

Briefing on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems



By unanimously adopting the Principles and Guidelines, UN member states recognised the vital role of legal aid in strengthening criminal justice systems and the rule of law.

Introduction

In November 2004, a three-day meeting in Malawi produced the Lilongwe Declaration, which recognised the importance of legal aid in ensuring access to justice and fair trial in criminal cases. It set out detailed requirements for establishing an effective legal aid service to make this right a reality.

The UN Economic and Social Council followed this up by adopting Resolution 2007/24, noting that prolonged incarceration of suspects and pre-trial detainees without access to legal aid or to a court violated their human rights. It requested the UN Office on Drugs and Crime (UNODC) to convene an open-ended intergovernmental meeting of experts to study ways and means of strengthening access to legal aid in criminal justice systems and consider developing an instrument for strengthening access to legal aid.

Expert meetings were subsequently held to draft Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and the 21st session of the UN Commission on Crime Prevention and Criminal Justice adopted the draft.

On 20 December 2012 the UN General Assembly adopted the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems by unanimous consent.

Why the Principles and Guidelines are needed

It is estimated that on any given day, around three million people worldwide are held in pre-trial detention. This represents around 30 per cent of the total prison population. However, there are many countries where the proportion of pre-trial detainees is much higher. In some countries the majority of people in detention are awaiting trial and have not been convicted of any wrong-doing. Sometimes they remain in prison for years, often in conditions worse than those for convicted prisoners.

In Haiti, it was reported that in 2013 '80 per cent of prisoners are not judged, sometimes waiting up to 6 to 10 years to know their fate'. In Sierra Leone, in one prison 60 detainees shared a 25 square metre cell and are locked in for 16 hours at a stretch with a single bucket for a toilet, without beds or mattresses.

Without effective legal aid and advice, the presumption of innocence is lost. A long period of pre-trial detention reduces the chance of receiving a fair trial as time passes, evidence goes stale and witnesses disappear. The pressure to plead guilty increases as people lose confidence in the justice system and wish to end the uncertainty over their future. Without legal aid or advice, they have no help in applying for bail, preparing their case or speeding up the trial process. A high rate of pre-trial detention contributes towards prison overcrowding and poor conditions, impacting on the physical and mental health of detainees. Families also suffer from the loss of an income or carer, which may lead to loss of their home and breakdown of family relationships.

Legal aid for women

In a number of countries, women face structural and cultural barriers to accessing justice as they have little knowledge of their rights and lack the resources to find out what their rights are or exercise them. In 2005 the Open Society Justice Initiative referred to a case in Mexico where a husband refused to give his wife the housekeeping money to support their three children. She took \$35 from his wallet to buy food. Her husband was angry and filed a police report, resulting in his wife being charged with theft. She was held in pre-trial detention for four months as the husband refused to bail her. And in a 2010 report in Sierra Leone, Advocaid found that many women who find themselves caught up in the legal system lack an understanding of basic legal concepts and the legal rights to which they are entitled. 'The overwhelming majority of women charged with fraudulent conversion are illiterate and do not have access to a lawyer, often not understanding the difference between pleading 'guilty' or 'not guilty'.'

Rule of law

Legal aid is essential for a fair trial and to make the rule of law a reality. However, it cannot always be provided through legal representation by qualified lawyers. In many countries there are insufficient numbers of lawyers available or willing to carry out this work. The Principles and Guidelines allow for insufficient resources and set out a range of measures by which an effective system of legal aid can be established.

Legal aid can be provided in a number of ways, through legal representation, paralegals, partnerships with non-state providers, including non-governmental organisations (NGOs) and other service providers.

For the first time, states are given clear guidance on how to fulfil their obligations to provide legal aid for suspects, defendants, witnesses and victims involved in the criminal justice system, and minimum standards are set for implementation. Adopting and implementing these measures will ensure that people in all countries will be able to obtain legal aid, advice and assistance in the interests of justice, even where resources are limited.

Content of the Principles and Guidelines

Drawn from international standards and good practice, the Principles and Guidelines give guidance on the fundamental principles on which a legal aid system should be based. They spell out the elements needed for an effective and sustainable national legal aid system.

Legal aid is broadly defined to include ‘legal advice, assistance and representation for persons suspected, arrested, accused or charged with a criminal offence, detained and imprisoned and for victims and witnesses in the criminal justice process. Legal aid is provided at no cost for those without sufficient means or when the interests of justice so require’. The definition includes the concept of legal education and mechanisms for alternative dispute resolution and restorative justice processes.

14 Principles underpin legal aid provision

- States should guarantee the right to legal aid in their national legal systems at the highest possible level (e.g. in the Constitution).
- Provision of legal aid is a duty and responsibility of the state, and should be set out in legislation and regulations to ensure a comprehensive system that is accessible, effective, sustainable and credible. Sufficient resources should be allocated for legal aid.
- Anyone who faces a crime punishable by imprisonment or the death penalty should be entitled to legal aid at all stages, and regardless of the person’s means if the interests of justice require this.

- Legal aid should be available for victims.
- Legal aid should be available for witnesses of crime.
- Legal aid is non-discriminatory and should be available to everyone regardless of race, age, colour, gender, religion, etc.
- Effective legal aid should be provided promptly at all stages of the criminal justice process.
- People should be informed of their right to legal aid before being questioned by the police or deprived of their liberty.
- Effective remedies should be in place where access to legal aid is denied, delayed or undermined.
- Special measures should be taken to ensure women, children and groups with special needs have meaningful access to legal aid – and legal aid should be available throughout the country.
- In all legal aid decisions affecting children, the best interests of the child should be the primary consideration.
- Legal aid providers should be able to operate freely and independently, without intimidation.
- States should ensure legal aid providers are sufficiently trained and educated, and there is a procedure for dealing with complaints against them.
- Legal aid can be provided by a range of groups and institutions, including universities and civil society.

Guidelines

The Guidelines refer to the practicalities of establishing a legal aid system, covering arrangements for:

Means testing: Where people’s means (income) are taken into account in determining eligibility for legal aid, the guidelines set out conditions for applying it. For example, children are exempted from a means test or a court may waive it if the interests of justice require that legal aid be provided.

The right to be informed on legal aid: Information on the right to legal aid should be available to everyone, outside in the community and in police stations, detention centres, courts and prisons.

People suspected, arrested, detained, accused or charged with a criminal offence: They should be informed of their rights, including the rights to remain silent, to consult with a legal aid provider or counsel confidentially, and to have an independent interpreter where necessary.

Legal aid before trial: This should include assistance at the police station, representation at all pre-trial hearings and to ensure people are remanded lawfully and cases are dealt with in a timely manner.

Court proceedings: Where someone faces imprisonment or capital punishment, they should have access to legal aid so that they understand the case against them and can prepare their defence, be represented at court and at all critical stages of the proceedings. Paralegals and law students may provide assistance at court, provided they are under the supervision of qualified lawyers. Where someone is unrepresented, the judge or prosecutors must explain their rights to them in clear language.

Post-trial: On admission to prison, people should be informed of the prison rules and their legal rights. Legal aid providers should be encouraged to draw up rotas for lawyers and paralegals to visit prisons to provide free legal advice and assistance to prisoners. Foreign prisoners should be advised of any possibility of seeking transfer to serve their sentence in their home country.

Legal aid for victims: Victims should receive advice, assistance and support, including the possibility of taking civil action or making a claim for compensation. Their views should be presented and considered at appropriate stages of the criminal justice process.

Legal aid for witnesses: Witnesses should be given information, assistance and protection where appropriate. Interpretation services should be provided when needed.

Rights of women to access legal aid: A gender perspective should be introduced in all policies and practices to ensure equal and fair access to justice for women. This includes taking active steps to ensure that where possible women lawyers are available for women defendants, accused and victims.

Special measures for children: Special provisions are set out to ensure children's access to justice is effective at all stages; that diversion from the formal criminal justice system is promoted; and that deprivation of liberty is a measure of last resort and for the shortest possible time. Children's privacy and personal data should be protected so that their identity is not revealed.

Nationwide legal aid system: States should establish a coordinated and integrated system of legal aid, meeting the needs of children and specific groups such as people with disabilities, living with HIV, stateless persons etc. Legal aid providers should receive training and those working with children should receive specialised and interdisciplinary training on the rights and needs of children. A body should be set up to administer, co-ordinate and monitor legal aid services.

Funding the service: States should make adequate budget provision and set up funding mechanisms for the legal aid system. Examples are given as to how this may be done.

Human resources: States should provide for staffing the system, with adequately qualified and trained legal aid providers. Where there is a shortage of qualified lawyers, legal aid services may be provided by non-lawyers and paralegals.

Paralegals: Where paralegals provide legal aid services, states should introduce a standard training and accreditation scheme ensuring quality standards, and supervision of their training and work by qualified lawyers. The quality of their services should be monitored and evaluated. Trained paralegals may participate in court proceedings when no lawyers are available.

Regulation and oversight: In cooperation with professional associations, states should establish criteria for accreditation of legal aid providers, ensure they are subject to professional codes of conduct and have complaints and oversight mechanisms.

Partnerships with non-state legal aid providers: Universities and NGOs may provide legal aid services and states should consult with civil society, justice agencies and professional associations to recognise their role in the legal aid system; set quality standards and increase access to legal aid in all parts of the country and for all communities. Law students may participate in legal aid clinics or community schemes.

Research and data: Measures should be introduced by states to carry out research and data collection about the legal aid system, sharing good practice and improving coordination between all justice agencies.

Technical assistance: This may be provided by intergovernmental organisations such as the UN, donors and NGOs as well as state authorities, to develop legal aid and criminal justice reform.

Implementing the Principles and Guidelines

Who needs to act?

The Principles and Guidelines indicate that a range of actors will be involved in developing and providing a state's legal aid services. These include:

- Ministries of justice, interior, social affairs, women and children to set strategy for establishing and implementing a legal aid service
- Parliamentarians
- Courts, judges, prosecutors/state attorneys
- Legal profession and legal training establishments
- Police, prison services and their professional bodies
- Universities and law students
- Paralegals
- Civil society organisations including women and children organisations
- Special interest groups for people with special needs
- Alternative dispute resolution mechanisms

Actions required

- Establish a process and network of stakeholders to disseminate the Principles and Guidelines and build a consensus on the way forward
- Share information and ideas on good practice, including from other countries
- Develop an appropriate model for the legal aid system, taking account of the country context and resources available
- Draft proposals for reform
- Ensure compatibility with existing national legislation and regulatory framework
- Research the costs for implementing change and make resource proposals
- Promote change to key decision-makers and build public support for change
- Ensure training and systems are in place to ensure an effective and high-quality service
- Once the system is set up, monitor implementation and keep under review

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Penal Reform International
First Floor
60–62 Commercial Street
London E1 6LT
United Kingdom

Tel: +44 (0) 20 7247 6515
Fax: +44 (0) 20 7377 8711
Email: publications@penalreform.org
Web: www.penalreform.org
Twitter: @PenalReformInt