of component entities within the Legal Aid Service**: these will be too detailed to get into a category 1 establishing-law but because they are constitutional, the relevant article of the establishing-law must refer to regulations in this category. It is things like
    - the appointment and dismissal of Legal Aid Council members
    - detailed and exhaustive functions of the Council
    - detailed functions of, eg, Internal Audit Office, the Secretariat etc
    - terms of appointment and entry qualifications for the Director
    - detailed powers of deputy directors etc

  We will call this *Law on Legal Aid: Constitutional Rules*
- **3. Detailed rules of rights and duties**. These will set out things like
    - qualifying conditions for legal aid
    - detail on scope – areas of law covered by legal aid
    - definitions of key concepts, eg insolvency
    - costs

  However, *procedure* is not covered in these detailed rules. They do not describe actions.

  We will call this *Law on Legal Aid: Scope Rules.* It is recommended that the Director and Deputy Directors commission an annotated version as a Practice Direction which contains practical guidance for interpreting the Scope Regulations along with any caselaw applicable.
- **4. Procedural rules and guidance** describing actions: what happens or should happen, particularly in respect of case-events so far as they are predictable in the life-cycle of a case:
    - who is supposed to do what in a given scenario
    - how caseworkers should do this (1) – the practicalities
    - details of how the service is to be delivered

  This type of rules encompasses both the fine-grained bureaucracy of managing documents, cases and clients.

  These detailed procedural rules and guidance need to exist both

  - in a **traditional rules-based format** which we will call *Law on Legal Aid: Procedure Rules*, and also
  - in a more user-friendly **Process Map Tool** which contains practical guidance for practitioners on exactly how to proceed in each event in the life-cycle of a case.

  Both these documents should follow the events in the life of a case in logical sequence, ie from initial contact by the beneficiary to completion of the legal work until appeal rights are exhausted, and finally closure of the matter and archiving /destruction of casefiles.

- **5. Detailed rules on quality, ethics and service delivery:** these would seek to embed pervasively some more intangible modalities – or *ways* of doing things – within individual tangible tasks. It should cover
    - how caseworkers should do their job (2) – interpersonal / soft skills, incorporated values
    - overarching principles and standards on how to do the detail (how to write documents, data protection, case-records, archiving)
    - and the **art of embedding correct values into the service**

  This we will call, for the purposes of this report, *Law on Legal Aid: Quality and Delivery Rules***.**
- **6. Contractual terms for Legal Aid employees and candidates**: these should be kept quite separate and discrete. Whilst they are part of the operational structure they do not have day-to-day relevance to clients or other stakeholders. A member of the public should probably be able to access this information on a freedom of information basis, but it would not be normal for legal aid beneficiaries to encounter these rules.
    - Terms and conditions of employment for employees and others:
        - working time
        - absence
        - pay
        - leave
        - recording time worked
        - shifts
        - overtime
        - safety at work
        - termination
        - membership of professional body (GBA)
        - misconduct & disciplinary matters
        - incentives

  This will just be called *Legal Aid Service Internal Labour Regulations*. I do not address this in any detail in this report.

6.2 Summary of this proposal

Thus it is suggested that the six new legal instruments will be:

- *Law on Legal Aid: Main Statute*
- *Law on Legal Aid: Constitutional Rules*
- *Law on Legal Aid: Scope Rules*
- *Law on Legal Aid: Procedure Rules*
- *Law on Legal Aid: Quality and Delivery Rules*

and, rather separately:

- *Legal Aid Service Internal Labour Regulations*

Law on Legal Aid: **Main Statute**

Law on Legal Aid: **Constitutional Rules**	Law on Legal Aid: **Scope Rules**	Law on Legal Aid: **Procedure Rules**	Law on Legal Aid: **Quality and Delivery Rules**

6.3 Contents of new *Law on Legal Aid: Main Statute*

The main statute is an overview of the structure, bodies, status, legal obligations etc of the Service. It should incorporate:

Chapter 1: Organisation and legal form of the Service
2018 art.1
2007 art.1 – (collate these 2)
2007 art.2 definitions – considerably expanded
Chapter 2: Goals, principles, objectives and values
2018 art.2 – expanded to include 8 Key Values as per my paragraph 3.7 above
Chapter 3: Types of service: overview
2018 art.3
Chapter 4: Categories of eligible person: overview
2007 arts.4-5 hugely simplified (the detail will come later)
Chapter 5: Management and structure of the Service

The following new articles will just set out the existence of each body within LAS and usually a single line on its purpose. It will refer to, and give effect to, the relevant articles in the *Law on Legal Aid: Constitutional Rules* as far as the detail is concerned.

2018 art 9 expanded to include Director, Directorate and the three Councils

Director and directorate

2018 art.5 and 2007 art 13.1 and 13.2: Director

2018 art.6.1 and 6.2 Directorate

The Councils

2018 art.4 Legal Aid Council

2018 art.7 Service Quality Council

2018 art 8 Development Council

The Offices

2018 art 12.1 Human Resources Office

2018 art 13.1 Case Management Office

2018 art 14.1 Financial, procurement, accounting and reporting office

2018 art 14(1).1 Office of Material and Technical Support

2018 art 15.1 Office for evaluation of quality of legal consultation and legal aid in criminal cases

2018 article 16.1 Office for evaluation of quality of legal consultation and legal aid in civil and administrative cases

2018 article 17.1 Analytical Office

2018 article 18.1 Office of management of the register of invited public lawyers and legal case management software

2018 article 19.1 Secretariat

2018 article 20.1 Legal Aid Service Training Centre

2018 article 21.1 Internal Audit Office

2018 article 25 preamble only: register of invited public lawyers

2007 Law article 4^2 Permanent Group of Lawyers specialising in Juvenile Justice

Channels of delivery

2018 article 22.1, 22.2, 22.3 Legal Aid Bureaus. These paragraphs are largely the same as 2007 Law articles 16.1, 16.2 and 16.3 and should be merged with them, avoiding overlap.

2018 article 23.1 and 23.2 merged with 2007 article 17.1: Consultation centres

<u>Chapter 5: Constitutional and legal</u>

2018 articles 27, 28, 29, 30 and 31: property of the service, accountability of service before the Parliament, accountability of the service before Ministry of Finance, final provisions and enactment of the statute

2007 Law article 21^1 guarantee of a public lawyer's independence, and articles 22 and 22^1 funding and budget reduction of the service.

6.4 Contents of new *Law on Legal Aid: Constitutional Rules*

The *Law on Legal Aid: Constitutional Rules* will set out the detail of the modus operandi, operational rules, powers and responsibilities of each component entity within LAS. It should incorporate:

Director*:* 2007 articles 13.3 to 13.8 and 14
Directorate: 2018 Law art.6.3 and 6.4
Legal Aid Council, Service Quality Council and Development Council: new article setting out modus operandi, operational rules, powers and responsibilities of the three Councils
Human Resources Office: 2018 Law art 12.2
Case Management Office 2018 Law art 13.2
Financial, procurement, accounting and reporting office 2018 Law art 14.2
Office of Material and Technical Support 2018 Law art 14(1).2
Office for evaluation of quality of legal consultation and legal aid in criminal cases 2018 art 15.2
Office for evaluation of quality of legal consultation and legal aid in civil and administrative cases 2018 article 16.2
Analytical Office 2018 article 17.2
Office of management of the register of invited public lawyers and legal case management software 2018 article 18.2
Secretariat 2018 article 19.2
Legal Aid Service Training Centre 2018 article 20.2
Internal Audit Office 2018 article 21.2
Register of invited public lawyers 2018 article 25.2
Legal Aid Bureaus and bureau heads: Labour Regulations article 109, 2018 article 22.4 and article 11.1 to 11.4; 2007 Law articles 16.4 to 16.10.
Lawyers: 2018 articles 11.5 and 11.6
Consultation centres: Labour Regulations article 115, 2018 Law article 23.3 merged with 2007 Law article 17.2 and 17.3; 11.7 and 11.8

6.5 Contents of new *Law on Legal Aid: Scope Rules*

The Scope Rules define who gets legal aid, is an overview of the structure, bodies, legal obligations etc of the Service. It should incorporate:

What legal actions, help and representation are covered by Legal Aid:

2007 Law article 3 and 2018 Law article 3 should be combined and expanded so as to give much more detail on legal scope of the legal aid available, with definitions. Divide this into

- the actions performed (drafting, consultation, advice, referral to another agency, defending, protecting, providing representation), and
- categories of beneficiary

Who may receive legal aid:

2007 Law articles 4, 4^1 and 4^3 and a further list as necessary, outside the categories of minors and those with disabilities

Beneficiaries: eligibility, financial and on other grounds: 2007 Law articles 5 and 6

Further articles on: definition of insolvency, reference to the Unified database of Socially Vulnerable Families, the exercise of discretion for potential beneficiaries not in the Database.

There should be articles on

- reimbursement of legal aid (from 2007 Law Article 7)
- costs (from labour Regulations articles 121-122)
- remuneration of public lawyers (2007 Law article 21.7)

Consideration should be given to policy on beneficiaries making a financial contribution in certain cases – and if adopted this would be prescribed here in the Scope Regulations.

6.6 Contents of new *Law on Legal Aid: Procedure Rules*

The Procedure Rules Should where possible follow the logic and order of what happens in the life-cycle of a legal aid case. In other words, let's say it starts with the potential beneficiary's initial contact with a legal aid bureau or consultation centre. It ends with the closure of the case and ultimate destruction of documents.

How to distinguish the Procedure Rules from the Quality and Delivery Rules: the Procedural Rules tell a practitioner exactly *what to do when*; they are an instruction manual prescribing particular actions within the life of a case. In contrast, the Quality and Delivery Regulations tell the practitioner *how* to do the work, in terms of attitudes, behaviours and general principles.

The Procedure Rules should be also edited into an easy-to-read instruction manual which caseworkers and staff can refer to without having to consult the raw legislation. This will be referred to as Process Map or Process Tool. Such a Tool can refer to specific standard documents that a worker will use in carrying out their duties.

The Procedure Rules should incorporate:

2007 Law article 21 and 2018 Law article 24 both deal with initially involving public lawyers or a lawyer of a legal aid bureau in a case, and article 25 involvement of a lawyer form the register of invited public lawyers. These need to be consolidated into an article describing procedure for appointing a lawyer to a case.

Then the Labour Regulations contain a lot of detail that should be moved to the Procedure Rules. This includes

Case-management – general – articles 76-80

Case management – lawyers – articles 81 et seq

Client-care – communicating with beneficiaries – articles 104-105 (except 104.8 to 104.11)

Liaising with other caseworkers

Closing cases – articles 86-88 and 101

Reviewing casefiles in the course of a case – article 106

Legal Aid Bureau rules of operation – article 109

Services to clients in prison – article 111

Decision: to provide or to refuse legal aid – articles 112-113 (also covered by article 26 of the 2018 Law)

Data collection on refusals – article 114

Consultation centres – rules of operation – articles 115-116

Procedure re legal aid costs – article 121-122 though this is also captured by the Scope Regulations

New rules need to be written to implement a quality assessment framework.

New rules need drafting to provide for keeping the legal aid system in a permanent state of campaign to encourage better take-up of legal aid

6.7 Contents of new *Law on Legal Aid: Quality and Delivery Rules*

The Quality & Delivery Rules prescribe *how* the work should be done. Unlike the Procedure Rules, this is not task-centred. It is about ways of working, principles to be adopted, and policies that underpin the tasks which are done. It is pervasive, and cannot be reduced to single task or actions, but instead concerns standards attitudes, policies and behaviours.

Standards for document-writing – article 102
Communicating with clients – article 104.8 to 104.11
Casefile review by caseworker – article 106
Professional ethics – article 108
Interpersonal skills and duties – article 108
Rules of communication and conduct, attire at work including client-care: duty of courtesy etc articles 121-127, 131
Communication with other employees, beneficiaries, citizens, agencies: articles 126-129
New rules on quality standards need to be written.
New principles of client confidentiality and conflicts of interest may need to be written
New procedural and values-based articles need to be written on implementing delivery of the service in a way consistent with the adoption of the 8 Key Values
Data protection in relation to beneficiaries is addressed in articles 132 to 135 and 144

6.8 Labour Regulations

The new Labour Regulations would seek to limit the scope of the internal labour regulations document to matters pertinent to human resources within the organisation, personal questions and contractual questions as between the employer and the employee in the Legal Aid Service. Most of the current second half of the Labour Regulations should be removed variously to new regulations as described above. As I have commented above, articles 1 to 75 of the current Internal Labour Regulations appear to address this in a reasonably standard and reasonably adequate way.

However, as I am not an employment lawyer, nor do I have knowledge of the framework of employment law in Georgia, I have refrained from any further recommendations in this regard, other than suggesting retaining articles 1 to 75, and 136 to 143 of the current document and deleting items in article 2.1 as appropriate.

7 LAS response to legislative re-structuring; my recommendations

Unfortunately, the response does not currently endorse the re-structuring, citing difficulty of implementation, and stating

> *Such structural changes are not foreseen in near future and would be difficult to implement. In near future the LAS plans legislative changes which are aimed at solving existing practical problems in the delivery of services. In depth review of the structure of the normative framework is not foreseen, although we agree that it has to be restructured at some point.*

That last point "*we agree that it has to be restructured at some point"* is very heartening. It is suggested by this report-writer that **there is a need to stimulate appetite for root and branch change to the way the legislation is structured**. It is acknowledged that this will not be a high priority for lawmakers. The work needs to be done for them therefore. With reasonably limited resources, the law could be rewritten with a minimum of actual change on the ground. In that sense, legal restructuring can be uncoupled from other reforms that are nonetheless necessary within the legal aid system in Georgia. In the view of this report-writer, **there is sufficient logic and necessity for a restructuring of this nature that in the near future, that it would be advisable to create a briefing document for ministers and lawmakers. The rationale – including transparency, clarity, and predictability for the legal aid system – makes an unanswerable case in my view**.

I have noted the planned legislative changes in the short document *Need for legislative amendments* produced by the Legal Aid Service, to summarise anticipated discussions with lawmakers concerning likely specific amendments. These include much-needed adjustments so as to

- make the legal aid service more child-friendly
- provide legal assistance for victims
- provide legal assistance for those with disabilities
- provide legal aid for the protection victims of domestic violence
- make positive adjustments to the categories of individuals considered insolvent, so as to capture better the population of people with disabilities with legal problems regardless of their financial eligibility
- make amendments so as to award costs against a losing opposing party in a court case

- create better regulation of lawyers signed up as independent contractors with the service

These are no doubt, desirable changes, and they can only be recommended. Of course, they do not address the structural deficiencies of the current body of law. Nonetheless, **it is to be hoped that the need for structural reconfiguration of the law will be accepted, and promoted by LAS in the long-term**.